EMPLOYMENT TRIBUNALS

Claimant: Mr M Green

Respondent: (1) The Insolvency Service
(2) The Secretary of State for Business and Trade

Heard at: Newcastle Employment Tribunal **On:** 16 April 2024

Before: Employment Judge Newburn

Representation
Claimant: In person
Respondent: Mrs Whalley (non-legal representative) appeared the Secretary of State for Business and Trade

RESERVED JUDGMENT

1. The Claimant was not an employee of Green Gem Financial Limited in the terms of section 230 Employment Rights Act 1996 at the date when the company became insolvent.

2. The Respondent has no liability to the claimant under Part XII Employment Rights Act 1996.

3. The Claimant's claims are not well founded and do not succeed.

REASONS

Hearing

1. The hearing was a video hearing in which Mr Green represented himself and gave evidence under affirmation. the Secretary of State for BEIS ("**the Respondent**") was represented by Mrs Whalley. There was an agreed bundle of 142 pages. Mr Green had not filed a witness statement however the details of his claim were set out in the Claimant's ET1 and the Claimant confirmed under oath these details were correct. I heard evidence from the Claimant who was cross-examined by Ms Whalley in addition to which I also asked questions of the Claimant. I heard submissions from

both parties and had the benefit of a Bundle of relevant Case Law provided by the respondent. I reserved the Judgment as there was insufficient time in the day to give an oral judgment and give my reserved judgment here.

Introduction

2. The Claimant was pursuing payment from the National Insurance Fund ("**the NIF**") under the provisions of sections 166 and/or 182 of the Employment Rights Act 1996 ("**the ERA**") for redundancy pay, notice pay, and holiday pay.

3. Green Gem Financial Limited ("**the Company**") was insolvent within the meaning of sections 166 and section 183 ERA, having entered into creditors' voluntary liquidation on 25 November 2022.

4. The SoS was defending the claim. The SoS had rejected Claimant's application for payment from the Fund on the grounds that the claimant was not an employee of the company within the meaning of section 230 ERA and defended against the Claimant's claim for this reason.

Issues

5. Was the Claimant an employee within the definition of section 230 Employment Rights Act 1996 ("**ERA**")?

Finding of Facts

6. I have made the following findings of fact on the balance of probabilities having heard the evidence and considered the documents.

Company set up and payment

7. The Claimant is a Chartered Financial Planner. From 6 April 1998 he operated as a sole trader, trading as Green Gem Financial. On 2 March 2004 the Claimant incorporated Green Gem Financial Limited (the '**Company'**), the Claimant was the sole director and 100% shareholder and remained so as at the date the Company entered into creditors' voluntary liquidation on 25 November 2022.

8. In addition to his own knowledge I the area, the Claimant took advice from his accountant regarding remuneration from the Company. The accountant confirmed that the most tax efficient method for the Claimant to obtain remuneration through his Company was for him to identify himself as an employee of the Company.

9. The Claimant confirmed that had he understood or been advised that another option would have been financially better for him (e.g. being a sub-contractor, or simply the Company owner), he would have chosen to identify with that other option and would not have called himself and employee. Similarly, he confirmed that notwithstanding calling himself an employee at first, if he had been advised at any later point that it would be financially better to stop identifying himself an employee, he would have immediately stopped identifying himself as an employee.

10. The Claimant's evidence was that he understood from his own knowledge as a financial advisor and, he was advised by his accountant that, the most financially advantageous way of receiving remunerated from his Company was for him to be listed as an employee and to receive a sum beneath the level of his tax free personal allowance and below the rate at which payment of National Insurance would be required but at a rate that would preserve his entitlement to a State Pension benefit notwithstanding non payment of National Insurance.

11. The Claimant stated that he then arranged to have the Company pay £40,000 each year into his pension, this sum being an amount up to the tax-free threshold. The Claimant was a financial advisor specialising in pensions and had opted to do this to take advantage of the tax-free threshold.

12. The Claimant also received a dividend as a shareholder from the Company, which was paid most years.

13. The Claimant's evidence was that he therefore earned £48,400 per year.

14. The Claimant stated that he had control over his salary and how much he received. He reviewed it each year to ensure it kept inline with the shifting rates of tax and NIC to maintain the balance required to take advantage of the tax benefits. When he first set up the Company, he was cautious with payment as he was unsure on how much his Company would earn, he stated that "as the business owner [he] had to take a hit in the early years". After the first 5 years, the Company began to earn in the region of £50,000 – £70,000,000 per year, and in the last several years the Company was turning over £1,000,000 and the Claimant opted to pay himself salary and dividends.

15. The bundle contained only three payslips for September 2022, October 2022, and November 2022. They each showed the Claimant earned a total taxable pay of £700 per month, no NIC nor PAYE was then paid. The bundle did not contain any further payslips. These payslips did not show a payment into his pension scheme of £3,333 per month. The bundle contained a P60 for the tax year to 6 April 2021 5 April 2022 which did not detail any payment of pension, and stated the Claimant's salary was £8,400 with no payment of Tax or NIC having been paid (page 96.)

16. The bundle contained the Company bank statements for the months 1 March 2022 – 4 November 2022. The Claimant stated that the Company bank accounts demonstrated a payment of £3,333 was being paid to "Aviva Pension" each month which he asserted was his personal pension.

17. The accounts showed a payment of £3,333 was paid to Aviva Pension on 7 October 2022, 7 September 2022, 8 August 2022, 8 July 2022, 7 June 2022, and a payment of £6,666 on 6 May 2022. The Claimant asserted that prior to this, he paid the sum of £40,000 into his pension on a yearly basis and had done this for the past 8 years however he had not adduced evidence of this.

18. In The Claimant confirmed that he did not make any payments in PAYE or NIC as he deliberately set up his payment so that he was beneath the threshold of paying either, but whilst remaining able to obtain credit towards state pension each year. His payslips and the P60 for 21/22 reflected this.

19. The Claimant confirmed he received dividends from the Company as a director each year. In relation to this he completed a self assessment each year which was covered the income he received from property, as well as the dividends he received from the Company. He confirmed he paid corporation tax on those and the retained profit.

March 2022 – Voluntary Liquidation in November 2022

20. On 21 March 2023, the Claimant had transferred £38,704.00 sum from his personal account into the Company account. Thereafter there was an online transaction sending a sum for the same amount with a reference "*Porsche JCTTeesideMark Green Taycan Via mobile*". The Claimant confirmed this was to enable him to purchase his new Porsche from the garage; as the purchase price was too large to send from his personal account in one lump sum, he used the Company bank account to transfer part of the funds from his personal account there and then used the Company account to send the additional sums required to the car dealership to make the total sum.

21. The Claimant's evidence was that in April 2022 he "renewed" his contract of employment (pages 100 – 107). The Claimant's stated he had a written contract when he first became and employee in 2004, however this was not provided to the Respondent or within the hearing bundle.

22. The Claimant stated this previous contract was a simple document he had made himself from a template, in cross-examination he described it as "*maybe more of a description of duties*" which he had drawn up because his work was regulated by the Financial Conduct Authority (the '**FCA**') and he understood the FCA required employees had something in writing to confirm their duties. On reflection he stated that he considered it probably did not match the level of details required to be considered a legal contract.

23. In April 2022, he amended the way in which he made his pension payments from annually to monthly. The Claimant stated that this change precipitated his desire for a renewed contract, one that would reflect the change. Accordingly, he approached a solicitor stating that the Company required that he have an employment contract. They provided him with a contract which he then signed in April 2022 in his capacity as director of the Company on behalf of the Company, and as himself in the capacity of the individual employee.

24. The Claimant was asked what the benefit of the April 2022 contract was, and the benefit of being called and employee was to him, and he confirmed being an employee provided him with the means to achieve the best payment mechanism, and he considered it should also now afford him the benefit of a redundancy payment.

25. On 30 June 2022, the Claimant was appointed as a director of a company named "Green Gem Marketing Limited". The Claimant asserted he had not started trading with that company until January 2023 at which point he was providing advice to clients linked to the Company. The Claimant confirmed in oral evidence he was free to work elsewhere other than the Company, he said if he were to work as an IFA for another company this would have been more difficult presently than it had been previously, as the paperwork required would now take around 12 months to complete whereas before it used to take 4 months.

26. The Claimant's evidence was that part of the terms of operating as an IFA were to operate under the terms of the FCA. The Claimant states his Company was required to hold money in its account as part of the Financial Services Compensation Scheme; the amount to be retained is determined with reference to the types of arrangements that the Company has advised its clients upon.

27. The Claimant had determined the relevant sum he needed to hold in his account was £25,000, and he retained this sum accordingly (the '**Compensation Scheme Sum'**). The Claimant confirmed he had around £28,000 in the Company account on liquidation. The Claimant confirmed he had personally invested these sums in the company to meet the Compensation Scheme Sums required by the FCA and he lost these sums on liquidation.

28. The Company was required to submit monthly reports to the FCA which included a calculation from which the Compensation Scheme Sum could be calculated. The FCA reviewed the Claimant's Company calculations. The FCA determined that the Compensation Scheme Sum in the Claimant's accounts should in fact be much greater than £25,000. The Claimant did not think the calculation the FCA conducted would be correct as he considered the schemes he had advised on did not have any successful complaints and as a result he considered the percentage of successful complaints would be lower – thus his Compensation Scheme Sum could remain lower.

29. The Claimant stated that he did not therefore consider the FCA's calculation to be correct, he considered his Company solvent. He said he decided later to take advice from an Insolvency Practitioner.

30. On 16 August 2022, the Claimant approached an Insolvency Practitioner for advice. The Claimant stated that he was advised that if the sum was as great as the FCA claimed, the Company would be insolvent. The Claimant did not know the actual amount the Company would have been required to retain as a Compensation Scheme Sum, and he believed it would have taken a further year until the FCA review as completed to find this out.

31. The Claimant stated he calculated a realistic figure as to the Compensation Scheme Sum based on the information he had from the FCA, and inline with this, the Insolvency Practitioner determined he would be insolvent. Accordingly, he stated that he took the Insolvency Practitioner's advice and entered voluntary liquidation in November 2022.

<u>The Terms of the April 2022 contract</u>

32. The April 2022 contract stated the Claimant's employment began on 6 April 2004 and that no previous employment counted towards his continuous service. The Claimant had however carried out work as a sole trader from March 1998 trading under the name of Green Gem Financial.

33. The April 2022 contract provided the Claimant was to be engaged as a "Chartered Financial Planner/Director" it did not provide regular hours and stated the Claimant was to work such hours each week at such time between Monday to Friday as are

agreed between the Company and the Claimant in advance. The Claimant's normal place of work was listed in the contract as either an office in Birmingham or his home address.

34. The April 2022 contract makes reference to the employee obtaining details about benefits from his Manager. The Claimant did not have a Manager.

35. The April 2022 contract referred to a Disciplinary and Grievance Procedure which was available from the Company. The Claimant confirmed he did not have an instance in which he lodged a grievance or was subject to a disciplinary by the Company. Given his position as the only occupant at the Company, this would not have been operable.

36. The April 2022 contract contained a procedure for notifying absence and self certifying absences. This procedure made little sense in the circumstances as the only occupant of the Company. The Claimant stated he had never been sick from work. He later considered he had taken a week away from work in a December period for an operation. He stated this was taken during a quiet period and he arranged his client appointments around his time away from work.

37. The Claimant confirmed he did not have a record of his working hours and had not kept any. He stated he had no set hours of work and could work from any location he pleased. He arranged his hours to suit himself, albeit client meetings would need to be arranged to suit his clients' diaries. The Claimant stated he preferred to work late sometimes at 5am and dictated his own hours accordingly.

38. There was no mechanism by which the Claimant was to record the dates he would be working in advance, the pattern of his work was initially dictated by his client's availability for appointments, and thereafter during later years, the Claimant decided to stop taking on new clients and dealt with his existing client's renewals and looking after their needs. By this stage, he had fewer appointments and worked hours to suit his preferences.

39. The Claimant had stated in his claim to the RPS he worked 35 hours a week. The Claimant stated in evidence this was incorrect, and that he had written this because the online form required an entry in this field for his claim to be submitted.

40. The Claimant stated he split his working time between working as an employee and being a director carrying out duties of a director such as filing company statements and dealing with regulatory matters for the FCA. He did not record his hours for either and estimated he worked around 40 hours a week doing both roles. His April 2022 contract recorded his role as a Director.

41. The Respondent argued that if his salary were £8,400 p/a, working at even 35 hours would mean he was below the National Minimum Wage. The Claimant responded to say he earned £48,400 as he opted to place £40,000 into a personal pension, and with this sum he was earning above National Minimum Wage. The Respondent highlighted that, save for the Company bank statements showing the 6 purported pension payments just before he entered voluntary liquidation, the Claimant had produced no other evidence of this payment and his payslips and P60 did not support his position. The Claimant asserted he had such evidence but it must not have been submitted.

42. The April 2022 contract stated the Claimant was entitled to 25 days of holiday each year in addition to Bank holidays. The Claimant stated he did not take his full holiday allowance each year.

43. The Claimant made a claim to the RPS for his holiday (page 80) and claimed 25 days holiday pay. On his form he stated he had carried over 15 days leave from the previous year and had taken no holiday in the year being claimed. The Claimant had stated in his director's questionnaire (page 89) he had taken a week of leave in June 2022. In his oral evidence he stated he had not taken holiday and had worked through June 2022, he considered that he must have made a mistake in stating he had taken time off.

44. The Claimant's evidence was that he never recorded his holidays each year and that he did not obtain written agreement from the Company in advance as to when he was permitted to take his holidays as provided in his April 2022 contract. He stated he would usually take 2 weeks a year in January, and so he considered he must have taken 10 days in 2021, and therefore asserted he could carry over 15 days in 2022.

45. The April 2022 contract confirmed the Claimant was to receive a Salary of £8,400 a month. It confirmed he was entitled to receive a car allowance of £375 a month. The Claimant stated he had always received this sum from the Company in addition to his salary, the company bank accounts provided reflected this payment being made.

46. The Claimant confirmed that he was able to ask another Independent Financial Advisor to carry out his work. That person would need to be qualified but other than that requirement he could chose any person he wished to. I did not have evidence that the Claimant had done this.

47. The Claimant remained the sole shareholder and director of the Company throughout the Company's lifespan. For a short period, the Company had a company secretary from the incorporation date until June 2020, but otherwise no others worked for the Company. The Claimant confirmed he set the company secretary's wage and did not afford to them the same tax efficient payment structure as he set for himself, however his evidence was that they did not work enough hours to join a salary sacrifice pension scheme.

Submissions

48. The Respondent gave submissions which relied upon the written submissions stated in the Grounds of Resistance ('**GoR**') and referred me to the relevant case law contained within that document. I have had regard to those authorities.

49. The Respondent maintained its position that the Claimant was not an employee because any asserted contract of employment by the Claimant was not genuine. The Respondent stated the Claimant had stated his salary to be £8,400 which was supported by his payslips and P60, he did not pay Income Tax or NIC and if he worked between 35 – 40 hours as stated, this would mean he was earning below National Minimum Wage. The Respondent highlighted that the Claimant had total control over the Company and contended that the Claimant was engaged in a contract for service, not a contract of service.

50. The Claimant submitted he had an employment contract in place. He had never believed he was a sub-contractor and his work did not list him as such. He stated he was not in charge of his own destiny as he was subject to working under the FCA regulations and when it came to having to place the Company into voluntary liquidation as he states this was done acting on the advice of an Insolvency Practitioner which he did not control. Accordingly, he considered he should be able to take advantage of the RPS scheme.

Relevant Law

51. Section 230 ERA defines an employee as

(1) …an individual who has entered into or works 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."

52. 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; how the parties conduct themselves in practice; and their expectations of each other*."

53. The essential requirements for a genuine contract of employment are summarised by MacKenna J. in Ready Mixed Concrete (South East) Ltd v Minister of Pensions and National Insurance [1968] 2 QB 497 ("**Ready Mixed Concrete**"):

(i) The servant agrees that, in consideration of a wage or other remuneration, he will provide his own work and skill in the performance of some service for his master.
(ii) The servant agrees, expressly or impliedly, that in the performance of that service he will be subject to the other's control in a sufficient degree to make that other master; and
(iii) The other provisions of the contract are consistent with its being a contract of service.

54. These requirements have been subsequently approved in several cases, including Nethermere (St Neots) Ltd v Gardiner [1984] I.C.R 612 (at 623), where Lord Justice Stephenson added said that:

> "*There must, in my judgement be an irreducible minimum of obligation on each side to create a contract of service*."

55. This 'irreducible minimum', without which it will be all but impossible for a contract of employment to exist, is widely recognised as comprising three elements:

55.1. Control - put simply, that ultimate authority over the purported employee in the performance of his or her work must rest with the employer:

55.2. Personal Performance - the employee must be obliged to perform the work personally, subject to a limited power of delegation;

55.3. Mutuality of Obligation - an obligation on the employer to provide work and on the employee to accept and perform the work offered.

56. Beyond the 'irreducible minimum', it is well established in case law that there is a multi-factoral approach to establishing whether someone is an employee under section 230 ERA and each case depends upon its own facts.

57. In the case of Eaton v Robert Eaton Ltd & SOS – IRLR 83 [1988], the EAT ruled 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".

58. In Fleming v SOS [1997] IRLR 682, the Court of Session held that:

"*Whether or not a person is an employee is a question of fact. The fact that a person is a majority shareholder is always a relevant factor and may be decisive. However, the significance of that factor will depend on the circumstances, and it would not be proper to lay down any rule of law to the effect that the fact that a person is a majority shareholder necessarily and, in all circumstances, implies that that person is not an employee*."

59. The question on whether a majority shareholder and director of a company can be an employee has been examined in multiple cases with the current position being set out in Clark v Clark Construction Initiatives Ltd [2008] ICR 635, at paragraph 98 in which the EAT set a non-exhaustive list for factors for consideration by a Tribunal in such cases. They were as follows:

"(1) Where there is a contract ostensibly in place, the onus is on the party seeking to deny its effect to satisfy the court that it is not what it appears to be. This is particularly so where the individual has paid tax and national insurance as an employee; he has on the face of it earned the right to take advantage of the benefits which employees may derive from such payments.

(2) The mere fact that the individual has a controlling shareholding does not of itself prevent a contract of employment arising. Nor does the fact that he in practice is able to exercise real or sole control over what the first respondent does (Lee).

(3) Similarly, the fact that he is an entrepreneur, or has built the first respondent up, or will profit from its success, will not be factors militating against a finding that there is a contract in place. Indeed, any controlling shareholder will inevitably benefit from the first respondent's success, as will many employees with share option schemes (Arascene).

(4) If the conduct of the parties is in accordance with the contract that would be a strong pointer towards the contract being valid and binding. For example, this would be so if the individual works the hours stipulated or does not take more than the stipulated holidays.

(5) Conversely, if the conduct of the parties is either inconsistent with the contract (in the sense described in para.96) or in certain key areas where one might expect it to be governed by the contract is in fact not so governed, that would

be a factor, and potentially a very important one, militating against a finding that the controlling shareholder is in reality an employee.

(6) In that context, the assertion that there is a genuine contract will be undermined if the terms have not been identified or reduced into writing (Fleming). This will be powerful evidence that the contract was not really intended to regulate the relationship in any way.

(7) The fact that the individual takes loans from the first respondent or guarantees its debts could exceptionally have some relevance in analysing the true nature of the relationship, but in most cases such factors are unlikely to carry any weight. There is nothing intrinsically inconsistent in a person who is an employee doing these things. Indeed, in many small companies it will be necessary for the controlling shareholder personally to have to give bank guarantees precisely because the first respondent assets are small and no funding will be forthcoming without them. It could wholly undermine the Lee approach if this were to be sufficient to deny the controlling shareholder the right to enter into a contract of employment.

(8) Although the courts have said that the fact of there being a controlling shareholding is always relevant and may be decisive, that does not mean that the fact alone will ever justify a Tribunal in finding that there was no contract in place. That would be to apply the Buchan test which has been decisively rejected. The fact that there is a controlling shareholding is what may raise doubts as to whether that individual is truly an employee, but of itself that fact alone does not resolve those doubts one way or another."

60. The Court of Appeal subsequently considered those factors in Secretary of State for Business, Enterprise and Regulatory Reform v. Richard Neufeld [2009] EWCA Civ 280. The Court of Appeal confirmed it agreed with the essence of the factors referred to by Elias J in paragraph 98 of his Judgment in Clark adding a comment to four of them:

"*88. We respectfully agree with the essence of the factors referred to by Elias J in paragraph 98 of his judgment although we add a comment on four of them. Mr. Tolley criticised his first factor as amounting to a suggestion that the mere production of a written contract purporting to be a contract of employment will shift to the opposing party the burden of proving that it was not a genuine such contract. We doubt if Elias J was intending to refer to a legal burden. In cases where the putative employee is asserting the existence of an employment contract, it will be for him to prove it; and, as we have indicated, the mere production of what purports to be a written service agreement may by itself be insufficient to prove the case sought to be made. If the putative employee's assertion is challenged the court or tribunal will need to be satisfied that the document is a true reflection of the claimed employment relationship, for which purpose it will be relevant to know what the parties have done under it. The putative employee may, therefore, have to do rather more than simply produce the contract itself, or else a board minute or memorandum purporting to record his employment.*

89. We consider that Elias J's sixth factor may perhaps have put a little too high the potentially negative effect of the terms of the contract not having been reduced into writing. This will obviously be an important consideration but if the parties' conduct under the claimed contract points convincingly to the conclusion that

there was a true contract of employment, we would not wish tribunals to seize too readily on the absence of a written agreement as justifying the rejection of the claim. In both cases under appeal there was no written service agreement, but the employment judges appear to have had no doubt that the parties' conduct proved a genuine employment relationship.

90. As for Elias J's seventh and eighth factors, we say no more than that we regard them as saying essentially what we have said above in our "never say never" paragraph.

61. In Neufeld the Court of Appeal gave further importance guidance at paragraphs 81 – 85 as follows:

81 - Whether or not a shareholder/director is an employee is a question of fact. There are in theory two issues: whether the putative contract is genuine or a sham and secondly, where genuine, that it is a contract of employment.

82 - "*In cases involving an alleged sham, there will, as we have said, almost invariably be what purports to be a formal written employment contract, or at least a board minute or a memorandum purporting to record or evidence the creation of such a contract. The task of the court or tribunal will be to decide whether any such document amounts to a sham in the sense of the Snook guidance (and see also Protectacoat , to which we referred in paragraph [37]). Any such inquiry will usually require not just an investigation into the circumstances of the creation of the document but also into the parties' purported conduct under it, which will be likely to shed light on the genuineness or otherwise of the claimed contract. The fact that the putative employee has control over the company and the board, and so was instrumental in the creation of the very contract that he is asserting, will obviously be a relevant matter in the court's consideration of whether the contract is or is not a sham. It will usually be the feature that prompted the inquiry in the first place*."

83 - "*An inquiry into what the parties have done under the purported contract may show a variety of things: (i) that they did not act in accordance with the purported contract at all, which would support the conclusion that it was a sham; or (ii) that they did act in accordance with it, which will support the opposite conclusion; or (iii) that although they acted in a way consistent with a genuine service contract arrangement, what they have done suggests the making of a variation of the terms of the original purported contract; or (iv) that there came a point when the parties ceased to conduct themselves in a way consistent with the purported contract or any variation of it, which may invite the conclusion that, although the contract was originally a genuine one, it has been impliedly discharged. There may obviously also be different outcomes of any investigation into how the parties have conducted themselves under the purported contract. It will be a question of fact as to what conclusions are to be drawn from such investigation.*"

84 - *In a case in which no allegation of sham is raised, or in which the claimant proves that no question of sham arises, the question (or further question) for the court or tribunal will be whether the claimed contract amounts to a true contract of employment. As we have indicated, given that the critical question in cases*

such as those under appeal is as to whether the putative employee was an employee at the time of the company's insolvency, it will or may be necessary to inquire into what has been done under the claimed contract: there will or may therefore need to be the like inquiry as in cases in which an allegation of sham is made. In order for the employee to make good his case, it may well be insufficient merely to place reliance on a written contract made, say, five years earlier. The tribunal will want to know that the claimed contract, perhaps as subsequently varied, was still in place at the time of the insolvency. In a case in which the alleged contract is not in writing, or is only in brief form, it is obvious that it will usually be necessary to inquire into how the parties have conducted themselves under it.

85 - "*In deciding whether a valid contract of employment was in existence, consideration will have to be given to the requisite conditions for the creation of such a contract and the court or tribunal will want to be satisfied that the contract meets them. In Lee's case the position was ostensibly clear on the documents, with the only contentious issue being in relation to the control condition of a contract of employment. In some cases there will be a formal service agreement. Failing that, there may be a minute of a board meeting or a memorandum dealing with the matter. But in many cases involving small companies, with their control being in the hands of perhaps just one or two director/shareholders, the handling of such matters may have been dealt with informally and it may be a difficult question as to whether or not the correct inference from the facts is that the putative employee was, as claimed, truly an employee. In particular, a director of a company is the holder of an office and will not, merely by virtue of such office, be an employee: the putative employee will have to prove more than his appointment as a director. It will be relevant to consider how he has been paid. Has he been paid a salary, which points towards employment? Or merely by way of director's fees, which points away from it? In considering what the putative employee was actually doing, it will also be relevant to consider whether he was acting merely in his capacity as a director of the company; or whether he was acting as an employee.*"

62. Paragraph 88 in Neufeld above also provides that the burden of proof rests with the putative employee and that the provision of a document purporting to be a contract of employment by the putative employee may not of itself be enough, the Tribunal would have to be satisfied the document provided reflets the actual employment relationship being asserted.

63. In Rainford v Dorset Aquatics Ltd EA-2020-000123-BA, UKEAT/0126/20/BA the EAT held that:

"*Although there was no reason in principle why a director/shareholder of a company could not also be an employee or worker, it did not necessarily follow that simply because he did work for the company and received money from it, he had to be one of the three categories of individual identified in s 230(3) of the Act. Overall, the tribunal's conclusion that the appellant was not an employee or worker was one of fact based on relevant factors and was not perverse*."

Conclusions

64. I note the authorities confirm that the Claimant's position as 100% shareholder and sole director of the Company does not preclude him from being an employee.

65. The burden of proof is on the Claimant to show he was an employee within the definition of 230 ERA. The Claimant had adduced an employment contract in evidence. As detailed in paragraph 88 of Neufeld, the production of the contract itself is not enough, a Tribunal has to be satisfied that the contract was a true reflection of the employment relationship between the Claimant and his Company.

66. The timing of the April 2022, occurring just slightly before the Claimant took advice from the Insolvency Practitioner was not directly challenged by the Respondent in evidence and the Respondent did not challenge the Claimant's evidence that he sought to have the April 2022 contract drawn up because he wanted to reflect the mechanism for his pension payment becoming a monthly sum rather than a yearly payment.

67. Whilst I do not find the April 2022 contract was entered into in bad faith, I was not satisfied that the contract was a true reflection of the employment relationship or was meant to be indicative of anything other than the payment arrangement set up by the Claimant to achieve the optimal payment available to him as a director, utilising the vehicle of employee status to achieve the same.

68. The Claimant's evidence reflected this. The Claimant gave an honest answer on this issue and confirmed he was advised to call himself an employee because it afforded him the best opportunity for payment and financial planning and had that not been the case he would not have done this. Additionally, had there been a change to this position, he would have ceased to call himself an employee. The Claimant confirmed in evidence that the benefit to being recognised as an employee for him was this payment mechanism. The status of employee was not intended to be, and was not considered as, a status that would provide a description of the rights and obligations between himself and the Company, it was not more than a title given which enabled the Claimant to establish the most favourable payment mechanism.

69. The Claimant had control over the creation of his initial "list of duties" and over the April 2022 Contract. The Claimant's evidence was that he decided to get an employment contract drafted by a solicitor in 2022 in order to reflect his pension payment arrangements changing from annually to yearly. This contract was not then designed to set out his working rights and responsibilities as an employee.

70. I move on to Consider all the relevant factors, including the 3 "irreducible minimum; in terms of Control, the evidence indicated the Claimant had absolute control over the Company, there was no evidence of the Claimant making or keeping records of working hours, making holiday requests and or recording the holidays he had taken, of any sickness hours, he dictated his salary, he paid the same and reported it to HMRC ensuring he kept the payment below the requirement to pay Income Tax and NIC; he controlled work he would undertake via the choice of clients the Company took on and when to cease taking on clients, all of which suggest his level of control was commensurate with absolute control over the Company. There was no other person in the Company by whom he would need to run his decisions, whilst he took advice from his accountant, he was not controlled by their decisions, he was able to make alternative options regarding his pay should he have elected this.

71. Whilst the Claimant asserted, he was subject to the control from the FCA and the Insolvency Practitioners as he took their advice and complied with obligations set, they did not control him in the capacity as his employer; they provided rules for his professional framework and guidance on Insolvency respectively. I did not consider this would amount to the element of "control" required in the sense of establishing employment status.

72. In terms of Mutuality of Obligation, the Claimant provided his services to the Company in exchange for a remuneration provided as a mix of salary, pension, and dividends. Where this work was not available in the early years of the Company, the Claimant confirmed he was financially vulnerable, however this had not been the case since his Company had grown more. I accepted the claimant's evidence that he carried out his role each week, and although he did not record his hours of work, he carried out the work that was needed to be done and was paid for this work. Whilst this would point towards an employment relationship, I note that the Claimant's level of control on the Company overall did impact this position as the Claimant was able to choose his client numbers and confirmed that he had elected to stop taking on new clients at some point and simply deal with his existing case load. Therefore, whilst the Claimant carried out the work that was required of him, he had control over the levels of work required of him, and could have, and did make changes to that level to suit the amount of work he wanted to carry out.

73. In terms of Personal Service, there was no evidence presented to me to indicate the Claimant had substituted his work or parts of it. He confirmed that he was able to ask another Independent Financial Advisor to step in and carry out his role should he wish to do so, and he was free to choose this person, as long as they held the relevant qualifications. This could point away from there being an employment relationship however, in practice, I was not presented with evidence that the Claimant elected to do this. I note again however due to the level of control the Claimant had over the Company and his working patterns, the Claimant was able to ensure he arranged his appointments as he required to work at times and the hours he wanted to, which meant he did need or require a substitute to carry out his work.

74. It is noted that Claimant's payslips for September, October, and November 2022 did not correctly record his pension payment, and neither did his P60 for the tax year 2021/2022, The Claimant stated this must have been an error in his own recording. I accepted that from June 2022 at least, the Claimant was paid more than National Minimum Wage by virtue of his tax efficient option to place the maximum he could into his personal pension.

75. The Claimant's payslips taken in conjunction with the Company bank account for the 5 months in June 2022 to October 2022 demonstrated that the Claimant did receive sums that accorded with the terms dictated in the April 2022 contract for this period. Ordinarily this would be a factor pointing towards employee status. However, I found this factor carried less weight in light of my finding at paragraphs 67-69 and when considering the Claimant was able to take advantage of the optimal payment method available to him, and did so to ensure that whilst recorded on PAYE, he never made a payment of Income tax of NIC, he also complete control over his status in calling himself an "employee" and whether or to change this to something else. Additionally, he had control over the amount and type of remuneration he received which he elected to change in line with the tax bracket each year to ensure he was taking

advantage of the tax brackets, remaining under the limit to make payments of tax and NIC but above the threshold to ensure he gained credits for state pension. These options would not often be afforded to employees (although I am aware that there are cases where they may be).

76. With respect to his day to day working; the Claimant did not have any procedure for recording his working hours, either in advance by way of agreeing them in accordance with the terms of the April 2022 contract nor after the event. He did not have a procedure in place for requesting or recording the written approval of holiday granted which was envisaged by the terms of the April 2022 contract. The April 2022 contract referred to a Disciplinary and Grievance Procedure which was available from the Company however this was in reality not applicable to him, and he did not have a manager to whom he was answerable.

77. The facts in this matter were then finely balanced. Taking into consideration my findings overall, I determined that the circumstances ultimately pointed away from the existence of an Employment Relationship.

78. Whilst there are elements that are consistent with an employment relationship, the Claimant was able to conduct his work as he pleased. Whilst he carried out the work required of him, the Claimant was on the whole in charge of this, he was able to chose which clients to take on and when to cease taking those clients on; whilst the Claimant did not elect to substitute another to carry out his work, he had the opportunity to do so at his disposal and he did not take advantage of this opportunity because he did not need to do so, he was able to dictate the hours and times he worked. I found that the Claimant was in essence the master of his own destiny, he elected to draw up the April 2022 contract to reflect his payment mechanism and not to set out in writing his rights and responsibilities towards the company. The Claimant was able to take advantage of the optimal payment method available to him and did so to ensure whilst recorded on PAYE, he never made a payment of Income tax of NIC. The Claimant was free to change his status as “employee” to anything he desired at any time, and confirmed he would have done so immediately if he determined it was financially better for him to do this which is an opportunity rarely available to an employee.

79. Taken together as a whole, the circumstances as I found them were not consistent with an employment relationship.

Conclusion

80. The Claimant was not an ‘employee’ of the Company within the meaning of section 230 ERA at the date of the Company’s insolvency. The Claimant’s claims therefore do not succeed and are dismissed.

Employment Judge Newburn

Date 5 July 2024

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