



EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4102098/2022 (V)

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Held via Cloud Video Platform on 23 June 2022

Employment Judge M Sangster

10 **Mr S Walker**

**Claimant
Represented by
Mr P Harthan
Advocate**

15 **Secretary of State for Business, Energy &
Industrial Strategy**

**Respondent
Represented by
Mr P Soni
Solicitor**

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JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The judgment of the Employment Tribunal is that the Tribunal does not have jurisdiction to consider the claimant's complaints under sections 166 and 182 of the
25 Employment Rights Act 1996. Those complaints are accordingly dismissed.

REASONS

Introduction

1. This was a final hearing which took place remotely. This was not objected to
by the parties. The form of remote hearing was video. A face to face hearing
30 was not held because it was not practicable due to the Covid-19 pandemic
and all issues could be determined in a remote hearing.
2. The claimant presented a claim in which he sought a redundancy payment,
holiday pay and arrears of pay from the National Insurance Fund under
sections 166 and/or 182 of the Employment Rights Act 1996 (**ERA**). The
35 respondent denied that the claimant was entitled to any sums, on the basis
that he was not an employee at the relevant times.

3. The claimant gave evidence on his own behalf. Evidence in chief was given by reference to a written witness statement, which was taken as read. The respondent did not lead any evidence.

4. A joint set of productions was lodged, extending to 198 pages.

5 **Issues to be Determined**

5. Was the claimant an employee at the relevant time?

6. If so, is he entitled to any sums under s166 or 182 ERA?

7. If so, what sums is he entitled to?

Findings in Fact

10 8. The Tribunal found the following facts, relevant to the issues to be determined, to be admitted or proven.

9. Until June/July 2013, the claimant worked as an employee for an unrelated company.

15 10. Apex Access & Inspection Limited (**Apex**) was incorporated on 19 August 2013. The claimant was appointed as the sole director of Apex on 19 August 2013. He was also the sole/100% shareholder of Apex. The work undertaken by Apex was the inspection of structures in the oil and gas industry, mostly offshore.

20 11. The claimant took advice from an accountant in relation to the incorporation of Apex and how it should be structured. He was advised that he should pay himself a nominal monthly sum, through PAYE, under the tax and national insurance thresholds and to take payment beyond that as a dividend. He agreed to do so and the accountant dealt with all the arrangements to put that in place. The accountant set the figure to be taken via PAYE.

25 12. The claimant did not enter into an express contract of employment, written or oral, with the respondent in August 2013, or at any stage thereafter. The claimant did not apply his mind to the nature of the arrangement, or to issues

such as salary, national minimum wage, sick pay and holiday entitlement in the period from August 2013 to April 2021.

13. The claimant carried out the inspection of the structures, with his pattern of work being dictated by the industry standards. Accordingly, he initially worked on a two weeks on/two weeks off basis. When offshore he worked 12 hour shifts, in accordance with the standard industry practice. Around 2015, based on client requirements, the claimant's working pattern changed to three weeks on/three weeks off. While initially Apex worked for numerous clients, they latterly focused on a few key clients.
14. The claimant did not take holidays, or see himself as being entitled to do so, in addition to his onshore time. He was only unable to work due to illness on one occasion, in April 2020, when he contracted Covid-19 and was sent off the rigg by the client. The client however paid Apex in accordance with the contract and there was no change to the sums received by the claimant from Apex.
15. The claimant received the following sums per month via PAYE:
- a. £691.67 per month in the tax year 2014/15;
 - b. £880 per month in the tax year 2015/16;
 - c. £915 per month in the tax year 2016/17;
 - d. £680 per month in the tax year 2017/18;
 - e. £702 per month in the tax year 2018/19;
 - f. £719 per month in the tax year 2019/20; and
 - g. £732 per month in the tax year 2020/21.
16. Given the sums paid to the claimant via PAYE, the claimant did not pay any national insurance or income tax on them. He understood that the sums to be paid via PAYE were set at the level they were each year, by his accountant, to ensure that this was the case.

17. The claimant withdrew funds from the business during the course of each year. Those sums were deemed to be loans and were set off against the dividend payable to the claimant, which was determined at the end of each financial year. In the period from 1 September 2019 to 31 August 2020, the claimant received the sum of £104,248 in the form of a dividend payment from Apex. No evidence was presented in relation to the level of dividend payments for other years. The evidence was simply that dividends, of differing amounts, were paid to the claimant each year, in addition to the PAYE income the claimant received. The PAYE income being a small proportion of the claimant's income. The amount of the dividend payable in each year was determined by the profits of the company and set following discussion between the claimant and the accountant around the time of Apex's financial year end annually.
18. The claimant remained the sole director and shareholder of Apex from August 2013 to April 2021. For a short period from 2017 to 2018 Apex employed a secretary, but otherwise no one else worked with or for Apex.
19. Apex's business was impacted by the changes to IR35 Intermediaries legislation. Apex ceased trading on 5 April 2021. The claimant received no sums from the company following that date and did not undertake any further work for Apex.
20. The claimant commenced employment with a CAN Offshore Limited, formerly a key client of Apex, on 6 April 2021.
21. The claimant sought advice from an insolvency practitioner thereafter and Apex entered creditors voluntary liquidation on 22 October 2021.
22. On 6 December 2021, the claimant submitted a claim to the Insolvency Service, for redundancy pay, holiday pay and arrears of wages. All sums sought were on the basis of what he would have earned, had he been paid the national minimum wage for each hour worked, rather than what he received via PAYE.

23. Early conciliation took place from 15-17 March 2022 and the claim form was lodged on 13 April 2022.

Submissions

24. Mr Harthan, for the claimant, gave a brief submission, referring the Tribunal to the multiple test set out in ***Ready Mixed Concrete (South East) Ltd v Minister of Pensions and National Insurance***, as well as the case of ***Secretary of State for Business, Enterprise & Regulatory Reform v Neufeld & another*** [2009] IRLR 475 – particularly paragraphs 78 and 88-90. He submitted that, on the totality of the factual circumstances, it was clear that the relationship was of employer and employee. The claimant was accordingly entitled to the sums claimed.

25. Mr Soni, for the respondent, also gave a brief submission. He adopted the submissions set out in the Grounds of Resistance attached to the respondent's ET3 form. He submitted that there was very limited evidence from which the Tribunal could draw conclusions as to the terms of the purported implied contract of employment. Particular reference was made to the case of ***Dugdale v DDE Law Limited*** UAEAT/0169/16, given the similarity in the factual circumstances. In all the circumstances the Tribunal should concluded that the claimant was not an employee of Apex.

Relevant Law

26. Section 230(1) ERA defines 'employee' as '*an individual who has entered into or works under (or, where the employment has ceased, worked under) a contract of employment.*' Section 230(2) 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.*'

27. The issue of the status of a person as employee, worker or neither of those terms has been the subject of much case law. The essential test for employment status was set out in ***Ready Mixed Concrete (South East) Ltd v Minister of Pensions and National Insurance*** [1968] All ER 433, which

referred to the need for personal service, control and other factors consistent with a contract of service.

28. Guidance on determining whether an individual has employee status was provided in **Hall (Inspector of Taxes) v Lorimer** 1994 ICR 218, CA, where the Court of Appeal upheld the decision of Mr Justice Mummery in the High Court (reported at 1992 ICR 739), who had said:

'this is not a mechanical exercise of running through items on a checklist to see whether they are present in, or absent from, a given situation. The object of the exercise is to paint a picture from the accumulation of detail. The overall effect can only be appreciated by standing back from the detailed picture which has been painted, by viewing it from a distance and by making an informed, considered, qualitative appreciation of the whole. It is a matter of evaluation of the overall effect of the detail... Not all details are of equal weight or importance in any given situation.'

29. It is established law that a company may enter into a contract of employment with a person who is the principal shareholder and in sole control of the company (**Lee v Lee's Air Farming Limited** [1961] AC 12). In **Secretary of State for Business, Enterprise & Regulatory Reform v Neufeld & another** [2009] IRLR 475, Rimer LJ stated, at paragraph 80

'There is no reason in principle why someone who is a shareholder and director of a company cannot also be an employee of the company under a contract of employment. There is also no reason in principle why someone whose shareholding in the company gives him control of it – even total control (as in Lee's case) – cannot be an employee. In short, a person whose economic interest in a company and its business means that he is in practice properly to be regarded as their 'owner' can also be an employee of the company. It will, in particular, be no answer to his claim to be such an employee to argue that: (i) the extent of his control of the company means that the control condition of a contract of employment cannot be satisfied; or (ii) that the practical control he has over his own destiny – including that he

cannot be dismissed from his employment except with his consent – has the effect in law that he cannot be an employee at all. Point (i) is answered by Lee's case, which decided that the relevant control is in the company; point (ii) is answered by this court's rejection in [Secretary of State for Trade & Industry v] Bottrill [[1999] IRLR 326] of the reasoning in Buchan [v Secretary of State for Employment [1997] IRLR 80].'

30. It does not, however, follow that such a contract necessarily existed. Whether there was a contract between a shareholder/director and the company, and if so whether it was a contract of employment, is to be decided by the application of ordinary principles. Thus, in **Neufeld**, Rimer LJ said at para 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."

31. At paragraph 89 of *Neufeld*, Rimer LJ considered cases where there was no written agreement. He stated *'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,*
5 *we would not wish tribunals to seize too readily on the absence of a written agreement as justifying the rejection of the claim'.*

Observations on Evidence

10 32. The Tribunal heard evidence from the claimant only. The Tribunal noted that the claimant's evidence stated in his written witness statement differed, in a number of respects, to his evidence in response to cross examination questions. For example:

15 a. In relation to the issue of a written contract, in his witness statement he indicated that he did not feel it was a necessary requirement for the company to issue him with a written contract of employment in 2013, as he was the only employee of the business at that time. In his evidence under cross examination however he stated that he hadn't applied his
20 mind to his status or terms and conditions in 2013.

b. In his witness statement he indicated that his terms with Apex provided for 28 days holidays, to be taken at times when he would otherwise be offshore. He set out the procedure adopted when he took holidays, namely
25 that Apex would inform the client that the claimant was unable to provide services during the required leave period and the next tranche of time offshore would commence thereafter. In cross examination however he indicated he did not 'get holidays'. He stated he did not take any holidays and would never seek to do so when scheduled to go offshore, or the
30 client would not work with Apex again.

c. He struggled, when asked under cross examination, to explain a particular paragraph of his statement, in relation to rolling back payments for

national minimum wage purposes, stating that his representative would be able to explain the concept better.

- 5 33. In light of this, where there was a conflict, the Tribunal preferred the claimant's evidence given in response to cross examination questions.

Discussion & Decision

34. Determination of a person's status is a question of fact for the Tribunal, to be ascertained by examining the particular circumstances of each case.
- 10 35. It was accepted that there was no express contract of employment between the parties, whether written or oral. The claimant's position was that there was an implied contract of employment. The Tribunal was mindful of the guidance given at paragraph 89 of *Neufeld*. It noted that the absence of an agreement was an important consideration and considered whether the parties conduct under the claimed contract pointed convincingly to the conclusion that there was a true contract of employment. The Tribunal concluded that evidence presented of the parties' conduct did not point convincingly to such a conclusion, for the following reasons:
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- 20 a. The manner in which the claimant was remunerated pointed away from an employment relationship. While the claimant received regular payments via PAYE, this was a device to use up the claimant's personal allowances during each tax year. The sums paid via PAYE were not set by reference to the hours worked by the claimant or the national minimum wage, but by certain tax thresholds. The sums paid via PAYE were a small proportion of the claimant's income from Apex. The bulk of the claimant's income came from regular loans, of variable amounts, taken from the company throughout each financial year. Those loans were converted to dividends at the end of each financial year, if the level of profit of the company allowed for this. The payment of the dividend to the claimant derived from his shareholding and was not dependent on the existence of a contract of employment. The amount of the dividend varied annually and
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was based on the profitability of the company. This arrangement was not consistent with the claimant working under a contract of employment.

5 b. While the claimant worked regular shifts/hours, this was dictated by the industry he worked in, rather than Apex. No further factors were established in evidence which pointed to an implied contract of employment.

10 36. Adopting the approach expressed by Mummery J in *Hall*, the Tribunal concluded, based on the evidence presented, that the reality of the relationship between the parties was that the claimant was not an employee of the respondent, as defined in section 230(1) ERA, from August 2013 onwards. Further, there was no evidence to suggest that there was any variation of the nature of the relationship between the claimant and Apex between 15 August 2013 and April 2021.

37. Accordingly, the Tribunal does not have jurisdiction to consider the claimant's complaints under section 166 and section 182 ERA. Those complaints are accordingly dismissed.

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Employment Judge: Mel Sangster
Date of Judgment: 04 July 2022
Entered in register: 05 July 2022
and copied to parties

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