# EMPLOYMENT TRIBUNALS

**Claimants:** **(1) Stephen Linnecar**
**(2) Claire Linnecar**

**Respondents:** **(1) Creative Kingdom Books Ltd - in Liquidation**
**(2) SOS for Business and Trade**

**Heard at:** **East London Hearing Centre (by CVP)**

**On:** **7 June 2024**

**Before:** **Employment Judge Mr J S Burns**

Representation
Claimants: Mr S Linnecar
Respondent: Mr Parag Soni (lay representative)

# JUDGMENT

1. The Claimants were not employees of the First Respondent when it went into liquidation.

2. The claims are dismissed against both Respondents.

# REASONS

1. The Claimants sought payment from the National Insurance Fund (the Fund) under the provisions of section 166/182 of the ERA 1996 following the voluntary liquidation of the First Respondent ("R1") on 21/9/23.

2. The Second Respondent entered a defence denying that the Claimants had been employees of the First Respondent and hence they were not entitled to such payments.

3. The disputed employment status was the single issue which I dealt with today.

4. I heard evidence from the First Claimant (C1) and from his witness Amy Weil, (former employee of R1) and I read statements from the Second Claimant (C2) and Christopher Hurley (another former employee of R1). The documents were

in a bundle of 262 pages. I was also referred to a Respondent's case law bundle.

Findings of fact

5. C1 set up R1 on 9/9/11 and on the same day the Claimants (who are husband and wife) were registered as directors. C1 held 51% of the shares and the Second Claimant ("C2") held 49%.

6. R1 traded in buying and selling books.

7. In 2011 the Claimants took accountant's advice and decided to arrange the relationship between R1 and the Claimants in such a way that, on the face of it, both would earn £12500 salary per year as employees of the company. That figure was chosen and retained through subsequent years as being one which would not require the Claimants to pay any tax or National Insurance contributions. Throughout the life of the company the Claimants maintained (on payslips, P6Os and the like) that this was the pay they were receiving, with the result that nil or almost nil tax and National insurance contributions were paid by them.

8. C1 caused an offer letter to be issued to him in 2011 by C2 on behalf of R1 offering him employment at to work 35 hours (not including breaks) a week for a salary of £12500 per year. This would equate to a rate of pay of about £6.50 per hour, which would have been considerably less than the National Minimum Wage, and an unlawful arrangement. At the same time C1 issued an offer letter to C2 in the same terms.

9. C1 claims that the hours worked by him was reduced to 22 hours a week from 1/4/2020 onwards, with the consequence that he was earning salary at the rate of £10.92 per hour, in excess of the NMW. This claim is supported by the statement of Mr C Hurley, who however did not appear to be cross-examined.

10. However, when C1 lodged his application for Fund-payments, which he did on 22/9/23, he claimed that he had been employed to work 37.5 hrs a week. On 27/9/23 C1 phoned R2 and said that his hours had been reduced from 37.5 to 22 hours a week and on 6/10/23 a claimed R1 letter dated 1/4/2020 appeared to this effect. I asked C1 why, if this letter was written on 1/4/2020, it was written at all. He told me that it "seemed like a good idea" or similar. I give the claimed letter dated 1/4/20 little weight.

11. C2 claims that despite what is written in her offer letter, she worked only 8 hrs a week, which also brought her salary above the NMW level. However, when the C2 lodged her application for Fund-payments, which she did on 22/9/23, she claimed that she had been employed to work 40 hrs a week.

12. No record of actual hours worked has been produced. The Claimants' witness Ms Weil said she rarely saw C2 and I find she was in no position to say what hours C2 worked. No time-sheets or similar record of hours worked by either Claimant is available.

13. Notably, on the Claimants' case the same salary was payable to C1 for working 37.5 and then 22 hrs a week as was paid to C2 for working 8 hours a week, and there was no pro rata reduction when C1's working hours were allegedly reduced from 37.5 hrs to 22 in 2020.

14. If the Claimants were in receipt of salaries of £12500 each per year, then they should have been paid £1041.66 per month each. The Claimants produced bank statements for R1 for the period August 22 to August 23, but these show only a very few payments of that figure to C1, many other miscellaneous payments to and from C1 and no payments to C2. The Claimants' answer to this is that the payments from R1 were going into a joint bank account held by both Claimants and that some payments with C1's name on them were consolidated salary payments due to both Claimants, but they do not appear to be either in quantum or chronology. A regular pattern of salary payments (as is seen in a normal employment relationship) is completely lacking in relation to both Claimants.

15. On the Claimants' own case no salary payments at all were made by R1 to C1 during 11 months in the period November 21 to June 23 and no salary payments at all were paid by R1 to C2 during 11 months in the period November 22 to August 23.. Such payments as R1 made to the Claimants during those months were either directors' loans or dividends due to them as shareholders rather than employees.

16. Thus, by their applications to the Fund, the Claimants are asking R2 to pay purported arrear salaries which they as directors failed to cause R1, while it was trading, to pay to them properly or at all.

17. It is not suggested that the Claimants did not work during the months when no salary was paid. They say that this was because they were trying to pull R1 out of its financial difficulties. However the fact remains that during these months which lead up to the liquidation the work being done by them was not in exchange for salary but must have been for other reasons.

18. The situation regarding the Claimants is in stark contrast to that which pertained to Ms Weil, who was employed by R1 full time. She received a salary of about £2000 per month and was paid the correct amount on time every month during her employment which lasted from January 2019 to September 2023.

19. The Claimants claimed they took paid holidays but apart from Public/Bank Holidays no holidays are referred to on their payslips.

20. In cross-examination C1 conceded that his work for R1 not subject to control by anyone else and that he was not bound by the R1 disciplinary procedures. In his director's questionnaire (which he completed and sent to R2) he was asked whether he was supervised or guided but replied "No". C2 did not give oral evidence and she has not shown that she was any more constrained or controlled in her work than was C1.

21. C1 also failed to disclose in his questionnaire that since 2013 he has been a director working in another company of his called Snapit Screw Ltd. When asked whether he had any other business responsibilities he answered "No".

The law

22. Section 230 of ERA 1996 Act, provides as follows;

*230 Employees, workers etc.*

*(1) In this Act employee means an individual who has entered into or works under (or, where the employment has ceased, worked under) a contract of employment.*

*(2) In this Act contract of employment means a contract of service or apprenticeship, whether express or implied, and (if it is express) whether oral or in writing.*

23. The essential requirements for a genuine contract of employment were summarised by MacKenna J. in Ready Mixed Concrete (South East) Ltd v Minister of Pensions and National Insurance 1968 2 QB 497 ; *The servant agrees, expressly or impliedly, that in the performance of that service he will be subject to the others control in a sufficient degree to make that other master; and; The other provisions of the contract are consistent with its being a contract of service.*

24. In Autoclenz Ltd v Belcher [2011] ICR 1157 SC, the Supreme Court held that "*Where there is a dispute as to the genuineness of a written term in an employment contract, the focus of the enquiry must be to discover the actual legal obligations of the parties. All the relevant evidence must be examined, including: the written term itself, read in the context of the whole agreement."*

25. There is no single test for determining whether an individual is an employee within the meaning of section 230(1). Each case depends on its own facts. There is however, an irreducible minimum without which there can be no contract of employment. That minimum comprises; Mutuality of obligation an obligation on the employer to provide work and on the employee to accept and perform the work offered; Control ..that ultimate authority over the purported employee in the performance of his or her work must rest with the employer; and Personal service; ie that the employee must be obliged to perform the work personally, subject to a limited power of delegation

26. In Eaton v Robert Eaton Ltd & SOS _IRLR 83 [1988], the EAT held that a director of a company is normally the holder of an office, not an employee and evidence is therefore required to establish that the director was in fact employed . Factors include whether there was an express contract of employment or a board minute or written memorandum constituting an agreement to employ the person as a director and whether he was under the control of a board of directors.

27. In Rajah v Secretary of State _EAT/125/95, the EAT ruled that the relevant date for the purposes of deciding whether the Secretary of State is liable to make payments out of the National Insurance Fund to employees of an insolvency company, is the date at which the company became insolvent, not the position as it was two years ago, five years or ten years previously.

28. In Secretary of State v Neufeld and Howe [2009] EWCA Civ 280), the CA held that whether or not a shareholder/director is an employee of the company is ultimately a question of fact. A shareholder (including a controlling shareholder) and director can be an employee of the company, but the putative contract must be genuine not a sham and it must amount to a contract of employment not a contract for services. To establish employee status a claimant needs to prove more than mere appointment as director. The underlying facts must be examined including such matters as whether he has been paid directors fees or salary and what work he was actually doing. A written service agreement may be insufficient. In cases where the putative employee asserts the existence of an employment contract, it will be for him to prove it.

Conclusion

29. The claimed salaries were just figures chosen for tax-avoidance reasons, and had no bearing on or real correlation to the hours actually worked or such monies as were actually paid to the Claimants.

30. Neither of the Claimants would have been content to work as salaried employees for the very low (and never increased) pay referred to in the offer letters, even if it had been paid which, on the evidence, happened very seldom.

31. If they had worked the purported contracted hours for the purported contracted salaries as employees, then that would have been an unlawful arrangement.

32. There was no mutuality of obligation. As there was no lawful salary and there were no proper salary payments, it is not shown that any work done by the Claimants was pursuant to a real contractual obligation due by the Claimants to R1. Equally, R1 was under no real obligation to pay the Claimants salary and it did not do so for protracted periods, in stark contrast to how for example Ms Weil was treated.

33. Neither Claimant was controlled by the company in their work. There was no board of directors to control either of them. The reality of the situation was that they were an equal husband and wife team trading through the company which they controlled for their own benefit as shareholders and were simply using as a tax-efficient vehicle to avoid paying any tax or contributions to the Fund which they are now claiming against.

34. The written contracts relied on (the offer letters issued in 2011) did not in fact correlate with how the parties conducted themselves in practice. The purported contracts were a sham.

35. Neither Claimant has discharged the burden of proof to show that they were an employee of R1 when it went into liquidation.

36. Hence the First Respondent was not liable to pay them salary, holidays, notice pay or a redundancy payment and the Second Respondent is not liable to pay them out of the Fund.

**Employment Judge J S Burns**
**Dated: 7 June 2024**