



THE EMPLOYMENT TRIBUNAL

Claimant: Ms Fratrikova

Respondent: Secretary of State for Business Energy and Industrial Strategy

Heard at: London South Employment Tribunal (video hearing)

On: 30 November 2022

Before: Employment Judge Robinson

Representation

Claimant: In person

Respondent: Mr Soni (Solicitor)

RESERVED JUDGMENT

The judgment of the Tribunal is that the Claimant was not an employee and her claims for redundancy pay, holiday pay, arrears of pay and notice pay are dismissed.

REASONS

Introduction

1. The Claimant, Ms Fratrikova, set up Dankayo Limited (“the Company”) on 5 December 2018. On 1 May 2021 the company was put into liquidation. The Claimant claims that she was an employee of the Company and is therefore entitled to various payments from the National Insurance Fund.
2. The Claimant was representing herself having previously received advice on her claim from Redundancy Claims UK (“RCUK”). The Respondent was represented by Mr Soni, Solicitor.

Claims and issues

3. The Claimant has brought a claim for:
 - a. Redundancy pay

- b. Holiday pay
 - c. Arrears of pay
 - d. Notice pay
4. The parties agreed that an issue to be determined by the Tribunal before calculating the payments being claimed, was whether the Claimant was an employee of the Company or not.
 5. ACAS early conciliation started on 7 February and ended on 9 February 2022. The claim form was presented on 11 April 2022. The response form was received on 17 June 2022.

Procedure, documents and evidence heard

6. There was an agreed bundle of 139 pages, plus a witness statement from the Claimant.
7. During the hearing it became clear that the Claimant had pay slips that were not in the bundle. The Claimant emailed them to the Tribunal and the Respondent during the hearing and I accepted them into the bundle.
8. I have carefully considered the documentary evidence provided, together with the parties' oral evidence and closing submissions.

The Facts that the Tribunal found

9. I have made the following findings of fact on the balance of probabilities having heard the evidence and considered the documents. These findings of fact are limited to those that are relevant to the issues listed above, and necessary to explain the decision reached.

The nature of the relationship between the Claimant and the Company

10. The Claimant contacted Hays Specialist Recruitment Limited ("Hays") with the aim of carrying out Executive Assistant consultancy work. Hays advised the Claimant that the only way for her to carry out work for them was to set herself up as a limited company. The Company was therefore incorporated on 18 December 2018, with the Claimant as the sole Director and shareholder. Nobody else was involved in the Company, although the Claimant used an accountant to manage her finances.
11. The Claimant entered into a document headed "*Terms of Assignment of Consultants via a Limited Company Contractor and Self Billing Agreement*". This essentially set out the terms of service that the Company would provide for Hays. It was signed by the Claimant as Director of the Company.
12. The Claimant did not provide any evidence that she intended to grow the Company or take on staff; it was purely a tax arrangement to allow her to carry out work for Hays.

13. The actual work of the Company was carried out by nobody but the Claimant.
14. The working arrangements were that the Company was paid a day rate of £230 – a weekly amount of £1,150.
15. The pay slips that the Company provided to the Claimant show that the Claimant was paying herself a salary of £719 per month. Multiplying this by 12 and then dividing it by 52 gives a weekly amount of £165.92. This was below the minimum wage and attracted no tax or National Insurance contributions. The remaining money that the Company received for its work was paid to the Claimant as a dividend.
16. In other words, the Company received a weekly amount of £1,150, which was then transferred to the Claimant in two separate amounts: £165.92 as a salary and £984.08 as dividends.
17. The Claimant did not have any written terms and conditions of employment with the Company because she did not think it was necessary given that nobody else was involved in the Company. The Claimant view was that there was no difference between her and the Company; it was just a bureaucratic arrangement so that she could take on work via Hays.
18. The Company did not make any pension contributions for the Claimant as she had opted out.
19. The Claimant gave evidence that she took time off when she liked, but usually made up the time in evenings or weekends. The result of that arrangement was that the Claimant asserted that she had never taken annual leave.
20. Due to the Covid-19 economic downturn, and to growing industry aversion to people operating outside of IR-35, the Company went into liquidation on 1 May 2021. However, the Claimant had already performed her last day of work in December and received her last payment on 31 December 2020.
21. The Claimant appointed RCUK to assist her in submitting a claim to the Respondent under sections 166 and 182 of the Employment Rights Act 1996 (“ERA”).
22. On 24 March 2022, the Claimant was informed by RCUK that the RPS had rejected the claim because they did not consider that she was an “employee” as defined under the ERA.

The Law

23. Section 166 of the ERA provides that
24. *“(1) Where an employee claims that his employer is liable to pay him an employer’s payment and either...

(b) that the employer is insolvent and the whole or part of the payment remains unpaid, the employee may apply to the Secretary of State for a*

payment under this section.

(2) In this Part “employer’s payment” in relation to an employee, means-

(a) a redundancy payment which his employer is liable to pay to him under this Part.”.

25. Section 182 of the ERA provides that

“If, on an application made to him in writing by an employee, the Secretary of State is satisfied that-

(a) the employee’s employer has become insolvent,

(b) the employee’s employment has been terminated, and

(c) on the appropriate date the employee was entitled to be paid the whole or part of any debt to which this Part applies,

the Secretary of State shall, subject to section 186, pay the Employee out of the National Insurance Fund the amount to which, in the opinion of the Secretary of State, the employee is entitled in respect of the debt.”

26. Section 184 of the ERA provides that the debts to which this Part of ERA applies are-

(a) arrears of pay;

(b) notice pay;

(c) holiday pay.

27. Section 230 of the ERA provides interpretation provisions:

(1) ““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

...

(4) In this Act “employer”, in relation to an employee or a worker, means the person by whom the employee or worker is (or where the employment has ceased, was) employed.

(5) In this Act “employment”–

(a) in relation to an employee, means (except for the purposes of section 171) employment under a contract of employment.”

28. Sections 170 and 188 of the ERA give the Employment Tribunal the right to determine any question of liability regarding the payments.

The Tribunal's conclusions

29. Having found the facts as set out above the Tribunal has come to the following conclusions.
30. The starting point in assessing whether there a contract of employment is the decision in Ready Mixed Concrete (South East) Ltd v Minister of Pensions and National Insurance [1968] 2 QB 497, (“Ready Mixed Concrete”) in which the Court set out a threefold test:
- a. there must be mutuality of obligation whereby an individual agrees to provide their own work and skill in exchange for remuneration.
 - b. the individual must have agreed expressly or impliedly to be subject to a sufficient degree of control for the relationship to be one of master and servant.
 - c. the other terms of the contract are consistent with it being a contract of employment.
31. In relation to (a) and (b), it is obviously difficult to assess the question of ‘mutual obligation’ and a relationship of ‘control between master and servant’, when employer and employee are one and the same person, with nobody else involved, as in the case of the Claimant.
32. It seems to me that the artificiality of the arrangement that the Claimant has set up with the Company means that parts (a) and (b) of the threefold test become harder to apply to any great effect in these circumstances. That means that there is therefore a need to rely slightly more on (c); the overall arrangements of the implied oral contract and whether it points to an employer-employee relationship.
33. Although the Court in Ready Mixed Concrete did point out that the question of ‘control’ is not a determining factor, it nevertheless makes up one part of the threefold test and needs to be weighed in the balance.
34. That issue was addressed in the case of Secretary of State for Business Enterprise and Regulatory Reform v Neufeld and Howe [2009] EWCA Civ 280 (“Neufled”) where the Court of Appeal considered two separate cases involving directors of companies who also held a controlling shareholding. In both cases the directors were seeking payments from the Secretary of State under the ERA when their businesses went into liquidation. The Court of Appeal held that there was no reason in principle why someone whose shareholding in the company gives him control (even total control) cannot be an employee. In arriving at its decision the Court of Appeal reviewed a number of earlier authorities on the question of whether or not a controlling shareholder and director (or indeed a sole shareholder and director) in a company could also be an employee.
35. At paragraphs 85 and 86 of the Neufeld decision the Court of Appeal further addressed the issue of identifying whether or not a contract of employment was in place as follows:

36. *“85. In deciding whether a valid contract of employment was in existence, consideration will have to be given to the requisite conditions for the creation of such a contract and the court or tribunal will want to be satisfied that the contract meets them. In Lee's case the position was ostensibly clear on the documents, with the only contentious issue being in relation to the control condition of a contract of employment. 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 director/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: the putative employee will have to prove more than his appointment as a director. It will be relevant to consider how he has been paid. Has he 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 will 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.”*

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.”

37. I note that the Respondent is not alleging that this was a sham contract so I discard that possibility. The key question is whether the arrangements that the Claimant had made in relation to her company meant that it was a genuine contract of employment. The Claimant concedes that there was no written contract of employment so, for the purposes of section 230(2) of ERA, I have to consider whether there was an implied contract of employment. To decide that question I have weighed the following matters in the balance.

38. Firstly, it is not in dispute between the parties that the Claimant carried out the work personally. Indeed the Claimant and the Company were just one person, so the work that the Company was contracted to do could only be done, and was only done, by the Claimant.
39. Following the Neufeld decision, I note that being a director of a company does not automatically make that person an employee; there will need to be something more e.g. how they are paid. In this case the Claimant paid herself a below minimum wage salary and took the rest as dividends. This was for permissible tax efficiency reasons. However, it is a fact that 14% (£165.92 of £1,150) of what the Company made was paid in a below minimum wage salary and the rest (86%) was paid as a dividend.
40. On the question of control I have again considered the guidance in Neufeld. The Claimant created the Company because she was told that that was the only way of carrying out work via Hays. She was the sole shareholder and director for the lifetime of the Company. As the Court of Appeal acknowledged in paragraph 85 of the Neufeld decision, it is often conceptually difficult to answer the question of whether the Company controlled the employee, particularly in cases like the Claimant's, because Company and employee are one and the same person. I conclude that on the facts of the Claimant's case, there was no genuine element of control.
41. In reaching that decision I have particular regard to the Claimant being in control of her own arrangements and not "*subject to the other's control in a sufficient degree to make the other master*", which is a key element of a contract of employment as set out in Ready Mixed Concrete. For example, the Claimant kept no record of her annual leave and just took time off when she wanted, catching up on the work at times convenient to her. That is not an arrangement that is open to most employees.
42. I acknowledge that control is but one element of the requirements for a contract of employment (and not a determinative one) but it is nevertheless an important component.
43. I also note that the Claimant provided no evidence that she intended to grow the Company in any way and it was therefore clearly not a business that would ever have gone on to employ or engage others. As I have said, it was solely a vehicle through which the Claimant could receive payment from Hays.
44. Although the remuneration arrangements that the Claimant set up with the Company were legal, they provide a tax benefit that is not afforded to most employees. The Claimant sought to limit her tax and national insurance (in this case, to nil) by paying herself a salary below minimum wage but then now seeks to avail herself of the National Insurance Fund, one of the functions of which is to protect employees whose employer no longer exists.
45. Finally, I have considered whether there are other factors pointing towards or away from employment. The absence of a written contract, plus the absence of any written evidence of element of employment that I might

expect to see (e.g. holidays taken, notice being given), whilst not determinative, tend to point away from employment.

46. I must also consider the intention of the parties. In this case, that just involves considering the intention of the Claimant given she is the purported employer and employee. It is clear from her evidence that she established a Company on the advice of Hays as a tax efficient means of being paid. At no point did she consider that she was 'employing' herself; she merely considered that she was receiving her payments via a Company. The Claimant was very candid in her evidence in admitting that she only realised she might have a claim for payments from the National Insurance Fund when she contacted RCUK. RCUK essentially advised her to retrospectively assert that she worked 48 hours a week and never took annual leave, in order to maximise her claim. I find this to be also persuasive in the facts of this case pointing away from a genuine contract of employment.
47. My conclusion is therefore that there was no contract of employment in place between the Company and the Claimant. She is not entitled to claim redundancy pay, holiday pay, arrears of pay or notice pay and those claims are therefore dismissed.

Employment Judge Robinson

Date: 8 December 2022