



## EMPLOYMENT TRIBUNALS

**Claimants:** Mr K Tomlinson  
**Respondents:** R W Taylor Joinery Limited

## AT A PRELIMINARY HEARING

**Heard:** At Nottingham, in public  
**On:** 20 November 2023  
**Before:** Employment Judge R Clark (Sitting Alone)

### Appearances

For the Claimant: Mr Tomlinson in person  
For the Respondent: Mr Taylor, Director

## JUDGMENT

The claimant was an employee of the respondent.

## REASONS

### 1. Introduction

1.1. This is a claim seeking a statutory redundancy payment, compensation for accrued but untaken annual leave and damages for breach of contract in respect of notice pay.

1.2. This is a public preliminary hearing to determine the legal status of the economic relationship between the parties.

## **2. The issues**

2.1. Although it has been set down to determine only whether the claimant was an employee, the claim in respect of holiday pay requires only that Mr Tomlinson was a worker, as defined in Regulation 2 of the Working Time Regulations 1998.

## **3. Preliminary Matters**

3.1. I reserved judgment for practical reasons. Mr Taylor's health is such that I did not want to require him to remain in the building longer than necessary. I was also aware there are other issues between the parties in respect of the winding up of this company and a request for written reasons was likely in any event.

## **4. Evidence**

4.1. For the claimant I heard from Mr Tomlinson himself. He also called Mr J Stevenson (Jnr) who gave limited hearsay evidence on two discrete matters in dispute. It was hearsay in that almost all of what he could say was second hand from his father, also John Stevenson (Snr). Mr Stevenson Jnr contacted the tribunal after the hearing to explain that the witness statement he affirmed to as his evidence was in fact one prepared by his father, but was identical to his statement. He accepted that was wrong but maintained the answers he otherwise gave were correct. I do not need to consider this situation further beyond the observation that his evidence was of next to no relevance to the issues I had to decide and in view of how it came about, I gave it no weight.

4.2. For the respondent I heard only from Mr Taylor.

4.3. Both parties had prepared their own bundles of documentation. All witnesses were questioned and both Mr Tomlinson and Mr Taylor made brief closing submissions.

## **5. Facts**

5.1. It is not my role to resolve each and every last dispute of fact between the parties but to make such findings of fact as are necessary to resolve the issues before me and to place them in their proper context. On that basis, and on the balance of probabilities, I make the following findings of fact.

5.2. Mr Taylor has spent his working life as a joiner. Latterly that has focused on manufacturing bespoke products such as staircases. His time in business was initially as a sole trader. On 23rd September 1983, he took on Mr. Tomlinson as an apprentice bench joiner. Mr. Tomlinson proved to be a competent and committed employee over the following 19 years or so. There is no dispute that during this time Mr Tomlinson was an employee. He was paid weekly through PAYE at a rate of pay set by Mr Taylor. The business was small, at its highest, Mr Taylor employed no more than three employees including Mr. Tomlinson. At the time, Mr Taylor was active in all aspects of production making four individuals in total.

5.3. In or around 2002, Mr Taylor decided to incorporate his business. In recognition of Mr Tomlinson's commitment to the business and, I find, as a means of retaining his skills for the benefit of the business, Mr Taylor offered him an interest in the new entity that would become the respondent. Mr. Tomlinson agreed accepted the offer. He paid the nominal value of the 25% shareholding, that was £25. He also became a statutory director. I find that total share issue of one hundred £1 shares did not reflect the actual financial investment in the business. For his part, Mr Taylor invested a further £30,000 in the newly incorporated business in addition to what assets of his were already in the business. At some point in time Mr Taylor had also purchased the building that the business occupied. Mr Tomlinson had no interest in that land. I find the business itself continued in exactly the same way as it had operated previously. For present purposes, there was no material change of customer base, products or systems of work.

5.4. The people running many small businesses of this nature often fail to document their relationships in the way they should. This business is no different. I find none of the employees had written contracts of employment nor were statements of main terms issued. Similarly, I find no further agreements were reached or documented as to the effect that Mr Tomlinson's new statutory office as director might have on the parties' previous legal relationship. Other than the necessary statutory forms used for the purpose of incorporation and the periodic reporting to Companies House, there is next to nothing in writing which deals with the relationship between the parties.

5.5. Mr. Tomlinson did not at any time have a formal job description in the sense of a written document outlining his duties either in the workshop or as a director. Nevertheless, I'm satisfied he was engaged as a bench joiner and, in this industry, that brief title is sufficient for all to understand the broad focus of the duties. I find that role continued after the incorporation of the respondent. For what it adds, I note the respondent's ET3 described the claimant as "manufacturing director". That is a job title that I have not seen referred to elsewhere and I have not been taken to any other documents making such reference.

5.6. Significantly, upon incorporation the arrangements for Mr. Tomlinson to draw remuneration out of the business also remained unchanged. Mr. Tomlinson continued to be paid weekly through the PAYE system deducting statutory deductions as an employee, he continued to receive pay slips each week and the rate at which he was paid continued to be set unilaterally by Mr Taylor. That rate increased overtime to the extent that by the time the business ceased trading the claimant was being paid the gross sum of £960.43 per week. Mr Taylor has described this method of payment as being Mr Tomlinson's choice. I do not accept that. I find Mr Tomlinson has never really been involved in the administration of the respondent's business. In fact, his level of attention to the affairs of the company may be so remote as to put into question whether he has discharged any of the statutory duties imposed on him by his office. That is, in part at least, due to his own disinterest in pressing for that level of involvement and that, in turn, arises mainly from the fact that Mr Taylor has retained single handed control over all financial and administrative decisions of the company. The only professional advice that the respondent, or Mr Taylor, received was from the company accountants who I find prepared and ran the payroll. At some point around the

incorporation, a decision was taken on behalf of the company that Mr Tomlinson would continue to receive a wage, subject to tax and national insurance contributions as an employee. Mr Taylor was aware of that and must have agreed to it. It has continued for the last 21 years.

5.7. Initially Mr. Tomlinson did not have the benefit of a pension scheme. At some point since the respondent was incorporated he has received a payment into what is called a “director's pension” paid by the respondent in the sum of approximately £1200 per annum. I have not been told anything of the specific nature or limitation to this scheme and infer as a fact that it discharges the obligations that came into force over the last 10 years for auto-enrolment.

5.8. I find the business continued to be run as it had prior to the respondent's incorporation and this continued at all times until the business ceased trading on 31 March 2023. That is qualified only by the fact that during the last three or four months, Mr Taylor was unwell and some of his tasks and duties were picked up in his absence by Mr. Tomlinson. In evidence, Mr Taylor himself described himself as managing director and as “ruling the roost” and that “he gave the orders”. I find there were no board meetings involving the two directors. Although recruitment of staff was infrequent, when it happened it was Mr Taylor that decided who would be appointed.

5.9. This is consistent with both parties' description of the role demarcation and management of the business. Mr Taylor was responsible for the relationships with customers and clients, he would organise the estimates and negotiations to secure new work. He would do the site visits and measuring except where in later years, he was too unwell to do so when he would ask Mr. Tomlinson to do it. Once the work was commissioned, Mr Taylor would instruct Mr Tomlinson to undertake the manufacturing work in the workshop with the assistance of any other apprentice or other employee. the work would then either be delivered or collected and Mr Taylor would deal with payments.

5.10. I have no doubt that as Mr Tomlinson's experience increased overtime he would occasionally be asked to carry out aspects of these functions but the control of them remained with Mr Taylor. Similarly at Mr Taylor's failing health meant at some point he was unable to work in the workshop area itself on safety grounds. That necessarily meant Mr Tomlinson took greater day-to-day control of the operations in the workshop.

5.11. Between 2002 and it ceasing to trade in 2023, it faced periodic cash flow pressures. Suppliers' invoices would sometimes fall due at a time when customers had not paid their bills; similarly, with VAT and other tax liabilities. Sometimes cash was needed for machinery upgrades or replacements that the business itself could not afford at that time. When this happened, I find it was Mr Taylor who injected cash into the business to keep it solvent and trading. Mr Tomlinson was never asked to do likewise, whether in proportion to their shareholding or otherwise. When asked about this Mr Taylor explained that “in my mind I had surplus cash and I knew he didn't”. At the time the business ceased trading Mr Taylor had a positive director's loan account in respect of which the company owed him over £100,000.

5.12. Of course, such a capital call on shareholders could be paid unequally and that unequal contribution could be reflected in an adjustment to the shareholding. I find it did not. In fact, the only other significant change that took place over the life of this respondent was the balance of shareholding between members of the company shifted the other way, in Mr Tomlinson's favour. Mr Tomlinson's initial 25% shareholding was voluntarily increased by Mr Taylor on one or two occasions to the point where, at the time the business ceased trading, Mr. Tomlinson held 45% of the shares. I find this was again with the intention of retaining Mr Tomlinson in the business. There was no further consideration for the increased shareholding given by Mr Tomlinson. The shareholding itself was intended to provide some capital growth for the shareholders but, in reality, the business proved not to be that profitable, at least insofar as surplus profit was made after expenses. I find in only one of the 21 years it operated was a dividend paid to shareholders. That was 2004 and Mr Tomlinson received something in the region of £1,250.

5.13. Of course, one of those expenses accounted for in each year of the business's existence was its staff costs. I have seen the accounts for 2022 and 2023. I'm told and I accept that the entry for staff costs includes "director's remuneration", which is sometimes shown separately. For 2023, that sum was £50,903 of which almost all is accounted for in the salary paid to Mr. Tomlinson in the weekly payroll.

5.14. I find Mr. Tomlinson did have a substantial degree of autonomy in certain elements of his work. In one sense he could come and go as he pleased, on the other hand I find he essentially worked full time and managed his attendance according to the workload to be done. Similarly, I find he was able to book annual leave according to his own circumstances. He did not expressly seek advance approval of leave from Mr Taylor but would consult with him and record annual leave on the wall planner alongside any absences that Mr Taylor may have taken from the business. Mr Tomlinson had one extended period of sickness absence at the back end of 2022 and he continued to receive his pay during his time away from the business and as far as is shown in the evidence before me the company did not claim any SSP. I do not have sufficient to know for certain whether Mr Tomlinson's absence qualified for an SSP claim and, on balance, it seems to me that the absence of any claim for SSP, if in fact that is what happened, would be explained with greater certainty by the fact that it was a mere oversight rather than a positive decision not to do so based on a view about Mr. Tomlinson's employment status. To conclude otherwise would be inconsistent with the fact that Mr. Tomlinson has had National Insurance payments deducted alongside his PAYE tax throughout his economic engagement with the respondent.

5.15. I find Mr. Tomlinson had access to the respondent bank and bank cards. He was a joint signatory on the company bank account which had a double signatory mandate for both him and Mr Taylor to authorise cheques. Mr Taylor's contention that this is not something he would have granted had Mr. Tomlinson not been a director of the company Mr. Tomlinson had access to a bank card and did make payments using it on behalf of the business. Indeed, some of those payments appear now to have been for a personal expenditure and have resulted in a negative director's loan arising in the sum of £3742.31. On the face of it, Mr Thomas will be required to account for that.

5.16. An issue arose between the parties as to whether Mr. Tomlinson had been involved in the sale of assets of the respondent in the months before it ceased trading. There is no suggestion did anything dishonest, it is advanced to suggest his involvement in the business was more than that of an employee. The evidence of this is not wholly convincing. Mr Taylor simply believes that Mr Tomlinson may have had some contact with the neighbouring joinery business around February 2023. That is the same business that he has subsequently become employed by. Mr Tomlinson 's position is that he was not involved in the sale of any assets. In support of that he called Mr J Stevenson Jnr to give evidence. It turned out he did not have any first-hand knowledge and I have set out above the reason why I cannot rely on his evidence. However, it is clearly open to me to infer that Mr Taylor's ill-health was likely to have become known in the industry, especially in the close geographic location of these two similar businesses. It is equally clear Mr. Tomlinson was in discussions with Mr Stevenson in early 2023 about new employment, in anticipation of respondent ceasing to trade. It is a short step for anyone in Mr Stevenson's position to think to himself that there may be assets of value that he might be interested in purchasing and which might actually be welcome d by Mr Taylor. I find it more likely than not that Mr Tomlinson will have had some sort of discussions about the work being done by the respondent and which may have prompted Mr Stevenson's later enquiries but, on the evidence before me, I cannot take my findings much beyond that sort of involvement. I do find as a fact that upon Mr Taylor returning from a short episode of sick leave, Mr Stevenson Snr contacted him made an offer for some stock and the deal was done between those two, and not involving Mr. Tomlinson.

5.17. The business ceased to trade on 31 March 2023. At a meeting at the respondent's accountant, there was discussion about closure and whether the business was solvent or not and the consequences of that to the employees. Mr Taylor took the decision to wind up as a solvent business and satisfy the debts. That, of course, is a perfectly proper decision open to him, insofar as he was waiving his claim to the full amount owed to him by the company.

## 6. Law

6.1. Section 230 of the Employment Rights Act 1996 provides, so far as is relevant: -

***(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.***

***(3)In this Act "worker" (except in the phrases "shop worker" and "betting worker") means an individual who has entered into or works under (or, where the employment has ceased, worked under)—***

***(a) a contract of employment, or***

*(b) any other contract, whether express or implied and (if it is express) whether oral or in writing, whereby the individual undertakes to do or perform personally any work or services for another party to the contract whose status is not by virtue of the contract that of a client or customer of any profession or business undertaking carried on by the individual;*

6.2. Previous cases have guided courts and tribunals on how to identify one type of contract over another. The key concepts are: -

- a. The irreducible minimum parts, without which it will be all but impossible for a contract of service to exist of personal performance, mutuality of obligation and that the employee is subject to a sufficient degree of control by the employer for it to be a contract of employment. **(Ready Mixed Concrete (South East) Ltd v Minister of Pensions and National Insurance 1968 1 All ER 433, QBD)**.
- b. To consider the reality of the performance of the agreement. **(Autoclenz Ltd v Belcher and ors 2011 ICR 1157, SC)**
- c. Although each case will present a number of factors pointing in different directions, the test is not answered by a checklist. 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.' **(Hall (Inspector of Taxes) v Lorimer 1994 ICR 218, CA)**

6.3. In the case of company directors and shareholders, the status does not need to include employment status but equally does not exclude it. Various cases have provided guidance on how to approach the task, typically in the context of majority shareholders who are not under control of others, or could outvote them on because of their majority shareholding. Key cases include **Clark v Clark Construction Initiatives Ltd and anor 2008 ICR 635, EAT** and **Secretary of State for Trade and Industry v Bottrill**, both of which were revised in Secretary of State for **Business, Enterprise and Regulatory Reform v Neufeld and anor 2009 ICR 1183, CA** . I have considered what assistance they might provide to determining this case although Mr Tomlinson was, of course, at all times a minority shareholder and the parties are not relying on a purported written contract of employment.

## 7. Discussion and conclusions

7.1. This is a sad case to end up in litigation. The two individuals before me have had enough respect for each other to build and maintain a 40 year-long working relationship. Mr Taylor's position on behalf of the company is informed largely by a moral stance. The notion of a redundancy payment appears to have arisen in the discussions about closure of the business in the context of a claim on

the state if the business declared itself insolvent. He did not want to take that route as he did not feel it was morally right when the company could pay its commercial debts and would not be insolvent unless he himself enforced the repayment of his loan. That is something he has previously been relaxed about and reflects other examples of the generosity he has demonstrated towards Mr Tomlinson in the way the company affairs were set up and evolved over time, albeit that was also clearly in his and the company's interest.

7.2. But all of that is irrelevant to the test I have to apply. The findings of fact lead me to the following conclusions on the key aspects of the relationship. None is determinative. They all carry different weight. They do not exist as a checklist, but to paint the picture of the relationship. Only by standing back from that picture can those matters be viewed as part of an overall conclusion. The key factors are:-

- a. Mr Tomlinson was an employee for 19 years before the incorporation. Next to nothing changed in the way the work was done by the parties after the incorporation.
- b. Mr Tomlinson has been paid as an employee throughout. That Mr Tomlinson's pay did not vary with attendance or absence is as consistent with a well-regarded, long-standing and experienced employee as any other status.
- c. The rate of pay was set by Mr Taylor, even after the incorporation of the respondent.
- d. Mr Taylor has control of the company and in turn Mr Tomlinson. That control materialises in both 'voting' control of the company in Mr Taylor's majority shareholding over Mr Tomlinson but also, and more importantly, 'actual' control in the day to day management of the company and the work done by Mr Tomlinson.
- e. Although Mr Tomlinson was a statutory director, he has neither exercised the functions of that office nor has he been permitted to due to the way Mr Taylor himself ran the business. That is a state of affairs that seems to have worked for both men.
- f. Although Mr Tomlinson has had some degree of autonomy in how he carried out his duties and the arrangements for leave and timekeeping, they are as consistent with a well-regarded, long-standing and experienced employee as they are of any other relationship.
- g. Mr Tomlinson carried no financial risk in the success of the respondent.
- h. In circumstances that might amount to a capital call on shareholders, at no time did Mr Taylor consider any additional capital or cash flow facilities should be made by both shareholders. He volunteered and organised it from his own resources exclusively. That was itself a reflection of the unilateral control he had over the financial affairs of the business and his sense that it was his business.



- i. Nothing in the steps taken, to some degree, of assisting in the disposal of assets on the cessation of business carries any great weight on the determination of what the true relationship was.

7.3. In summary, I am satisfied the total picture before me shows someone wholly integrated into the business, performing a role that was identical to the role performed for nearly 20 years as an employee. There is clearly mutuality of obligation evidenced by the reality of how things had worked in the last 20 years in exactly the same way as the first 20 years. The company expected Mr Tomlinson to do the workshop work, irrespective of what it expected of him in his statutory office of director, and that it would pay him for it. In return, he expected to be given the work, to do it and to be paid.

7.4. There is clearly an obligation of personal performance. In his capacity of a statutory director, his duties to the company cannot be subcontracted. In any event, there is absolutely no room for a conclusion that Mr Tomlinson was free to have subcontracted the technical joinery work that was otherwise performed by him.

7.5. The only area of potential argument is control. The respondent's position on this flows from Mr Tomlinson's status as a statutory director and shareholder. That is a valid argument but a starting point only and much of what has been advanced is founded on a misconception that it is something approaching a binary choice between being a director or being an employee. The law makes clear it is not binary. A statutory director need not be an employee. Equally, being a statutory director does nothing to undermine the possibility of also being an employee if that reflects the reality of the relationship. Some of the autonomy that Mr Tomlinson has is said to be indicative of his role as director and shareholder. Viewed as part of the total picture, I do not consider it to be anything more than flowing from the nature of the working environment in this very small business and itself consistent with a well-regarded and long-standing senior employee.

7.6. I have found as a fact that Mr Tomlinson remained under the direction of Mr Taylor in the work to be done. Mr Tomlinson is an experienced and competent joiner and the fact he has been left to organise his own work and the work of others is because of that, rather than any status as a statutory director or shareholder. This case has not really engaged with voting disputes, although Mr Taylor was always able to outvote Mr Tomlinson had they ever actually had director's meetings and he did outvote him on the options for a creditors' voluntary liquidation. But the control in this case is more about the day-to-day control which carries a strong flavour of an employer and employee relationship, albeit in the context of a competent and experienced employee who can be left to organise himself. Even the pay to be paid to Mr Tomlinson was unilaterally determined by Mr Taylor.

7.7. Of course, had the parties addressed their mind to it at the time, all of that could have existed under an explicit agreement that Mr Tomlinson relinquished his employee status upon taking up the minority shareholding. The parties did not do that. In the absence of basic employment contracts, it is not surprising that they did not address their mind to that either. I might have been left to discern the intentions of the parties and the practical reality of their actions in something of a vacuum but for two key factors. Mr Tomlinson was paid as an

employee throughout the 21 years of the respondent's existence. Those terms are an unbroken continuation of the arrangement Mr Taylor had with Mr Tomlinson prior to the respondent's incorporation when he was the sole trader employer. The incorporation in itself cannot have altered Mr Tomlinson's status, not least because there would have been continuation of employment as an associated employer, if not under TUPE. The question then is whether Mr Tomlinson becoming a shareholder and statutory director necessarily altered his employment status with the newly incorporated entity. It did not as a matter of law, and although it was open to the parties to agree a different way of regulating their affairs, I am satisfied they did not as a fact.

7.8. Consequently, I am satisfied that the legal test of employment status is made out. It necessarily follows that I do not have to analyse separately whether Mr Tomlinson was in any event a worker as all claims can proceed on the basis of his status as an employee.

## 8. Next Steps

8.1. The case will therefore proceed to a final hearing, if that remains necessary. I would remind the parties of the benefit of settlement and the obligation to further the overriding objective. In the circumstances of this case that means encouraging the parties to consider if a further hearing is in fact necessary and proportionate in view of how the three claims now stand. The claim for a redundancy payment is formulaic and the arithmetic should be capable of agreement. The claims for notice and holiday pay face evidential issues. It is clear Mr Tomlinson was on notice of the closure some time in advance. Whilst that would need resolving on evidence, there is a real prospect that there was no failure to give notice, or only marginal. The claim for holiday pay is also largely formulaic being based only on the statutory provisions but the evidential conclusions on the when the leave year commences, the proportion of it remaining at the termination date and the discount for holiday actually taken in that period may also prove it to be negligible claim, if anything is owed at all.

EMPLOYMENT JUDGE R CLARK  
4 December 2023

JUDGMENT SENT TO THE PARTIES ON

...20 January 2024.....

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Case number: 2600888/2023

FOR THE EMPLOYMENT TRIBUNAL