Neutral Citation Number: [2025] EAT 89

Case No: EA-2022-000679-AS

EMPLOYMENT APPEAL TRIBUNAL

Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 29 May 2025

Before :

HIS HONOUR JUDGE AUERBACH

- -

Between :

SECRETARY OF STATE FOR BUSINESS AND TRADE

Appellant

- and –

(1) MR V KARPAVICIUS (Debarred)
(2) PRIME AQUARIUMS LTD (Dissolved)

Respondent

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- -

Mr B Randle (Instructed by DBT Legal Advisers) for the **Appellant**
The Respondents did not appear and were not represented

Hearing date: 29 May 2025

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JUDGMENT

SUMMARY

Contract of Employment

The tribunal erred in its consideration of whether the claimant, who had claimed a redundancy payment, had been an employee. It decided that question on the basis that the fact that he was the sole director and shareholder of the insolvent company claimed by him to have been his employer was necessarily wholly irrelevant. That was not a correct application of the guidance in Secretary of **State for Business, Enterprise and Regulatory Reform v Neufeld and Howe** [2009] EWCA Civ 280; [2009] ICR 1183.

HIS HONOUR JUDGE AUERBACH:

1. Prime Aquariums Limited, which I will call "the company", was incorporated on 20 January 2016. The sole director and shareholder at all times was Mr Vida Karpavicius, who I will call the claimant. On 8 December 2021 the company went into creditors voluntary liquidation.

2. On 21 March 2022 an employment tribunal claim was begun by Redundancy Claims UK on behalf of the claimant claiming a redundancy payment and payments of wages, holiday pay and notice money. The company was a respondent but did not take any part in the proceedings. The then Secretary of State for Business Energy and Industrial Strategy was also named as a respondent. The Secretary of State resisted the claim, in particular asserting that the claimant had not been an employee of the company. Time points were also raised.

3. The matter came to a hearing at Reading on 6 April 2023, conducted by CVP before Employment Judge Shastri-Hurst. The claimant appeared in person. The Secretary of State was represented by a lay representative, Mr Soni. An oral decision was given at the conclusion of the hearing; a written judgment and reasons followed. The tribunal dismissed the claims for wages, holiday pay and notice monies as out of time. It upheld the claim for a statutory redundancy payment and ordered the Secretary of State to pay it in the amount of £1,322.15.

4. The Secretary of State, who is now the Secretary of State for Business and Trade, appealed. One ground of appeal, ground 2, was permitted to proceed to a full appeal hearing.

5. In the EAT the company has once again taken no part in the proceedings. Indeed, I note that it was in fact dissolved on 10 May 2023. The appeal was initially listed for hearing in September 2024. However, close to the hearing date it transpired that, in error, the claimant had not received the relevant papers. He applied for a postponement to give him enough time to prepare and seek advice. The Secretary of State did not oppose that application and I granted it.

6. The hearing of the appeal was relisted for 19 December and the notice of hearing was emailed on 27 October 2024. Despite reminders, guidance, and a warning from the administration, the claimant did not put in an Answer. By an order sealed on 11 December 2024, Sarah Lindsay, on behalf of the Registrar, debarred the claimant from taking any further part in the appeal.

7. On the day set for the relisted hearing, it transpired that the email address of the Secretary of State's representative had changed upon the Department changing name, he had not seen the notice of hearing sent to him at his previous email address, and counsel previously retained had not been rebooked. In those circumstances, upon the representative's application, I postponed the hearing.

8. The appeal hearing has been effective today. Although, in the circumstances that I have described, no-one has appeared to oppose the appeal, the Secretary of State must still make it good on its merits. Mr Randle has appeared for him today, speaking to a short skeleton argument.

9. The Secretary of State accepts that, if the claimant was an employee of the company, as defined in section 230 **Employment Rights Act 1996**, then he was entitled to a statutory redundancy payment. However, the sole live ground of appeal contends that, in concluding that he was indeed an employee, the tribunal erred in law.

10. The tribunal had a bundle of documents. It heard evidence from the claimant based on a written statement and he was cross-examined. It heard submissions and was referred to authorities. In its self-direction as to the law, the tribunal identified that, in order to be entitled to the payments that he sought, the claimant had to have been an employee of the company. It continued as follows:

> **"32. It is possible for a shareholder and director to be an employee as well, even when the claimant is 100% shareholder, meaning that they have complete control of the company. In fact, this is an irrelevance.**
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> **33. The case of Secretary of State for Business, Enterprise and Regulatory Reform v Neufeld and Howe [2009] EWCA Civ 289 set out helpful guidance in cases in which a director/shareholder is alleged to also be an employee. The question is one of fact for the Tribunal to determine, with regard to two issues:**
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> **33.1. Was the putative contract genuine, or a sham; and,**

33.2. If the contract is genuine, is it a contract of employment? This required proving more than just appointment as director. Relevant factors include:

33.2.1 How the claimant was paid - a salary points to employee status, director's fees point away from it.

33.2.2. How the claimant had been acting - simply acting in the role of director, or acting as an employee.

34. In the case of Neufeld, the Employment Appeal Tribunal found that the Tribunal had erred in finding that the claimant was not an employee, and erred in taking into account the irrelevant facts that he had given personal guarantees, had lent money to it, and was a controlling shareholder.

35. Another useful case is that of Secretary of State for Business, Innovation and Skills v Knight [2014] IRLR 605, in which the Employment Appeal Tribunal upheld the Tribunal's decision that the claimant was an employee. This was despite the fact that she was managing director and sole shareholder, and, during the last two years, had waived her salary to allow others to be paid. The issue was the claimant's employment status at the point when the redundancy payment fell due. The question was whether, by the time of redundancy, the claimant's employment contract had been varied or discharged as a result of her waiving her salary. The Tribunal (upheld by the EAT) found that on the facts, there was no variation or discharge, but that there was simply a choice by the claimant not to take her salary."

11. The tribunal went on to make the following material findings of fact.

"36. Prime Aquariums was incorporated on 20 January 2016 by the claimant, who was the sole shareholder and director of the company. The company consulted on aquarium sales, also undertaking building projects on-site, selling made to order products, to be built and delivered by suppliers. From the point of order to the date of delivery would be around 2-3 months.

37. For several years, Prime Aquariums was running well. The claimant was a 'one man band', and referred to himself as Operations Manager, but had no written contract of employment. When the company was set up, there as an oral agreement with the company that he 'take care of the whole thing'. He agreed to be paid £11,500 per annum.

38. The claimant undertook the following tasks:

38.1. Communications with clients, using all different media; email, telephone, social media and eBay

38.2. Managing the company's reviews on several platforms;

38.3. Dealing with the company's finances and accounts;

38.4. Taking and posting photos and videos of aquarium projects to social media platforms;

38.5 Manager company expenses.

39. In terms of his hours, the hours of Prime Aquariums were 0900-1700hrs, however the claimant would work when the work needed to be done. Although the claimant did go on holiday, he just took the work with him and answered calls and emails as usual.

> **40. The claimant received payslips that were produced by a third party company, engaged by Prime Aquariums to take care of salary, tax, VAT and so on – [109 111]. The claimant did not always get the money that was recorded on these payslips, and did not receive a regular monthly salary.**
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> **41. The claimant received P60s each year: I have had sight of the P60s for 2019, 2020 and 2021 – [106-108].**
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> **42. In his role as director, the claimant made director's loans to the company periodically. He would also on occasion receive some dividends.**
>
> **43. When the Covid-19 pandemic hit in March 2020, Prime Aquariums' suppliers were not able to fulfil the requirements for orders received by the company. This meant that delays were caused, leading to cancellations, refunds and poor reviews from customers.**
>
> **44. On 11 August 2021, the claimant sent a letter of authority to RCUK, giving them authority to deal with matters relating to his redundancy claim and other statutory entitlements - [39]. It was around August that the company took its final orders, which would take 2-3 months to complete.**
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> **45. The last bank transactions for Prime Aquariums took place on 16 November 2021 - [112]. The claimant was still required to work up to that date, in order to ensure that the last orders taken were all completed."**

12. Whether the claim for a redundancy payment was in time depended on the date of putative redundancy if the claimant was indeed an employee. The tribunal decided that if an extension of time was required, it should be granted. Further on, as well as finding that the claimant was an employee, it found that the date of redundancy was such that that claim was in any event in time.

13. As to whether the claimant had been an employee of the company, the tribunal's conclusions were as follows.

> **"60. The claimant had no written contract of employment, and there is no suggestion that any purported employment contract is a sham. In any event, I note that sham cases are a rarity, and they tend to be based on a written contract designed deliberately to mask the sham. I find that there is no sham in this case.**
>
> **61. Therefore, I must move on to consider all relevant factors, including how the claimant was paid and how the claimant had been acting.**
>
> **62. Although I accept that the claimant did not always take his salary, he did receive payslips, and the company had engaged a third party specifically to deal with issues such as those payslips. The mechanics of paying the claimant appear therefore to point towards him being an employee.**
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> **63. In terms of what he actually did whilst working, the claimant did everything required to make the company operate. He was not just performing director's responsibilities, but was doing all tasks, from updating social media, to handling client orders, to controlling the finances. I find that the claimant acted in accordance with his contract, that he was to do all**

tasks and 'take care of the whole thing' as he said he was contracted to do in evidence.

64. Looking at the bank statements, and taking into account the claimant's evidence that the last orders would have been completed in November 2021, I accept that he was working up to the closure of the company's bank account on 16 November 2021. It may have been that the volume of work reduced, however there was still work to be done, and the claimant was still the person doing that work.

65. In line with *Knight*, I have to consider the claimant's employee status at the time that the redundancy payment fell due. In light of my finding that the claimant worked until 16 November 2021, that is the date on which I must consider his status, particularly in relation to the claimant's waiver of his salary.

66. I again refer back to the case of Knight, and find that, in this case, there was no variation of the claimant's contract, and no discharge of it. The claimant simply chose not to be paid his salary in order to put that money back into the company. This is not sufficient in and of itself to mean that the claimant's contract was varied or discharged at the point when he was made redundant.

67. The fact that the claimant was the sole shareholder and so had 100% control of the company is irrelevant, as is the fact that he made director's loans and took dividends as a director.

68. I therefore conclude that the claimant was an employee of Prime Aquariums, at the time of the redundancy, on 16 November 2021. In light of that finding, the claim under s166 is in fact within the primary time limit in any event."

14. The tribunal accordingly concluded that the claimant was entitled to a redundancy payment, and, on the basis of the agreed gross weekly pay, it calculated that payment as being £1,322.15.

15. The sole live ground of appeal before me is expressed as follows.

"At [67] of the Decision, the Tribunal misdirected itself by finding (without any explanation) that the Claimant's role as shareholder of PAL with 100% control of the company was an irrelevant factor for determining employee status, as was the fact that the Claimant had made director's loans. The Tribunal's misdirection at [67] seems to arise from a misreading of *Secretary of State for Business Enterprise & Regulatory Reform v Neufeld & Howe* [2009] ICR 1183, which found that ordinarily a sole shareholding or director's loan would not be relevant for determining employee status, not that they would never be relevant."

16. Section 230(1) **Employment Rights Act 1996** 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."

17. In **State for Business, Enterprise and Regulatory Reform v Neufeld and Howe** [2009] EWCA Civ 280; [2009] ICR 1183 the Court of Appeal considered two appeals which raised the issue

of the correct approach to take where the person claiming to have been an employee of an insolvent company was also a director and the sole or a controlling shareholder. Rimer LJ gave a single judgment on behalf of the Court of Appeal which conducted a comprehensive review and analysis of the prior authorities and gave guidance.

18. At [26] the court identified that the logical starting point was a reminder of the essentials of the contract of employment provided in **Ready Mixed Concrete (South East) Limited v Minister of Pensions and National Insurance** [1968] 2 QB 497. The court then suggested, at [27], that the question of principle was "tested best by the consideration of the extreme position [of the] so-called 'one man' company."

19. The court laid to rest the heresy that had been articulated or flirted with in some of the prior authorities, which postulated that the fact that an individual is the controlling shareholder of the company means that the necessary control element of a contract of employment *cannot* be present. **Neufeld and Howe** makes clear that that is not the law. The individual's control of the company, as its shareholder, does not necessarily preclude the existence of a contract of employment, including the necessary element of control as between that company and that same individual as its employee.

20. The bulk of the decision, however, was devoted to wrestling with the doctrinally fraught question of what, if any, is or may be the relevance in the given case, of the individual's control of the company, for the question of whether the individual did in fact have a contract of employment. The Court of Appeal in particular considered how the fact of the individual being the controlling shareholder and director may or may not inform the multi-factorial assessment conducted within the crucible of the principles laid out in **Ready-Mix Concrete**. At [49] the court said:

> **"49. ... Of course in answering that question his status as a director/controlling shareholder will or may be one of the factors which will have given rise to such question and will be part of the factual background against which the question falls to be answered. But the answer to it must ultimately depend on what he agreed with the company he would do, whether he did it and whether what he so agreed and did show that he had a contract of employment with the company. If such inquiry shows that he did have such a contract, his status as director/controlling shareholder will not ordinarily require any different conclusion..."**

21. At [54] the court said:

> **"54. Once both that argument and the *Buchan* fallacy are removed from the arena, the only relevance of the putative employee's control of the company is likely to be in the context of the consideration of whether (a) the contract he is asserting was a sham rather than a genuine employment contract (for the obvious reason that he will have been pulling the strings that will have purportedly created it) or (b) if intended to be genuine, its terms and the way in which it was intended to be performed (that is, in essence, the services to be rendered and the remuneration to be paid) were compatible with its being classed as a contract of employment. Once it is found that it is both a genuine contract, and apparently also a genuine *employment* contract -- by which we mean that it is just what it purports to be -- it cannot cease to be such merely because the employee has a shareholding ranging from, say, 51% to 100% in the company. By that point in the inquiry, the size of his shareholding and the extent of his control will ordinarily have become irrelevant."**

22. Further on, the court drew the threads together in the following way:

> **"86. We have referred in the previous paragraph to matters which will typically be directly relevant to the inquiry whether or not (there being no question of a sham) the claimed contract amounts to a contract of employment. What we have *not* included as a relevant consideration for the purposes of that inquiry is the fact that the putative employee's shareholding in the company gave him control of the company, even total control. The fact of his control will obviously form a part of the backdrop against which the assessment will be made of what has been done under the putative written or oral employment contract that is being asserted. But it will not ordinarily be of any special relevance in deciding whether or not he has a valid such contract. Nor will the fact that he will have share capital invested in the company; or that he may have made loans to it; or that he has personally guaranteed its obligations; or that his personal investment in the company will stand to prosper in line with the company's prosperity; or that he has done any of the other things that the 'owner' of a business will commonly do on its behalf. These considerations are usual features of the sort of companies giving rise to the type of issue with which these appeals are concerned but they will ordinarily be irrelevant to whether or not a valid contract of employment has been created and so they can and should be ignored. They show an 'owner' acting qua 'owner', which is inevitable in such a company. However, they do not show that the 'owner' cannot also be an employee.**
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> **87. We have, however, twice -- and deliberately -- used the word 'ordinarily' in the last paragraph. We have used the word not because we foresee other circumstances but because 'never say never' is a wise judicial maxim."**

23. Earlier on, in its discussion of the authorities, the Court of Appeal had referred to guidance given by Elias P and members in the earlier case of **Clark v Clark Construction Initiatives Limited and another** [2008] ICR 635, in particular at paragraph [98] of that decision. The EAT said this:

> **"98. How should a Tribunal approach the task of determining whether the contract of employment should be given effect or not? We would suggest that a consideration of the following factors, whilst not exhaustive, may be of assistance:**
>
> > **"(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.

"(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).

"(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 (Arascene).

"(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 described in para.96) 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 (Fleming). This will be powerful evidence that the contract was not really intended to regulate the relationship in any way.

"(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.

"(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. That would be to apply the Buchan test which has been decisively rejected. 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."

24. In **Neufeld and Howe** the Court of Appeal commented on the guidance in **Clark** as follows:

"88. We respectfully agree with the essence of the factors referred to by Elias J in paragraph 98 of his judgment although we add a comment on four of them. Mr Tolley criticised his first factor as amounting to a suggestion that the mere production of a written contract purporting to be a contract of employment will shift to the opposing party the burden of proving that it was not a genuine such contract. We doubt if Elias J was intending to refer to a legal burden. In cases where the putative employee is asserting the existence of an employment contract, it will be for him to prove it; and, as we have indicated, the mere production of what purports to be a written service agreement may by itself be insufficient

> **to prove the case sought to be made. If the putative employee's assertion is challenged the court or tribunal will need to be satisfied that the document is a true reflection of the claimed employment relationship, for which purpose it will be relevant to know what the parties have done under it. The putative employee may, therefore, have to do rather more than simply produce the contract itself, or else a board minute or memorandum purporting to record his employment.**
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> **89. We consider that Elias J's sixth factor may perhaps have put a little too high the potentially negative effect of the terms of the contract not having been reduced into writing. This 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, we would not wish tribunals to seize too readily on the absence of a written agreement as justifying the rejection of the claim. In both cases under appeal there was no written service agreement, but the employment judges appear to have had no doubt that the parties' conduct proved a genuine employment relationship.**
>
> **90. As for Elias J's seventh and eighth factors, we say no more than that we regard them as saying essentially what we have said above in our 'never say never' paragraph."**

25. There is one further important strand of the discussion in **Neufeld v Howe**. This concerns the position where the claimant in the given case is not relying on a written document said to be a written contract of employment. The court said at [55]:

> **"55. ... Where, however, the contract is not in writing, it will of course need to be proved by other means, and, given the greater informality likely to obtain in 'one-man' companies, the fact and extent of the alleged employee's control of the company may be a factor for consideration."**

26. To similar effect, at [61] the court said:

> **"66. ... If, however, the contract was not in writing, or was expressed only in short form, so that it is necessary to examine the conduct of the parties in order to deduce the content of the contract, the position of the individual and manner in which the company's affairs were conducted provide the factual setting for the inquiry."**

27. There is no need to add to the comprehensive guidance given by the Court of Appeal in **Neufeld and Howe**. It is important to take on board that that the fact of a 100% or controlling shareholding cannot by itself point to the conclusion that a claimant was not an employee, but may form the background or backdrop to the consideration of other factors, and the Court of Appeal's observations that it will "ordinarily" be irrelevant. But that general guidance falls short of the proposition that the fact that the individual controlled the company will necessarily always be irrelevant and could have no influence whatsoever on the tribunal's reasoning and evaluation of other

factual features or overall conclusion. The passages that I have set out also suggest that there may be more room for it to be regarded as having a significant impact in a case where there was no written contract, which may make it incumbent on the tribunal to scrutinise and evaluate more closely, against that backdrop, the actual arrangements and what the individual actually did.

28. The present tribunal stated at [32] that the fact that the person claiming to be an employee is, as well as a director, a 100% shareholder having complete control, is "an irrelevance". At [34], in referring to **Neufeld and Howe**, the tribunal observed that the EAT found that the tribunal in that case had erred in finding that the claimant was not an employee and in taking into account "the irrelevant facts" that he had given personal guarantees, had lent money to it and was a controlling shareholder. At [67] it said that the fact that the claimant was the sole shareholder with 100% control was "irrelevant" as was the fact that he made director's loans and "took dividends as a director". The first of these statements formed part of the tribunal's general statement of the law.

29. I agree with Mr Randle that this was unfortunately an error, as this self-direction does not accurately capture the important nuances of the guidance given by the Court of Appeal in **Neufeld and Howe**, drawing in turn on the guidance given by the EAT in **Clark**. As the passages I have set out show, the fact of the claimant's control, as shareholder, of the company is not to be treated as just another relevant factor to be weighed in the balance. It is not *ordinarily* relevant; but that does not mean that it never can be relevant in any way at all. It may form part of the backdrop or context against which other factors fall to be assessed, particularly where there is no written contract.

30. Possibly, the present tribunal was led astray by a passage in the course of [91] of the Court of Appeal's decision, where it referred to "irrelevant considerations" in the case of Mr Neufeld including that he had given personal guarantees to the company and had lent money to it, and had a controlling shareholding in it. At that stage of its decision, the Court of Appeal was considering the facts of the particular case of Mr Neufeld. It concluded that, having found that Mr Neufeld had what was

otherwise a genuine contract of employment, the tribunal in that case then erred by treating those other features as trumping or reversing that conclusion. But this passage did not form part of the Court of Appeal's general guidance as to the applicable legal principles in cases of this kind.

31. Further, what the present tribunal said at [67] was part of its concluding assessment. In the absence of the tribunal's general summary of the law capturing the nuances of the guidance in **Clark** and in **Neufeld** on this point, and given the unambiguous way in which the tribunal stated its conclusion at [67], I cannot be sure that it did not materially err in its reasoning as to the conclusions to be drawn from the primary findings of fact that it made in this case.

32. I accept Mr Randle's general submission that this error could potentially have made a difference to how the tribunal evaluated other evidential or factual features of this case, and that it might have viewed them differently had it done so against the backdrop of the claimant in particular being the sole shareholder and controller of the company. Such features included what was referred to as "the oral agreement" reached at the outset that he would "take care of the whole thing", the fact that there was no written contract, the findings that he did not always get the money that was recorded on the pay slips, and did not receive a regular monthly salary, and that he received some dividends, or what the tribunal describe at [67] as "dividends as a director". On the subject of dividends and how they might potentially, in a given case, be viewed or categorised, I note that there is a useful discussion in the decision of the EAT in **Dugdale v DDE Law Limited** UK EAT 00169/16.

33. Having regard to all of that, I do not think it can be said that, even if the tribunal had given itself a more appropriately framed direction on this aspect in line with **Clark** and **Neufeld and Howe**, the outcome would have been bound to be the same. I therefore uphold the appeal.

34. It is regrettable that, for a combination of reasons this litigation has now been running for some time. But I am not in a position to substitute a decision of my own for that of the tribunal. In particular I am not satisfied that all the necessary findings of fact have been made by the tribunal, or

that there is only one outcome possible on the evidence presented to the tribunal or facts found by it.

35. The matter must, therefore, be remitted to the tribunal for fresh determination, although the only issue now to be decided afresh is simply whether the claimant was or was not an employee of the company. The tribunal's decision dismissing his claims for various payments other than the redundancy payment has not been challenged by him and stands, as does the tribunal's decision, for the purposes of the redundancy payment claim, with respect to the effective date of termination, if the claimant was indeed an employee, and hence that his claim for that payment was in time.

36. Mr Randle has submitted that upon remission there would be no particular advantage, given the passage of time and narrowness of the issue, to the matter being remitted to Employment Judge Shastri-Hurst, and that it might benefit from a fresh pair of eyes. I agree, and will direct that whether the claimant was an employee is to be determined at a fresh hearing before a different judge.

37. It appears to me, however, that, at least as a starting point, the necessary evidence, in terms of the claimant's witness statement and other documentary evidence prepared for the original hearing, can stand, and may suffice. However, I will leave it to the tribunal as a matter of case management to consider any application that may be made to it by either party to adduce additional evidence, whether witness or documentary evidence, for the purposes of the re-hearing.

38. I add, for good order, that, although the claimant, in circumstances I have described, was debarred from participating in this appeal, he has not been debarred from participating in the proceedings that will now resume in the employment tribunal.