



EMPLOYMENT TRIBUNALS

Claimants: (1) Mr R. Morgan
(2) Mrs J. Morgan

Respondent: SMS Farming Limited

Heard at: Watford

On: 30 January 2025

Before: Employment Judge Skehan

Appearances

For the claimant: Ms Step-Marsden,
counsel

For the respondent: Mr Gittins, counsel

RESERVED JUDGMENT

1. The claimants are not employees of the respondent pursuant to section 230 Employment Rights Act 1996 (ERA).
2. The claimants are not workers of the respondent under section 230 ERA.
3. In light of the above, the claimants' claims in their entirety are dismissed.

REASONS

1. This preliminary hearing was listed to determine whether the claimants were employees pursuant to section 230 Employment Rights Act 1996 (ERA), or, in the alternative, if it is determined that the Claimants are not employees, whether they are workers under section 230 ERA.
2. As is not unusual in these cases, the parties have referred in evidence to a wider range of issues than I deal with in my findings. Where I fail to deal with any issue raised by a party, or deal with it in the detail in which I heard, it is not an oversight or an omission but reflects the extent to which that point was of assistance in determining the issues within this litigation. The witness statement relied upon a matter of record and the hearing was recorded. I only set out my principal findings of fact. I make findings on the balance of probability. All witnesses gave evidence under

oath or affirmation. Their witness statements were adopted and accepted as evidence-in-chief. All witnesses, were cross-examined. I heard from both of the claimants, along with Jane Morgan for the respondent. Throughout this judgment, the parties will be referred to on a first name basis as they all share the same surname. No disrespect is intended.

Law

3. There is no dispute between the parties in respect of the law. I note the submissions made by both parties and they are not recorded herein.
4. S 230(1) ERA states: *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.* Section 230(3) ERA 1996 states: *In this Act “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 that of a client or customer of any profession or business undertaking carried on by the individual; and any reference to a worker’s contract shall be construed accordingly.*
5. The issue of Employment Status was recently before the Supreme Court in the decision of Commissioners for His Majesty’s Revenue and Customs v Professional Game Match Officials Ltd [2024] UKSC 29 (‘PMOL’). A number of relevant propositions can be derived from this case:
 - a. Mutuality of obligation and control are necessary, but not necessarily sufficient, conditions of a contract of employment [30].
 - b. The tribunal must address “the cumulative effect of the totality of the provisions...and all the circumstances of the relationship created by it’ and view “in the round, the relationship between the parties recorded in the agreement in the setting of the surrounding circumstances.”; *White v Troutbeck SA* [2013] EWCA Civ 1171 [30]
 - c. It is an essential element of a contract of employment that the employee provides his or her personal service for payment by the employer [40].
 - d. The extent of control in any particular case remains a relevant factor in the overall determination of whether there exists an employment relationship. It is not the case that once the pre-conditions of mutuality of obligation and control are satisfied, they drop out of the picture as relevant factors in the overall assessment of whether a contract of employment exists [32].
 - e. Control is expressed in the most flexible terms [39]. On the one hand, the requirement for control extends only so far as there is scope for it and, on the other hand, that there must be some control, if only in incidental or collateral matters. What matters is lawful authority to command so far as there is scope for it; *Zujis v Wirth Brothers Pty Ltd* (1955) 93 CLR 561.

The Facts

6. This matter relates to a dispute within a family business. The claimants, Richard and Julie, are a married couple. Richard owns a 25% share of the respondent. This litigation arises from a deterioration in the relationship between Richard and his brothers in 2023. This deterioration has led to litigation between the parties including:
 - a. this litigation in the Employment Tribunal issued on 12 December 2023;
 - b. a section 994 petition issued by Richard in the High Court on 13 March 2024 (the petition/Richard's petition); and
 - c. particulars of claim issued by the respondent and another family business in the High Court on 29 May 2024 (the respondent's High Court claim).
7. The High Court pleadings signed with a statement of truth were within the Employment Tribunal bundle. I consider that while these documents are conflicting in respect of references to employment status and obviously not determinative of status, they are helpful alongside the evidence produced specifically for this tribunal hearing, in identifying the background circumstances to this matter.
8. The respondent is a family farm, that was set up to be owned equally by 4 brothers being Richard, Nigel, Colin, and David (whose share is now controlled by his widow, Jane). All brothers worked within the farm from a young age. Historically, the parents of the 4 brothers owned and ran the farm by way of a partnership and the brothers inherited from their parents on an equal basis. The corporate structure of the farm was changed over the years. The brothers experienced severe corporate/financial difficulties where that resulted in corporate entities been placed into administration in 2013 and dissolved in 2017. The brothers rebuilt their business resulting in the formation of the respondent company. The family/respondent also own/control various other corporate entities. These other family businesses included Fields Farm Fresh Ltd with which Julie was concerned and a meat/ abattoir business that was run separately and employed approximately 50 people.
9. The respondent has operated as a family enterprise between the brothers and their families. The respondent has been operated and managed in an informal manner, without formal divisions of responsibility or labour between the brothers. Each brother tended to devote their time to the part of the family business in which he was more skilled and interested. In particular:
 - a. Richard tended to deal with the practical hands-on aspects of farming including the livestock. Richard who has dyslexia, has historically paid little attention to documentation. This has been left to others within the business to organise.
 - b. Colin, who is now semiretired also tended to focus on the practical aspects of farming;
 - c. Nigel and David tended to deal with the administrative and financial aspects of the farming business
10. The brothers and their families also benefited from the opportunity to use residential properties owned by the respondent without payment of rent.
11. All of the brothers have loaned large amounts of money to the respondent. Richard and Julie claim to have jointly loaned a sum of circa £1.8 million (excluding interest) to the respondent. While the exact sum is disputed it is common ground that the amount loaned can be measured in the hundreds of thousands of pounds. The respondent has also borrowed from commercial lenders supported by personal guarantees from the brothers and its directors. These loans are described by Richard in the petition as 'a further manifestation of the relationship of mutual trust and confidence in which the companies were founded and operated and of the quasi partnership

nature of the companies.’ Richard’s petition states that these loans were made and the understanding and with the legitimate expectation that each of the brothers would have the right to participate within the management of the company and the other family companies, and to receive remuneration and other financial or valuable benefits from the respondent and the other family companies. The respondent has never declared any dividend nor has it ever paid interest.

12. No written employment contracts are in existence. Prior to the deterioration in the relationship between the claimants and the respondent, there was no discussion between the parties that mentioned or indicated the possible employment or other status of the claimants. There was no formal agreement between the brothers or their family members about how they would receive remuneration or profits from the respondent save that (on accountants advice) the brothers and other family members were employed by the respondent on modest wages. Richard was originally paid a sum of £225 per week that increased to a maximum of £350 per week. All brothers were paid equally.
13. Richard worked long hours mainly on physical farming work. He estimates that he worked 7 days a week and often worked around 14 hours a day in winter and 16 to 18 hours a day in the summer months. During calving and lambing seasons he would work through the night without any sleep at all. The £350 per week received by Richard did not and was not intended to reflect the hours of work he invested within the respondent. Julie estimates that she went approximately 30 hours a week mainly developing the direct meat selling business for Field Farm Fresh Ltd, a business owned by the respondent. Julie also described how she helped her husband on the farm on an ad hoc basis. Julie was paid £300 per week. Julie’s work reduced in volume during certain times for example May 2022. It was hoped by all parties that her working hours would increase as the business grew.
14. There was no set process in relation to holidays. Richard would not take holidays on traditionally busy times on the farm such as lambing and calving seasons. The nature of the family business alongside Richard’s dedication to the farm dictated when holidays could not be taken. As there was no written contract, Richard considered that there was no right for him to provide a substitute. He notes that a substitute would have been able to do some of the physical work would not have his experience or knowledge of the farm.
15. There are numerous conflicting references to ‘employment’ status within the documentation generated by the parties following their breakdown in relations. Within the High Court documentation both the respondent and Richard claim, in different documents, that Richard both is and is not an employee. Jane describes the respondent’s references to ‘employee’ or ‘employment status’ as ‘errors’ or used for convenience. Richard does not address the conflict within his documentation. Richard’s defence to the respondent’s High Court proceedings at paragraph 15.2 that states, ‘ it is denied that [Richard] worked on the farm as, or solely as, an employee of [the Respondent]. [Richard] worked on the farm as a director of, and shareholder in, [the respondent] which was a family company which operated as a quasi partnership. The employment agreement provided for the defendant to be paid a low wage which did not reflect the role played by [Richard]...’.
16. There is a letter dated 6 June 2023 in the bundle from Richard’s solicitors to the respondent confirming that Richard wishes to step away from the business and broaching the need for agreement for the purchase of his shares. There are minutes from the respondent meeting held on 14 September 2023 referring to Richard having ceased to work and because a ‘breakdown in relations ...[Richard] should be notified that his contract of employment is terminated on notice...’. This is then followed up by a letter sent by the respondent to each claimant on 18

September 2023 purporting to terminate their contracts of employment. Within the respondent's High Court claim, the particulars of claim says that, '2. The defendant is a former director and former employee of the[respondent].

17. It is common ground that the practical work undertaken by the claimants changed and evolved following the breakdown of their relationship. However both representatives agreed that there was no change in status on the breakdown of relationships and the status of the claimants can be properly identified from the years prior to the dispute.

Deliberation and conclusion

18. Richard is a shareholder in the respondent and was a director during the time in question. Neither his position as a shareholder nor director are incompatible with Richard being an employee or worker of the respondent. However it is relevant to distinguish between Richard's control as a shareholder/director over the company (which is irrelevant to his worker/employee potential status) and the control if any that the respondent had over what work Richard did and how and when and where he did it under the alleged employment/worker contract. It is the latter that is the focus of my consideration when considering whether there was a contract of employment or a worker's contract in existence.
19. I start with an examination of the role/work Richard carried out. Richard's industry experience and knowledge of the farm was required for the managerial/strategic/owner element of his role at the farm. I consider that these aspects connected to Richard's position as a shareholder/director of the respondent. It is within the shareholder remit, entirely unconnected to any employee or worker status that Richard (jointly) invested a large sum of money in the respondent. It would not be practically possible to provide a substitute for Richard to provide a substitute for his input as a shareholder/director. That part of Richard's work/function is irrelevant to his potential employees/worker status. This leaves the everyday farm work that is relevant to potential employees/worker status. This work, due to its nature, was unrelenting and Richard undertook long hours.
20. The farm was managed collectively by the brothers. Farming matters were delegated in the main to Richard. I conclude on the balance of probability that while Richard discussed his work with his fellow shareholders and directors there was no person other than Richard exercising control over Richard's day-to-day work. Nobody told Richard what to do, how to do it, or when to undertake any particular role, it was a decision for him. The 'where' element was dictated by practicality. There was no requirement for Richard to seek prior approval from his brothers in relation to any of the day-to-day farm work. There was no requirement for Richard to seek approval for proposed holidays from anybody. The nature of the farm and Richard's commitment to it dictated when Richard could go on holiday. I conclude that Richard alone chose when he took holiday. Julie developed the business opportunity that she had identified within Field Farm Fresh. She was a de facto director of the company and her initiative was supported by the respondent. Julie decided what needed to be done to develop the business and did it. Her work included receiving orders for meat from customers, processing and packaging the orders and delivering them to the customers. Her working hours diminished at times (e.g. May 2022) without reference to or comment by the respondent. When viewing the question of control I conclude that the circumstances point to a lack of control exercised by the respondent over either of the claimants' work.
21. Richard argues that as he did not have a written contract there was no right of substitution. He accepts that a substitute would have been able to do some of the physical work, but that any

substitute would not have the knowledge of the farm. I conclude that the strategic element of running the farm, that requires farming industry knowledge and knowledge of the farm is tied to Richards shareholder/director status and as such are relevant to my consideration. I am looking at the remainder of the day-to-day work. Richard does not dispute that he could provide a substitute to carry out the physical work on the farm. I also note that during cross examination Julie said that she helped her husband on the farm during busy times. There is no suggestion within Julie's witness statement that her worker/employee status related to physical work on the farm as her activities were entirely tied to Field Farm Fresh Ltd. This is an example of Richard appointing a substitute to carry out those tasks that possibly could attract worker/employee status. Richard could equally have asked a friend or acquaintance to help out. I conclude the work that could possibly carry employee or worker status allowed for Richard to provide a substitute and that he did, on occasion, provide such a substitute. Julie noted on occasion where she organised somebody else to do the delivery for her. I conclude that, in a similar fashion to Richard, Julie could provide a substitute to undertake the practical elements of her role that was not clearly connected to her de facto director role.

22. I have considered the pay received by the claimants. It is common ground between the parties that the historic references to labelling this pay as 'employment' reflected 'accountants advice' at the time. All brothers were treated similarly. My starting point is that Richard has paid tax and national insurance as an employee and thus, on the face of it, has earned the right to take advantage of the benefits that employees may derive from such payments. However this does not sit easily when viewed alongside the practical arrangements. It was submitted on behalf of the claimants that the Respondent also provided other forms of valuable employment consideration in the form of a car, car tax, insurance, fuel and all vehicle repairs, residency in a property owned by the Respondent, all utility bills and mobile telephone and contract. None of these additional benefits are recorded as employment benefits for tax purposes or feature within Richard's P60s as contained within the bundle. The tax treatment of Julie's payments was unclear. Her tax returns were not within the tribunal documentation. On balance I conclude that the labelling of the payments as 'employment' was a paper exercise conducted on 'accountants advice' without any active consideration of the actual position. I do not consider the tax documentation or indeed the references to 'employment' within the company documentation is in these particular circumstances a reliable indication of any employment relationship.
23. I note the relative parity of weekly payments between Richard and Julie, but an obvious disparity within their hours. Julie estimates that she worked 30 hours a week on average. There were periods for example May 2022 when it is likely that Julie's working hours dipped substantially below 30 hours per week. It was not envisaged by any party that Julie's weekly payments would be altered in any way due to the reduction in work or the pay would increase if the business developed as all parties had hoped. Richard estimates that he worked somewhere between 98 and 126 hours a week. The disparity of work/working hours is obviously not intended by any party to be reflected within their pay.
24. However, it can be seen that there is some connection between work and pay by both the respondent's decision to start to provide payments to Julie with a view to developing Field Farm Fresh Ltd and by reference to the letters sent to both Richard and Julie when they indicated a wish to step back from the business, that state, '*As you have withdrawn your labour and ceased to attend to any work or duties for the Company no further payments of salary/wages will be made, that the claimants made by the respondent are conditional upon the work provided.*' Jane states within her witness statement that '*...it was clear that [Richard] had withdrawn his labour*

on the Farm and he had ceased to undertake an duties for the Respondent and so not further payments would be made.'

25. Considering the entirety of the evidence in relation to the payments, I conclude that while there is a connection between payments and work, there is not the expected connection normally present within an employment relationship. The work undertaken is manual or physical labour that, within most normal employments would mean that pay would change with the amount undertaken. While the claimant's payments are made because the individual is in some way actively involved in the family business it is not connected to the actual work undertaken by the individual as would normally be expected within an employment context.
26. How the payments made to the claimants are accounted for within the respondent is a matter for the director/shareholders of the respondent. It is not directly relevant to the issue of status before me. I do not accept the submission that, 'it is nonsensical to suggest that Richard and Julie worked long hours to not receive any pay'. In any company where revenue coming in does not exceed payments (be it wages or otherwise) going out, it tends to be the shareholders who pick up the shortfall. I consider the recording of the payments as 'directors loans' to be a neutral factor reflecting the respondent's accounting practices. However on balance, I consider that the circumstances of the payments made to the claimants make them more closely aligned with director's or de facto director's drawings, rather than employment earnings.
27. There are repeated references to a 'quasi-partnership' within the High Court documentation, and by this expression I understand the parties to refer to a limited company that is run informally by family members or close friends that have operated since the company's inception on the basis of good faith and mutual benefit, for all intents and purposes like a traditional partnership, apart from the corporate documentation. This closely reflects the intention, inception and subsequent management of the respondent.
28. I conclude that:
- a. The respondent did not exercise control over the work carried out by the claimants;
 - b. It was possible for both Richard and Julie to provide substitutes to carry out their work;
 - c. The amount and manner in which the payments. were made to the claimants point away from the existence of a contract of employment;
 - d. There was no intention between the parties to create an employment relationship.
 - e. The documentation, paperwork and Richard's tax position file potentially pointing to an employment relationship, are inconsistent with a finding of employment when the entirety of the circumstances are considered; and
 - f. For all the reasons set out above, the claimants were not employees of the respondent.
29. I now turn to whether the claimants could be 'limb (b) workers'. In this scenario, again I am looking at the work identified as not relating to the claimants' director/de facto director roles or Richard's shareholder role. In relation to the remainder of the work the claimant undertook and whether they undertook to do or perform personally any work for the respondent. There is no suggestion that the claimants were undertaking work on their own account so as to be self-employed, or that they were clients or customers of the Respondent. I am looking particularly at requirement for 'personal service'.
30. The basic effect of limb (b) is, so to speak, to lower the pass-mark, so that cases which failed to reach the mark necessary to qualify for protection as employees might nevertheless do so as workers. I repeat the entirety of my findings set out above. The requirement for personal service is oft viewed with particular reference to whether the individual has the right to offer a substitute

to perform the work.

31. It is the case that the claimants could appoint a substitute. I conclude that they are unable to meet the requirement that they perform personally the work that was capable of amounting to worker status. However the absence of the obligation to personally perform the work is fatal to the claimants claims that they were workers of the respondent. I conclude that the claimants were not workers of the respondent.
32. Both representatives confirmed that the entirety of the claims brought by the claimants required either employment or worker status. As the claimants are neither workers nor employees of the respondent I have dismissed the claimants' claims of:
- a) Unfair Dismissal;
 - b) Failure to provide notice pay;
 - c) Failure to provide statement of employment particulars;
 - d) Breach of maximum weekly working time;
 - e) Failure to provide annual leave or holiday pay;
 - f) Failure to pay national minimum wage; and
 - g) Unlawful deductions from wages

Approved by:
Employment Judge Skehan
28 February 2025

Sent to the parties on:

4/3/2025

For the Tribunal Office:

N Gotecha