



EMPLOYMENT TRIBUNALS

Claimant

Respondent

Mrs C Brett

v

GPRX Data Ltd

Heard at: Cambridge

On: 2 November 2017

Before: Employment Judge G P Sigsworth

Representation

For the Claimant: In person.

For the Respondent: Mr A Sendall, Counsel.

RESERVED JUDGMENT

1. The Judgment of the Tribunal is that the Claimant was not an employee of the Respondent between April 2014 and 31 August 2016.

RESERVED REASONS

1. The Claimant brings claims of constructive unfair dismissal and for unpaid wages to this Tribunal. There is an issue about her length of service. She contends that she was an employee of the Respondent from 6 April 2014 until the date of her resignation on 13 April 2017. The Respondent maintains that she was not an employee until she signed a director's service agreement on 1 September 2016. Thus, the Respondent says, the Claimant does not have sufficient service to bring a claim for unfair dismissal.
2. The Tribunal heard oral evidence from the Claimant and, for the Respondent, from Ms Joanna Burnett. There were some documents produced by the parties, despite there not being a formal disclosure exercise or an agreed bundle of documents. The parties did not argue that there was insufficient documentation before the Tribunal for the Judge to make a decision in the case. In particular, the Judge had regard to the director's service agreement for the Claimant, minutes of board meetings and pay documentation. After the evidence, the parties or the

representatives made submissions to the Tribunal, and also provided the Tribunal with some case law. The Judge took the view that the issue was a complex one, and reserved the decision to give further time for consideration of the case.

Findings of Fact

3. The Employment Judge has made the following relevant findings of fact:-

3.1 The Claimant, Ms Burnett and Mr Paul Reed (the latter two being husband and wife) together founded the Respondent company in August 2012. At all material times they were the three directors and the shareholders in a forty (Claimant)/thirty/thirty proportion. There was some definition of roles, as the three directors were executive directors. The Claimant took main responsibility for sales and marketing. Ms Burnett was concerned with administration, finance and data analysis. Mr Reed was in charge of technical matters. Until April 2014, the directors took no remuneration from the business. They worked together to build it up, working such hours as they could, depending on their young families and other work commitments. From about November 2013, Mr Reed gave up his full time job and worked exclusively for the Respondent.

3.2 From April 2014, the directors/shareholders decided that there was enough money in the company to allow them to pay themselves £833 per month through the payroll. This was a tax effective way to remunerate themselves, because it utilised their personal allowances and ensured that they did not pay tax on this remuneration. They were advised by their accountant to do this. It was necessary for them to receive this money through the PAYE system, and this generated relevant PAYE related documentation for HMRC and from HMRC, such as pay slips and P60s at the tax year end. They would deduct income tax and National Insurance at source. Further, as shareholders, the three directors paid themselves dividends, roughly every quarter, sums totaling £12,000 each in 2014, £15,000 in 2015, and a higher figure in 2016. The financial year for the business runs from 1 September to 31 August. The payment of dividend was not in fact linked to the differential shareholding between the Claimant and the other directors, because the Claimant waived her right to take more than they did.

3.3 Under the general direction of the three acting as the company board of directors, they each had a fair degree of autonomy as to when and where they worked. In practice, as no doubt with many start-up businesses, the three directors worked long hours, evenings and weekends, as was necessary. They had no fixed job descriptions, no fixed holidays and these were taken with the agreement of others. There were no other trappings of employment such as access to sick pay, notice period for termination, restrictive covenants on termination etc. This way of working continued until

August 2016, and the company grew in terms of income and profitability. Monthly board meeting minutes from December 2013 indicate that the directors agreed that directors' service agreements should be put in place – as well as a shareholders' agreement – and an external consultant was to be approached for advice on this and the execution of the agreements. It was noted as an action requirement for Ms Burnett. However, the decision to enter into directors' service agreements was not actioned until August 2016.

- 3.4 In June 2016, an external consultant was brought in to help with the plan for scaling up the business. As part of that plan, and to protect their investments and shareholdings, advice was given to the directors that they should expressly and formally become employees, and draw a salary. This was in order to ensure that their work for the Respondent would be properly reflected as a cost to the business, if it were the case that other investors became interested in investment in or purchase of the business. These DSAs were to be put in place, irrespective of whether the directors were actually "employees" in the legal sense before this. Thus, directors' service agreements were drawn up and signed by the directors with effect from 1 September 2016. Now, key terms and conditions were expressly set out. They were each to receive a salary of £75,000 per annum, and were no longer paid a dividend (possibly because the Respondent could not afford that in addition). They were expected to work 35 hours per week minimum, between 9am and 5.30pm on Mondays to Fridays, with 30 days holiday per annum, and they had a fixed and named place of work. They were each entitled to a six months notice period, and at termination of employment they were subject to restrictive covenants and confidentiality clauses. The Claimant's director's service agreement (no doubt the others as well) expressly provides that the date of continuous employment for legal purposes starts on 1 September 2016. In common with the other directors, the Claimant signed her director's service agreement. The minutes for the board meeting of 26 August 2016 state that it was confirmed that each director understood that the DSA related to their employment with the Respondent and not to their position as a shareholder. It is recorded that the consultant took the board through the DSA on a line by line basis, making amendments as necessary within the meeting. There was no dissent from the final draft and the individual contracts had been signed out by the respective directors and were included with these minutes for final individual review and sign off. The agreements allowed for future performance related pay and that consideration of future pension arrangements should be prioritised. It was further discussed and agreed that the directors would review the draft staff handbook to allow its early finalisation. The Respondent had at the time already two or three employees who assisted the directors.

- 3.5 I accept the Claimant's evidence that, so far as her role, duties and responsibilities were concerned, there was little change after 1 September 2016, as compared with what she had done before. She also worked much the same hours, before and after. She continued to work under the general direction of the board. As before, the Respondent provided her with the tools for her job, presumably her lap top computer and mobile phone, etc. She was required to market and sell the Respondent's products, and she could make no substitution for her services. In April 2014, the Claimant gave up her existing job to work exclusively for the Respondent and then continued to take general direction from the board.

The Law

4. The relevant statutory provisions are as follows:-
- 4.1 Section 94(1) of Employment Rights Act 1996 provides that an employee has the right not to be unfairly dismissed by his employer.
- 4.2 Section 95(1)(c) provides that an employee is dismissed by his employer if the employee terminates the contract under which he is employed (with or without notice) in circumstances in which he is entitled to terminate it without notice by reason of the employer's conduct. This is the constructive dismissal case, pursued by the Claimant in these proceedings.
- 4.3 Section 108(1) provides that section 94 does not apply to the dismissal of an employee unless he has been continuously employed for a period of not less than 2 years ending with the effective date of termination.
- 4.4 Section 230(1) provides that 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.
5. The starting point is the test for contract of service set out in the classic case of Ready Mixed Concrete (South East) Ltd v Minister of Pensions and National Insurance [1968] 2QB 497. There the judge held that a contract of service exists if these three conditions are fulfilled:-
- “i) The servant agrees that, in consideration of a wage or other remuneration, he will provide his own work and skill in performance of some service for his master.
- ii) He agrees, expressly or impliedly, that in the performance of that service he will be subjected to the other's control in a sufficient degree to make that other master.

- iii) The other provisions of the contract are consistent with it being a contract of service”

In some early cases, when control was the central feature of the contract of employment, tribunals held that a director or any other person who had a controlling interest in the company's shares could not be regarded as an employee of the company, at least for redundancy purposes. Other early cases, however, suggest that the real issue is whether the alleged contract of employment is a bona fide agreement between the company and the director, and the fact that the director is also a controlling shareholder is but one factor to be taken into account when determining that issue.

6. The case of Lee v Lee's Air Farming Limited [1961] AC12, PC, is a documented case of the one man company. The case established two propositions. First, that an individual who owns all the shares in, and is the sole director of, a company – and so has total dominion over it – can also be employed by that company under a contract of service. Second, on the control point, the company and the man who owns it are not the same person, and it is the company that exercises the relevant control. In Lee's case, the employer was the company and the employee was Mr Lee. It made no difference that Mr Lee in effect exercised the control by the company as the company's agent. The close identity that in reality existed between the company and Mr Lee did not prevent a contract for service being created.
7. In Secretary of State for Trade and Industry v Bottrill [1999] IRLR 326, CA, it was held that a person with a controlling shareholding can also be an employee for the purposes of making claims against the Secretary of State under the insolvency provisions of the Employment Rights Act 1996. Whether or not an employment relationship existed was to be decided by having regard to all the relevant facts. Where the person concerned has a controlling shareholding that was likely to be significant in all situations, and in some cases would prove to be decisive, but it was only one of the factors which were relevant and not determinative. The factors which the tribunal would be likely to consider included whether or not there was a genuine contract between the company and the shareholder; the circumstances in which the contract came into existence; and what the parties actually did in accordance with the contract.
8. The case law was then considered by the then President, Elias J, in Clark v Clark Construction Initiatives Limited [2008] IRLR 364, EAT. Guidance was given to tribunals in deciding whether the contract of employment of a majority shareholder should be given effect. (Of course, here, the Claimant is not majority shareholder, but she is a shareholder and therefore clearly has some control over the employees and the direction of the business, whether through the board of directors or otherwise.) That guidance given by the EAT was then modified slightly but largely approved by the Court of Appeal in the leading case of Secretary of State for Business Enterprise and Regulatory Reform v Neufeld [2009] IRLR 475, CA. This was an appeal in two joined cases, and it was held that

directors with 90% and 100% shareholdings respectively in their companies were employees on the facts. Rimer LJ gave the leading judgment. The guidelines, as modified, are as follows:-

- “1. There is no formal burden on the party denying employment status to prove that, and the employee will have to do more than simply provide documentation to satisfy the tribunal.
 2. The mere fact of a majority shareholding (or de facto control) does not in itself prevent a contract of employment arising.
 3. Similarly, entrepreneur status does not in itself prevent a contract of employment arising.
 4. If the parties conduct themselves according to the contract (eg as to hours and holidays), that is a strong pointer towards employment.
 5. Conversely, if their conduct is inconsistent with (or not governed by) the contract, that is a strong pointer against employment.
 6. The lack of a written contract may be an important consideration but if the parties’ conduct tends to show a true contract of employment the tribunal should not seize too readily on the absence of a written agreement to justify a rejection of the claim of employment status.
 7. The taking of loans from the company or the guaranteeing of its debts are not intrinsically inconsistent with employment.
 8. A majority shareholding and/or control will always be relevant and may be decisive, but that fact alone should not justify a finding of no employment.”
9. In the Neufeld case, it was held that in deciding whether a valid contract of employment was in existence, consideration would have to be given to the requisite conditions for the creation of such a contract and the court or tribunal would want to be satisfied that the contract meets them. In some cases, there will be a formal service agreement. Failing that, there may be a minute of a board meeting or a memorandum dealing with the matter. But in many cases involving small companies, with their control being in the hands of perhaps just one or two directors/shareholders, the handling of such matters may have been dealt with informally and it may be a difficult question as to whether or not the correct inference from the facts is that the putative employee was, as claimed, truly an employee. In particular, a director of a company is the holder of an office and will not, merely by virtue of such office, be an employee; a putative employee will have to prove more than his appointment as a director. It would be relevant to consider how he has been paid; whether he has been paid a salary, which points towards employment, or merely by way of director’s fees, which points away from it. In considering what the putative employee

was actually doing, it would also be relevant to consider whether he was acting merely in his capacity as a director of the company, or whether he was acting as an employee. Further, the Court of Appeal held this. The fact of the Claimant's shareholding and control of the company is not ordinarily relevant to the inquiry as to whether or not (there being no question of a sham) the claimed contract amounts to a contract of employment. 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 employment 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 things that the 'owner' of a business would 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 as an 'owner', which is inevitable in such a company. They do not show that the 'owner' cannot also be an employee. However, that is the case 'ordinarily'. 'Never say never' is a wise judicial maxim. Although the absence of a written agreement will obviously be an important consideration, if the parties' conduct under the claimed contract points convincingly to the conclusion that there was a true contract of employment, the tribunal should not seize too readily on the absence of a written agreement as justifying the rejection of the claims. A 'multi factorial' approach is thus well established and most cases will depend on their particular facts, with no one factor being a magic bullet. However, as is so often the case, the fact that all facts are prima facie equal does not stop particular emphasis being placed on one factor which may appear more equal than the others.

10. I was referred specifically by the Respondent to the case of Dugdale v DDE Law Limited, an un-reported decision of the EAT on 4 July 2017. Here, the Claimant was a solicitor in a small practice which was incorporated (for limited liability purposes) but run in practice similarly to a partnership. She was held not to be its employee. Remuneration was an important factor, but here payment by dividends/loans (with only a small element of director's remuneration for tax purposes) was held to point against employment status. EAT followed the case of Neufeld. This case has similar facts in some respects to the case before me, and I make further reference to the conclusions in Dugdale in the conclusions below.
11. The Claimant referred the case of Stack v Ajar-Tec Limited [2015] IRLR 474, CA. This is a case rather different on its facts from the case here. There was a written contract of employment, and the Tribunal (upheld by the Court of Appeal) implied into it a term enabling payment to the Claimant.

Conclusions

13. Having regard to my findings of relevant fact, applying the appropriate law, and taking into account the submissions of the parties, I have reached the following conclusions:-

- 13.1 Before 1 September 2016, the Claimant did not have a written contract of employment and neither did her fellow directors/shareholders. Further, there was no board minute or memorandum of understanding indicating the existence of such a contract. The directors had it in mind at some point they should become employees each with a director's service agreement. However, although they were taking remuneration from the business from April 2014, they were content not to go down that road, no doubt as there was not then the need as there was later to protect their investments. The lack of a written contract for the period that the Claimant contends that she was an employee (before 1 September 2016) is not of course conclusive if there are other factors that point strongly to a contract of employment existing. Directors can be employees as well and they are not mutually exclusive concepts. The fact that each of the directors had a degree of ownership and control did not negate the possibility that each of them had a contract of employment as well. However, here the directors clearly had in mind that directors' service agreements were desirable when the circumstances were right, and there is a strong indication of a conscious decision by them not to set up an employment relationship at the material time (between April 2014 and 1 September 2016).
- 13.2 The Claimant and the other directors were under the general control of the board. Such a situation can give rise to employee status, as indicated in the case law – Lee, Bottrill, Clark, etc. Here, however, before 1 September 2016 the directors had no fixed hours or holidays, or place of work, and within their specific areas of responsibility were largely self directing, and all (no doubt) working as hard as they could in order to build up this young business. The remuneration structure was also of importance. They were paid mainly by way of dividend, which points away from employment. Entitlement to dividend deriving from the shareholding is not dependent on the existence of a contract of employment. See Neufeld and Dugdale. The PAYE element of pay was a tax efficient device to make full use of the directors' personal allowances. It did not properly reflect a fair work/wage bargain, being greatly under the national minimum wage. Before 1 September 2016, any of the directors could in theory have disappeared on holiday for months at a time and they would still have been entitled to a dividend, which was the greater part of their remuneration. They would not in those circumstances have been entitled to salary as an employee, if absent without leave from work.

- 13.3 All that changed from 1 September 2016 with the signing of the directors' service agreements. Now the directors were all paid a salary, and no further dividend was drawn. The directors had minimum hours, a place of work, 30 days holiday, etc. They were also subject to restrictive covenants and confidentiality terms on the termination of their employment. As a director and as a shareholder and the holder of an office before 1 September 2016, the Claimant was not, by virtue of that office, necessarily an employee. It has to be established that what she did was not as a director and shareholder remunerated largely by dividends, but as an employee. However, the work done by the Claimant was equally consistent with that done by a director/shareholder of a start up business; see Neufeld.
- 13.4 The case of Dugdale has similarities with this case, on the facts, and in that case the Claimant was found not to be an employee. The following points are in common. The directors had no express contract of employment, and no consideration of employment status was made when the company was founded - that came later. The directors worked the hours that were required to build up the business and took holidays as and when they were able to do so, with the agreement of their fellow directors. For the most part, the directors were remunerated by payment of dividends (or a loan account reduced by declaration of dividend – Dugdale), and the only salary paid was to make full use of their personal allowances for tax purposes. It is not a normal feature of a contract of employment that payment is made in this way. The Claimant was a minority shareholder and she could be overruled by her fellow directors/shareholders. However, her fellow directors could have suspended her from involvement in the Respondent whether or not she was an employee. Thus, as in Dugdale, the right to control was not a point of any great significance. The case of Stack, relied upon by the Claimant, can be distinguished. There, there was a contract of employment in which a term entitling the employee to payment was to be implied. Here, we have no express contract of employment.
- 13.5 Thus, having regard to all the relevant factors I have to consider, and for the reasons set out above, I conclude that until she signed a director's service agreement on 1 September 2016, the Claimant was not an employee of the Respondent. She was a director and shareholder of the business, working for it in that capacity and remunerated as a shareholder and director. A contract of employment need not and cannot be implied in the circumstances.

Employment Judge G P Sigsworth

Date:23/11/2017.....

Sent to the parties on:

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For the Tribunal Office