Neutral Citation Number: [2025] EAT 121

Case No: EA-2023-001070-AT

EMPLOYMENT APPEAL TRIBUNAL

Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 14 August 2025

Before :

HIS HONOUR JUDGE JAMES TAYLER

- -

Between :

MARK CRAVEN

Appellant

- and –

FORREST FRESH FOODS LIMITED

Respondent

- -
- -

Lee Bronze (instructed through direct access) for the **Appellant**
Elizabeth Evans-Jarvis of Aticus Law for the **Respondent**

Hearing date: 10 June 2025

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JUDGMENT

SUMMARY

Contract of Employment

The Employment Tribunal erred in law in concluding that an employee on appointment as a director ceased to be entitled to any remuneration as an employee.

HIS HONOUR JUDGE JAMES TAYLER

1. This appeal raises the question of whether the Employment Tribunal correctly analysed the entitlement of the claimant, who was an employee and a director of the respondent, to salary and/or sick pay.

2. The appeal is against a judgment of Employment Judge Cline after a hearing on 6, 7 March and 10, 11 May 2023. The judgment was sent to the parties on 8 August 2023.

3. The respondent is engaged in wholesale distribution of food and drink. The managing director and majority shareholder of the respondent is Christopher Craven ("Mr Craven"), who is a second cousin of the claimant. The claimant started working as a driver in 2009 for the business that was incorporated as the respondent on 12 January 2010. The claimant left the employment of the respondent in December 2011. The claimant subsequently rejoined in a sales capacity. The claimant asserted that he did so in February 2013 whereas the respondent asserts it was in August 2015. The Employment Tribunal held that the claimant entered into a written contract of employment with the respondent in August 2015. The contract included the following provisions:

> JOB TITLE
>
> You are employed as Business Development Manager and your duties will be as advised by a Director. Your duties may be modified from time to time to suit the needs of the business. …
>
> PLACE OF WORK
>
> You will normally be required to work at Unit 6b, Scotts Industrial Park, Fishwick Street, Rochdale, OL16 5NA. You will not be required to work outside the United Kingdom.
>
> HOURS OF WORK
>
> Your normal hours of work are 47.5 per week between the hours of 6.00am and 6.00pm Monday to Friday with a 30 minute unpaid break each day. You may be required to work additional hours when authorised and as necessitated by the needs of the business.
>
> REMUNERATION

> Your salary is currently £10,600.20 per annum payable weekly in arrears by BACS as detailed on your pay statement. Your salary is set at such a level as to compensate for the need for occasional additional hours. …
>
> BENEFITS
>
> Your position has the benefit of a performance related commission, details of which are shown separately. …
>
> SICKNESS PAY AND CONDITIONS
>
> There is no contractual sickness/injury payments scheme in addition to SSP. Conditions relating to the above are shown in the Employee Handbook to which you should refer.
>
> CAPABILITY AND DISCIPLINARY PROCEDURES
>
> The disciplinary rules that form part of your contract of employment and the procedures that will apply when dealing with capability or disciplinary issues are shown under the headings "Capability Procedures" and "Disciplinary Procedures" in the Employee Handbook to which you should refer. …
>
> GRIEVANCE PROCEDURE
>
> Should you feel aggrieved at any matter relating to your employment, you should raise the grievance with a Director, either verbally or in writing. Further information can be found in the Employee Handbook.
>
> NOTICE OF TERMINATION TO BE GIVEN BY EMPLOYER
>
> Under 1 month's service - Nil.
> 1 month up to successful completion of your probationary period - 1 week.
> On successful completion of your probationary period but less than 5 years' service - 1 month.
> 5 years' service or more - 1 week for each completed year of service to a maximum of 12 weeks after 12 years. …
>
> PAY IN LIEU OF NOTICE
>
> We reserve the contractual right to give pay in lieu of all or any part of the above notice by either party.

4. The contract provided that the claimant was employed as a "Business Development Manager" with normal working hours of "47.5 per week between the hours of 6.00am and 6.00pm Monday to Friday" with a salary of "£10,600.20 per annum payable weekly in arrears by BACS" with duties that would be "advised by a Director" and might be "modified from time to time to suit the needs of the business".

5. The Employment Tribunal recorded that the salary was set to be below the threshold for income tax. The claimant received further remuneration as a "director". This was not a matter about which the Employment Tribunal made any findings. On 1 April 2016, the claimant was allocated one dividend only "D" Share". On 30 June 2016, the claimant was appointed as a statutory director of the respondent. The Employment Tribunal did not make any substantive findings about what, if any, changes there were to the claimant's duties when he became a statutory director.

6. The payments made to the claimant increased substantially over time. The Employment Tribunal recorded that the claimant received £32,878 in 2016-17 which increased to £76,640 for 2017-18. Payments were made predominantly as "dividends" and "director's loans". A pay slip in the supplementary bundle demonstrated that the claimant was still being paid an annual salary that was only a small proportion of his total remuneration.

7. The claimant and Mr Craven fell out. The claimant had become a director of another company. Mr Craven thought that the claimant was working for the other company when he should be working for the respondent. Things came to a head in 2022. On 22 April 2022, the claimant was signed off work and did not return thereafter. The claimant was suspended on 17 May 2022. An Extraordinary General Meeting was held on 10 June 2022 at which the claimant was removed as a director of the respondent. The claimant was not paid after this date. The claimant raised a grievance on 18 July 2022. The respondent initially agreed to investigate the grievance but it was "paused" and did not progress. On 17 January 2023, the claimant resigned as an employee giving 12 weeks notice. On 3 February 2023, the claimant resigned as a director and employee with immediate effect. On 15 February 2023, the respondent wrote to the claimant stating that the claimant's resignation dated 17 January 2023 was accepted and that the respondent would pay 12 weeks pay in lieu of notice. The letter also noted that the claimant had resigned as a director.

The Decision of the Employment Tribunal

8. The Employment Tribunal held that the claimant remained an employee after he became a director [31]:

> **I reject the Respondent's assertion that the Claimant ceased to be an employee entirely when he became a director**, that the 2015 contract was therefore void and that his position was then governed solely by the terms of the articles of association. **However, I also reject what I understand to be the basic tenor of the Claimant's position that his appointment as a director had no real impact on his employment status and that, in effect, all monies due to him were due to him as an employee** pursuant to his employment contract. As such, when determining whether the Claimant was entitled to the sums he now claims, **I have had to consider each claim as a discrete issue because it has not been possible to establish any overarching agreement between the parties as to what sums the Claimant could expect to receive and in what capacity.** [emphasis added]

9. Despite holding that the claimant remained an employee the Employment Tribunal found that all payments were made because he was a director:

> 34) The Respondent's position is that, in effect, all pay to the Claimant by the relevant period was in his capacity as a director and shareholder. **I am conscious that there was no specific agreement that the August 2015 contract had been amended but I also note that, in that contract [173], the Claimant's salary is put at £10,600.20 per annum. This is clearly a fraction of what he was receiving by the relevant period so it must be the case that the position changed by way of mutual conduct if not by specific agreement.** I have already set out above my view that **the Clamant has, in effect, been content to take the benefits of being paid by way of a dividend whilst, at the same time, asserting that he did not understand the position** and simply left it to Mr Craven to deal with on his behalf. In my judgment, the Claimant cannot have it both ways if he now says that he is entitled to payment as an employee pursuant to his contract. Despite the Claimant's assertions in this regard, I have not seen or heard anything to persuade me that the position set out by Mr Craven is wrong. The fact that the Claimant received payments from the Respondent into his bank account on a monthly basis does not indicate anything about the legal basis of that payment; indeed, the Claimant himself commented in cross-examination that he effectively just accepted the money and did not seek to question or understand the basis upon which it was being paid.
>
> 35) I am required to make findings of fact on the basis of the evidence before me and, as such, **I find on the balance of probabilities that the Claimant either agreed or, at the very least, acquiesced over time, to a payment structure based not on the contract of August 2015 but on his position as a director.** As such, **once he had been removed as a director in accordance with the articles of association in June 2022, he was not entitled to any further payments from the Respondent on the evidence I have seen.** [emphasis added]

10. Based on that finding, the Employment Tribunal dismissed the complaint of unauthorised deduction from wages:

> 53) *Was the Claimant entitled to PAYE earnings between 10th June 2022 and 17th January 2023?* For the reasons set out above at paragraphs 32 to 35, I find the answer to be no.

11. The Employment Tribunal analysed the complaint in respect of holiday pay:

> 36) Whilst I have found in relation to his monthly income that the Claimant cannot rely on the August 2015 contract for the purposes of his monthly income, the position can be, and in my view is, slightly different in relation to sick pay. The August 2015 contract states specifically that "[t]here is no contractual sickness/injury payments scheme in addition to SSP". Reference is made to the employee handbook [175], which says in section 3 [181] that statutory sick pay is to be paid "if you are eligible". Neither party addressed me on this point. As above, I have found that, for the purposes of his monthly income, the Claimant was not entitled to payment after his removal as a director in June 2022. The Claimant claims an entitlement to unpaid sick pay for the same period. However, given that the August 2015 contract does not provide for anything other than SSP and, by the relevant period, the Claimant had been removed as a director (and therefore, as I understand it, is not eligible for SSP), it must follow that he is not entitled to SSP during the relevant period.

12. In the light of that finding the Employment Tribunal held:

> 54) Was the Claimant entitled to sick pay between 10th June 2022 and 17th January 2023? For the reasons set out above at paragraph 36, I find the answer to be no.

13. Thus, the Employment Tribunal decided that although the claimant remained an employee throughout he was not entitled to any salary or sick pay because all payments were made to him because of his role as a director.

The appeal

14. The claimant appealed on multiple grounds. Limited grounds were permitted to proceed by John Bowers KC Deputy Judge of The High Court. Judge Bowers stated:

> I believe that the points identified under the headings "misapplying the law" and "perversity" are reasonably arguable. I am also concerned that the Judge decided a case of this sort on the burden of proof. Although the point is entitled perversity, this is a misnomer as it is a pure point of law as it relates to the legal principle that if a person works they should be entitled to pay and the interconnection of employment and directorship.

15. Revised grounds of appeal were submitted setting out these issues.

Subsequent Employment Tribunal decision

16. After a further hearing in the Employment Tribunal between 12-15 May 2025 before Employment Judge Leach it was held that the claimant was constructively and unfairly dismissed on 3 February 2023. There was a judicial determination that the claimant remained an employee of the respondent until 3 February 2023. The Employment Tribunal also held that the claimant's absence

was genuinely caused by illness. Accordingly, the argument that Ms Evans-Jarvis has sought to run in this appeal, notwithstanding the fact that this was not the basis of the decision of Employment Judge Cline, that the claimant was not entitled to wages because he provided no work, would founder because he was absent from work due to genuine ill health.

The Law

17. The claimant brought complaints asserting unauthorised deduction from wages. Section 13 **Employment Rights Act 1996** ("**ERA**") provides:

> 13 Right not to suffer unauthorised deductions.
>
> (1) An employer shall not make a deduction from wages of a worker employed by him unless—
>
> (a) the deduction is required or authorised to be made by virtue of a statutory provision or a relevant provision of the worker's contract, or
>
> (b) the worker has previously signified in writing his agreement or consent to the making of the deduction.

18. Section 27 **ERA** provides:

> 27 Meaning of "wages" etc.
>
> (1) In this Part "wages", in relation to a worker, means any sums payable to the worker in connection with his employment, including—
>
> (a) any fee, bonus, commission, holiday pay or other **emolument referable to his employment, whether payable under his contract or otherwise**,
>
> (b) **statutory sick pay** under Part XI of the M1Social Security Contributions and Benefits Act 1992, [emphasis added]

19. Section 230 **ERA** defines an employee:

> 230 Employees, workers etc.
>
> (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. [emphasis added]

20. A statutory director may also be an employee. In the case of a Managing Director it was held by Mr Justice Phillips in **Folami v Nigerline (U.K.) Ltd** [1978] ICR 277:

> It seems to us that where it is established that a person has been appointed managing director of a company, that his duties include effective management of the affairs of the company in all its aspects, that he has discharged those duties, and that he has been remunerated by that company in the sense that he has received a salary from the hands of that company, the prima facie conclusion to be drawn is that he is an employee of the company.

21. A controlling director may be an employee. In **Secretary of State for Trade and Industry v Bottrill** [1999] I.C.R. 592 Lord Woolf M.R. held:

> We recognise the attractions of having in relation to the Act of 1996 a simple and clear test which will determine whether a shareholder or a director is an employee for the purposes of the Act or not. However, the Act does not provide such a test and it is far from obvious what Parliament would have intended the test to be. We do not find any justification for departing from the well established position in the law of employment generally. **That is whether or not an employer and employee relationship exists can only be decided by having regard to all the relevant facts. If an individual has a controlling shareholding that is certainly a fact which is likely to be significant in all situations and in some cases it may prove to be decisive. However, it is only one of the factors which are relevant and certainly is not to be taken as determinative without considering all the relevant circumstances.** …
>
> If the tribunal concludes that the contract is not a sham, it is likely to wish to consider next whether the contract, which may well have been labelled a contract of employment, actually gave rise to an employer/employee relationship. In this context, of the various factors usually regarded as relevant (see, for example, *Chitty on Contracts* , 27th ed. (1994), vol. 2, pp. 703–704, para. 37–008), the degree of control exercised by the company over the shareholder employee is always important. This is not the same question as that relating to whether there is a controlling shareholding. **The tribunal may think it appropriate to consider whether there are directors other than or in addition to the shareholder employee and whether the constitution of the company gives that shareholder rights such that he is in reality answerable only to himself and incapable of being dismissed. If he is a director, it may be relevant to consider whether he is able under the articles of association to vote on matters in which he is personally interested, such as the termination of his contract of employment. Again, the actual conduct of the parties pursuant to the terms of the contract is likely to be relevant. It is for the tribunal as an industrial jury to take all relevant factors into account in reaching its conclusion, giving such weight to them as it considers appropriate.** [emphasis added]

22. The Court of Appeal confirmed that a controlling director can also be an employee in **Secretary of State for Business, Enterprise and Regulatory Reform v Neufeld and Howe** [2009] EWCA Civ 280; [2009] ICR 1183. The court held that the starting point is to consider the essentials

of a contract of employment having regard to **Ready Mixed Concrete (South East) Limited v Minister of Pensions and National Insurance** [1968] 2 QB 497. The Court of Appeal had regard to the analysis of Elias P and members in **Clark v Clark Construction Initiatives Limited and another** [2008] ICR 635 including guidance at paragraph 98(5):

> 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.

23. In assessing the nature of the agreement between the parties the manner in which tax has been paid and any description of the nature of the contract is relevant, but not determinative: **Young and Woods Ltd v West** [1980] IRLR 20 CA.

24. If there is a dispute about whether an individual fulfils the statutory requirements to be entitled to Statutory Sick Pay that is not a matter for the Employment Tribunal: **Taylor Gordon & Co Ltd v. Timmons** [2004] IRLR 180. However, where such an entitlement is not disputed, there could be a claim for unauthorised deduction from wages because SSP is defined by section 27 **ERA** as wages.

Analysis

25. Regrettably, I have concluded that the decision of the Employment Judge was perverse. Under a contract of employment the employee agrees to undertake work for another, under some degree of control, in return for wages. The Employment Judge held that when the claimant became a director on 30 June 2016 he continued to be an employee but under a contract that did not require him to do any work for the respondent as an employee, and gave him no entitlement to wages as an employee. The antithesis of a contract of employment. That follows from the decision that despite the claimant continuing to be an employee all the work he did was as a director and all remuneration was received in that capacity. The Employment Judge focused almost entirely on the manner in which payments were made, the majority being by way of "dividends" and "director's loans". In **Clark v Clark** Elias P suggested those are factors that "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". The

claimant had entered into a contract of employment in August 2015 which the Employment Judge appeared to accept subsisted, at lease in respect of some terms. That contract gave the claimant a job title, set hours of work and at least part of his remuneration, and provided that his duties would be "as advised by a Director". The Employment Tribunal was required to make findings of fact about the claimant's duties and his agreed remuneration, whatever the manner of its payment, immediately before he became a director. Because there was an employment contract in existence at the time the claimant became a director the Employment Judge had to consider whether it was terminated, which he does not appear to have concluded was the case; or varied and, if so, how and what the variations were. Consideration should then have been given to any additional duties the claimant undertook once he became a director and whether he performed them as part of his duties under his contract of employment, or on some other basis. There is nothing unusual about an employee being made a director and undertaking some additional directorial roles in their capacity as an employee. Many employees are appointed as directors without a substantial change in their duties. The claimant was not a controlling director. It appears that the business was still run by Mr Craven. The Employment Judge did not make the necessary findings of fact, did not apply the correct legal principles and reached a decision that was perverse.

26. The matter is remitted for consideration by another Employment Tribunal because the errors of law were fundamental. It will be for the Employment Tribunal to case manage the matter on remission, but it may be appropriate for the remitted issues to be determined together with remedy for the unfair dismissal complaint.

Embargoed judgment

27. As usual the judgement was sent out under embargo to allow represented parties the opportunity to point out typographical errors and the like. Mr Bonze provided a few suggested typographic corrections. Unfortunately, Ms Evans-Jarvis improperly sought to take the opportunity to re-argue matters and introduce facts that were not found by the Employment Tribunal. The covering email sent when judgments are sent under embargo makes it clear that this should not be done. There

was no "invitation to make representations prior to finalization" as suggested by Ms Evans-Jarvis. I see no reason whatsoever to vary the substantive content of the judgment.