



EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 8000281/2024

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Held in Glasgow via Cloud Video Platform (CVP) on 11 June 2024

Employment Judge J D Young

10 Mrs Lorraine Campbell

Claimant
In Person

15 Horizon Photography Ltd

Respondent
Represented by:
Mr D Campbell.

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JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The Judgment of the Employment Tribunal is that the respondent is due to pay to the claimant (1) a redundancy payment in the sum of **Five thousand seven hundred and eighty seven pounds (£5787)** and (2) the sum of **Two thousand four hundred and seven pounds and sixty two pence (£2407.62)** in respect of failure to provide the requisite period of notice of termination of employment.

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REASONS

Introduction

1. In this case, the claimant presented a claim to the Employment Tribunal seeking a redundancy payment and notice pay from the respondent. The response from the respondent stated that it had no objection to the claim.

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2. In correspondence with the Tribunal, the principal issue which required determination was whether or not the claimant as a majority shareholder and Director of the respondent was also an employee and so entitled to a redundancy payment.

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The hearing

- 5 3. At the hearing, I heard evidence on oath from the claimant. I also received productions many of which, on request, were provided shortly after the hearing being:
- a. Letter from P Grimley & Company, Chartered Accountants, of 12 June 2024;
 - 10 b. Share transfer form dated 9 September 2021;
 - c. P45 for the claimant dated 24 January 2024 indicating that she was to leave employment on 31 January 2024;
 - d. P60 for the claimant for tax year to 5 April 2023 showing tax and national insurance paid.
 - 15 e. P60 for claimant for tax year to 5 April 2022 showing tax and national insurance paid;
 - f. P60 for the claimant for tax year to 5 April 2021 showing tax and national insurance paid;
 - g. P60 for the claimant for tax year to 5 April 2020 showing tax and national insurance paid;
 - 20 h. P60 for the claimant for tax year to 5 April 2018 showing tax and national insurance paid;
 - i. P60 for Fraser Giles for tax year to 5 April 2022 showing tax and national insurance paid;
 - 25 j. P60 for Fraser Giles for tax year to 5 April 2021 showing tax and national insurance paid;
 - k. P60 for Fraser Giles for tax year to 6 April 2020 showing tax and national insurance paid;

- l. P60 for Fraser Giles for tax year to 5 April 2018 showing tax and national insurance paid;
- m. P45 for Fraser Giles showing leaving date of employment as 31 January 2024;
- 5 n. P60 for David Clark for tax year to 5 April 2018 showing tax and national insurance paid;
- o. P60 for David Clark for tax year to 5 April 2019 showing tax and national insurance paid;
- 10 p. P60 for Janelle Milne to 5 April 2023 showing tax and national insurance paid;
- q. P45 of Janelle Milne showing leaving date of 31 January 2024;
- r. P45 of Rebecca Tizzard showing leaving date of 31 January 2024;
- s. P45 for Enid Mitchell showing leaving date of 20 December 2023;
- 15 t. P45 for Bianca Macdonald showing leaving date of 30 November 2023;
- u. P60 for Robyn Hay for tax year to 5 April 2020 showing tax and national insurance paid;
- v. P60 for Louise Glenn for tax year to 5 April 2020 showing tax and national insurance paid;
- 20 w. P60 for Alastair Campbell for tax year to 5 April 2018 showing tax and national insurance paid;
- x. P60 for Justin Godfrey for tax year to 5 April 2018 showing tax and national insurance paid.
- y. Claimant Payslip for December 2003
- 25 z. Claimant Payslip for January 2024

4. From the evidence heard and documents produced, I was able to make findings in fact on the issue.

Findings in fact

- 5 5. The respondent was incorporated on 27 October 2017 with Alastair Campbell (son of the claimant) being appointed director on that day. He was the sole shareholder.
6. The respondent conducted the business of photographers concentrating on schools and children's nursery. The business would seek bookings for school/nursery class and individual photographs; arrange and take the appropriate photographs; edit the photographs taken; package the product, and return the product to the schools/nursery for viewing by parents and other potential purchasers. Thereafter, orders would be placed with the respondent processing those orders, dealing with any queries, arranging/taking payment from customers and packaging the items purchased for delivery to customers..
7. The respondent employed David Clark as a full time photographer and Fraser Giles as a full time editor in 2017. David Clark was paid at the rate of £30,000 gross per annum and Giles Fraser was paid at the rate of £22-24,000 gross per annum.
8. The claimant whose date of birth is 2 March 1961 commenced work for the company in January 2018 dealing with administration matters on a part-time basis. She stated that she had received a contract of employment at that time but no contract was produced. She was paid approximately £880 net per month.
9. The onset of COVID affected the business of the company given the impact on schools and children's nursery.
10. Given the downturn in business, Alastair Campbell ceased working for the respondent around July 2020. At that time, he retained his shareholding

interest and position as director. David Clark left the company at the end of December 2020. Fraser Giles and the claimant continued working in the company.

- 5 11. During the period of furlough (March 2020 - 30 September 2021) furlough claims were submitted and paid for the claimant and other staff.
12. As Covid eased bookings continued to be sought and made albeit on a reduced basis given the impact of COVID. The claimant took on responsibility for the conduct of the business as outlined at paragraph 6 and that came to involve full time working.
- 10 13. On 9 September 2021, Alastair Campbell resigned as a director and transferred the one share in the company to the claimant who became 100% shareholder and director.
14. The claimant continued with the conduct of the business in arranging for photographs taken; to be put to edit; packaged and returned to the
15 school/nursery. Thereafter, she dealt with orders received from those who sought class/individual photographs and processed these orders.
15. The claimant entered into a personal guarantee with the respondent Bank in support of the overdraft arrangements..
16. The claimant took holidays of a week in August and approximately 10 days at
20 Christmas/New Year.
17. Payments of pension were made to NEST throughout the whole period of her engagement with the company. She had no lengthy illness at any time.
18. Her accountant processed salary through the payroll and she received payslips. Sample payslips produced for month to end December 2023 and
25 end January 2024.
19. Those showed payments of £3,000 per month gross with a deduction of income tax and national insurance and NEST payments. Her salary had been increased over 2020/2023 to account for the additional responsibilities.

20. The respondent ceased trading at end January 2024 after discussion with its Bank who advised that they were no longer able to support the business. Steps were taken for application to strike the respondent off the Register of Companies on 12 June 2024 with the first Gazette notice of strike off on 18 June 2024.
21. Other individuals were employed by the company in the period October 2017-31 January 2024 on short-term contracts being Justin Godfrey; Louise Glenn; Robyn Hay, Bianca MacDonald; Enid Mitchell; Janelle Milne and Rebecca Tizzard. They received appropriate employee P60s and P45s.
22. The respondent was unable to make any payments of redundancy or notice pay to the claimant or Fraser Giles. Mr Giles had addressed payment by claim through the Employment Tribunal..

Discussion and conclusions

23. To be entitled to a redundancy payment it is necessary to be an employee who has been dismissed by reason of redundancy. An “*employee*” is defined by section 230 of the Employment Rights Act 1996. Essentially, that means that a claimant must be working or have worked under a “*contract of employment*”.
24. ***Secretary of State for Business Enterprise and Regulatory Reform v Neufeld & another*** [2009] IRLR 475 made it clear that there is no reason in principle why someone who is a shareholder and director of a company cannot also be an employee of the company under a contract of employment. That would apply where someone whose shareholding in the company gives him/her control of it, even total control. The issue of whether or not such a shareholder/director is an employee of the company is a question of fact. The case made it clear that the “*owner*” can also be an “*employee*” even if the company was effectively “*a one man band*” and answerable to no one in respect of the running of the affairs of the company or has made personal guarantees.

25. In this case, there was no written contract of employment produced for the claimant either when she was engaged by the company on a part-time basis or thereafter. That is clearly a consideration which requires to be taken into account. However, that should not be taken as rejection of the claim of employee status.
26. The facts show that the claimant's son incorporated the respondent business with him as sole shareholder and director. The business then employed principally David Clark and Fraser Giles on a full time basis and the claimant on a part time basis. I was satisfied that the claimant was employed by the respondent for administrative purposes on a part-time basis from January 2018.
27. The downturn in the business caused by COVID resulted in Alastair Campbell seeking alternative employment in July 2020. At that time, he did not divest himself of his shareholding or directorship and the company remained in business. David Clark then left the company at the end of December 2020.
28. The claimant was in receipt of furlough payments along with other employees of the respondent. The claimant became more involved in the business of the company as COVID eased and she commenced full time working..
29. She became sole shareholder and director of the respondent as from 9 September 2021. In the period from 1 January 2018 through to 9 September 2021, I considered that the claimant working under a "*contract of employment*" initially on a part time basis and then on a full time basis. She was engaged in the business of the respondent and paid wages/salary in return for that work. There was no evidence that she was self employed or engaged in any other capacity. She paid tax and national insurance and payment of pension contribution as an employee. She was in receipt of P60 forms showing deductions of tax and national insurance in the tax years to 5 April 2018 and thereafter.
30. That position essentially continued subsequent to the transfer of the whole share capital of the company (one share) to her on 9 September 2021 and her appointment as a director through to 31 January 2024.

31. She continued to operate the business and engage in the activities in which she had been involved prior to the transfer of ownership and appointment as director. She continued to receive payments of salary and not director's fees or dividends. She continued to receive forms P60 for the tax years ending 5
5 April 2022 and 5 April 2023 showing PAYE tax and national insurance payments made. Her wage slips showed deductions for payment of pension payments to NEST.
32. I was then satisfied that the claimant continued to be employed by the respondent in carrying out the necessary duties to continue the operation of
10 the business until the end of January 2024. While the claimant took less holiday entitlement to which she would have been due on a statutory basis, that does not affect my view that the claimant was an employee of the respondent at the relevant time. Neither does the lack of written contract.
33. I am satisfied that the indebtedness of the company to the Bank and its
15 withdrawal of support to the respondent resulted in cessation of the business as at 31 January 2024. At that time the claimant and other remaining employees (Fraser Giles and another part time employees) were in receipt of P45 documents as employees of the respondent.
34. Section 139(1) of the Employment Rights Act 1996 contains the definition of
20 "redundancy" and includes the closure or cessation of a business. In this case the business ceased as at 31 January 2024 and the claimant's employment terminated as a consequence. At that time she had the requisite period of continuous employment for a redundancy payment to be made. In the circumstances therefore, I consider that the claimant is due a redundancy
25 payment from the respondent.
35. At termination of employment the claimant was paid at the rate of £36,000 per
annum (£692.30 per week gross). The statutory limit of a week's pay for redundancy payment purposes at the relevant time was £643 per week. She was employed for six complete years by the respondent and given her date
30 of birth her statutory entitlement is therefore $6 \times 1.5 \times 643 = £5787$.

36. The termination was also without notice and so the minimum period of notice specified in s86 of Employment Rights Act 1996 would apply namely 6 weeks. Her net pay at termination ran at the rate of £2407.62 per month. However the P45 submitted for the claimant is dated 21 January 2024 and that suggests some notice of termination of employment as at 31 January 2024. The claimant was paid salary to end January 2024. A claim for notice pay is essentially damages for not receiving the correct notice. I consider it reasonable to assess that claim as one month's pay being the sum of £2407.62.
37. However these proceedings are no doubt the necessary precursor to a claim on the insolvency fund under s166 of the Employment Rights Act 1996 and albeit an award is made against the respondent for notice pay such a claim is not one of the "*employers payments*" that can be made by the Secretary of State [section 166(2)].

J Young

Employment Judge

24 June 2024

Date

Date sent to parties

25 June 2024
