EMPLOYMENT TRIBUNALS

Claimant: Mr C Brodie

Respondents: 1. Hermes Parcelnet Limited
2. Staffline Group plc
3. Winner Recruitment (Birmingham) Limited

HELD AT: Manchester **ON:** 21 June 2019

BEFORE: Employment Judge Batten (sitting alone)

REPRESENTATION:

For the Claimant: Ms J Connolly, Counsel
For the Respondents: R1: Ms J Hale, Solicitor
R2: Mr T Cross, consultant
R3: Ms A Del Priore, Counsel

RESERVED JUDGMENT
ON A PRELIMINARY HEARING

The judgment of the Tribunal is that:

The claimant was an employee of Arctics Limited so as to entitle him to the protection of the provisions of the Transfer of Undertakings (Protection of Employment) Regulations 2006 and to bring claims before the Tribunal which are dependent upon his status as an employee.

REASONS

1. This preliminary hearing was convened following a case management preliminary hearing on 19 March 2019 which decided to list the claim for preliminary hearing for the purpose of determining the following matters:

    1.1. Whether the claimant was at any material time an employee of Arctics Limited so as to entitle him to the protection of the provisions of the Transfer of Undertakings (Protection of Employment) Regulations 2006 ("TUPE") and to bring claims before the Tribunal which are dependent upon his status as an employee.

    1.2. The first and second respondents' applications for a deposit order in in light of the "fragmentation" issue as pleaded by the respondents.

    1.3. The claimant's application to amend the grounds of claim.

2. At the beginning of this hearing day, the Tribunal reviewed the significant amount of documentation that had been disclosed in relation to the fist issue above and the witness statements. It was agreed with the parties that there would, realistically, only be sufficient hearing time available to deal with the first issue, namely the question of the employment status of the claimant and the hearing therefore proceeded, by consent, to deal with that aspect only.

3. This Judgment is given with reasons because the evidence of the parties and submissions on the issue of the claimant's employment status were completed only at the very end of the hearing day. Consequently, there was no time left for the Tribunal to deliberate and arrive at a decision on the hearing day. Judgment was therefore reserved.

Evidence

4. An agreed Bundle was presented at the commencement of the hearing in accordance with the case management Orders. The second respondent produced a copy of a Share Buyback and Share Purchase Agreement relating to shares in Arctics Limited and Haywood Knight Associates Limited. In addition, the claimant produced copies of emails between the parties' representatives dated 22 April and 31 May 2019 regarding disclosure, which were said to be relevant to the applications for a deposit order. References to page numbers in these Reasons are references to the page numbers in the agreed Bundle.

5. The claimant gave oral evidence from a primary witness statement. The second respondent called Mr C McNaughton of Vista Employer Services Limited to give oral evidence. Each of these 2 witnesses were subject to cross-examination by the other parties. In addition, the first respondent tendered a witness statement from Mr Steven Byrne, its Head of Hub Sortation and Infrastructure, the second respondent tendered a brief witness statement from Ms Lauren Hook, a former employee of the second respondent, and the third respondent tendered a witness statement from one of its Directors, Mr D Oliver. These 3 witnesses did not give oral testimony and were not subject to cross examination.

Findings of fact

6. Having considered all the evidence, the Tribunal made the following findings of fact. Where a conflict of evidence arose, the Tribunal resolved the same on a balance of probabilities. The findings of fact relevant to the issues which have been determined are as follows.

7. The claimant was, from 21 February 2005, engaged in the business of Arctics Limited which traded as “Igloo” as a director of the company. He signed a contract of employment on 21 February 2005. The contract appears in the bundle from page 544 to 550. It provides for a salary of £145,000 and a car allowance of £18,000. The claimant was to work 8 hours per day, Monday to Friday to suit the needs of the business and to devote the whole of his energies and working hours to the business and such duties as consistent with his position. From 12 September 2005, the claimant became a statutory director and shareholder of the company as registered at Companies House to the extent of a 50% shareholding.

8. In or about 2006 - 2007, on advice from the company’s accountants, the claimant’s remuneration was varied so that he received a nominal salary from Igloo, which in 2018 amounted to £7,800, and he was remunerated largely through the payment of substantial dividends. The claimant later reduced his working time to 4 days per week by arrangement and agreement with his fellow director.

9. The first respondent is a consumer delivery company which collects and delivers parcels. Igloo contracted to supply staff to the first respondent to work in the first respondent’s operations at Warrington, Rugby and Liverpool.

10. The second and third respondents are suppliers of temporary and agency staff. They were also contracted to supply staff to the first respondent. The relevant contracts between the parties were renewed from time to time and on occasion amended.

11. Igloo’s contract with the first respondent became a significant part of the business of Igloo and the claimant was in overall charge of the running of

Igloo's contract with the first respondent. He was key to the business relationship with the first respondent and he had day-to-day responsibility for the contract, the provision of staff and any issues arising. The claimant attended at and worked at the first respondent's various sites from time to time. He did not work on any of Igloo's other contracts to any extent and the responsibility for Igloo's other contracts fell to the other director of Igloo.

12. On 4 January 2018, the first respondent sent a 'Notice of Termination' letter to Igloo, stating that the existing contract would end on 31 July 2018.

13. On 14 January 2018 the first respondent issued a 'Request for Proposal' for the supply of temporary workers, warehouse operatives and drivers. The first respondent invited its suppliers, including Igloo and the second and third respondents, to tender for the opportunity to continue to supply staff to the first respondent. The documentation suggested that TUPE would apply to affected employees.

14. The first respondent sought information from Igloo and other contractors on those employees who might be affected by a TUPE transfer arising from the tender process outcome. The claimant dealt with the tender process. In response to the request for information, the claimant wrote on behalf of Igloo to say that "*The staff who qualify under TUPE regulations in this situation will only include staff who are solely employed on the work covered by the contract*." (Bundle page 212). The first respondent also sought information on the "Dedicated Management Team" for each hub. In response the claimant confirmed the number to be zero (Bundle page 243). The claimant went on to say that, in the event that Igloo was unsuccessful in the tender, he intended to re-deploy the management staff onto other Igloo contracts and also said that none of his staff were contracted to work only at the first respondent's sites.

15. In April 2018, the first respondent announced that Igloo was not successful in the tender process whilst the second and third respondents were successful. The second and third respondents agreed that TUPE would apply to Igloo employees upon commencement of the new contracts. In addition, the first respondent decided to retain certain staff that had been supplied to it by Igloo. Briefing notes were drawn up for the transferring employees. Igloo also drew up a letter to inform its affected staff of the transfer of their employment.

16. On 14 June 2018, Igloo engaged a legal advisor, Ms Watson, who wrote to the first respondent about the employees that Igloo considered to be in scope to transfer to the first respondent.

17. On 26 June 2018, Ms Watson sent the second respondent details of those employees of Igloo which were located at Warrington and which Igloo considered to be in scope to transfer and she also sent the third

respondent details of those employees of Igloo which were located at Rugby and which Igloo considered to be in scope to transfer. Within the information provided, Igloo said that the claimant should be on the list of employees who were subject to a TUPE transfer to the respondents, because he was 100% dedicated to the management of the first respondent's account with Igloo.

18. On 9 July 2018, the second respondent issued a letter about "proposed measures" under TUPE. The claimant's name appeared on the list of potentially affected employees.

19. On 18 July 2018, a consultation meeting took place between the claimant and the second respondent at which the second respondent's legal adviser, Mr McNaughton questioned the claimant about Igloo and his work.

20. On 24 July 2018 the second respondent issued a second "measures" letter to Igloo, regarding the claimant. This included notice that the second respondent envisaged a review of the claimant's role as part of a re-organisation/redundancy and that consultation on such would commence post transfer.

21. On 25 July 2018, the second respondent emailed the claimant to state its revised position, namely that it considered that the claimant was not assigned to the group of employees eligible to transfer to the second respondent.

22. On or after 31 August 2018, the claimant left employment with Igloo because the work he had been undertaking was transferred to the respondents. The claimant entered into a settlement agreement with Arctics Limited on 5 September 2018 which included a provision that the claimant resigned as a director of Arctics on the same day. The claimant also entered into a share buyback and share purchase agreement with Arctics Limited as part of his exit package.

The applicable law

23. A concise statement of the applicable law is as follows.

24. Section 230(1) ERA defines an 'employee' as:

"an individual who has entered into or works under … a contract of employment".

25. Section 230(2) ERA provides that a 'contract of employment' means:

"a contract of service or apprenticeship, whether express or implied, and (if it is express) whether oral or in writing".

26. TUPE Regulation 2(1) defines an 'employee' as:

"any individual who works for another person whether under a contract of service or apprenticeship or otherwise but does not include anyone who provides services under a contract for services".

27. The definitions of employee under the ERA and the TUPE Regulations are not the same. However, the claimant's claims of automatic unfair dismissal under TUPE, ordinary unfair dismissal and wrongful dismissal all require the claimant to satisfy the test under the ERA.

28. In the case of O'Kelly & others v Trusthouse Forte plc [1983] ICR 728 CA Sir John Donaldson confirmed that, in approaching the question of whether a claimant is an employee, a Tribunal must "consider all aspects of the relationship, no single factor being in itself decisive and each of which may vary in weight and direction, and having given such balance to the factors as seems appropriate, to determine whether the person was carrying on business on his own account".

29. The Tribunal must therefore consider all relevant factors in the relationship between the parties, including the degree of control exercised by the employer over the claimant (for example: whether the claimant was under a duty to obey orders; who had control over working hours; supervision; the mode of working; and who provided any equipment). However, the Tribunal should take note of the fact that many employees, by virtue of their skill and expertise, may be subject to very little control. The Tribunal must also take account of organisational matters, such as the degree to which an individual is integrated into the employer's organisation, whether there is an existing disciplinary procedure which is applicable to the individual and whether the individual is included in any schemes such as for occupational benefits. The Tribunal must also have regard to the economic reality of the relationship between the parties and whether the claimant can be said to be in business on his own account or whether he worked for another who takes the ultimate risk of loss or profit.

30. Other factors to be considered by the Tribunal include: whether there was a requirement for personal performance or whether the claimant could send a substitute or sub-contract the work; whether there was mutuality of obligation between the parties such as an obligation on the employer to provide work and on the employee to do it; and the Tribunal must also consider whether there were any other factors consistent with the existence of an employment relationship.

31. The Tribunal considered a number of cases to which it was referred by the parties in submissions. The cases were:

Secretary of State for Business, Enterprise and Regulatory Reform –v- Neufeld and Howe [2009] ICR 1183

Department for Employment and Learning v Morgan [2016] IRLR 350

Dugdale v DDE Law Limited UKEAT/0169/16

32. The Tribunal took those cases as guidance and not in substitution for the provisions of the relevant statutes.

Submissions

33. The representatives of the respondents made a number of detailed submissions which the Tribunal has considered with care but do not rehearse in full here. In essence it was asserted by the first respondent's Solicitor that the contract of employment was a sham and that in practice, the claimant worked under a contract for services, choosing how he was paid and without control being exercised by Igloo over him. The representative for the second respondent asserted that the contract of employment should be ignored because the claimant had written it himself, that his role was in practice dictated by him and not to him by Igloo because the claimant chose to work when and where he liked and the fact that he was remunerated mainly through dividends was significant because it meant that the claimant was paid out of the profits of the company. Counsel for the third respondent submitted that the Tribunal should look at the reality of the claimant's working arrangements which it was submitted suggested that the claimant was in business on his own account and pointed to the fact that his earnings as shown on his p60s suggested he was not in receipt of the national minimum wage for the hours he worked.

34. Counsel for the claimant also made a number of detailed submissions which the Tribunal has considered with care but do not rehearse in full here. In essence it was asserted that there was ample evidence to conclude that the claimant was an employee and that the allusions to illegality by the respondents should be dismissed, that personal service and mutuality of obligation had not been seriously disputed and that the only dispute was about control and the way the claimant was paid which was not conclusive, given the seniority of the claimant, the nature and importance of the work he undertook and the requirements of the client, the first respondent which he attended to at all times.

Application of facts and law (including where appropriate any additional findings of fact)

35. The Tribunal has applied its relevant findings of fact and the applicable law to determine the issues in the following way.

36. The question of employee status is a question of fact for the Tribunal. In this case, from the outset, the claimant was employed pursuant to a written contract of employment entered into in 2005. He became a director and shareholder of Arctics Limited thereafter. The Tribunal considered that the fact that the claimant wrote the contract of employment, as he did for all employees of the company, is not unusual for a very senior employee to do as part of their duties. Whilst the respondents sought to suggest that the contract was a sham and not

reflective of the arrangements in practice by 2018, the Tribunal did not agree. The contract had been validly entered into and later varied, on advice of the accountants such that the claimant's salary had been reduced and replaces by dividends dependent on the company's results. Much of his remuneration was therefore not guaranteed in the way that a salary would be and was more akin to a bonus. The claimant agreed to the change many years ago and the Tribunal did not consider the revised method of remuneration to be fatal to the claimant's employment status.

37. The Tribunal considered that the claimant was required to provide personal service to Igloo and that there was mutuality of obligation. It was not suggested otherwise by the respondents and it is difficult to imagine how any form of substitution could work in relation to such a senior position. In practice, the claimant was key to the contract with the first respondent and he had full responsibility for it on a day-to-day basis. He could not have neglected his duties for any period of time nor could he have handed his duties over to another with any ease. He was the first respondent's key contact and critical to the ongoing business relationship.

38. On the question of control, the Tribunal had regard to the guidance in Neufeld. The claimant was a 50% shareholder, previously a 30% shareholder, and so had not at any time been a controlling shareholder as such. The fact that the claimant may have founded the business and built it up does not negate employee status. In practice, the claimant had overall control of the way Igloo performed its contract with the first respondent. However, the Tribunal considered that the degree of personal control exercised by the claimant was a reflection of the claimant's seniority within Igloo. The Tribunal accepted the submissions of Counsel for the claimant, that the fact that the claimant had to co-operate with his fellow director was important and meant that he was effectively under the control of the company. Whilst on the face of it, the claimant exercised a degree of autonomy over how he worked day-to-day, he could not neglect his duties nor act without regard for the business and interests of Igloo.

39. In Neufeld, the Court of Appeal held that there is no reason in principal why someone who is a shareholder and director of a company cannot also be an employee of the company under a contract of employment. The control condition of a contract of employment can still be satisfied, as the Tribunal considered it to be in the claimant's case.

40. The Tribunal also noted the circumstances in the case of Morgan that was cited and which followed Neufeld. The Tribunal considered that case to be on similar facts to this case, in that Mr Morgan was a 50% shareholder in receipt of a low salary and remunerated largely through dividends. He had been employed under a written contract of employment and the dividends were held to be emoluments for the services rendered by Mr Morgan to the company, which should be treated as salary and as an

alternative way of receiving remuneration for services rendered. The Tribunal considered that to be the case also with the claimant and Igloo.

41. In all the circumstances, having regard to the contractual documentation between the parties and between the claimant and Igloo, the manner in which the claimant worked for Igloo and in relation to the contract with the first respondent, the Tribunal considered that the claimant had been employed by Igloo under a written contract of employment from the outset and that, on balance, nothing arose after 2005 or otherwise to change the claimant's position as an employee. The claimant worked to the contract and was integrated into Igloo's organisation at all times, answerable to the Board and responsible to it. In those circumstances, the Tribunal concluded that the claimant could not therefore be described in any sense as independent or self-employed or in business on his own account.

42. For all the above reasons the Tribunal concludes that the claimant was an employee of Igloo. He is therefore entitled to the protection of the provisions of the Transfer of Undertakings (Protection of Employment) Regulations 2006 and to bring claims before the Tribunal which are dependent upon his status as an employee.

43. The Tribunal noted that it is the respondents' case that the new contracts with the first respondent meant a fragmentation of the previous work which was split between 3 new providers and therefore a fragmentation of the work which the claimant had undertaken. That assertion and any effect on the claimant's position and claims will be considered at a future hearing.

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Employment Judge Batten
Dated: 22 October 2019

JUDGMENT SENT TO THE PARTIES ON:

24 October 2019

FOR THE TRIBUNAL OFFICE