Case No: 3303643/2024

EMPLOYMENT TRIBUNALS

Claimant: Mrs N Ross
Respondent: Nikki Marks Ltd

Heard at: Watford **On:** 25 October 2024

Before: Employment Judge Dick

Representation
Claimant: Ms C Howells (counsel)
Respondent: Miss C Jeffrey (director of the respondent company)

RESERVED JUDGMENT

1. Before 22 September 2023 the claimant was not an employee of the respondent within the meaning of the Employment Rights Act 1996 or the Transfer of Undertakings (Protection of Employment) Regulations 2006/246.

2. There was not a relevant transfer on or around 22 September 2023 within the meaning of the Transfer of Undertakings (Protection of Employment) Regulations 2006/246.

3. The complaints of unfair dismissal and failing to make a redundancy payment are dismissed because the claimant was not continuously employed by the respondent for a period of not less than two years.

4. The complaint of wrongful dismissal is dismissed as the claimant was paid for the notice period to which she was entitled under statute.

REASONS

Key to references:

[x] = page x of agreed bundle;

{y} = paragraph y of the statement of the witness being referred to.

INTRODUCTION

1. The claimant worked at a beauty salon ("the salon") from 2008. The business was operated by the respondent company ("NML"), in which the claimant was a shareholder. It traded under the name Pretty Woman & Everyman, the name of the salon. On 22 September 2023 all the shares in the business were sold to a company called Your Skin Coach Limited "YSCL", of which Miss Cara Jeffrey was (and is) the sole shareholder. The same day the claimant signed an employment contract with NML, now of course controlled by Miss Jeffrey, as a Senior Beauty Therapist. The claimant was dismissed from that role, with one week's notice, for what the respondent says was redundancy, on 3 January 2024.

2. The claimant makes three complaints to the Tribunal. The first complaint is that she was unfairly dismissed. The second and third are that the respondent failed to pay her a redundancy payment and sufficient notice pay. The claims depend upon the claimant's contention that she was an employee of the respondent company before the shares were sold, i.e. that she had been employed since 2008. If that were the case, she would have in excess of the two years' service required to bring the claim for unfair dismissal and she would have been entitled to the statutory maximum twelve weeks' notice pay (rather than to the one week which the respondent says she was entitled to) and to a redundancy payment.

3. As part of her claim the claimant asserted that on 22 September 2023 there had been a transfer within the meaning of the Transfer of Undertakings (Protection of Employment) Regulations 2006/246 (a "TUPE transfer"). The case had been listed for a preliminary hearing before me in order to "determine whether the Claimant TUPE transferred to the respondent on or about 22 September 2023".

PROCEDURE, EVIDENCE etc.

4. Before the evidence was called I discussed the issues with the parties. Everybody agreed that after the sale of the shares in NML to Miss Jeffrey ("the sale") the claimant was employed by NML. I suggested to the parties, and they broadly agreed, that the real issue was not so much whether there was a TUPE transfer, but whether the claimant was an employee before the sale – *if* she was an employee of NML before the sale, she would have continuity of

employment within the meaning of the Employment Rights Act 1996 ("ERA") regardless of whether or not there was a transfer. If she was an employee before the sale and there was a transfer, TUPE would operate to preserve continuity of employment; if she was an employee before the sale and there was no transfer, she would also have continuity of employment under ERA because even if her role changed, the identity of her employer did not. (This characterisation may oversimplify things somewhat as it overlooks that the definition of employment is slightly wider within the meaning of TUPE then it is within the meaning of ERA, although as I conclude below this distinction has no practical effect on the facts of this case.) I was nevertheless bound to decide upon whether there had been a TUPE transfer, although in doing so I had also to decide the issue of employment status before the sale, given that there could be no TUPE transfer if the claimant was not an employee before the sale. The parties therefore agreed that I should determine employment status as a preliminary issue as well as, or as part of, the TUPE question; they had come prepared to deal with the point. Below I use the shorthand "ERA employee" and "TUPE employee" to mean a person who is an employee within the meaning of, respectively, ERA and TUPE.

5. Since the respondent was not legally represented, before the hearing began I ensured that the parties were provided with copies of TUPE regulations 3 and 4 and with the following parts of the *IDS Employment Law Handbook*: Vol 3 paragraphs 2.170, 2.97 to 2.105 (relating to the employment status of company directors and controlling shareholders – those were the relevant paragraph numbers at the time; in the latest edition they are now at Volume 6, paragraphs 6.45 onwards) and Vol 13 paragraphs 1.9 to 1.13 (relating to whether the sale of shares could amount to a TUPE transfer). During the course of submissions Vol 13 Ch 2 (now Vol 14 Ch 2), relating to the meaning of employment under TUPE), was also referred to. Where I was assisted by the authorities referred to in those passages, I cite them below.

6. Having taken time to read the statements, I heard evidence from the witnesses (i.e. the claimant and then Miss Jeffrey). In the claimant's case the usual procedure was adopted: her written statement stood as her evidence-in-chief and she was then cross-examined. Miss Jeffrey adopted her document headed "Key Facts", prepared for the purposes of this hearing, and the contents of her response form, as her statements and was then cross-examined.

7. At the conclusion of the evidence I heard oral submissions on behalf of the parties and reserved my decision. I apologise to the parties for the time it has taken for me to prepare the decision.

FACT FINDINGS

8. I find the following facts on the balance of probabilities. Not every fact was in dispute; where there was no dispute I simply record my findings. Where I have had to resolve a factual dispute, I make it clear below. I have not made findings on every factual dispute, but merely on those which assisted me to come to a decision on the point in issue

9. The facts which are set out in paragraph 1 above were not in dispute; I do not repeat them here.

The claimant's role and pay before the sale

10. The claimant founded Nikki Marks Ltd in July 2008 (her maiden name was Marks). Originally she and her parents were the shareholders, but on 6 February 2020 she bought her parents out, becoming the sole owner and director of NML. On 20 August 2020 the claimant's husband purchased 50% of the shares in NML, becoming the other director. As the claimant told me in her oral evidence, she had started out working simply as a beauty therapist. As she got more confident she became the head therapist and by the time of the sale she was working as the manager of the salon. Her husband's role was "more behind the scenes" – he helped her with the accounts and with business decisions; he did not work at the salon or work with customers. I accept all of that. It was also not in dispute that when working at the salon the claimant would also do "reception duties" such as taking payments and making bookings.

11. The claimant's case was that when she started there was a written contract of employment, full-time, as a beauty therapist. There had been no written update or written variation to the contract, at least in the last 10 years, though it was possible there had been some change in the early years. She had never provided a copy of that contract to the respondent and did not produce a copy in evidence. The claimant did not appear to dispute that Miss Jeffrey had asked for it at least at some point (albeit in what she, the claimant, described as a "casual conversation"); she said that she simply was unable to find it, having moved home a number of times since it was signed. On the basis of the claimant's evidence I accept that it is more likely than not that some form of written contract was drawn up around 2008. However, since the claimant could not remember what the terms of the contract were, I am unable to make any findings on what the written terms were (and in particular I am unable to draw any conclusions about whether, on the face of it, it was an *employment* contract as opposed to any other sort). It also seems to me that given the changes in the claimant's role since the written contract was prepared it is unlikely that the document would assist me greatly now. It seems fairest to me to treat the absence of that 2008 written contract as a neutral fact, i.e. neither assisting the claimant nor the respondent in terms of credibility. (Though see below on the lack of a newer written contract.) That is a separate point to whether the claimant did or did not tell Miss Jeffrey that she was an employee of the company (regardless of whether she provided or failed to provide documentary proof of that), on which also see below.

12. The claimant was paid monthly through the salon's payroll. Her oral evidence was that the amount she was paid was decided by her and the other directors (i.e. her parents or her husband, depending upon when it was). The claimant also took dividends from time to time as a shareholder. I was not provided with any records of dividend payments. In response to my question the claimant

said it was more in the early years and less later; over the last 5 years it had been maybe £ 5000 a year, maybe less; she thought that a £ 4000 final dividend that she took had been the first for three years. I accept all of this.

13. In evidence were 50 monthly payslips, said by the claimant to be a selection. They ranged from her first (dated October 2010) to what must have been the penultimate one (December 2023) and covered most of the years in-between. All, including those after the sale, had her role as "director". The claimant's basic (monthly) pay started as £ 502.92. By 2016 it was £ 833.34 and by 2020 it was £ 933.34; it was the same in July 2023. Of the 46 slips from 2016 to July 2023, 9 show payments of national insurance (sometimes around £ 100, sometimes lower) and one shows payment of income tax (£ 16.40 in March 2013). Some, but not all, of those occasions coincided with the claimant being paid statutory sick or maternity pay (and when she took the latter, her basic pay was reduced by the amount of statutory pay taken). The slips also show that the claimant was paid "furlough" (I assume under the terms of the Coronavirus Job Retention Scheme). I also note that counsel for the claimant was able to point to a slip which showed that one year the gross pay to date exceeded the threshold for paying at least some income tax – see [113], which shows £ 281.60 tax paid to date in March 2020 (i.e. the end of the tax year). The slips from September 2017 show modest contributions towards a pension from both the respondent (up to £28) and the claimant. The claimant also took paid holidays.

14. The claimant's evidence, which I accept, was that immediately prior to the sale she was working a total of 36 ¾ hours per week {7}. I was shown a few screenshots from the respondent's system which showed her on the rota on various days. As I have said, her basic pay for July 2023 [132] was £ 933.34 or (multiplying by 12 then dividing by 52) 215.39 per week. This equates to an hourly rate of a little under £ 6, which is substantially below the applicable national minimum wage of £10.42. I also accept the claimant's evidence that she sometimes worked more (or less) than the hours she set out in her statement to suit the needs of the business. She described those extra hours as "voluntary".

15. The respondent company employed a number of others as therapists etc. (see below). In cross-examination the claimant agreed that none of those others was awarded dividend payments (since they were not shareholders). She also said that that they had been paid at a higher rate than the hourly rate I refer to in the previous paragraph, i.e. I took her to mean that the others were paid at least the minimum wage. There was some suggestion made during the course of closing submissions that other employees may also have been asked to do work they were not paid for (despite the claimant's answer in cross-examination that other employees were not asked to do voluntary hours), but as counsel Ms Howells conceded, that was not in evidence; even if it had been I do not see that it would greatly have aided the claimant's case – if they had been asked to work for free, those employees were in rather a different situation to the salon manager/owner.

16. In her oral evidence the claimant denied that that her pay had been deliberately set at a level so as to avoid the payment of (almost) any income tax: "it was just the salary we agreed to". I found the claimant's evidence on that point to be unconvincing; I do no accept it. Her pay changed over the years as did income tax thresholds; I do not accept that was a coincidence. There must have been deliberate thought about those changes in pay and their consequences. The claimant effectively accepted that she was being paid at below the minimum wage for the hours she worked but that she did also take dividends, albeit relatively modest ones, which of course would have been subject to different rates of tax than PAYE income.

Discussions leading up to the sale

17. Prior to the sale the claimant spoke to Miss Jeffrey and it was agreed that the claimant would continue to work at the salon, under a contract of employment that was essentially to be on Miss Jeffrey's "standard terms" (she owned/ran other salons – see below).

18. There was an issue between the parties about whether Miss Jeffrey was aware before the sale that the claimant was (or believed herself to be) an employee of NML. The claimant's written evidence was phrased as follows: "Prior to the sale, my working hours and qualifications were discussed with Cara Jeffrey, and she was therefore aware that I was an employee of NML." Put another way, the claimant is not saying that she *told* Miss Jeffrey she was an employee, but rather that she assumes that Miss Jeffrey would have assumed she was an employee. I was shown an exchange of emails between Miss Jeffrey and the claimant (from [19]) shortly before the sale. (Although the emails were sent from the claimant's husband's email account, it is clear from the contents that the information was provided by the claimant – in the context, where the writer of the emails uses words such as "I", "myself" etc., they are clearly referring to the claimant, not her husband.) In a 25 July email, basic annual wages are provided for each of the 6 therapists, identified by initials, employed by the respondent "as requested" in an earlier conversation; the claimant's wages were not included. The same email dealt with hours worked (or to be worked) and here the claimant is included, with the explanation "we [clearly including the claimant] are all therapists". The claimant says, and I accept, that she did not include her salary as by this point simply because she and Miss Jeffrey had already discussed what rate Miss Jeffrey would offer her, this being the "going rate" at the other salons Miss Jeffrey ran (see below). As Miss Jeffrey pointed out, and I also accept, the rate had not actually been agreed at that point, though in fact the suggested rate did end up being the agreed rate. In a later response in the same email chain to a query about the therapists' qualifications and willingness to learn new treatments, the claimant provided that information about herself and the other therapists. The claimant accepted in her oral evidence that she had never provided her own employment contract to Miss Jeffrey despite being requested to, but she did point out (and Miss Jeffrey agreed) that she also did not provide other employees' contracts. On the basis of all of this, I accept Miss Jeffrey's evidence that she did not know, and had no reason to believe, that before the sale the claimant believed herself to be an

employee of the respondent in the commonly understood sense, i.e. someone who works under an employment contract and has the protection of various statutory rights including the right not to be unfairly dismissed. (See below about the parties' understanding of the issue of "employment" as a director.)

The sale

19. As I have said, the sale took effect on 22 September 2023. I was provided with a sale and purchase agreement carrying that date. All the shares in NML (as well as shares in what I take to be a related company, Nikki Marks Management Limited) were sold to YSCL. The agreement contains a clause purporting to prohibit the claimant from setting up in competition with the respondent for a period of 24 months. The agreement also says that the claimant has disclosed anonymous particulars of each employee and the principal terms of their contracts (see the previous paragraph). A later clause says that the claimant has disclosed copies of all contracts which apply to the employees, but as I have said the parties accepted that that did not in fact happen.

20. By a document also dated 22 September 2023 and addressed to the directors of NML, the claimant resigned "as a director and an employee" of the respondent. The document purports to waive any right of the claimant to bring a claim against the respondent "in respect of the termination of [her] office or employment or otherwise". This might be said to evidence a belief on the part of the claimant that she was an employee, but it was not signed by or on behalf of the respondent. I also note that the claimant's husband signed a document in identical terms and yet there never any suggestion that he was an employee of the company. The same document also purports to waive the right to pursue any claim the claimant might have against the respondent. I take no account of that, as in general it is not permissible to contract out of the statutory rights granted by ERA and none of the exceptions to that principle are engaged in this case.

21. On the same day, 22 September 2023, the claimant signed a contract of employment, as a Senior Beauty Therapist, which was signed on behalf of the respondent by Miss Jeffrey [23]. The contract had a "date of commencement of this employment" of 22 September 2023. It did not contain any provision about continuity of service etc – it made no mention of any previous employment. Although the claimant says that the contract represented a change to the terms and conditions of her employment (the respondent of course says there was no employment beforehand) there was no dispute that the claimant willingly accepted the terms of the September contract. The employer is named as "Nikki Marks Limited". The contract says that in the event of illness the claimant must notify "head office". It includes a restrictive covenant, purporting to prevent the claimant from setting up in competition within 5 miles of the salon for a period of six months after leaving employment.

22. Payslips from September 2023 (i.e. after the sale) show that the claimant's pay had increased significantly – the basic pay was now £ 1980. It was pointed out to me that the payslips after the sale continue to describe the claimant as a director and also still have her "join date" as 1 December 2008.

YSCL and Miss Jeffrey

23. In her oral evidence Miss Jeffrey described YSCL as a "vehicle" and said that she had paid tax on the shares in NML. She was currently the sole owner and director of both NML and YSCL; there were no other company officers. YSCL owned and ran two other salons; she owned and ran about seven salons in total. The salon that the claimant had worked in was now known as the "Transformation Clinic", sharing that branding with one other clinic/salon; I understand that this change happened some time after the sale. Decisions about the salon were made by Miss Jeffrey "overall", but she employed a team of managers who made day-to-day decisions. She worked herself as a therapist at salons/clinics "across the group".

Dismissal

24. The parties agree that the claimant was dismissed, for what the respondent says was redundancy, by letter dated 3 January 2024, with her last day of employment to be 10 January. This followed a consultation meeting earlier that day, the claimant having first been told she was at risk of redundancy on 29 December 2023. I make only very limited findings about that now, confining myself to maters which are not in dispute and are relevant to the issues I have to decide.

25. For the purposes of notice period and redundancy payment, the respondent agrees it treated the claimant as if she had four months', rather than in excess of twelve years', service.

26. The claimant appealed against the decision to dismiss her by way of an email dated 8 January 2024 and the respondent refused that appeal in an email dated 12 January. There did not appear to be a dispute that the claimant's first explicit assertion to Miss Jeffrey that she was an employee came (if one does not include the letter referred to at paragraph 20 above) in that 8 January email. Miss Jeffrey's response to that point was: "As discussed during the meeting, you were employed prior to the sale of NML as a Company Director, your pay and dividend payments evidenced this too. There was no contracted handover to me within the sale pack of NML". Of course, Miss Jeffrey's opinion about the claimant's employment status before the sale cannot be relevant to my decision on that status, since Miss Jeffrey was not one of the parties to the employment contract (if that is what it was) before the sale. Nevertheless, I do record that, having heard the oral evidence in this case, I conclude that Miss Jeffrey was here using the word employee in a looser sense to the commonly understood sense I describe at paragraph 18 above. Ms Jeffrey was in effect referring to tax status. The concept of an employee for tax purposes is not the same as the concept of an employee in employment law. In tax law, for example, there is no intermediate "worker" category as there is in employment law. For tax purposes, someone is either an employee (i.e. subject to PAYE) or they are not; and company directors have employee status for PAYE registration

purposes, by virtue either of being employed under a contract of service (i.e. an employment contract) or "employed" as office holders with earnings (i.e. with no requirement for an employment contract). As Miss Jeffrey expressed her belief in her oral evidence: "all directors can be on PAYE, [but] not as an employee". Put simply, whether or not HMRC would have considered the claimant to be an employee for the purposes of tax law does not assist me in my determination of ERA employee status.

LAW

Relevance of employment status to the complaints

27. A complaint of "ordinary" unfair dismissal (i.e. the sort of complaint made in this case) can only be brought by someone who was been continuously employed for a period of not less than two years (ERA s 108). So in this case, unless the claimant was an employee, withing the meaning of ERA, before the sale, her complaint of unfair dismissal must be dismissed. The entitlement to a statutory redundancy payment also depends on continuous employment for a period of not less than two years (s 155 ERA) so the same would apply to the complaint of failing to pay redundancy pay.

28. The complaint of wrongful dismissal in this case is based on what the claimant says is her entitlement to statutory notice pay, i.e. the term imparted into the employment contract by operation of s 86 ERA (though see also the footnote below). S 86 depends upon the number of years of continuous employment, i.e. in this case the issue is how long was the claimant an ERA employee for. If she was not an ERA employee of NML before the sale, she would only be entitled under s 86 to one week's notice, which she got, and so her complaint of wrongful dismissal must be dismissed.

29. On the claimant's behalf, Ms Howells accepted that, were I to conclude that the claimant was not an ERA or a TUPE employee before the sale, then I would be obliged to dismiss the claims.

Employment status under ERA in general

30. The starting point is s 230 ERA, which so far as is relevant provides:

> (1) In this Act "employee" means an individual who has entered into or works under (or, where the employment has ceased, worked under) a contract of employment.
>
> (2) In this Act "contract of employment" means a contract of service or apprenticeship, whether express or implied, and (if it is express) whether oral or in writing.

31. "Employee" is to be distinguished from "worker"; the latter is defined by s 230(3) ERA and is not relevant to this case in that workers do not have the right not to be unfairly dismissed etc., though it is relevant in the sense that some of

the authorities I refer to below deal with the distinction between employees and workers.

32. In *Ready Mixed Concrete Ltd* v *Minister of Pensions and National Insurance* [1968] 2 QB 497 at 515 Mackenna J set out the three conditions necessary for a contract of service to exist.

    i. The employee agrees that, in consideration of a wage or other remuneration, he will provide his own work and skill in the performance of some service for the employer ("mutuality of obligation" and a requirement of "personal service").

    ii. The employee agrees, expressly or impliedly, that in the performance of that service he will be subject to the employer's control in a sufficient degree consistent with an employment relationship ("control").

    iii. The other provisions of the contract are consistent with its being a contract of service.

33. Regarding mutuality of obligation, there must be an obligation on the employee to do some work and for the employer to pay for that (described as the "wage-work bargain" in *Commissioners for His Majesty's Revenue Customs* v *Professional Game Officials Ltd* [2024] UKSC 29). As long as there is an obligation to do *some* work, the fact that an employee is entitled to turn down (some) work is not necessarily inconsistent with mutuality of obligation and the obligation of personal service.

34. Regarding personal service, in *Stuart Delivery Ltd* v *Augustine* [2022] ICR 511 the EAT held that while an unfettered right to substitute another person to do the work or perform the services was inconsistent with an undertaking to do so personally, a conditional right might or might not be inconsistent with personal performance, depending on the precise contractual arrangements and, in particular, the nature and degree of any fetter on that right.

35. Regarding control, in *Ready Mixed Concrete*, at 515, the court said:

> Control includes the power of deciding the thing to be done, the way in which it shall be done, the means to be employed in doing it, the time when and the place where it shall be done. All these aspects of control must be considered in deciding whether the right exists in a sufficient degree to make [an employment contract]. The right need not be unrestricted.

36. The question is whether there is to a sufficient degree a contractual right of control over the employee, rather than whether in practice the employee had day to day control over their own work. The *extent* of control will remain relevant to the overall assessment where the employee/worker establishes *sufficient* control to satisfy the *Ready Mixed Concrete* control requirement (*Revenue and Customs Commissioners* v *Atholl House Productions Ltd* [2022] I.C.R. 1059 at para 75).

37. Once mutuality of obligation and control are established, a multi-factorial approach must be applied to determine whether, judged objectively by

reference to the contract and the circumstances in which it was made, the parties intended when reaching their agreement to create a relationship of employment. That intention is to be judged by the contract and the circumstances in which it was made and on the basis of facts or circumstances which existed at the time that the contract was made, and which were known or reasonably available to the parties (*Atholl House* (above)).

38. In *Uber BV and others* v *Aslam and others* [2021] UKSC 5 the Supreme Court held that when deciding whether someone was a worker it was wrong in principle to treat the written agreements as a starting point. Rather, it was necessary to determine, as a matter of statutory interpretation, whether the claimants fell within the definition of a "worker". The Tribunal's findings should be based on the language of the agreement but also the way in which the relationship in fact operated and the parties' evidence about their understanding of it. As the same court put it in *Autoclenz Ltd* v *Belcher* [2011] UKSC 41, the true agreement will often have to be gleaned from all the circumstances of the case, of which the written agreement is only a part. The *Autoclenz*/*Uber* principle applies to determination of employee status just as it does to the determination of worker status – *Ter-Berg* v *Simply Smile Manor House Ltd* [2023] EAT 2 para 47. In the latter case, the EAT clarified that in a case where what was the true intention of the parties in reality is a live issue, it is necessary to consider all the circumstances of the case which may cast light on whether the written terms do truly reflect the agreement, applying the broad *Autoclenz* approach rather then stricter contractual principles. At paras 65 onwards, the EAT said that a written term stating that a person is not an employee or worker could not stand if as a matter of fact the person was, nor if the object of the term was to defeat statutory rights. Absent those circumstances, it is however legitimate to have regard to the way in which the parties have chosen to categorise the relationship, and in a case where the position is uncertain, it can be decisive.

Employment status of company directors

39. A company director may also be an ERA employee; that will be so where they have entered into a contract of employment (i.e. ERA employment) with the company. A number of cases in the higher courts have dealt with the issue of whether a director who has a controlling interest in a company (i.e. who, like the claimant at the material time, has shares and can make the company's decisions) may be an ERA employee. In the passages of the *IDS Manual* I mention above, the authors cite a number of authorities; many of these are decisions based upon the particular facts of the cases and so can, at best, be instructive rather than binding. I concentrate instead on three of the cited cases, which set out general principes to be applied.

40. In *Secretary of State for Business, Enterprise and Regulatory Reform* v *Neufeld and another case* 2009 ICR 1183, the Court of Appeal (from paragraph 80 onwards) considered the earlier authorities. Whether or not a director is an employee is a question of fact for the Tribunal to determine. There may in theory be two issues. The first will be whether the putative contract is a genuine contract or a sham. (The Court went on to say that such cases will be rare; the evidence before me was not sufficient to allow me to come to such a conclusion.) The second, i.e. the one which will apply to this case, will be

whether, assuming it is a genuine contract, it amounts to a contract of employment (it might, for example, instead amount to a contract for services). An inquiry into what was done under the claimed contract will or may be necessary. In order for the employee to make good their case, it may well be insufficient merely to place reliance on a written contract made, say, five years earlier. The Tribunal will want to know that the claimed contract, perhaps as subsequently varied, was still in place. In a case in which the alleged contract is not in writing, or is only in brief form, it will usually be necessary to inquire into how the parties have conducted themselves under it.

41. The Court went on to approve, subject to some comments of its own, the factors set out at paragraph 98 of the EAT's judgment in *Clark* v *Clark Construction Initiatives Ltd* [2008] ICR 635. Those factors, with my summary of the Court of Appeal's comments in *Neufeld* are as follows:

> (1) Where there is a contract ostensibly in place, the onus is on the party seeking to deny its effect to satisfy the court that it is not what it appears to be. This is particularly so where the individual has paid tax and national insurance as an employee; he has on the face of it earned the right to take advantage of the benefits which employees may derive from such payments. *Producing a contract does not however put the burden of proof on the other party – the putative employee may have to do more than simply produce the contract itself. If the assertion that there was an ERA contract is challenged, the Tribunal will ned to be satisfied that the document is a true reflection of the claimed employment relationship.*
>
> (2) The mere fact that the individual has a controlling shareholding does not of itself prevent a contract of employment arising. Nor does the fact that he in practice is able to exercise real or sole control over what the company does: Lee's case.
>
> (3) Similarly, the fact that he is an entrepreneur, or has built the company up, or will profit from its success, will not be factors militating against a finding that there is a contract in place. Indeed, any controlling shareholder will inevitably benefit from the company's success, as will many employees with share option schemes […]
>
> (4) If the conduct of the parties is in accordance with the contract that would be a strong pointer towards the contract being valid and binding. For example, this would be so if the individual works the hours stipulated or does not take more than the stipulated holidays.
>
> (5) Conversely, if the conduct of the parties is either inconsistent with the contract ([*in the sense of the controlling shareholder effectively ignoring it*]) or in certain key areas where one might expect it to be governed by the contract is in fact not so governed, that would be a factor, and potentially a very important one, militating against a finding that the controlling shareholder is in reality an employee.

(6) In that context, the assertion that there is a genuine contract will be undermined if the terms have not been identified or reduced into writing. This will be powerful evidence that the contract was not really intended to regulate the relationship in any way. *The Court of Appeal considered that this might put a little too high the potentially negative effect of their being no written contract. It will obviously be an important consideration, but if the parties' conduct under the claimed contract points convincingly to the conclusion that there was a true contract of employment, the Court would not wish tribunals to seize too readily on the absence of a written agreement as justifying the rejection of the claim*.

(7) The fact that the individual takes loans from the company or guarantees its debts could exceptionally have some relevance in analysing the true nature of the relationship, but in most cases such factors are unlikely to carry any weight. There is nothing intrinsically inconsistent in a person who is an employee doing these things. Indeed, in many small companies it will be necessary for the controlling shareholder personally to have to give bank guarantees precisely because the company assets are small and no funding will be forthcoming without them. It would wholly undermine the Lee approach if this were to be sufficient to deny the controlling shareholder the right to enter into a contract of employment. *For this and the eighth factor, the Court of Appeal repeated its "never say never" maxim.*

(8) Although the courts have said that the fact of there being a controlling shareholding is always relevant and may be decisive, that does not mean that the fact alone will ever justify a tribunal in finding that there was no contract in place. [...] The fact that there is a controlling shareholding is what may raise doubts as to whether that individual is truly an employee, but of itself that fact alone does not resolve those doubts one way or another.

42. In *Rainford* v *Dorset Aquatics Ltd* EAT 0126/20 the EAT said that it is important to distinguish between the control exercised by a shareholder/ director over the company and the control, if any, exercised by the company over what work the individual did and how, when and where he or she did it. The latter was of central relevance to whether there was a contract of employment under ERA.

TUPE

43. When there is a change of employer, the TUPE regulations may apply. Under reg 4, a "relevant transfer" has an effect on a "contract of employment". There is a question whether "contract of employment" in TUPE has the same, or practically speaking the same, meaning as it does in ERA. Reg 2(1) defines an employee as "any individual who works for another person whether under a contract of service or apprenticeship or otherwise but does not include anyone who provides services under a contract for services". In other words, it applies to someone employed in the ERA sense "or otherwise". The only case in the higher courts to have considered the point appears to be *Clifton Middle School Governing Body* v *Askew* [2000] I.C.R. 286. This appears to me to be of little

assistance in this case, beyond its explanation that the insertion of the words "or otherwise" were intended to give effect to the EU directive which led to TUPE; the directive at the time dealt with the rights from a contract of employment *or from an employment relationship.* The authors of the IDS manual point out that the relevant directive has since changed, so that now employee "shall mean any person who… is protected as an employee under national employment law." Which rather leaves us where we started.

44. The authors of the IDS manual further suggest that "or otherwise" is intended to include those people who have protection from unfair dismissal under ERA even though they are not technically employees – Crown servants etc. I agree. They go on to point out that even were TUPE to operate for example on ERA *workers* as well as *employees*, if such workers are not employees for the purposes of claiming, say, unfair dismissal, then they do not suddenly become entitled to such rights merely because their "employment" transfers following a relevant transfer. Again, I agree – TUPE only transfers the previous employers' rights, powers, duties and liabilities – it cannot create new duties/liabilities where before there were none.

45. More generally, since the effect of a relevant transfer is that the old employer's rights, powers, duties and liabilities are transferred to the new employer, the new employer will be bound by the old employment contract. There are exceptions to this set out in reg 4, such as if the sole or principal reason for the variation is an economic, technical, or organisational reason entailing changes in the workforce, provided that the employer and employee agree that variation (reg 4(5)(a)).

46. So far as is relevant to this case, under reg 3, a relevant transfer takes place where there is a transfer of an undertaking or business to another person where there is a transfer of an economic entity which retains its identity. (Here the word person means legal person, i.e. it includes companies.) Clearly the economic entity (i.e. the shop) retained its identity. The question was, was it transferred from one person to another? On the face of it, the same person, i.e. company, employed the claimant before and after the sale, but it is not necessarily so simple as that. Although a sale of shares, i.e. where the ownership of the employer company changes but the company does not, generally falls outside the scope of TUPE (*Brookes and ors* v *Borough Care Services Ltd and anor* 1998 ICR 1198) there can be an exception to this where a purchasing company assumes day-to-day control of the employer company.

47. In *Print Factory (London) 1991 Ltd* v *Millam* 2007 ICR 1331 the Court of Appel said that where, following a transfer of shares, a subsidiary is 100 per cent owned by a parent company, the question of whether the business has been transferred for the purposes of TUPE is one of fact which must be resolved deploying the experience and expertise of the Employment Tribunal. The mere fact of control, which will follow from the relationship between parent and subsidiary, will not be sufficient to establish the transfer of the business from subsidiary to parent. In that case there were a number of "evidential indications" which, in combination, established that control of the business, in the sense of how its day-to-day activities were run, had passed from one company to the

other. According to the High Court (QBD) in *ICAP Management Services Ltd* v *Berry and anor* 2017 IRLR 811, the key questions are whether the new party (i) has become responsible for carrying on the business, (ii) has incurred the obligations of employer, and (iii) has taken over day-to-day running of the business, in other words, whether the new party has 'stepped into the shoes' of the employer. In that case although there had been changes in day-to-day management, this did not demonstrate a parent company taking over the management; individual employees' work did not change and pay arrangements were not centralised or standardised. In *Guvera Ltd* v *Butler and ors* EAT 0265/16, the EAT noted that the fact that the new company had not started paying the employees' wages did not mean there had been no transfer.

CONCLUSIONS

ERA employment status prior to the sale

48. I have already concluded that some sort of written contract existed between the claimant and the respondent in around 2008, but I have been unable to reach any conclusion on what the written terms were. In any case, as I have found, the claimant's role had changed significantly by 2023 – she was managing the business and acting as the salon manager in addition to her work as a therapist, so that written contract would likely have little if any bearing on my decision even were it available.

49. I do accept that there was some sort of contract between the claimant and the respondent which was still operative in 2023 – contractual relations were established in 2008 and I see no reason to conclude that, despite the changes which had occurred, that broad intention was absent by 2023. As I have already said, I do not consider this to be one of those rare cases where the contract was entirely a sham The question is whether that contract was an ERA employment contract. In the absence of a written contract, and following *Neufeld* as I have summarised it at paragraph 40 above, I must look to the parties' actions as far as I can ascertain them from the evidence – what was actually happening?

50. Applying the *Clark* factors in turn:

(1) The claimant paid barely any tax or national insurance as an employee, by design. It seems to me that where minimal amounts were paid, this was simply by accident. I stress that this feature is not determinative, though I do give it significant weight.

(2) Although the claimant owned only 50% of the business, her husband owned the other 50% and on the basis of the evidence I heard, the significant decisions were taken by the claimant, albeit with her husband's input. The reality is that the claimant had real or sole control over the company. I remind myself that that point does not prevent a contract of employment arising.

(3) Likewise, the fact that the claimant would benefit from the company's success does not militate against a finding that there was an ERA contract.

(4), (5) So far as whether the parties' conduct was in accordance with the contract is concerned, it does appear to have been, but that is in the context of what I consider must have been the limited terms of the contract. I conclude that there was no more than an obligation on the respondent to pay the claimant a set amount monthly (which was achieved by payment of holiday pay and sick pay when the claimant did not work) and an obligation on the claimant to do what work she considered necessary. I cannot consider whether the claimant worked the hours stipulated or took more than the stipulated holidays, since neither of those things appear to me to have been stipulated. On the basis of the facts as I have found them, the contract did not, for example, specify set days or hours for the claimant to work – the claimant simply did those hours which she thought were required at any particular time, which would vary. There clearly was not a requirement for the respondent to pay the claimant more than her basic pay, however many hours she worked. I cannot see that there could have been any of the other terms commonly seen in a contract of employment. There cannot practically have been a term that the claimant would have to give the respondent notice (or vice versa). The claimant could not in practice have been contractually subject to such things as disciplinary or long-term sickness policies. There also cannot have been any term that the claimant was to carry out the respondent's instructions, since she would have been instructing herself (although I note that this would apply in any "one person company case" and the whole point of the above authorities is that that point, or at least that point alone, does not mean there was no ERA contract).

(6) While there was a written contract in 2008, given the changes since, that written contract did not reflect the relationship between the parties in 2023. It reflected a different situation, when the claimant was only one of three shareholders and had little or no involvement in running the business. The situation was much different in 2023. There was no attempt by the parties to identify the terms of this new relationship or to reduce into writing. I do regard this as an important consideration, given that the parties' conduct under the contract does not in my judgement point convincingly to the conclusion that there was a true contract of employment. Payslips and PAYE do not alone make an ERA employment relationship.

(7) It is not suggested that the claimant took loans from the company nor paid its debts. It might be said that working for below the minimum wage or for free was in a similar category, although there is significant distinction – there is something intrinsically inconsistent with employee status about doing that, or at least, the wages are intrinsically linked with employment in a way that loans from the business or debt guarantees are not. Taking account of an absence of payment at or above the minimum wage does not undermine the Lee approach – it could never be necessary for someone who is running a business to do that for an employee; declining to be paid it is not akin to simply lending the company money in my judgement.

(8) The fact, as I have found it, of the claimant's control of the company is relevant and significant on the facts of this case, though I do not base my

judgment wholly upon it, but also on the factors I have considered above (and those which I now come to).

51. Considering the authorities on employment contracts more generally (paragraphs 32 to 38 above), there was clearly some mutuality of obligation, though it is doubtful whether for some of the claimant's work there was a requirement for personal service – had the claimant decided to ask someone else to do the things she was doing, would the company have minded? It is of course difficult to meaningfully apply this aspect of the test to a situation such as this. As to control (and considering also *Rainford*) it cannot meaningfully be said that the company exercised any control over what work the claimant did and how, when and where she did it – in common parlance the claimant was her own boss.

52. Standing back and looking at the reality of the situation: the claimant was paid through PAYE a set amount every month, regardless of the hours she actually worked; in practice she was paid well below the minimum wage. She sometimes worked "voluntarily", i.e. for free. She had a materially different status in that regard to those who, everyone agreed were employed by the company – the other therapists, for example. The amount paid by PAYE was set so as to largely avoid payment of income tax and national insurance through the PAYE scheme. Above that amount, the claimant paid herself in dividends (even if those dividends were modest). While the claimant had one set role (therapist) she clearly also managed the salon and ran the company. All of this in my judgment points to a person running a business on her own account, minimising (as she was perfectly entitled to do) her tax liabilities, rather than someone acting as an employee of the business. The contract was in my judgment a contract for services rather than a contract of service. Therefore, before the sale the claimant was not in my judgement an ERA employee.

TUPE

53. In my judgment there can only be said to have been a TUPE transfer when rights have been transferred. The rights in question in this claim, which are based in ERA, did not apply to the claimant before the sale, as she was not an ERA employee. There can therefore have been no transfer, or at least no transfer for the purposes of this claim. Whether the wider TUPE definition of employee might have operated to transfer other of the claimant's rights, such as under the Equality Act 2010, is a theoretical question which I need not answer.[1]

[1] As I have said, there can be no claim on the basis of statutory notice pay, since that is dependent on length of service as an ERA employee. But TUPE could perhaps operate to impart the term on notice from the old contract to the new contract. Quite apart form the fact that the claim is not put on the basis of a contractual notice period, there would be other difficulties for the claimant with that approach. There would be the question whether the claimant could rely on this Tribunal's jurisdiction over contract claims if the old contract did not meet the ERA definition of an employment contract. There would also be the point about whether the claimant had willingly accepted the changes in the contract – if so, TUPE might not operate to impart the old terms. Finally, there would

54. For those reasons and the reasons set out at paragraphs 43 and 44 above, in my judgment the words "or otherwise" in TUPE reg 2(1) do not have the practical effect of extending the ERA definition of employee so as to take the claimant within the definition of a TUPE employee. On the facts of this case, if the claimant was not an ERA employee, she was not a TUPE employee. Further, as I have found, the claimant provided services under a contract for services, so that even if she worked for NML "under a contract of service or otherwise", she was still not an employee within the meaning of reg 2(1).

55. Even if I am wrong about all of that, the strict answer to the question I was to answer – whether the Claimant TUPE transferred *to the respondent* (my emphasis) on or about 22 September 2023 – is still no. The respondent is NML. If I am wrong in the above conclusions, the claimant was employed by the respondent both before and after that date, so there cannot have been a *transfer* to the respondent.

56. Could there have been a TUPE transfer from NML Ltd to YSCL? That was not a question I was formally asked to consider; YSCL was not a respondent to the case and there was no application to add it. It also seems to me that the question of who the claimant's employer was *after* the sale has no practical effect – NML and YSCL are both trading and solvent and are both controlled by the same person. It is therefore unnecessary for me to answer that question, but were I to have applied the authorities at paragraphs 46 to 47, I would likely have come to the conclusion that the transfer of shares to Miss Jeffrey did not transfer the business to YSCL for the purposes of TUPE. While YSCL might now be considered to be NML's parent company, it has not stepped in to the shoes of the employer. Since Miss Jeffrey controls both companies it is, I accept, hard to distinguish the acts of the two companies, but NML is one of a number of interests of YSCL and although NML's salon adopted the branding of one (not all) of YSCL's salons, NML does seem to me to be a materially distinct entity. While there were clearly some changes after the sale, the better view is that NML remains the claimant's employer as a matter of law and in a practical sense.

Concluding remarks

57. The claimant evidently feels that she was treated unfairly by Miss Jeffrey; equally evidently, Miss Jeffrey would deny this. That is an issue which would have been ventilated at a final hearing had the case reached that point and I recognise that the effect of the decision I have made in this case is that the claimant will not get the chance to do that. My findings on the preliminary points oblige me to dismiss the claims and it would be inappropriate for me to comment on the wider merits of the claim and in particular on whether Miss Jeffrey's actions were unfair. That is not something I was asked to decide and I did not hear the evidence which I would have needed to hear to come to such a decision.

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be the issue of whether the claimant had contracted out of her right to bring a claim for breach of contract – see paragraph 20 above.

Approved by:

Employment Judge Dick

23 January 2025

SENT TO THE PARTIES ON
24 January 2025

FOR THE TRIBUNAL OFFICE

Notes

All judgments (apart from judgments under Rule 51) and any written reasons for the judgments are published, in full, online at *https://www.gov.uk/employment-tribunal-decisions* shortly after a copy has been sent to the claimants and respondents.

If a Tribunal hearing has been recorded, you may request a transcript of the recording. Unless there are exceptional circumstances, you will have to pay for it. If a transcript is produced it will not include any oral judgment or reasons given at the hearing. The transcript will not be checked, approved or verified by a judge. There is more information in the joint Presidential Practice Direction on the Recording and Transcription of Hearings and accompanying Guidance, which can be found here:

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