EMPLOYMENT TRIBUNALS

Claimant: **Mr Nigel Lofthouse**

Respondent: **St Cross Kitchens of Winchester Ltd**

Heard at: **Bristol (by CVP)** **On:** **10 July 2024**

Before: Employment Judge Street

Representation
Claimant: Miss E Lofthouse, Claimant's wife and lay representative
Respondent: Miss McGrath, consultant

RESERVED JUDGMENT

1. **The Claimant was an employee of the Respondent from March 2019 to a date of termination yet to be determined.**
2. **Permission to amend the claim as set out in the application of 9 February 2024 is refused.**

CASE MANAGEMENT

1.1. The case is listed for a private preliminary hearing on 5 September by video at 10.00 am for one hour, for the following:

1.1.1. Defining issues
1.1.2. Listing the final hearing
1.1.3. Consequential case management directions.

1.2. Joining instructions will be issued the day before the hearing.
1.3. The parties are to have dates of availability for the final hearing for the following twelve months.

REASONS

2. Background

2.1. This is a claim against a limited company of which the Claimant was one of four directors. The company was founded in November 2018. Its purpose was to make and install kitchens. The Claimant resigned as director on 15 December 2021. The Respondent says that terminated his engagement and the Claimant says he was dismissed without notice on 6 January 2022. On 4 April 2022, he brought a claim of unfair dismissal, holiday pay, arrears of pay and failure to provide a written statement of particulars of employment. He applies to amend his claim to add whistleblowing (protected disclosure).

2.2. The hearing was listed to deal with preliminary matters including as to whether or not the Claimant was an employee or a worker and whether he should have permission to amend his claim. Orders for the preparation for the hearing had been made on 18 January 2024 by Employment Judge Bax.

3. Evidence

3.1. The Tribunal heard from Mr Lofthouse, and, for the respondent, from Lucie Pearsall, director, Dr Ewen McMorris, director and Mark Elstob, former director.

3.2. The tribunal was provided with an agreed bundle extending to 287 pages.

3.3. In addition, at the request of Mrs Lofthouse, the tribunal listened to extracts not exceeding one minute from the recording of the meeting of the directors on the 13th 13 December 2021.

3.4. Mr Elstob generously attended to give evidence although he had Covid and was clearly unwell. His evidence was interposed at 11.15 am.

3.5. The bundle had been resubmitted, a clean copy provided to the claimant only two days earlier. That was because the original bundle had annotations to the evidence which rendered it inappropriate for use by witnesses.

3.6. The Respondent's witness statements had been prepared in substantial breach of the Order made by Employment Judge Bax, which limited the word count to 3000 words. The claimant had adhered to the Order. The Respondent's witness statements as originally presented ran to in excess of 30 pages, (double spaced). Miss McGrath had intervened and redrawn the witness statements since discovering the breach, serving severely shortened statements again on 8 July 2024.

3.7. The steps taken by the Respondent's representatives in preparation of the case for hearing would otherwise have seriously impacted on the fairness and perceived fairness of the hearing.

3.8. Miss McGrath's intervention was helpful, but faced the Claimant and his representative, his wife, with having prepared on the basis of markedly different witness statements.
3.9. I too had prepared on the basis of the documents presented in breach of the Order. I had discounted the annotations when looking at the bundle. I had read the fuller witness statements.
3.10. The new documents reached me after the start of the hearing, having been sent in the day before. The Order had been for the documents to be provided by 5 July 2024.
3.11. The right witness statements had not been exchanged or presented to the Tribunal in accordance with the Order. The potential consequences include striking out the Respondent's response, refusing to permit the Respondent's witnesses to give evidence or postponing this hearing with a costs order.
3.12. I was satisfied that a fair hearing was still possible and that the overriding objective did not require that the Respondent's witnesses were barred from giving evidence altogether.
3.13. I have taken care not to base findings of fact or my deliberations on recollections of the longer and now withdrawn witness statements.
3.14. Although no comment was made on behalf of the Claimant during the hearing, there may of course remain a perception of unfairness.
3.15. Peninsula is a specialist litigation company. This conduct is more than disappointing, in spite of Miss McGrath's efforts to rectify the situation.
3.16. None of the witness statement were signed and the parties were directed to ensure that signed copies were submitted for the Tribunal File.
3.17. The spelling of Mrs Pearsall's first name, Lucie or Lucy, varies in the documents.

4. **Issues**

4.1. The issues before the Tribunal to decide are as follows.

4.1.1. Was the Claimant an employee of the First Respondent within the meaning of s.230 of the Employment Rights Act 1996

4.1.2. Was the Claimant a worker of the First Respondent within the meaning of s.230 of the Employment Rights Act 1996

4.1.3. The amendment application by the Claimant in respect of whistleblowing claims

4.2. The tribunal should have gone on to: -

4.2.1. Finalise the list of issues to be determined at the final hearing,

4.2.2. List that hearing with consequential case management orders.

4.3. In the event, there was no time to reach those two matters. Judgment was reserved.

4.4. A further hearing has been listed to address points 4.4 and 4.5 of the list of issues on 5 September 2024.

5. **Findings of Fact**

5.1. The company was founded at the initiative of Dr Ewan McMorris who invited Lucie Pearsall, Nigel Lofthouse and Mark Elstob to join in the enterprise as company directors. He was prepared to fund the start-up costs and if necessary to lend money to support his colleagues financially while the company got up and running. He took a leadership role while the other three directors were to work in the business, bringing their respective skills and fields of expertise. No other staff were to be involved at the outset. The business was the design, manufacture and installation of new kitchens.

5.2. The company was incorporated on 12 November 2018. There had been a meeting in October 2018 when plans were laid (221).

5.3. All directors were part of the joint decision-making and key decisions about the company as against their areas of individual responsibility were decisions that they were entitled to and did contribute to.

5.4. Shareholdings were not mentioned in the evidence but I infer that Mr Lofthouse did not himself have a controlling shareholding.

5.5. Roles in the business were divided up according to skills and experience. Each had their own workload and responsibilities. Mr Elstob was a highly skilled cabinetmaker who had made kitchens before. He took the lead in producing the carcases and led on manufacturing quality and finish.

5.6. Mrs Pearsall managed front of house with sales and design, payments and invoices, monitoring the bank account and cash flow. Lucie Pearsall's skills were in design and sales. She looked after the clients, dealt with costings, ordering, invoicing, marketing, the website. If needed she would also help with practical matters, such as sanding, painting, removing protective film from units. She would produce designs, check with Mr Lofthouse that they could manufacture them, and consult him over time estimates and materials.

5.7. Dr McMorris was the chairman and led on strategic decisions. Dr McMorris did not work day-to-day in the business. He hoped to draw income and/or dividends in due course but did not during the period at issue.

5.8. Mr Lofthouse had in the past had a management role but for two years had worked on a self-employed basis with Mr Elstob on Dr McMorris's property. He wanted to work more directly in carpentry and had been learning skills from Mr Elstob. Mr Lofthouse took a managerial role in the workshop. He was to develop the workshop systems and had overall responsibility for the workshop, in particular after Mr Elstob ceased to be a director (EM ws para 5). He was responsible for operating the software that produced the build lists, while also working alongside Mr Elstob in the workshop creating the units. He had an organisational role, devising processes is to make manufacturing more

efficient without losing quality. He learned to use Polyboard, software that produced build instructions, on which the business relied. He was the only person in the business who developed those skills.

5.9. In terms of the management of the company the four directors worked together and made decisions jointly. There was no hierarchy.

5.10. The work was carried out as a team effort between the three working directors.

5.11. Mrs Pearsall kept minutes which record the company decisions and difficulties. There are articles of association which have not been produced. There are no other formal documents relating to the internal business arrangements.

5.12. There are no written contracts, whether of employment or otherwise. Matters are described as being dealt with orally and on a trust basis.

5.13. There was no discussion as to the legal basis on which they worked together, beyond that they were co-directors in a joint enterprise operated through the company. Three were working directors. They did not discuss employment or any other status. It was agreed that they would be paid for their work when the company could afford to make such payments.

Pay discussions

5.1. It was agreed at the outset that there would be no income drawn from the business until the business could support it – contracts for the sale of kitchens would bring deposit payments.

5.2. In the minutes from 30 October 2018, it was agreed that payroll would be inhouse and while pensions needed more discussion and research (the handwritten notes read “Pensions – need addressing” (218)), the business would adopt a PAYE system so “Tax and national insurance are all managed correctly.” The holiday year would start from when people started to be paid, with an “allowance” of 22 days holiday per year, to be inclusive of any closure between Christmas and the New Year, in respect of days that were not bank holidays (219).

5.3. Working hours, “Generally will be 8:00 to 5:00, with weekend opening times still to be confirmed officially.”

5.4. Income from the business would be dependent on leads and on how quickly they would receive payment for orders (217).

5.5. In the minutes from December 2018, it is reiterated that the three working directors would be paid under PAYE, “As this is the easiest way to manage tax and national insurance” (224).

5.6. Between them, the directors had experience of being employed and of being self-employed. Mr Lofthouse and Mr Elstob had been working on a self-employed basis under the CIS scheme for Dr McMorris’ business Portcullis and it was minuted in the same discussion that any such work would continue on that basis.

5.7. No directors took directors fees, dividends or loans during the material period.

5.8. In due course, the directors chose not to make pension provision (any minute confirming that has not been produced).

5.9. Payment to the three working directors was made from 12 February 2019, when the first deposit was received. There had been a hope that back pay might be possible, but that was not achieved.

5.10. At the meeting on 12 March 2019, pay and holidays were again discussed (227),

> "Pay to be £1500 after deductions for NL, ME and LT going forward. Holidays and bank holidays will be paid and that amount is assumed a working week is 44 hours. We will close between Christmas and the New Year."

5.11. Mr Lofthouse describes that decision as reflecting a joint agreement as to what the company could afford to pay (oral evidence 9).

5.12. Mr Lofthouse's wife was due to give birth, he was concerned to receive a regular income.

5.13. The work available to the business for income generation was of course not guaranteed, so there was necessarily uncertainty about income receipts to the business. Payment to the directors is not recorded here as being dependent on business income or varying with hours worked.

5.14. In private WhatsApp messages between Dr McMorris and Lucy Pearsall, Dr McMorris had said, on 2 March 2019, shortly before this meeting of 12 March 2019,

> "Nigel has suggested that he needs £1500 to live on each month and that we should set the take-home at that, with the plan that it ideally won't fall below that amount. We can do some planning and see if that's likely to be the case. Between you and I, I have told him if it does fall below that I will quietly lend him the money to ensure he still has his £1500" (148).

5.15. Dr McMorris referred to his in his oral evidence.

> "I offered to lend Nigel money, we had all a very clear understanding, I could not afford to pay people's wages, I could put in seed funding but going forward the business was all of ours responsibility. Nigel was rightly concerned, he was the main breadwinner and I felt guilty about getting him into a business when he may not get paid and I offered to lend him money if there were months in which he could not get paid. " (oral evidence 23)

5.16. That risk is not noted in the minutes as discussed or as qualifying the pay agreement. Mr Lofthouse did not see the pay agreed at this point as being conditional on business income.

5.17. This is Dr McMorris' view,

> "It was explicit from the outset that they would only get paid when the business had money, then and for the future."

5.18. He said they picked the figure March 2019 as sustainable,

> "We picked the £1500 as sustainable, but they were only there because they needed to make the money and if they did not there might be lean periods when they might not get paid. We picked it as sustainable so there would be a regular amount of money each month for each director." (oral evidence)

5.19. The £1500 was paid to each working director.

5.20. By April 2019, minutes show a busy schedule already, with plans being discussed for moving to the next level – whether that was to be by machinery to speed up the process or extra hands in the workshop (229). Repayment to Dr McMorris for materials was agreed to be delayed so that they could pay their "wages from the business account."

5.21. On 15 November 2019, the minutes show that Dr McMorris proposed that everyone had a pay rise to £12.25 per hour and be paid hourly for the work they do. The estimate was that Mrs Pearsall would be paid for around 40 hours per week and Mr Lofthouse for around 48 hours per week, as, "This better reflects the hours he puts in which varies depending on work flow" (234).

5.22. Mr Elstob was negotiating roughly two days off a month to carry on some private work on a self employed basis while remaining a director and his pay was reduced accordingly (234).

5.23. It is not recorded that that was agreed. Mrs Pearsall was to carry out a cash flow projection spreadsheet.

5.24. It is common ground that everyone worked hard, often doing evenings, bank holidays and weekends as needed. It was understood that there would be no payment for overtime and hours were not monitored, save that Mr Elstob was to keep track of his non-working Fridays. As Miss Pearsall says , "We did the hours we needed to support the needs of the business."

5.25. The minutes for 17 December 2019 show discussion of holiday and time off, needing more structure. Mr Lofthouse and Mrs Pearsall could not be off at the same time as Mr Elstob, unless they shut down for two weeks in the summer. There was no conclusion to that discussion (234).

5.26. On 8 January 2020, it was minuted that,

> "it is agreed that NL and LP will receive £15 per hour as long as the business can sustain it. Worked into monthly payments across this year for hours worked, this makes monthly wages £3120 before deductions for Nigel for an approximate 48 hour week" (239).

5.27. Mark Elstob resigned on 12 March 2020 but continued to work for the respondent as an employed cabinet maker and installer.

5.28. That had been anticipated: the minutes for 17 December 2020 show,

> Mark to become an employee working Mon – Thurs with every Friday off proposed. His contract is to be amended by LP accordingly with EM to then discuss it with Mark and make sure it is explained and signed" (237).

5.29. At that point the company drew up an employment contract for Mr Elstob. There had been no previous written contract. Mr Lofthouse was involved in drawing up the contract and new company handbook. Mr Elstob was seen as the company's first employee, including by Mr Lofthouse (oral evidence 6). He was enrolled in the statutory pension scheme. He submitted time sheets, had set hours of work and had to have permission to use the workshop for his own purposes out of hours. His rate of pay was to be £12.25 per hour.

5.30. He ceased to be a director.

5.31. He no longer had access to accounting information and returned his bank card for the company account (ME ws para 6).

5.32. The directors assumed that as directors they were not employees. They did not regard the employee handbook as applying to them (LP ws para 7).

5.33. On 15 June 2021, the minutes record with regard to pay discussions,

> "Discussed new team member James starting next week. Nigel doesn't want to be paid less than our new team member as he will need to train him. Nigel wants £180 per day (no longer hourly based based on average hourly week of 48).
>
> Lucie will accept £170 a day as she is unsure about how sustainable these increases are for the business but agrees to support Nigel in earning more than James. Ewan agrees that if Nigel is to earn more than James, so should Lucie as his senior. The new rates are agreed by all for now for as long as the business can support that. Nigel and Lucie both aware that those rates are only possible if the cash flow is there to support it, otherwise they will only be able to be paid what the business can afford as per the usual arrangement." (245).

5.34. Mr Lofthouse agreed in oral evidence that that meant that the agreed pay was itself conditional on there being funds. At the same time, he pointed to the business taking on a new staff member, deposits would be coming in, "I was not too worried about not being paid." (oral evidence 20). In terms of whether the pay was enforceable, in the sense that if it was unpaid or underpaid he could bring a claim for unpaid wages, he thought that applied from around March 2019.

5.35. Throughout the period of Mr Lofthouse involvement, payment was made at the full rate currently agreed, save that on one occasion it was paid in part in cash, from funds held in the business. Later, Mrs Pearsall varied pay to herself, reducing it when cash flow did not permit full pay, but she confirmed that that had not happened while Mr Lofthouse was a director.

2020 – 2021

5.36. In March 2020, Mark had become an employee and given up his directorship.

5.37. When COVID intervened, two of the directors, Mr Lofthouse and Mrs Pearsall, were furloughed as salaried directors. Entitlement followed on the fact that a Real Time Information (RTI) submission notifying payment for each as an employee had been made to HMRC.

5.38. On 2 November 2020 an additional employee, Brian, was taken on as a cabinet maker and installer to work alongside Mr Elstob. He had previously worked as a subcontractor. Again, the directors regarded Brian and Mark as employees, by contrast with the directors.

5.39. In June 2021, the company took on the services of a subcontractor, James Heath. He was to work installing kitchens and to assist with making them if required. He is described as self-employed to enable him to be flexible with his work and times.

5.40. Mr Lofthouse estimated that up to 70% of his time was in the workshop. The balance was on the software working on the agreed designs and on carrying out his functions as company director.

Mr Lofthouse: arrangements regarding his work and role

<u>Tools and equipment</u>

5.41. Mr Lofthouse provided and used his own hand tools. He used his own van. He initially bought a laptop but eventually the company bought it from him. The company also agreed in due course to pay for repairs to his van.

5.42. Purchases of major items of equipment, such as heavy machinery, had to be agreed between the directors and were then bought by the company. (ME oral evidence 4)

5.43. In due course, Mr Lofthouse would ask the company to finance the purchase of tools, initially paying it back so that the tools became his. His fellow directors agreed to replace his pin gun after it had been used in the business and broken. He retained the replacement when he left the business. As time went on, tools might be purchased by and remain in the ownership of the company.. When Mr Lofthouse stopped work for the company, tools were returned by agreement to the rightful owners.

5.44. At Mr Lofthouse' initiative, Nigel and those in the workshop or fitting kitchens wore branded clothing, in order to look professional and to promote the business.

<u>Hours and annual leave</u>

5.45. The directors had agreed standard opening hours and expected normal working hours. There was a degree of flexibility. discussed extra hours or weekend working informally between them, exchanging their own plans.

5.46. Mr Lofthouse took a couple of late starts a week to for childcare reasons, but worked later to make up for that. There were times when he worked from home, if he had drawings to do, but otherwise was hands-on in the workshop (oral evidence). He enjoyed a degree of autonomy with regard to his working hours, as did all three working directors, but essentially the business had to be manned and the work get done to produce the kitchens. The workload was heavy.

5.47. Annual leave was dealt with co-operatively. No director was required to seek permission from the others or from the company to take holiday leave. The contractual rules around holiday that were applied when Mark Elstob became an employee in the workshop did not apply to the directors. They would let each other know of planned absences as a courtesy and in the interests of business efficacy. It has been agreed at the outset that holiday absences would be paid at the same rate as working hours.

5.48. Mr Lofthouse did not have to ask permission to take leave, but he could not be away at times when the business needed him because others were on holiday. He made sure he did not take leave when there were any big projects on and so he could be absent without it impacting the workshop (NL oral evidence).

5.49. Mr Lofthouse was able to take medical appointments during the working day and he could work from home.

5.50. Mr Lofthouse had several absences for surgery or other ill health during the period of his association with the company. His pay was maintained. While he was recovering from operations he delegated all manual work to the team but kept the computer work and remained entitled to contribute to decision making.

5.51. Evidence has not been given that Mr Lofthouse did not attend when needed or that any absences during the agreed normal hours impacted the completion of contract work for clients.

5.52. Mr Lofthouse was able to use the workshop for facilities for private work as an unchallenged matter of right and did so.

Control and supervision

5.53. With regard to the workshop work or the software design work, Mr Lofthouse was not supervised by his colleagues. His work was not monitored. He was not told how to carry out his work. He was not subject to supervision or appraisal.

5.54. He was responsible for meeting the requirements of the business as regards working towards dates for delivery.

Integration

5.1. Mr Lofthouse's role and skills were integral to and vital to the business, as both Mrs Pearsall and Dr McMorris recognised.

Policies and Procedures

5.2. The company had no policies or procedures in relation to employees until Mark Elstob became an employee instead of a director of equal status with the other two working directors. When an employment handbook was created, the working directors did not take the view that the content applied to them. That view was shared by Mr Lofthouse.

How the directors viewed the arrangement

5.3. Lucy Pearsall says,

> "We each had our own workload and responsibility as director's come up which played to our individual strengths and abilities. These were the roles that we undertook as part of the directorship; It was not additional employment. … (LP ws para 11)"

> "In the very simplest of terms I do not regard myself as an employee. I have total freedom to do my job and I am answerable to no one and the claimant was in the same position. (para 13)"

> All the directors regarded Mark, James and Brian, employed staff, taken on as such or as self-employed subcontractors, as in a different category from the directors or working directors.

December 2015

5.4. On 15 December 2021, Mr Lofthouse wrote to his fellow directors in the following terms:

> "Re: Termination of director's appointment
> I, Nigel Lofthouse, hereby terminate my directorship of Saint cross kitchens of Winchester limited with immediate effect in accordance with article 22, subsection (f) of the memorandum and articles of association of said company."

5.5. The following day, 16 December 2021, he wrote,

> "**Attn – The Manager**
>
> I write to confirm that after I arrived this morning to start work; I was asked by Lucie Pearsall (a company director) to leave the premises and take two days of annual leave leading into my upcoming (pre- booked) holiday.

…
I would like to clarify the current position. I have resigned from my role as Co director. I have not given notice as a permanent employee of the company. I would draw your attention to my length of service since the company's incorporation on 12 November 2018."

5.6. Mrs Pearsall confirms the conversation about absence as follows

> **"**I think I said If you are not going to talk to me or to Ewen you may as well take the next two days because you are going to Cornwall anyway. Then we talked about the laptop. All our work is on the laptop."

6. **Law**

Worker or Employee

6.1. Section 230(1) of the Employment Rights Act 1996 ("ERA 1996") defines an employee as,

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

6.2. Section 230(2) provides that,

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

6.3. That is by distinction from a contract for services, which is a contract for a self-employed arrangement.

6.4. Section 230(3) provides that "worker" means "an individual who has entered into or works under (or where the employment has ceased, worked under) -

> (a) a contract of employment, or
>
> (b) any other contract, whether express or implied and (if it is express) whether oral or in writing, whereby the individual undertakes to do or perform personally any work or services for another party to the contract whose status is not by virtue of the contract of a client or customer of any profession or business undertaking carried on by the individual.

6.5. A protected disclosure under the Employment Rights Act 1996 means a qualifying disclosure made by a worker, applying the definition in section 230(3).

6.6. Both relationships, that is, employee and worker, depend on the formation of a contract between the parties *(Windle v S of S for Justice 2015 ICR 156 (para 12)).*

6.7. A contract is a promise, or set of promises, that the law will enforce. In employment context, the employee promises to perform work in exchange for the payment of wages and the commitment to provide work. Other terms may also apply, covering holidays, payment for holidays, sickness absence, the use of equipment, satisfactory performance standards. Typically, an employment contract will be made up of a variety of terms and conditions

setting out the respective obligations of the parties and incorporating statutory requirements and employee entitlements.

6.8. For there to be a contract, there must be the intention to enter into legal relations and those legal relations must be intended to be created by way of a contract not by some other legal mechanism (*Sharpe v Bishop of Worcester 2015 CA IRLR 663).* There must be, expressly or impliedly, an offer, acceptance and consideration – that is, each party gives something of benefit to the other.

6.9. It is not necessary for a contract to be in writing. It is an important protection for each party that it is in writing, so that the terms can be clearly identified, but an oral contract of employment or for services is binding on both parties. Contracts may be partly written and partly oral and they can also be constituted or evidenced by conduct. (*Protectacoat Firthglow Ltd v Szilagyi [2009] EWCA Civ 98, [2009] IRLR 365)*

6.10. Once a contract does exist, 'employment' tends to reflect mutual obligations, whereas the 'worker' definition tends to concentrate on the element of personal service by the individual (not on the obligation of the employer to provide work).

6.11. If the contract is not one of employment, those who carry on a business on their own account and enter into contracts with clients or customers to provide work or services for them are self-employed and excluded from statutory employment rights. Those who provide their services as part of a business carried on by someone else rather than on their own account are likely to be workers, with a range of statutory employment rights, even though more limited than those for employees.

6.12. The question is always what the true legal relationship between the parties is. That may or may not be accurately reflected in contractual documents. All the relevant evidence, oral, written and ongoing conduct, must be examined to determine the "true agreement" (*Carmichael v National Power Plc [1999] ICR 226 HL).*

6.13. The case of *Taperer v South London and Maudsley NHS Trust 2009 ICR 1563 EAT,* a TUPE case, reminds us that the contract terms are to be identified at the time at the time the contract is entered into, describing that as an elementary premise in the construction of contracts.

6.14. The Supreme Court in *Uber Bv and ors v Aslam and ors 2021 ICR 657* held that by reason of the purpose of the statutory protections conferred on workers and employees the terms of a written contract are not even the starting point in determining whether an individual falls within those definitions. The focus must be on the practical reality of the working relationship. The key

questions relate to subordination and dependence, having regard to the legislative purposes of statutory rights. These are not ordinary commercial contracts.

6.15. A number of tests have been applied in distinguishing employees from workers and workers from those in genuine self-employment.

6.16. In relation to employee status, the traditional three questions, derived from *Ready Mixed Concrete (South East) Ltd v Minister of Pensions and National Insurance 1968 1 All ER 433 QBD* are:

> 1. Did the worker undertake to provide his own work and skill in return for remuneration?
> 2. Was there a sufficient degree of control to enable the worker fairly to be called an employee? That is, has the worker expressly or impliedly agreed to be subject to the other's control in the performance of his duties?
> 3. Were other provisions consistent or inconsistent with the existence of a contract of employment?

6.17. Mutuality of obligation – that is, each party to the contract offering something to the other, one committing to offer work and pay, the other promising to carry out the work - is a central issue in determining whether an individual is an employee or genuinely in business on his or her own account.

6.18. Without mutuality of obligation and a sufficient degree of control, there cannot be a contract of employment (*Carmichael above, and Montgomery v Johnson Underwood Ltd [2001] ICR 819)*

6.19. In *Stephenson v Dephi Diesel Systems Ltd EAT [2003] ICR 471,* Elias J said this,

> "The significance of mutuality is that it determines whether there is a contract in existence at all. The significance of control is that it determines whether, if there is a contract in place, it can properly be classified as a contract of service, rather than some other kind of contract."

6.20. The question of control is not to be determined solely by whether the worker has day-to-day control over their own work but by addressing the cumulative effect of the provisions in the agreement and all the circumstances *(White and anor v Troutbeck SA , CA [2013] IRLR 949).*

6.21. Can a worker or employee engage a substitute to carry out the work for them? Personal performance is an explicit component of the ERA 1996 definition of worker and is also a necessary constituent of a contract of

employment. A limited or occasional power of delegation is not inconsistent with that requirement (*Ready Mixed Concrete, MacKenna, above).* An unfettered right to substitute another person to do the work or perform the services is inconsistent with an undertaking to do the work personally. A conditional right to provide a substitute may not be inconsistent with the obligation to provide personal service *(Pimlico Plumbers Ltd v Smith [2018] UKSC 29)*. but the presence of a substitution clause in written documentation is unlikely to prevent a finding of "worker" status if there is no evidence of such a clause being operated or intended to operate in practice (Uber, above).

6.22. The requirement for personal service for employees has been seen as higher than for workers. If a genuine right of substitution exists, this negates an obligation to perform work personally and is inconsistent with employee status. It is immaterial that it is not used, so long as it is part of the contract. So, if there is no requirement for personal service, it is said that the contract cannot be one of employment *(Express & Echo Publications Ltd v Tanton [1999] ICR 693 HL)* but that now has to be approached in the light of the judgement of the Supreme Court in Uber, above, bearing in mind the purpose of the legislation.

6.23. Relevant to the analysis as to whether an individual is self-employed, a worker or an employee, therefore, will be the extent of control of the worker and the way he does the work held by the organisation, the extent of mutual obligation to provide and to perform work, the extent of integration into the organisation, that is whether the worker was part and parcel of the organisation or truly independent of it, whether there is an obligation on the worker to perform the work personally or whether he is entitled to employ a substitute. It is a multi-factorial assessment: consideration of all the circumstances is required, the terms of the contract and between whom and when it was made.

6.24. The following questions are helpful in creating the overall picture.

- What was the amount of the remuneration and how was it paid?—a regular wage or salary tends towards a contract of service; profit sharing or the submission of invoices for set amounts of work done, towards independence.
- How far, if at all, did the worker invest in his own future: who provided the capital and who risked the loss?
- Who provided the tools and equipment?
- Was the worker tied to one employer, or was he free to work for others (especially rival enterprises)? Conversely, how strong or otherwise is the obligation on the worker to work for that particular employer, if and when called on to do so?
- Was there a 'traditional structure' of employment in the trade?
- How did the parties themselves see the relationship?

- What were the arrangements for the payment of income tax and national insurance?
- How was the arrangement terminable?—a power of dismissal smacks of employment.

6.25. In *Cotswold Developments Construction Ltd v Williams [2006] IRLR 181*, a four-fold approach was suggested:

(1) was there one contract, or a succession of shorter ones?

(2) If one contract, did the claimant agree to undertake some minimum (or, at least, reasonable) amount of work for the company in return for pay?

(3) If so, was there such control to make it a contract of employment?

(4) If there was insufficient control (or some other factor negativing employment) was the claimant nevertheless obliged to do some minimum (or reasonable) amount of work personally, this qualifying him as a worker?

6.26. Relevant factors in assessing control include whether the individual is under a duty to obey orders, has control over his or her hours of work and holiday, is supervised as to the mode of working, whether he or she provides their own equipment.

6.27. An alternative approach considers integration, that is the integration of a worker into the organisation – is there any disciplinary or grievance procedure, is the individual included in any occupational benefit scheme? Is he in business on his own account? Does he provide his own equipment, hire his own helpers, take a financial risk, take any role in investment and management of his own business and can he profit from his own success?

6.28. Express contract terms are important but not necessarily decisive. An express contract term stating that there is no contractual obligation to offer and/or to do work does not inevitably preclude a finding of worker, or even employee status, where the individual works regularly and consistently for the master).

6.29. The effect of the judgment of the Supreme Court in *Uber* is that in assessing status, the facts must be looked at in the round, bearing in mind the purpose of the statutory protections provided to those who are in a situation of economic dependence, subordinate and vulnerable to exploitation.

6.30. Difficult questions can arise where the Claimant is also a company director. It is well established that while company directors are office holders, they can simultaneously be employees. That can be the case even with a one-man company where the one director also has sole control. The usual tests

apply: to be an employee, an office holder must enter into a contract with the company and it must be a contract of service.

6.31. In *Secretary of State for Employment v Bottrill [1997] BCC 145,* it is pointed out that no simple, clear test has been included in the legislation to determine whether a shareholder or director was an employee within the meaning of the Employment Rights Act 1996. Therefore an examination of all the relevant facts is appropriate. Control is always important and the Tribunal should look at where the real control lies in practice.

6.32. In *Rainford v Dorset Aquatics Ltd EAT 0126/20,* there was no evidence of an express contract written or oral. The terms of the contract had to be implied from the conduct of the parties and the circumstances.

6.33. At paragraph 16, considerations from the cases of *Clark v Clark Construction Initiatives Ltd [2008] ICR 635 (EAT)* and *Neufeld (Secretary of State v Neufeld [2009] are set out EWCA Civ 280,* referring also *to Dugdale v DDE Law Ltd, (unreported)* in relation to the question whether a director/shareholder is also an employee of a company (which are likely to apply equally to the wider concept of "worker"):

- (1) There is no reason in principle why someone who is a shareholder and director of a company cannot also be an employee, even if the person has total control over the company;
- (2) Whether the shareholder/director is an employee is a question of fact for the tribunal;
- (3) In cases where matters have been dealt with informally it may be a difficult question as to whether the correct inference is that the shareholder/director was truly an employee;
- (4) In considering the issue it will be necessary in particular to consider how the parties have conducted themselves, what they have actually done and how they have been paid;
- (5) Where the conduct of the parties is inconsistent with the existence of a contract of employment or is in some areas not governed by such a contract, that will be an important factor pointing away from a finding that the shareholder/director is an employee;
- (6) It follows that the lack of any written employment contract or other record thereof, is likely to be an important consideration; if contractual terms have not been identified or reduced into writing, that will be powerful evidence that the contract was not really intended to regulate the relationship in any way.
- (7) The fact that the shareholder/director has control of the company or that his personal investment in it will stand to prosper with the company will be "part of the backdrop" but will not *ordinarily* be relevant to the issue and can and should therefore be ignored (see: *Neufeld* para [86]).

6.34. The judgment continues by pointing out that the primary underlying question is of statutory rather than contractual interpretation: the purpose of the Employment Rights Act and other employment legislation is the protection

of workers who are vulnerable because they are in a relationship of subordination and dependence towards their employers; and a "touchstone of subordination and dependence" is the degree of control exercised by the putative employer over the work or services performed by the individual concerned *(see Uber).*

6.35. The judgment refers to the case of *Dugdale*, in relation to the payment of "salary" with payslips and PAYE deductions: that is a relevant factor which would point towards employment, but it is not decisive. It may be of little significance where organized entirely by a company accountant for tax reasons without any particular awareness on the part of the putative employee and covers only a small part of the total payments to a shareholder/director.

6.36. The case of *Neufeld* above is also authority for the following, in director cases.

6.36.1. Do the parties act consistently with the contract or a board minute or memorandum purporting to record his or her employment

6.36.2. it is an important consideration if the contract is not in writing but if conduct points to a conclusion that there is a true contract of employment it is not decisive

6.36.3. Exercising control of a company as a shareholder does not prevent the control test for an employment contract being met. The company, a separate legal entity, provides the necessary element of control.

6.36.4. Forfeiting salary because of financial difficulties in the company does not preclude a finding that someone is an employee - it does not necessarily point to an agreed variation of his or her contract

6.36.5. Lack of writing maybe an important consideration but if the parties' conduct tends to show a true contract of employment, tribunals should not "seize too readily on the absence of a written agreement to justify a rejection of the claim."

Amendment

6.37. The Tribunal can only adjudicate on the specific complaints made in the claim, unless amendment is permitted. The issues that the Tribunal decides must be based on the content of the claim and response. The question of what is in an ET1 is purely a question of fact. That means more than ticking the box indicating the claim made. As explained in *Chandhok v Turkey [2015] IRLR 195 EAT,* the claim sets out the essential case.

> "In summary, a system of justice involves more than allowing parties at any time to raise the case which best seems to suit the moment from their perspective. It requires each party to know in essence what the other is saying, so they can properly meet it; so that they can tell if a

> tribunal may have lost jurisdiction on time ground; so that the costs incurred can be kept to those which are proportionate; so that the time needed for a case, and the expenditure which goes hand-in-hand with it, can be provided for both by the parties and by the tribunal itself, and enable care to be taken that any one case does not deprive others of their fair share of the resources of the system. It should provide for focus on the central issues. That is why there is a system of claim and response, and why an employment tribunal should take very great care not to be diverting into thinking that the essential case is to be found elsewhere than in the pleadings."

6.38. The question of whether an ET1 contains a claim has to be judged by reference to the whole document *(para12) Parekh v Brent LBC [2012 3WLUK 542, referring to Ali v Office of National Statistics [2005] IRLR 201, CA.* Further particulars may be required of a claim properly included in the ET1 but amendment may be necessary if something is omitted.

6.39. Where a claim or response omits something, the permission of the Tribunal is required. the Tribunal has a broad discretion to allow amendment.

6.40. Any amendment must be precisely formulated, so that the other party can know the claim to be met *(Ladbrokes Racing v Traynor (UKEATS/0067/06).*

6.41. In *Selkent Bus Co Ltd v Moore 1996 ICR 836, EAT,* guidance is given as to how Tribunals should approach applications for leave to amend.

6.42. In deciding whether to grant an amendment the tribunal must take into account all the circumstances and should balance the injustice and hardship of allowing the amendment against the injustice and hardship of refusing it (Selkent, above). The factors identified in that case are the nature of the amendment, the applicability of time limits and the timing and manner of the application, but the effect of granting the amendment and the balance of hardship are central considerations. The underlying merits of the proposed amendment may be an appropriate consideration as part of the whole picture but primarily to exclude the hopeless case. That is because the strength of the evidence cannot be tested before disclosure.

6.43. The case of *Vaughan v Modality Partnership 2021 ICR 535, EAT*, confirms that the core test in considering applications to amend is the balance of injustice and hardship in allowing or refusing the application.

6.44. In general the Employment Tribunal should assume the case to be brought is arguable, unless plainly outside jurisdiction or unmeritorious

6.45. The Presidential Guidance (para 6 dealing with amendments) draws that distinction between amendments seeking to add or substitute a new claim arising out of the same facts as the original claim, and those which add a new claim entirely unconnected with the original claim. When determining which of the categories the case being considered falls into, the entirety of the claim form must be considered. So the Tribunal will look for a link between the facts described in the claim form and the proposed amendment. Where there is no such link, the claimant will be bringing an entirely new cause of action.

6.46. If the amendment does not amount to a new claim, time limits do not need to be considered.

6.47. if the amendment does introduce a new claim, the Tribunal must consider whether the claim is in time. (*Galilee v Comr of Police of the Metropolis [2018] ICR 634 and Reuters, above*. The new claim is deemed to be presented at the time that the amendment application is considered. If the claim is on the face of it out of time at that point, the Tribunal needs to consider whether there is an arguable case that time should be extended. That normally requires the Tribunal to hear evidence. If plainly out of time, permission to amend should be refused. If it is arguably out of time, that is simply a factor to consider. If the claim is in time, or arguably in time, other relevant factors will be considered.

6.48. As to the ACAS early conciliation procedure, a similar approach is taken as to the considerations with regard to whether there is a new claim or amendment of an existing one. In *Science Warehouse v Mills [2016] IRLR 96, EAT,* a new claim of victimisation was permitted without compliance with the EC requirements, where there had been compliance with the EC requirements in respect of the original claim. But, the EAT observed, "had the subsequent claim been entirely unrelated to the existing proceedings… the tribunal might have declined to permit the amendment, but that decision would be informed by a variety of factors, not merely the fact that no early conciliation process could have been engaged in".

6.49. The fact that the application to amend introduces a wholly new cause of action does not prevent it being made. In *Abercrombie and ors v AGA Rangemaster Ltd 2014 ICR 209,* the Court of Appeal stressed that focus should be "not on questions of formal classification but on the extent to which the new pleading is likely to involve substantially different areas of enquiry than the old; the greater the difference between the factual and legal issues raised by the new claim and by the old, the less likely it is that it will be permitted."

6.50. The later the application, the greater the risk of the balance of hardship being in favor of rejecting the amendment *(Martin v Microgen Wealth Management Systems Ltd EAT 0505/06)*

6.51. The EAT gave guidance in how to take into account the timing and manner of the application in the balancing exercise in *Ladbrokes Racing Ltd v Traynor EATS 0067/06*; a Tribunal will need to consider: -

i) Why the application is made when it was and not earlier
ii) Whether allowing the amendment will bring delay and additional costs because of a lengthened hearing and whether if so, those might be unlikely to be recovered from the other party
iii) The impact of the delay on the availability of or quality of evidence.

6.52. The time-limit for bringing a claim in respect of detriment caused by protected disclosure under section 47B of the Employment Rights Act 1996 is, by section 48(1A) and 48(3), three months from of the act or failure to act,

or last date within a series of similar acts or failures. That time limit can be extended for such further period as the Tribunal considers reasonable where the Tribunal is satisfied that it was not reasonably practicable for the complaint to be presented before the end of that period.

6.53. The same time limit of three months applies in respect of a dismissal where time runs from the effective date of termination and again extension can be granted for a reasonable further period where it was not reasonably practicable to bring the complain in time.

7. Submissions

7.1. Miss McGrath made a written submission, amplified by short oral submission and Mrs Lofthouse made a short oral submission. I have considered those with equal care in making my findings of fact and in determining the issues.

8. Reasons

8.1. The first issue before the Tribunal is as to whether Mr Lofthouse was a worker or an employee. Both would normally be established by reference to written contracts. In this case there are none. In itself, that points against a contractual relationship of either kind with the company. However, a different view may be taken based on the conduct of the parties and the circumstances.

8.2. The paucity of records has led to a degree of uncertainty about what was actually intended or agreed. I have to work largely on inference from the evidence, in the absence of agreed contractual documents. I have not seen the memorandum and articles of association.

Was there an intention to enter into legal relations

8.3. To be a worker or an employee, there must have been the intention to create legal relations.

8.4. If the directors were workers or employees, it is because of their relationship with the company. The company would be the master – using a neutral word that does not imply a conclusion as to the relationship – and any control would be with the company, not the individual directors.

8.5. There was an intention to enter into legal relations in accepting directorships of the limited company. The directors were embarking on business enterprise in pursuit of profit. They were undertaking liabilities and responsibilities as directors of a company that had its own legal identity and could contract in its own right.

8.6. Furthermore, this was a business venture between individuals who were not family members. That points the same way: it would be surprising if there was no intention to create legal relations given liabilities and obligations being incurred in the pursuit of profit.

8.7. In my judgment, there was an intention to enter into legal relations with the company as directors. That does not automatically translate into an intention to create legal relations with the company as individual workers or employees.
8.8. That has to be inferred from the context, in particular the conduct of the parties and the arrangements they made but it sets an important context.

Was payment of salary contractual?

8.9. From March 2019 and throughout the following period, until Mr Lofthouse ceased to be involved, payment was made at the rate currently agreed. It was not paid at a reduced rate, although once paid in part in cash from funds held within the business.
8.10. Dr McMorris is clear that it was always intended that payment would only be made if there was enough money in the business
8.11. Mrs Pearsall makes the same point; she says payment was contingent on cash flow and since Mr Lofthouse's departure, when the business has not generated the cash flow, she has taken a reduced salary.
8.12. Mr Lofthouse did not see his pay as dependent in the short term on cash flow.
8.13. There is some evidence in the minutes to support that. It is not set out in the minutes in March 2019 that payment was conditional. The minute sets out that "Pay is to be £1500 after deductions". Dr McMorris approached it on the basis that the sum was not guaranteed, in discussing a loan to Mr Lofthouse if payment fell short. He explained the figure of £1500 in oral evidence as "sustainable",

> "We picked it as sustainable so there would be a regular amount of money each month for each director."

8.14. In the minute of January 2020, the variation to the level of pay to £15 per hour was to be "as long as the business can sustain it". In June 2021, the agreement was for new rates (£180 for Mr Lofthouse, £170 for Mrs Pearsall) "agreed by all for now for as long as the business can support that."
8.15. Uncertainty in such a central term as pay points against any contractual entitlement to pay. The question is whether it was uncertain – pay due only if funds permitted - or whether pay was agreed subject to variation.
8.16. In my judgment, there was an agreement as to pay, establishing an entitlement, albeit one subject to variation by agreement if funds would not permit. The expectation throughout was that the working directors would make their living from the business. They needed reliability. Once the business was generating income, they were in a position to agree payment and from March 2019, they did. It was explicit throughout that that might change if the business went through lean periods, but in my judgment that change required further agreement. Pay was in fact varied upwards at frequent intervals and could equally be varied downwards if business conditions dictated. Each variation is minuted. I infer that a future reduction would also be minuted. That

interpretation is consistent with the expectation of Mr Lofthouse and with Dr McMorris' comment that the payment first agreed had to be sustainable.

8.17. I do not draw inferences from what happened once Mrs Pearsall was the sole working director, when circumstances were very different. In any event, forfeiting salary because of the company's financial difficulties does not necessarily point to an agreed variation of contract.

8.18. It is important to establish when the contract was made if the payments were contractual. There was no such contract in being in October 2018, when outline plans were being made – the company had not been incorporated. Between then and February when payment commenced, plans for working arrangements and entitlements, including pay and holidays were being fleshed out. Payment began as soon as deposits came in and funds permitted. In my judgment there was a contract in place from the date of the 12 March 2019 meeting. The contract provided for a set rate of pay in exchange for work done, not simply as directors but in the activity of the business. It was variable by future agreement. In my judgment, it was not variable without further agreement.

8.19. That supports a conclusion that the directors were undertaking to provide their own work and skill in return for an agreed level of remuneration. That in turn supports a conclusion that there was an intention to enter into legal relations as regards that work and pay.

The arrangements for pay

8.20. The arrangement adopted for pay was that it would be paid under PAYE with deductions for tax and national insurance. This was not arranged without the directors' involvement by a company accountant (as in Rainford above). This was their decision, and they kept payroll in house. At the same meeting where that is discussed, it is also discussed that two of the working directors would continue to work under the CIS scheme for Dr McMorris' company, that is, on a self-employed basis. The directors understood that they were choosing a different course.

8.21. That applied to all the payments made: no different vehicles such as dividends or loans were used.

8.22. PAYE is a scheme for deducting tax and national insurance for employees. The impact of tax on employees is different from that for the self-employed or for company dividends or loans from companies. The national insurance contributions paid by employees through PAYE provide enhanced access to national insurance benefits. All the HMRC forms to be completed in relation to staff refer to them as employees. The directors were making a clear choice here.

8.23. Furthermore, when furlough came along, the company took advantage of it for two directors, based on the fact that the company had made an RTI ("real time information") submission to HMRC, notifying that each of those directors was an employee. Government funds were received on the strength of that submission.

8.24. That there might be funding attracted by making an RTI submission was not something that the company could take into account when payment was first contemplated. But there is a clear inconsistency between Mrs Pearsall's assertion that they never thought of themselves as employees, and the monthly presentation of PAYE returns for themselves as employees; nor did they later resile from receiving government support based on that status.

8.25. The use of the PAYE scheme and the associated declarations and submissions in this case point to the directors being employees. It is a factor, it is not determinative.

Was there mutuality of obligation?

8.1. The three working directors needed to work to support themselves. They intended this venture to produce an income for themselves, as eventually did Dr McMorris.

8.2. All three working directors undertook to work for the company. That was the agreement from the outset; each had their particular roles and the business depended on them fulfilling that role. Each did work that was essential to the success of the business, each was fully integrated into the business. There is no disagreement on that.

8.3. There was an agreement at the outset that they would not pay themselves until the business started to generate income.

8.4. The intention from the outset was that the three working directors would take a salary. That was achieved by February 2019, when payment started. The March agreement followed.

8.5. It was clearly understood and agreed that any salary depended on them doing the work to which they had committed. Between them, they had to find that work. They then expected to be paid for it.

8.6. They depended on that salary – they were all working people – and in accepting that they would work regularly and reliably for the company and be paid for it, I find that the directors were agreeing that the company would find and provide them with work.

The right of substitution – as against personal performance

8.7. Dr McMorris and Mrs Pearsall are clear that Mr Lofthouse enjoyed the right of substitution. They refer to the workshop arrangements. He was free to put in a subcontractor, for example, to carry out work that he might otherwise have done.

8.8. There is a difference between substitution and delegation. There is no doubt that Mr Lofthouse had the right to delegate. Substitution would involve more than that.

8.9. I bear in mind that something around 20 – 30% of Mr Lofthouse role involved the design elements around using the software which only he could use. Some further element of his role involved managing the workshop efficiently and

improving the systems for production. Those elements of his job are less amenable to delegation. Dr McMorris so confirmed in saying that they had not found anyone with the ability to use the software package that they had been depending on after Mr Lofthouse left.

8.10. If there were a right of substitution, it would be expected to be recorded. Here the Respondent is asserting a right of substitution which is not recorded. More than that, the oral evidence is that it was never discussed between them.

8.11. I find no right for Mr Lofthouse to engage a substitute to carry out his role for him. There was a right to delegate the workshop work, but there was a significant element in his role that he could not delegate. To do so would have required detailed negotiation with his co-directors, based on identifying someone with the skills and training required and even then they may have and were entitled to refuse. That is because those elements of the role were essential to the future development and success of the company.

Control

8.12. Mrs Pearsall is very clear that she did not see herself or Mr Lofthouse as under anyone's control,

> "I have total freedom to do my job and I am answerable to no one and the claimant was in the same position. (para 13)"

8.13. That is to overlook the role of the company itself. The work was not done for themselves as individuals. The agreement was with the company. They worked as a team, and all the work was to promote the company's success in its chosen field of activity. The question therefore is whether the company exercised any control.

8.14. Mr Lofthouse was not supervised or controlled in the exercise of his management of the workshop or in his work using the software that created the build lists. That is consistent with normal management of skilled employees – a Head of Finance or a Head of Publicity will manage their department and not expect interference with matters within their proper authority. But that authority is delegated by the employer, here the company.

8.15. There is little here to show explicit control. However, this was a team effort. Mr Lofthouse could not make decisions outside his particular field of responsibility without the agreement of his co-directors. It makes no difference that it appears that he was forceful and they might have been minded to concede. The point is that he could not implement his plans without the company. The company did not for example consent to buy a new van, but did consent to repairing his old one. The company had to agree terms in respect of additional employees – those matters were discussed and agreed between the directors and minuted.

8.16. Mr Lofthouse enjoyed a degree of flexibility in his working arrangements. There is no complaint that his autonomy led him to breach the guidelines overall in terms of working hours, output or on matters such as annual leave.

He started late and worked late, but he did the work expected of him and there is no complaint of failure to meet deadlines. He worked within the guidelines as recorded.

8.17. In my judgment, Mr Lofthouse was subject to the overall control of the company in as to the direction of the company and matters of pay, terms, conditions, staffing, and the conduct of the business.

The extent of control

8.18. There remains an issue as to the extent of control. That helps to distinguish the employee from the worker.

8.19. Relevant factors include whether the individual was under a duty to obey orders, has control over his or her hours of work and holiday, is supervised as to the mode of working and whether or not the individual provides their own equipment.

8.20. The picture here is mixed. Mr Lofthouse provided some of his own tools – he used his small tools in the business and retrieved them when the relationship ended. He paid for the laptop to start with, the company then bought it off him. The company was to pay for any major items of equipment. He used his own van but the company paid for repairs.

8.21. He had flexibility over his hours, but there were agreed working hours, and there is no complaint that he was not there when expected. The flexibility included coming in late for child care reasons, but he said he made the time up. He dealt with personal matters during working hours without complaint or intervention. There was the obligation to get the work done but flexibility within that pointing to a degree of autonomy.

8.22. There is no evidence of Mr Lofhouse having to obey orders. The control over his holiday is limited to avoiding leaving the business in difficulties during his absence at crucial times or when others were away. There was no supervision as to his mode of working.

8.23. The contract was entered into in the knowledge that Mr Lofthouse was working from time to time on a self-employed basis.

8.24. There is no company minute or contract, which identifies the status and that is an important consideration.

8.25. The directors did not consider themselves to be employees at the time, and drew a distinction between themselves and “genuine” employees from the time that they took Mr Elstob on as one.

8.26. Against that, the directors appear not to have addressed their minds to the issues around status or legal relationships, so the lacuna is one that probably arises from lack of thought rather than conscious decision. They did not see that paying salary as employees implied anything, even while accepting furlough payments, while deciding that as directors they were exempt from provisions requiring pension for employees. The holiday figure of 22 days appears to be from Mrs Pearsall’s experience when working for a different company and seems unrelated to any statutory provisions.

8.27. In summary,

- There is no express written contract
- There are few documents relating to the status of the directors
- There was minimal discussion of their status
- Mr Lofthouse was not a controlling shareholder
- No agreement or discussion about the right of termination has been given in evidence
- There was an intention for the directors to create legal relations with the company qua directors
- There is no express evidence of an intention to create legal relations in respect of the work done in the business
- The company was dependent on that work being done
- I have found that there was work performed pursuant to a contract, providing for work in exchange for pay; there was the necessary mutuality of obligation and in my judgment an intention to create legal relations.
- There was a requirement for personal service in the activities of the business as well as in the capacity of director. There was no right of substitution.
- Pay was presented to HMRC as on an employee basis, both in making deductions, paying national insurance and eventually claiming furlough payment
- No payments were made other than through PAYE – no loans or dividends
- Furlough payments were received on the basis of employee status
- There was independence within areas of responsibility, while nonetheless being answerable to the board.
- There was overall control by the board as to the direction of the company and matters of pay, terms, conditions, staffing, and the conduct of the business.
- Mr Lofthouse worked regularly and consistently for the company.
- It is not said that he failed to adhere to the agreed guidelines as to hours and annual leave, save that he had flexibility within that which he exercised.
- There was little day to day control of matters such as when to take leave, save observing the needs of the business, conducting personal business during office hours, varying hours for childcare reasons.
- Mr Lofthouse was not given orders
- He was not subject to an employee contract or employment-related policies and procedures
- There is no express right of termination
- Some use was made of Mr Lofthouse' own tools. The company provided the major and more expensive items
- The company provided the premises

- There was an element of risk in committing to a new business enterprise but there are many situations in which employees stand to gain if their employer prospers

Judgment

8.28. I have not found this to be an easy case. I conclude that in my judgment Mr Lofthouse was at least a worker and in fact an employed director of the company, an employee.

8.29. The purpose of the directors in entering into the business arrangements was to provide themselves with an income, a living, and the company relied on their work to progress and flourish. Mr Lofthouse worked regularly and reliably for the company. I find that to be a requirement and that there was an intention to create legal relations and mutuality of obligation. There was a requirement of personal service. There was no right of substitution. I attach weight to the manner of remuneration and the declarations and submissions made, to the advantage of the directors and the company in relation to it. Normally payment of salary is a key indicator of employee status, and that is how the company chose to describe the directors to HMRC. I attach weight to the degree of control exercised by the company in terms of strategic direction, the provision of equipment and premises, the decisions about staffing. In my judgment there was sufficient control to support a finding that Mr Lofthouse was an employee.

8.30. The absence of records does not reflect a decision about status, rather an absence of thought. It is less persuasive in that context than had it been a deliberate choice.

8.31. The factors pointing away from employee status, such as the way the individuals viewed their status, are less persuasive in this context given their very limited understanding of the concepts.

8.32. In my judgment, Mr Lofthouse was an employee of the Respondent throughout the material period.

8.33. I am not asked to determine the effect of his resignation letter, said to be solely in relation to his office as director.

Amendment

8.34. The claim was made to the Employment Tribunal on 4 April 2022.

8.35. The Particulars of Claim do not raise whistleblowing, deal with events from 13 December 2021 and attribute the unfair treatment the Claimant complains of to the conduct of a meeting on 13 December 2021.

8.36. There is reference in the claim form to whistleblowing, in Box 15, initially in terms of expressing an interest in passing on his concerns to the whistleblowing authority. The Claimant goes on the say that the company is mismanaged financially and at worst “is exposing the directors of the business to legal action” He complains that raising his concerns led to him being

challenged personally, with “paranoia and personality issues”. He brings a claim for unfair dismissal and related payments on 6 January 2022.

8.37. He had taken legal advice. The focus of the claim appears to be on unfair dismissal, but there is that indication of protected disclosures producing adverse treatment, without more detail.

8.38. The Respondent did not in its response recognise a whistleblowing claim and it was not addressed. The Respondent’s position was that the Claimant had resigned on 15 December 2021 and that he was not an employee.

8.39. The case as presented was listed for a two day final hearing to take place on 18 – 19 January 2024. Case management directions were given on 7 October 2023, limiting the Tribunal File to 100 pages and witness statements to 3000 words for the Claimant and 5,000 words for the Respondent.

8.40. On the application of the Respondent on 7 December 2023, 18 January 2024 was converted to a case management hearing. That application by the Respondent, while expressing that the case was more complex than had been appreciated, and in particular that there was a dispute as to the Claimant’s status, did not refer to a whistleblowing claim.

8.41. By the Order of 7 October 2023, preparation should have reached the stage of a Tribunal File being finalised, with witness statements to be exchanged by 21 December 2023.

8.42. No further details in respect of the whistleblowing claim had been provided.

8.43. At the hearing on 18 January 2024, Mrs Lofthouse was not able to clarify the whistleblowing claim sufficiently to allow amendment to be considered.

8.44. Employment Judge Bax directed further information/an application to amend the claim, by 9 February 2024. On that date, the application to amend was submitted.

8.45. The application to amend covers matters in May 2020, August to September 2020, November and December 2020, throughout 2021, with specific instances in March, November and December and on 11 January 2021.

8.46. The application itself runs to 14 pages, single spaced, as against four short paragraphs in the original claim form, with 2 pages, single spaced of Particulars of Claim also given.

8.47. The claims made are of fraud in the falsification of company accounts; the directors being prevented from speaking to the company accountant and a belief that the company was not using the required accounting software; a belief that there was or would be tax evasion; potential for fraud in the mishandling of the bounce back loan from government and the failure to account for it properly; supporting a complex scheme to evade tax by another company (Portcullis) through support provided by Mrs Pearsall’s work for Portcullis at a time when it was insolvent; failure properly to evidence the company’s purchase of equipment, leaving it exposed to recovery by bailiffs acting in pursuit of Portcullis debts; blocked fire exits at the company premises; lack of electrical certification for the premises, both those placing individuals at health and safety risk; committing VAT fraud by allowing a

subcontractor to purchase a piece of equipment through the company to avoid VAT on the purchase.

8.48. The case is somewhat complex in that it appears in part to raise questions of tax evasion or fraud by a different company.

8.49. Some of the matters may amount to a series of similar acts, others do not.

8.50. There are undoubtedly serious allegations.

8.51. There is in box 15 of the claim form what amounts to the bare bones of the claim, as Employment Judge Bax expressed it, in the reference to financial mismanagement and the directors being exposed to legal action.

8.52. There are no details and it was not presented in a form which enabled the Respondent to respond. The Respondent did not realise that claim was there.

8.53. The central issue here in deciding whether or not to grant amendment is the balance of hardship.

8.54. For the Claimant, these are very substantial claims, expressed to be matters that he raised in the public interest. They have considerable weight for him.

8.55. For the Respondent, these are also very substantial claims. They address matters that were not raised in the claim, over the whole period of Mr Lofthouse involvement with the Respondent, up to and beyond his purported dismissal or resignation.

8.56. Either way, they demand substantial new evidence and a substantially longer hearing.

8.57. What was known before 9 February 2024 was that there was some allegation of financial misconduct. These allegations are so far-reaching and detailed that in practice they amount to new claims, by comparison with the earlier “bare bones”. They are to a very considerable extent unconnected with the original claim.

8.58. There must be a link between the matters now raised and the matters leading up to the resignation (“as director”) on 15 December 2021. However, that link is not made expressly in the grounds given in respect of the claim of unfair dismissal, where the matters pleaded start on 13 December 2021.

8.59. If admitted, there will be delay and additional costs. The final hearing will be longer and the preparation longer and more intrusive, for both parties.

8.60. If this is not a new claim, time limits are not relevant. However, on the basis that this is in practice a number of claims that were only hinted at in the claim form, in my judgment the time limits are to be considered as a factor; many of the claims were arguably out of time even when the claim was first made; insofar as they are new claims they are substantially late.

8.61. The claim could have been clarified shortly after it was lodged. Here, the Claimant took no steps to clarify the claim even after directions were issued for a two day hearing in October 2023. The case management orders showing a contained claim, capable of explanation with 100 pages of evidence, addressing matters from 13 December 2021 onwards.

8.62. At that point, the Claimant must or reasonably should have been aware that no whistleblowing claim could be considered at that hearing, in the absence of any details of the allegations.

8.63. The first detail comes in the course of the hearing on 18 January 2024. The first indication of the scope of the proposed amendment comes on 9 February 2024.

8.64. The time limit for the presentation of a protected disclosure claim to the Tribunal is three months, or such reasonable longer period as the Tribunal considers reasonable if it was "not reasonably practicable" for the claim to be made in time.

8.65. Not reasonably practicable is a high test. It does not confer a general discretion on the Tribunal to extend time.

8.66. Very limited reasons for the delay in bringing these matters forward are given. In the amendment application itself, the Claimant says that he and his wife made the natural assumption that raising the case through ACAS, ticking the relevant box in the ET1 (box 10) was enough, "The resultant Tribunal would enable these concerns to be referred to the appropriate authorities".

8.67. They had taken legal advice.

8.68. They are intelligent, articulate and experienced people.

8.69. There is an abundance now of information on the internet that gives clear instructions on how to bring an Employment Tribunal claim, often presented by legal firms giving authoritative guidance in the hope of attracting business. An explanation of the need to express the claim clearly at the outset comes up quickly in a brief search, as does the time limit.

8.70. It is not at all clear to me why it was thought to be unnecessary to explain in any way the serious concerns now being raised. I do not accept that that was a reasonable or natural assumption.

8.71. Mrs Lofthouse had little to add to this in making her closing submission.

8.72. The natural inference is that this was not intended to be part of the original claim. That would explain the lack of content in the claim form and the lack of urgency in bringing these serious and far-reaching claims forward. In my judgment, the extent of the allegations now being made reflects a degree of afterthought.

8.73. The delay before the extent of the proposed claims was disclosed is therefore all but 21 months after the claim was submitted. This hearing is more than two years after the claim was submitted. The full hearing, if the amendment is granted is not likely to be before 2025. The case preparation would in effect be restarting now.

8.74. In my judgment, the balance of hardship operates in the Respondent's favour; the Respondent is more severely prejudiced by admitting the amendment. What is proposed is in effect a major new case, requiring significant disclosure and a significantly longer hearing.

8.75. I take into account that the explanation for delay in bringing the claims forward is flimsy, the more so given that the case should have been ready for hearing in January 2024.

8.76. I do not give permission for the claim to be amended.

Employment Judge Street

Date 17 July 2024

Reasons sent to Parties on
29 July 2024

Jade Lobb
For the Tribunal Office