EMPLOYMENT TRIBUNALS

Claimant: Mr G Baldwin

Respondent: Firexo Ltd

Heard at: Reading **On:** 18 and 19 April 2024

Before: Employment Judge Hawksworth

Appearances
The claimant: represented himself with support from Mr S Rein
For the respondent: Mr S John (counsel)

RESERVED JUDGMENT

1. The claimant was an employee of the respondent from February 2019 but was not an employee of the respondent after July 2019.

2. This means that he does not have sufficient qualifying service to bring a complaint of unfair dismissal.

3. Therefore, the complaint of unfair dismissal is not well-founded, and is dismissed.

REASONS

The claim and issues to be decided

1. The claimant Mr Baldwin presented his claim on 14 June 2023 after early conciliation from 3 April 2023 to 25 May 2023. He identified the claim as one of unfair dismissal.

2. At a preliminary hearing on 15 December 2023, EJ Tynan refused an application by the claimant to amend his claim to include a complaint of automatic unfair dismissal for making a protected disclosure under section 103A of the Employment Rights Act 1996. EJ Tynan identified that the claim would go forward as a claim of 'ordinary' unfair dismissal under section 98 of the Employment Rights Act 1996 (page A33).

3. In box 8.1 of his claim form, the claimant ticked a box to indicate that he was also making a complaint about notice pay. In the hearing before EJ Tynan, the claimant confirmed that this was done in error as he is not pursuing a claim in respect of notice, having been given and having worked six months' notice (page A27).

4. In relation to the complaint of ordinary unfair dismissal, there are preliminary questions as to whether the claimant was an employee of the respondent, and if so whether he had sufficient qualifying service to bring a complaint of unfair dismissal.

5. At the start of the hearing I discussed these issues with the parties to understand their positions. The respondent's case is that an employment relationship moved to self-employment, or that any recent period of employment had begun less than two years before. The respondent says the relationship ended by agreed termination on 1 February 2023.

6. The claimant says that he was employed throughout, and that he was dismissed with effect from 29 September 2023.

Evidence

7. The respondent prepared a file of papers for the hearing. It had 146 pages. Page references in this document are to that file of papers. I allowed the respondent to rely on some late disclosure, about 20 pages of documents printed from Companies House website with information about other companies in which the respondent said the claimant had involvement. In the event these documents played no part or very little part in the evidence.

8. There were references in the papers to some discussions about settlement. The parties confirmed that there were no pages in the file or references in the statements to privileged (confidential) settlement matters.

9. After taking some time on 18 April 2024 to read the statements and key documents, I heard evidence from Mr David Breith, the respondent's CEO. I asked the claimant whether he would prefer to give his evidence first, so that he had experience of being questioned before having to question Mr Breith himself, but he said he had prepared his questions and was happy to proceed in line with the normal order of witnesses for unfair dismissal complaints.

10. On 19 April I heard evidence from the claimant. Both witnesses had prepared and served statements in line with the orders made by EJ Tynan.

11. I heard closing comments from Mr John and the claimant. The claimant was assisted by Mr Rein in making his closing comments.

12. After evidence and closing comments there was not enough time for me to make my decision and tell the parties what I had decided and why. I explained that I would send my decision and reasons in writing. I apologise for the delay in doing so, this is as a result of the current high workload in the employment tribunal.

Findings of fact

13. I make the following findings of fact from the evidence I heard and read. Where there is a dispute between the parties, I have to decide what I think is most likely to have happened, in other words I apply the balance of probabilities.

14. I first set out the chronology of what happened, then make some additional findings on the nature of the claimant's role with the respondent.

Chronology

15. The respondent is the UK trading company within a group of companies ultimately owned by Firexo Corporation, a company registered in Delaware. Mr Breith is the majority shareholder in Firexo Corporation and the claimant is also a shareholder. Until September 2023 the claimant was also a director of a number of other companies within the group but he has never been a director of the respondent.

16. The respondent was established in 2017 as a start-up. The company developed a new type of chemical fire extinguisher which it markets, produces and supplies.

17. The claimant joined the respondent in the role of Group Operations Director on 1 February 2019 with an initial salary of £80,000 and a car allowance of £6,000. The claimant was part of the senior management team. Both parties accept that this was the start of an employment relationship. It was subject to a 6-month probation period. The terms of the offer of employment were set out in an informal email dated 5 December 2018 (page B36). No terms and conditions of employment were sent to the claimant at the start of his employment. The respondent kept few written records about the claimant's employment status.

18. The parties agree that the claimant was an employee in February 2019 to April 2019. He received payslips for February and March 2019 with deductions for tax and employee national insurance (page C86 and C87) and in April 2019 received an employee P60 form (page C88). The claimant worked solely for the respondent during this period.

19. The company experienced cash flow issues as a result of some regulatory delays and in April 2019 Mr Breith suggested to sales staff and the claimant that it would be tax advantageous for the company and for them to move to self-employed status. The claimant agreed with this proposal. The respondent did not give the claimant a contract recording this change, and no written record was made of the agreement they had reached. Mr Breith said that for a small business with limited resources trying to survive through a difficult time financially, corporate governance was at the bottom of the pile of priorities.

20. I find that the agreement reached between the claimant and Mr Breith about the change in status was genuine, and that it was suggested by Mr Breith to allow more flexibility at a difficult time for the business, and to permit the claimant to take on other work if he wanted (as he later did).

21. In April, May and June 2019 the work the claimant was doing day to day did not change, but in line with Mr Breith's proposal, the claimant invoiced the respondent rather than receiving a payslip. His invoices were for £6,166.67 through his

company Gareth Baldwin Consultancy Limited (page C89, C91 and C93). This was a company the claimant had set up about 4 years before for a different project.

22. At the same time, the claimant was a director of other companies in the group of companies which includes the respondent. The respondent paid the claimant a director's fee of £1,000 per month (from which he paid employee national insurance contributions) in April 2019 (page C90), May 2019 (page C92) and June 2019 (page C94). He received payslips for these payments.

23. From July 2019 the claimant stopped receiving the £1,000 director's fee separately and started invoicing the respondent £7,166.67 per month (page C95). He did not receive payslips after this date, was not subject to PAYE and made no employee national insurance contributions. The respondent made no pension contributions for him.

24. By agreement, some of the claimant's invoices for 2019 and the early part of 2020 were not paid in full. He was paid £5,000 in most months (page C85). He was given the value of the shortfall in shares.

25. I accept that for the remainder of 2019 the claimant was working for most of his time for the respondent and that his work involved a lot of travelling.

26. In early 2020 as the pandemic was beginning, the respondent's manufacturing operations (which were based in China) ceased. To support the business, the respondent asked employees and consultants to take a reduced salary, unpaid time off or a break in consultancy agreements. By agreement, the claimant invoiced the respondent £2,000 per month in March 2020 (page C103). Mr Breith and the claimant agreed that the claimant would reduce his time working for the respondent and that he could take on other work.

27. In April 2020 Mr Breith advised all staff that the respondent was unable to pay salaries due to the effects of the pandemic. Two members of staff went onto the furlough scheme but the claimant did not. The last payment the claimant received from the respondent was in March 2020.

28. By this time, the claimant's work for the respondent had reduced significantly, although he continued to respond to technical queries and attend meetings as required. At about this time the claimant took on other work and from about August 2020 he took on a directorship and consultancy role with Bucks Property Construction and Maintenance (pages 143 and 144). He did not require the permission of the respondent to do so.

29. The claimant emailed Mr Breith in July 2020 to say that he was aware his date to return to the respondent couldn't be decided at that time, but he was happy to parachute back in as and when the company could accommodate him (page 39). Mr Breith responded to say he would share plans when they were finalised, but that would not be for a few more weeks (page 38).

30. The claimant returned to work with the respondent about a year after that, in July 2021. The parties agreed that initially this would be on an unpaid basis. There are no documents confirming the date of the claimant's return. I find that the

claimant restarted work with the respondent in July 2021 because this date, given by the claimant in his evidence, is consistent with the date Mr Breith first thought in his witness statement, and with what the claimant said in an email in March 2023 (page B67). Other than pay, the claimant's role and working arrangements were largely unchanged from 2019.

31. In October 2021 the respondent was considering listing on the Nasdaq stock market. It held a series of remote meetings about this to which the claimant was invited in his capacity as a shareholder of the business. The claimant attended about 9 one hour meetings in the 3 month period to January 2022 and also did some work on this project. In the event the listing did not go ahead. The respondent paid the claimant a one-off bonus of £15,000 in respect of work he did on this project (pages B41 and C105). This was at Mr Breith's discretion, it was not something that had been agreed between the claimant and Mr Breith. I make this finding based on the wording of the email on page B41.

32. In January 2022 the respondent secured alternative funding. The claimant and Mr Breith spoke about the plans for the business and for paying the claimant again. Mr Breith emailed the claimant (page B43):

> "You are in the plan @ £60k per annum, plus all of the shares and stuff.
>
> There is also a lot of other expenses that can be diverted for bonuses or what [you] need.
>
> It can be what we want it to be to be honest mate within reason."

33. The claimant replied (page B42), saying:

> "When I started the first time, I was on £80k plus car allowance. However that did change to £5k per month gross when I was asked to go Nett with the sales team.
>
> I anticipated I would improve on that and if not too bold I would like my package to match other executive directors which I believe is a sum in excess £120k per year?"

34. In February 2022 the claimant started invoicing the respondent again, at the rate of £5,000 per month (page 106). There were further exchanges about the claimant's salary in March 2022 in which Mr Breith said he was not in a position to change anyone's remuneration there and then, but bonus structures were being put together which would be based on performance (page B50 and B53).

35. I find that the parties had agreed that the claimant would invoice £5,000 per month. I find that there were ongoing conversations about the level of the claimant's remuneration and bonus schemes, but that no agreement was reached that the claimant's remuneration would increase and no bonus scheme was introduced. If there had been any such agreement or scheme, this would have been reflected in the claimant's invoices to the respondent.

36. The respondent's financial position remained difficult throughout the latter part of the pandemic period. On 31 January 2023 Mr Breith met with the claimant to discuss the termination of the claimant's role with the respondent. I find that the claimant was not expecting this, but that he engaged in the discussion and agreed that his role would terminate. I reach this finding based on the claimant's email sent after the meeting which had the subject 'Exit Operations Agreement' and said, 'Can you please put our agreement into an email for me so we both have a record?' (page B57).

37. Mr Breith replied in an email (page B56). The email said that they had discussed and agreed that:

    37.1. the claimant would stop work from a day-to-day operational perspective but keep hold of his email and laptop so that if needed he would 'be on hand'; and
    37.2. the respondent would continue to pay the claimant for 6 months.

38. Mr Breith ended the email by asking the claimant to take on a new project. He asked the claimant to identify third party logistics sites in Europe and the rest of the world which could be put in place to facilitate the respondent's shipping arrangements.

39. The agreement was confirmed by Mr Breith in an internal email to the finance manager (page B61). This email also confirmed that 'after the 6 months [the claimant] will be paid £1,000 per month as he will be staying on as Director'.

40. Mr Breith sent a draft termination letter to the claimant on 27 February 2023 (page B64). It said that the claimant had been working under an unwritten consultancy agreement. It said the respondent would honour a six month notice period, subject to pay from other work during the notice period being set off against the claimant's pay by the respondent.

41. The set off provision had not been discussed with the claimant and it was not acceptable to him. He sent an email to Mr Breith on 1 March 2023 saying that the terms set out in the draft termination agreement conflicted with the terms they had agreed and that he would not sign the termination agreement (page B67).

42. The respondent paid the claimant £5,000 per month from February 2023 to July 2023 (page 85).

<u>The claimant's role with the respondent</u>

43. I make the following additional findings about the claimant's role with the respondent.

44. From February 2019 to about December 2019, the claimant's role for the respondent was predominantly full time. He worked consistently, whatever hours were required, there was some fluctuation. The claimant had control over his working hours, consistent with being a director. A lot of travel was involved in the role and to some extent the claimant had control over when he travelled, for example he could arrange his own visits to suppliers. On some occasions he accompanied Mr Breith in which case there was less control over timing of trips.

45. There was no change in the way the claimant worked before and after April 2019.

46. The claimant never engaged someone to work as a substitute on any part of his work for the respondent. If he had wanted someone to step in to do part of his role, he would have had to ask the management team and they would have considered any recommendation the claimant made, or identified someone else.

47. The claimant was provided with a workstation at the respondent's offices, a laptop computer, a company mobile and company credit cards. The respondent did not allow staff, including contractors, to use their own devices, for security reasons. The claimant kept this company property during the covid period.

48. The claimant had company business cards which identified him as Group Operations Director. He signed off correspondence with this title and was introduced to customers, suppliers and at shareholder meetings with this title.

49. There was no agreement that the respondent would pay holiday pay. After April 2019 the claimant did not need to seek permission to take holiday but had to notify the respondent so that his holidays could be entered into a diary system. This was for planning purposes. He continued to invoice the same monthly fee for a month in which he had holiday.

50. There was no agreement that the respondent would pay sick pay and the claimant did not receive statutory sick pay for any period of sickness after April 2019. After April 2019 the respondent did not make any deduction from the claimant's monthly fee in respect of any sickness absence (for example during a period when the claimant had covid).

The law

<u>'Ordinary' unfair dismissal</u>

51. The right not to be unfairly dismissed is provided for in section 94 of the Employment Rights Act 1996. That says at sub-section 1:

"An employee has the right not to be unfairly dismissed."

52. Section 108(1) says that two years' qualifying service is required to bring a complaint of 'ordinary' unfair dismissal:

"Section 94 does not apply to the dismissal of an employee unless he has been continuously employed for a period of not less than two years ending with the effective date of termination."

53. Where the right applies, the employer must show that the dismissal is for a potentially fair reason as set out in section 98(2).

54. Where there is a potentially fair reason for dismissal, the tribunal must consider (under section 98(4) of the Employment Rights Act 1996):

"*whether in the circumstances (taking into account the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a fair reason for dismissal."*

55. This is determined in accordance with equity and the substantial merits of the case. The tribunal considers whether dismissal was within the range of reasonable responses open to the employer. The tribunal must not substitute its own view of the appropriate penalty for that of the employer.

Employment status under the Employment Rights Act 1996

56. The statutory definition of an employee in section 230(1) of the Employment Rights Act says that an employee is:

"an individual who has entered into or works under (or, where the employment has ceased, worked under) a contract of employment".

57. Section 230(2) defines a contract of employment as:

"a contract of service or apprenticeship, whether express or implied, and (if it is express) whether oral or in writing".

58. There is no statutory definition of contract of service. The factors to be considered are derived from case law. In the case of Ready Mixed Concrete (South East) Ltd v Minister of Pensions and National Insurance [1968] 2 QB 497 it was held that three conditions must be met for a contract of service (a contract of employment) to exist:

58.1. the employee agrees, in consideration for a wage or other remuneration, to provide their own work and skill in the performance of some service for the employer;
58.2. the employee agrees, expressly or impliedly, to be subject, in the way they perform that service, to a sufficient degree of control by the employer for the relationship to be one of employer and employee; and
58.3. the other provisions of the contract are consistent with it being a contract of employment.

59. In Autoclenz v Belcher [2011] IRLR 823, the Supreme Court confirmed that the summary in Ready Mixed Concrete remains *'the classic description of a contract of employment'.* It went on to emphasise the importance, in the context of employment contracts, of considering the 'true agreement between the parties', which might mean looking beyond what is set out in a written contract: '*the true agreement will often have to be gleaned from all the circumstances of the case, of which the written agreement is only a part.'*

60. In summary, mutuality of obligation and the right of control are essential features of a contract of employment. Mutuality of obligation involves consideration of whether the individual has agreed to provide their 'own work', in other words whether there is a requirement for personal performance. A range of other factors may be relevant to the question of whether a contract of employment exists, and these may vary from case to case. The courts have cautioned against a 'checklist

approach': what is required is investigation of all the factors that are relevant in the particular case and an evaluation of the whole.

Conclusions

61. I have applied these legal principles to the facts as I have found them. The claimant can only pursue a complaint of unfair dismissal if he was an employee under section 230 of the Employment Rights Act. That requires me to consider whether he was working under a contract of employment. I first have to decide:

    61.1. where are the terms of the contract set out;
    61.2. if any written contract does not reflect the true agreement between the parties, what other circumstances, such as the conduct of the parties and any oral exchanges between them, shed light on the true agreement;
    61.3. what is the status of the relationship the true agreement gives rise to, based on my findings of fact, and weighing their importance.

62. In this case, there were no formal written contracts between the parties. I have to assess the surrounding circumstances, including the correspondence between the parties and the oral exchanges between them, to decide the true agreement between the parties, and to determine what was the employment status of that agreement.

63. As to the relevant period for me to consider, the parties agree that the claimant was an employee from February 2019 to April 2019. There was a separate relationship in relation to the claimant's other director roles for which he was paid in April, May and June 2019.

64. The material period which is in dispute concerns the claimant's employment status in relation to his role of director from April 2019 to July 2023. This includes the following periods:

    64.1. April 2019 to March 2020 when the claimant worked for the respondent, invoiced the respondent and was paid;
    64.2. March 2020 to July 2021 when the claimant did no material work for the respondent, did not invoice the respondent and was working elsewhere;
    64.3. July 2021 to January 2022 when the claimant was working for the respondent but did not invoice the respondent and was not paid by the respondent, other than one discretionary bonus;
    64.4. February 2022 to July 2023 when the claimant was working for the respondent or on notice, invoiced the respondent and was paid.

65. The following features of the relationship need to be considered during these material times:

    65.1. the mutuality of obligation between the claimant and the respondent;
    65.2. whether personal performance was required, that is, whether the claimant agreed to provide his own work;
    65.3. the degree of control to which the claimant was under;
    65.4. the other features of the working relationship and whether they were consistent with a contract of employment.

66. As to mutuality of obligation, the working relationship during the period from April 2019 to March 2020 led on from an earlier period of employment, when there had been an obligation on the claimant to work for the respondent, and a corresponding obligation on the respondent to pay for that work. The parties agreed in April 2019 that the claimant would move to self-employed status for financial reasons. His day-to-day work did not change. He continued to perform his role, and the respondent paid his invoices. The mutual obligation (the pay/work bargain) continued from the earlier period of employment after April 2019, up to March 2020.

67. That was not the position during the period from March 2020 to February 2022. During this period, the respondent told the claimant that it could not afford to pay him, he stopped submitting invoices and he worked elsewhere for part of this period. The parties understood, as the email exchange in July 2020 demonstrates, that further discussions would be required if their working relationship was to recommence. There was no mutual obligation, no pay/work bargain, during this period.

68. Although the claimant was working for the respondent during July 2021 to January 2022, I have found that the parties had agreed that he would do so without pay. The claimant received one discretionary bonus during this period. There was no obligation on the respondent to make this payment.

69. The claimant said that it was not reasonable to think that he would reduce his monthly remuneration and later agree to work for nothing, unless it was under the promise and expectation that he would be compensated as soon as normal sales and operations were resumed. The claimant's unpaid work reflected his desire to protect his investment in the business, and his hope that the respondent's financial position would improve and he could resume his work on a paid basis. However, there was no agreement between the parties about compensation for unpaid work during this period. I have concluded that there was no mutual obligation in relation to pay and work during this period.

70. The mutual obligation between the parties began again during the period from February 2022 to July 2023. The parties agreed that the claimant would be paid for his work for the respondent, and he invoiced the respondent during this period.

71. Personal performance: Another part of this element of the test is whether the claimant agreed to provide his own work. In the absence of written terms and conditions recording the relationship, there was no express term permitting the claimant to provide a substitute. I have found that the claimant did not at any stage engage someone to work as a substitute on any part of his work for the respondent. If he had wanted to do so, he would have had to ask the management team and they would have considered any recommendation the claimant made. The claimant would not have been able to just ask someone else to attend in his place.

72. I conclude therefore that personal performance was required of the claimant, both during his initial period of employment and in the periods in which he was

engaged by the respondent after that, that is from April 2019 to March 2020 and from February 2022 to July 2023.

73. Control: this is a matter of degree. As a director of the company, the claimant had some control over his work, in relation to when he did some things, like the scheduling of overseas trips, and the detail of how he did his work. However, I have concluded, based on the initial offer email, and the instruction to the claimant in the email recording dismissal arrangements, that the respondent also had control over what the claimant did, both in the period before April 2019 and after that. The respondent was, to some extent at least, directing what the claimant did (even if not telling him the detail of how to do it). Again, this was the position during the periods in which the claimant was engaged by the respondent after his initial period of employment, that is from April 2019 to March 2020 and from February 2022 to July 2023.

74. My conclusions on mutuality of obligation, personal performance and control suggest that the relationship could have been an employment relationship, between the periods from April 2019 to March 2020 and from February 2022 to July 2023. (I have found that there was no mutuality of obligation between March 2020 and February 2022. That is not consistent with there being a contract of employment during that period.)

75. Other features of the working relationship: The last limb of the test requires me to consider the other features of the relationship and the extent to which they are consistent with the claimant being an employee with an employment relationship.

76. Title - the claimant's use of the title of Group Operations Director in company business cards, correspondence and in meetings is neutral. The title could be indicative of an employment relationship or self-employment.

77. Equipment – the claimant had a workspace, laptop and mobile that were provided by the respondent. This feature can be suggestive of an employment relationship. However, in the circumstances of the claimant's case it is more neutral, because the equipment was also used in the context of the claimant's role as a director of other group companies, and because there were security considerations which meant that the respondent provided equipment to contractors as well as employees.

78. Financial investment – the claimant was a shareholder of the respondent, as well as operations director. He had an interest in the financial performance of the business as a result. I have found that the claimant accepted shares in compensation for shortfalls in remuneration. Those features are more suggestive of self-employment.

79. Furlough – the claimant was not put on the furlough scheme, and did not ask to be put on the scheme, as might have been expected if he had been an employee.

80. Holiday and sickness – after April 2019 the claimant informed the respondent of his holiday for administrative reasons, but he did not need to apply for holiday. He invoiced the same fee for months in which he was on holiday or sick. A flat monthly fee which does not vary despite periods of holiday and sickness, in the

absence of an agreement to pay holiday pay or sick pay, is more suggestive of self-employment than employment.

81. The parties' description of the relationship – from April 2019 both parties agreed that the relationship would be one of self-employment. From that time, the claimant's pay arrangements reflected that agreement. The claimant did not receive pay slips, he submitted invoices, and he did not pay tax or employee national insurance contributions via PAYE. Those are features which are not consistent with an employment relationship. I have not found that those arrangements were a sham.

82. I have considered the parties' description carefully, bearing in mind that the position taken by the parties is not determinative of employment status and that:

    82.1. the true relationship between employer and employee cannot be changed simply by putting a different label on it;
    82.2. a party can resile from a deliberately chosen position; and
    82.3. the relative bargaining power of the parties, where employers are often able to dictate terms, means that the true agreement might be different to that which appears to have been agreed.

83. I also have in mind that an employer seeking to avoid the unfair dismissal provisions should not be able to rely on other breaches of employment protection legislation to support an assertion that someone is not an employee.

84. However, in this case, the claimant was a director and shareholder of a relatively small start-up business. There were no standard terms; Mr Breith and the claimant discussed and agreed the move to self-employment. This was not a case of an established employer imposing standard terms on an employee. The claimant accepted what was described as a change from employed to self-employed status, and the arrangements which followed reflected that change. There were good reasons on both sides for the change in the relationship. In these circumstances, I can attach some weight to the parties' description of the working relationship as one of self-employment.

85. Having weighed up the features of the claimant's working relationship with the respondent, I have concluded that other features of the claimant's working relationship after April 2019, in particular the pay and tax arrangements, were not consistent with an employment relationship. Those features that are suggestive of an employment relationship, such as the provision of equipment, were connected with the particular position of the respondent and the claimant's other director roles and financial investment; less weight should be attached to them for these reasons. I have concluded that the parties' agreement that the claimant should move from employment to self-employment in April 2019 was a genuine agreement that was reflected in the features of the working relationship after that date. There was no change to status when the claimant began working for the respondent again in July 2021 or when he started invoicing again in February 2022.

86. Therefore, I have concluded that the claimant was not an employee of the respondent from April 2019 to July 2023. This means that he does not have

sufficient qualifying service as an employee to bring a complaint of unfair dismissal. The complaint is not well-founded and is dismissed.

Employment Judge Hawksworth

Date: 19 July 2024

Sent to the parties on: 19 July 2024...

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For the Tribunals Office

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