



## EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 8000161/2024

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Held in Glasgow via Cloud Video Platform (CVP) on 13 August 2024

Employment Judge N M Hosie

10 Mr B Thomson

Claimant  
In Person

15 Omega Finance Limited [in Liquidation]  
per Middlebrooks Business Recovery & Advice

First Respondent  
No appearance and  
No representation

20 The Secretary of State for Business and Trade

Second Respondent  
Represented by:  
Mr P Soni

### JUDGMENT OF THE EMPLOYMENT TRIBUNAL

25 The Judgment of the Tribunal is that: -

- (1) the claimant was an employee of the first respondent, Omega Finance Limited, in terms of s.230 of the Employment Rights Act 1996;
- (2) the claim under s.23 of the Employment Rights Act 1996 is well-founded and the respondents shall pay to the claimant the sum of **£8,702.28 (EIGHT THOUSAND, SEVEN HUNDRED AND TWO POUNDS AND TWENTY EIGHT PENCE)**, as unlawful deductions from wages;
- (3) the respondents shall pay to the claimant the sum of **£4,351.14 (FOUR THOUSAND, THREE HUNDRED AND FIFTY ONE POUNDS AND FOURTEEN PENCE)**, as a redundancy payment;

- (4) the respondents shall pay to the claimant the sum of **£2,881.32 (TWO THOUSAND, EIGHT HUNDRED AND EIGHTY ONE POUNDS AND THIRTY TWO PENCE)**, as damages for breach of contract (failure to give notice of termination of employment);
- 5 (5) the respondents are liable, jointly and severally, for these payments; and
- (6) the claim for unpaid holiday pay is dismissed.

## REASONS

### Introduction

- 10 1. This case arose out of the insolvency of Omega Finance Limited, the first respondent Company (“Omega Finance”), which went into liquidation on 5 December 2023, and in whose business the claimant, Brian Thomson, was engaged. The principal issue for me was whether Mr Thomson had been an “employee” of the failed Company. If he was an employee, he enjoyed the  
15 protection given by s.182 of the Employment Rights Act 1996 (“the 1996 Act”) to employees whose employer has become insolvent. Mr Thomson had submitted a claim to the second respondent, The Secretary of State for Business and Trade (“the SOS”), but his claim was rejected, on the basis that he was not an employee of Omega Finance, within the meaning of s.230 of  
20 the 1996 Act.

### The evidence

2. I heard evidence at the Hearing from Mr Thomson. He gave his evidence in a measured, consistent and convincing manner and presented as credible and reliable. A Joint Bundle of documentary productions was also submitted  
25 (“P”).

### The facts

3. Having heard the evidence and considered the documentary productions, I was able to make the following findings in fact, relevant to the issue of employment status with which I was concerned.

4. Mr Thomson was the Managing Director and sole shareholder of Omega Finance. He started the business on 11 April 2011. As I understand it, the main business of the Company was a novel one. It was to provide a vehicle for finance, in particular in the health care sector, and also in the veterinary and optician sectors.

### **Contract of Employment**

5. Although this was disputed by the SOS, I was satisfied that Mr Thomson had a contract of employment. One was produced in the bundle (P. 87–92). It was dated 11 April 2011 and was signed by Mr Thomson ostensibly in his position as an employee and also by him as the Managing Director of Omega Finance (P. 92). It was not a “sham”. Mr Thomson confirmed that it was signed by him on 11 April 2011. Mr Thomson’s evidence was credible and reliable.

### **Salary**

6. Mr Thomson received a salary of £30,000 per annum, in terms of his contract. His salary payments were subject to income tax and national insurance payments.
7. However, from around 2019 when the Company ran into financial difficulties and had cashflow problems, Mr Thomson decided to reduce his salary to £12,500 which was below the limit for payment of income tax. His P60s for the tax years to 5 April 2020 and 5 April 2021 record that his annual salary was £12,500 (P. 93–94). His P60s for the tax year to 5 April 2022 and 5 April 2023 record that his annual salary was £12,570 (P. 95–96).
8. Mr Thomson had no other income. He was not “employed” (using that term in a neutral sense) anywhere else.
9. It was clear that he was committed exclusively to the business of Omega Finance. He worked long hours, often in excess of the 40 hours required by his contract of employment.

10. He also took annual holidays which he detailed in a “Director’s Questionnaire” which he submitted to the SOS (P. 71).

### Discussion and Decision

- 5 11. The representative for the SOS adopted, by way of submissions, the grounds of resistance which accompanied the ET3 response form (P. 31–36). He disputed that Mr Thomson was entitled to the payments which he sought namely redundancy pay, notice pay, holiday pay and arrears of wages, as he was not an employee in terms of s.230 of the 1996 Act.

### Relevant law

- 10 12. In terms of s.230 of the 1996 Act, an “employee” is defined as being an individual who has entered into or works under a contract of employment. By subsection (2), a “contract of employment” is stated to mean “a contract of service or apprenticeship, whether express or implied, and (if it is express) whether oral or in writing.” For that, there must in the first place be a contract of some kind – i.e. an intention to create legal obligations.
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13. As to the test to be applied, according to Harvey on Industrial Relations and Employment Law (A1 [38]):
- “The general approach is to deny that any one test or feature is conclusive. All the so-called tests should be regarded as useful general approaches, but in every case, it is necessary to weigh all the factors in the particular case and ask whether it is appropriate to call the individual an “employee”.*
- 20
14. The definition in s.230 does not provide much in the way of assistance in determining whether or not in any particular case the individual bringing the claim was an employee or not. Determination of a person’s status, therefore,
- 25 is a question of fact for the Tribunal, to be ascertained by examining the particular circumstances of each case. There are a very large number of authorities on the issue.

### Contract of Employment

15. My finding that Mr Thomson had a written contract of employment was a significant factor.
16. It was also significant that he was paid a salary and, at least for a number of years, he was required to pay income tax. He also paid National Insurance throughout his alleged employment.
17. It was also significant that he had no other form of “employment” and that he was committed to working exclusively for Omega Finance.
18. He did not work “regular hours” in the sense of a 40 hour week working 9am to 5pm. He often worked in excess of these hours. He was committed to working solely for the Omega Finance business.

### Control

19. It was clear from the case law that “control” is a relevant factor. I questioned Mr Thomson about this. I asked him who he was “answerable to”. He accepted that he was not subject to control from anyone in the business. However, he explained that he was answerable to the “Financial Conduct Authority” who had power to close his business.
20. In ***Secretary of State for Business, Enterprise & Regulatory Reform v Neufeld & another*** [2009] ICR 1183, the Court of Appeal clarified the guidance it had previously given in ***Secretary of State for Trade and Industry v Bottrill*** [1999] ICR 592. The Court took the view that exercising control of a Company as a shareholder does not prevent the control test for an employment contract being met. As demonstrated in ***Lee v Lees Air Farming Limited*** [1961] AC12, the Company, a separate legal entity, provides the necessary element of control.
21. In ***Bottrill***, the Court of Appeal held that the fact that someone has the practical control over his or her destiny i.e. he or she cannot be dismissed without his or her own consent – does not prevent that individual being an employee.

22. There is no reason, therefore, in principle, why someone who is a Director and shareholder of a Company cannot also be an employee of the Company under a contract of employment. This was accepted by the second respondent's representative.

5 23. In **Clark v Clark Construction Initiatives Limited and another** [2008] ICR 635, the EAT provided a (non-exhaustive) list of factors that a Tribunal is faced with when deciding whether a majority shareholder has "employee status". These factors were modified in **Neufeld** when the Court of Appeal said that when an individual's employment status is in dispute, the Court or  
10 Tribunal must be satisfied that any relevant document is a true reflection of the claimed employment relationship, and for this purpose, it will be relevant to know what the parties have done under it.

24. I was satisfied, as I have recorded above, that the contract of employment which Mr Thomson produced is a genuine contract of employment. It is a true  
15 reflection of Mr Thomson's employment relationship with Omega Finance. I was satisfied that, by in large, he acted in accordance with that contract.

25. With reference to the guidance in **Ready Mixed Concrete (South East) Ltd v Minister of Pensions and National Insurance** [1968] 2QB 497, which was referred to by the second respondent's representative, it was clear that Mr  
20 Thomson provided his own work and skill in the performance of his duties for the Company. He carried out the work personally. There was no question of anyone else "substituting" for him.

### Conclusion

26. I arrived at the view, therefore, that Mr Thomson was an employee, as defined  
25 in s.230 of the 1996 Act. He was working under a contract of employment which reflected "*the true agreement between the parties*". This was the clear "*picture*" I formed "*painted from the accumulation of detail*". Mr Thomson was not a person "*performing the services as an accessory to the business*". He was very much "*part and parcel*" of the organisation (**Hall v Lorimer** [1992]  
30 ICR 39 and [1994] ICR 218).

### The claims

27. In the course of the Hearing, Mr Thomson accepted that he did not have a claim for outstanding holiday pay.

28. However, as I have found that he was an employee, the respondents are  
5 liable, jointly and severally, for his remaining claims. I deal with each in turn.

### Unpaid wages

29. When his employment with the respondent Company ended on 5 December 2023, when the Company went into liquidation, Mr Thomson's salary was £12,570 gross per annum. He was only been paid until 31 March 2023 (P.97).

10 30. He was due to be paid wages, therefore, for the 36 week period from 31 March 2023 until 5 December 2023 when his employment ended. His annual earnings of £12,570 gross equate to £241.73 per week. Accordingly, he is entitled to a payment of **£8,702.28** (36 x £241.73), as unlawful deductions from wages.

### 15 Redundancy payment

31. The respondent Company ceased trading when it went into liquidation on 5 December 2023. Mr Thomson's employment came to an end on that date. This was clearly a redundancy situation and Mr Thomson is entitled to a redundancy payment.

20 32. At the time of his dismissal, he had been employed for 12 complete years and he was 65 years of age. Based on weekly earnings of £241.73, he is entitled to a redundancy payment of **£4,351.14** (18 x £241.73).

### Notice

25 33. Mr Thomson was summarily dismissed. On the basis of his length of service, he should have received 12 weeks' statutory notice. Omega Finance was in breach of contract in this regard and Mr Thomson is entitled to an award of damages for that breach. The award is based on net weekly earnings which

in Mr Thomson's case was £240.11. Accordingly, he is entitled to payment in this regard of **£2,881.32** (12 x £240.11).

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**Employment Judge: N Hosie**  
**Date of Judgment: 20 August 2024**  
**Entered in register: 21 August 2024**  
**and copied to parties**

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