Case No: 1304020/2023
1304468/2023

EMPLOYMENT TRIBUNALS

Claimant: 1) Mr Ross White
2) Mr Mark Hughes

Respondent: 1) CAR-TECH (STAFFORDSHIRE) LIMITED – In Liquidation
2) The Secretary of State for Business & Trade

Heard at: Midland West Employment Tribunal (By CVP)

On: 15 April 2024

Before: Employment Judge M Hussain

Representation:
Claimants: Both attended and were not represented
Respondent: Mrs Lorraine Whalley (non-legal representative) appeared the Secretary of State for Business and Trade

RESERVED JUDGMENT

1. The conclusion of the Tribunal is that the claimants are employees of the first respondent.

2. The first respondent is ordered to pay Mr White the following sums:
    a. Statutory redundancy pay in the sum of £5,342
    b. Notice pay in the sum of £1936

3. The first respondent is ordered to pay Mr Hughes the following sums:
    a. Statutory redundancy pay in the sum of £7,018
    b. Notice pay in the sum of £1936

4. The claims for holiday pay are dismissed upon withdrawal.

REASONS

1. Mr Ross White has brought a claim by way of an ET1 received on 12th May 2023 for redundancy pay, holiday pay and notice pay. The claim is brought against the first respondent, Car-Tech (Staffordshire) Limited, which is in liquidation. Mr White alleges that he was employed by the

first respondent. The Secretary of State for Business and Trade (hereafter "the Secretary of State") is an interested party.

2. Mr Mark Hughes has also brought a claim by way of an ET1 received on 6th June 2023 for redundancy pay, holiday pay and notice pay. The claim is brought against the first respondent, Car-Tech (Staffordshire) Limited which is in liquidation. It is that first respondent that the Mr alleges that he was employed by the first respondent. The Secretary of State is an interested party.

3. Both claimants produced Acas Certificates which demonstrated that the claims were brought in time and the Tribunal had jurisdiction to hear the claims.

4. By letter dated 17 November 2023, the parties were informed that a decision had been made for the claims to be heard together and the proceedings were combined.

5. The hearing took place via CVP, and the claimants attended the hearing. They were not represented. The Secretary of State was represented by a non-legally qualified Tribunal Representative, Mrs Lorraine Whalley.

6. The claim forms were served on the administrators who have played no part in the proceedings. By letter dated 17 November 2023 the parties were informed that a direction had been made pursuant to rule 21 of the Employment Tribunal Rules of Procedure 2013, which restricted the participation of the first respondent in these proceedings. In the circumstances, I considered that I could proceed in absence.

7. I have considered the bundle, which consists of 332 digital pages and a further bundle of authorities which consists of 95 digital pages. In addition, witness statements and supporting documents were provided by both claimants (143 digital pages) which were considered alongside oral evidence given by both claimants.

8. The hearing was listed for 1 day, and evidence and submissions concluded late in the afternoon. At the end of the hearing, I informed the parties that due to there being insufficient time for me to consider my decision, a written Judgment would be issued within 28 days.

Issues

9. I must firstly determine whether the claimants were employees of the first respondent, such to give rise to the Secretary of State having to make payments pursuant to sections 166, 168, 182 and 188 of the Employment Rights Act 1996.

10. If I conclude the claimant were employees, I need to consider:

    a. What is the amount of the redundancy payment?
    b. Was any holiday pay accrued but untaken, and if so, what amount is recoverable?

c. Is any there notice period payment which is recoverable and if so in what amount?

Findings of Fact

11. The first respondent, Car-Tech (Staffordshire) Limited), was incorporated on 05 September 2002. Both claimants were appointed as directors in addition to a further director, Stephen Yates. The first respondent was set up with the assistance of accountants. When the first respondent was incorporated, all 3 directors also became employees of the first respondent. The purpose of the first respondent was to maintain and repair vehicles.

12. Written contracts of employment were not issued to any employees throughout the period that the first respondent operated. Mr Yates worked as a mechanic, but also managed the administrative tasks of the business. Mr White worked as a mechanic and took on the role of pricing and collecting cars. Mr Hughes worked as an MOT tester and managed all tasks relating to MOTs of vehicles. There were no other employees of the business other than the 3 directors. The employment came about on the advice of the accounts and by verbal agreement between the directors. They also conducted themselves in a manner that was consistent with that agreement.

13. This continued up until 2006 when the claimants made a decision to dismiss Mr Yates for his conduct relating to the handling of the first respondent finances. Mr Yates resigned as a director in 2006 shortly after being dismissed, and the claimants increased their share in the first respondent to 50% each.

14. The claimants then split the responsibilities of running the business and working for the first respondent on a 50/50 basis throughout the week. The first respondent operated business hours between 08:30 am and 5:30 pm, Monday to Friday. Each claimant attended every day and worked between 20 and 25 hours per week as an employee. The rest of the time they completed duties related to their role as a director. This often meant coming in early and leaving late but they always worked a full day. I accept the evidence of the claimants that the hours would vary depending on the amount of work booked in. From 2006 the first respondent had additional employees which included a secretary and mechanics.

15. Any invoices that were issued, were issued by the first respondent and any payments received, were received in the first respondent's bank account. After 2006, only the claimants had access to the first respondent's bank account. The bank account was used for business transactions only. Each Friday, cash was withdrawn to pay employees. The bank transactions were checked and reconciled by the accountants. The claimants did not treat the first respondent's money as their own.

16. The first respondent was always supported by accountants who would set the rates of pay for each of the employees, manage payroll,

complete tax returns including self-assessment forms for the claimants and advise on the amount of dividends.

17. The claimants were advised of the rate of pay by the accountants and they agreed to a rate pay close to the minimum wage. Any tax and National Insurance payments due were managed through the PAYE scheme and wage slips were issued each week to the claimants. Any tax and National Insurance payments due on income earned as directors was managed through self-assessment forms.

18. Mr White's tax records showed that he was registered with HMRC as a PAYE employee of the first respondent from 2005 until 2022. A P60 for the tax year ending April 2022 showed that Mr White earned £9517 as an employee of the first respondent.

19. Mr Hughes tax records showed that he was registered with HMRC as a PAYE employee of the first respondent from 2002 until 2022. A P60 for the tax year ending April 2022 showed that Mr Hughes earned £9517 as an employee of the first respondent.

20. The claimants were accountable to each other and would make any decisions regarding the business together. If one of them could not attend, they would report their absence to the other who would make arrangements for the work to be covered. If they wished to take leave, they would check the diary and would book leave around other employee's leave. The claimants also logged their work times with the secretary who would forward the information to the accountant each week so that pay could be calculated and wage slips produced.

21. The claimants were not working or employed elsewhere and there is no evidence to suggest that they could substitute themselves as an employee for someone else.

22. I am satisfied on the balance of probabilities that the claimants were employees of the first respondent, and they were controlled as employees by each other, in their capacity as directors. The employment for both claimants began on 05 September 2002 and ceased by reason of redundancy on 28 October 2022. The first respondent entered into voluntary liquidation on 15 November 2022. Each respondent has completed 20 full years' service. At the time of termination Mr White was 48 years old and Mr Hughes was 59 years old.

23. I find and accept, and it was not challenged that the claimants were entitled to notice.

24. Mr White applied to the Secretary of State for payment from the National Insurance fund and the claim was rejected and communicated by way of letter dated 16 February 2023. Acas was notified on 10 May 2023 and an Early Conciliation Certificate was issued on 12 May 2023. The ET1 was presented 12 May 2023.

25. Mr Hughes applied to the Secretary of State for payment from the National Insurance fund and the claim was rejected and communicated by way of letter dated 20 February 2023. Acas was notified on 13 May 2023 and an Early Conciliation Certificate was issued on 15 May 2023. The ET1 was presented 06 June 2023.

26. All claims were presented within the required time limits.

Law

27. I have had regard to the authorities bundle and I have also considered the authorities and law referred to in the ET3 grounds of response.

28. I have had regard to the Employment Rights Act 1996. Sections 166 enables an employee to bring an application against the Secretary of State for the payment of a redundancy payment when the employer is insolvent (subsection (1)(b)). Section 168 goes on to set out the amount of that payment.

29. Section 182 enables an employee to make a claim to the Secretary of State for a debt that is owed by an employer at the appropriate date, when the employer has become insolvent, that the employment has been terminated and that the employee was entitled to be paid the whole or any part of the debt. Section 184 sets out the debts to which the Part applies, that includes pursuant to subsection 1:

> *"a) any arrears of pay in respect of one or more (but not more than eight) weeks*
> *b) Any amount which the employer is liable to pay the employee for the period of notice required by section 86(1) or (2) or for any failure of the employer to give the period of notice required by section 86(1).*
> *c) Any holiday pay*
> > *i. In respect of a period of periods of holiday not exceeding six weeks in all, and*
> > *ii. To which the employee became entitled during the twelve months ending with the appropriate date."*

30. The appropriate date is set out at section 185 of the act, which is either the date of the insolvency or the date of the dismissal.

31. Section 188 enables an employee to make a complaint to an Employment Tribunal in relation to those debts. Subsection 2 goes on to state that:

> *"An employment tribunal shall not consider a complaint under subsection*
> *(1) unless it is presented—*
> *(a)before the end of the period of three months beginning with the date on which the decision of the Secretary of State on the application was communicated to the applicant, or*
> *(b)within such further period as the tribunal considers reasonable in a case where it is not reasonably practicable for the complaint to be presented before the end of that period of three months."*

32. Section 230 of the Employment Rights Act at subsection 1 defines an employee as:

> *"an individual who has entered into or works under (or, where the employment has ceased, worked under) a contract of employment.*
> *A contract of employment is defined at subsection 2:*
> *"contract of employment" means a contract of service or apprenticeship, whether express or implied, and (if it is express) whether oral or in writing."*

33. Employer and Employment are defined at subsections 4 and 5 as follows:

> *""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.*
> *"employment"—*
> *(a)in relation to an employee, means (except for the purposes of section 171) employment under a contract of employment, and*
> *(b)in relation to a worker, means employment under his contract; and "employed" shall be construed accordingly."*

34. Sections 210 through to 219 set out the definitions of a week's pay. With section 221 subsection 2 stating:

> *"Subject to section 222, if the employee's remuneration for employment in normal working hours (whether by the hour or week or other period) does not vary with the amount of work done in the period, the amount of a week's pay is the amount which is payable by the employer under the contract of employment in force on the calculation date if the employee works throughout his normal working hours in a week."*

35. Section 1 of the National Minimum Wage Act 1998 sets out the entitlement for an employee to be paid the national minimum wage.

36. Section 17 goes on to set out that the employee is entitled to additional renumeration in the event that they qualify for the national minimum wage and are not paid it. The section then sets out the calculation which applies.

Employment Status

37. The starting point as to whether an individual is an employee is the test set out by Mackenna J in **Ready Mixed Concrete (South East) Limited v Minister of Pensions and National Insurance [1968] 2 QB 97** where at 515 it was stated:

> " *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 the performance of some service for his master. (ii) He agrees, expressly or impliedly, that in the performance of that service he will be subject to the other's control in a sufficient degree to make that other master. (iii) The other provisions of the contract are consistent with its being a contract of service."*

38. In **Nethermere (St Neots) Ltd v Gardiner [1984] I.C.R 612** Stephenson LJ described this condition as mutual obligations and said that it was the irreducible minimum of obligation required on each side to create a contract of services (ie of employment). The phrase 'irreducible minimum of obligation' was subsequently adopted in **Carmichael** and **Autoclenz**.

39. In the ***Supreme Court decision in Autoclenz Ltd v Belcher [2011] ICR 1157 SC*** the Court determined whether the disputed written terms were genuine terms of the contract. In paragraph 31 of the Judgement Smith LJ's Judgment in **Firthglow Ltd (t/a protectacoat) v Szilagyi [2009] EWCA Civ 98** is quoted as follows:

> *"[W]here there is a dispute as to the genuineness of a written term in a contract, the focus of the enquiry must be to discover the actual legal obligations of the parties. To carry out that exercise, the tribunal will have to examine all the relevant evidence. That will, of course, include the written term itself, read in the context of the whole agreement. It will also include evidence of how the parties conducted themselves in practice and what their expectations of each other were."*

40. In **Fleming v SOS [1997] IRLR 682** the Court of Session held whether or not a person is an employee is a question of fact. The fact that a person is a majority shareholder is always a relevant factor and may be decisive. However, the significance of that factor will depend on the circumstances, and it would not be proper to lay down any rule of law to the effect that the fact that a person is a majority shareholder necessarily in all circumstances implies that that person is not an employee.

41. I was also referred **to Eaton v Robert Eaton Ltd & SOS IRLR 83 [1988]** in which the EAT held that a director of a first respondent is normally the holder of an office, not an employee. Therefore, evidence is required to establish that a director was in fact "employed". Some of the factors to be considered by an Industrial Tribunal in determining whether a director was an employee include a descriptive term, such as managing director or technical director; whether there was an express contract of employment or a board minute or written memorandum constituting an agreement to employ the person as such director; whether remuneration was by way of salary as opposed to by way of director's fee; whether that remuneration was fixed in advance rather than made on an ad hoc basis; whether the remuneration was by way of entitlement rather than gratuitous and the functions actually performed by the director, ie was he merely acting in a directorial capacity or was he under the control of the board of directors.

42. However, the current position is as outlined by the Employment Appeal Tribunal in **Clark v Clark Construction Initiatives Ltd [2008] ICR 635**, EAT where it was concluded that a claimant who was the first respondent's controlling shareholder was not also an employee. At

paragraph 98 of the Judgment a non-exhaustive list for factors for consideration was set out. They were as follows:

> *"(1) Where there is a contract ostensibly in place, the onus is on the party seeking to deny its effect to satisfy the court that it is not what it appears to be. This is particularly so where the individual has paid tax and national insurance as an employee; he has on the face of it earned the right to take advantage of the benefits which employees may derive from such payments.*
> *(2) The mere fact that the individual has a controlling shareholding does not of itself prevent a contract of employment arising. Nor does the fact that he in practice is able to exercise real or sole control over what the first respondent does (Lee).*
> *(3) Similarly, the fact that he is an entrepreneur, or has built the first respondent up, or will profit from its success, will not be factors militating against a finding that there is a contract in place. Indeed, any controlling shareholder will inevitably benefit from the first respondent's success, as will many employees with share option schemes (Arascene).*
> *(4) If the conduct of the parties is in accordance with the contract that would be a strong pointer towards the contract being valid and binding. For example, this would be so if the individual works the hours stipulated or does not take more than the stipulated holidays.*
> *(5) Conversely, if the conduct of the parties is either inconsistent with the contract (in the sense described in para.96) or in certain key areas where one might expect it to be governed by the contract is in fact not so governed, that would be a factor, and potentially a very important one, militating against a finding that the controlling shareholder is in reality an employee.*
> *(6) In that context, the assertion that there is a genuine contract will be undermined if the terms have not been identified or reduced into writing (Fleming). This will be powerful evidence that the contract was not really intended to regulate the relationship in any way.*
> *(7) The fact that the individual takes loans from the first respondent or guarantees its debts could exceptionally have some relevance in analysing the true nature of the relationship, but in most cases such factors are unlikely to carry any weight. There is nothing intrinsically inconsistent in a person who is an employee doing these things. Indeed, in many small companies it will be necessary for the controlling shareholder personally to have to give bank guarantees precisely because the first respondent assets are small and no funding will be forthcoming without them. It could wholly undermine the Lee approach if this were to be sufficient to deny the controlling shareholder the right to enter into a contract of employment.*
> *(8) Although the courts have said that the fact of there being a controlling shareholding is always relevant and may be decisive, that does not mean that the fact alone will ever justify a Tribunal in finding that there was no contract in place. That would be to apply the Buchan test which has been decisively rejected. The fact that there is a controlling shareholding is what may raise doubts as to whether that individual is truly an employee, but of itself that fact alone does not resolve those doubts one way or another."*

43. Those factors were subsequently considered by the Court of Appeal in **Secretary of State for Business, Enterprise and Regulatory Reform v. Richard Neufeld [2009] EWCA Civ 280**. At paragraph 88 of the Judgment the Court of appeal agreed with the essence of the factors referred to by Elias J in paragraph 98 of his Judgment although added comment to four of them. The relevant paragraphs are as follows:

> *"88. We respectfully agree with the essence of the factors referred to by Elias J in paragraph 98 of his judgment although we add a comment on four of them. Mr. Tolley criticised his first factor as amounting to a suggestion that the mere production of a written contract purporting to be a contract of employment will shift to the opposing party the burden of proving that it was not a genuine such contract. We doubt if Elias J was intending to refer to a legal burden. In cases where the putative employee is asserting the existence of an employment contract, it will be for him to prove it; and, as we have indicated, the mere production of what purports to be a written service agreement may by itself be insufficient to prove the case sought to be made. If the putative employee's assertion is challenged the court or tribunal will need to be satisfied that the document is a true reflection of the claimed employment relationship, for which purpose it will be relevant to know what the parties have done under it. The putative employee may, therefore, have to do rather more than simply produce the contract itself, or else a board minute or memorandum purporting to record his employment.*
> *89. We consider that Elias J's sixth factor may perhaps have put a little too high the potentially negative effect of the terms of the contract not having been reduced into writing. 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, we would not wish tribunals to seize too readily on the absence of a written agreement as justifying the rejection of the claim. In both cases under appeal there was no written service agreement, but the employment judges appear to have had no doubt that the parties' conduct proved a genuine employment relationship.*
> *90. As for Elias J's seventh and eighth factors, we say no more than that we regard them as saying essentially what we have said above in our "never say never" paragraph."*

44. The Court of Appeal earlier in the Judgment noted:

> *80. There is no reason in principle why someone who is a shareholder and director of a first respondent cannot also be an employee of the first respondent under a contract of employment. There is also no reason in principle why someone whose shareholding in the first respondent 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 first respondent and its business means that he is in practice properly to be regarded as their "owner" can also be an employee of the first respondent. 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 first respondent 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 first respondent; point (ii) is answered by this court's rejection in Bottrill of the reasoning in Buchan.

81. Whether or not such a shareholder/director is an employee of the first respondent is a question of fact for the court or tribunal before which such issue arises. In any such case there may in theory be two such issues, although in practice the evidence relevant to their resolution will be likely to overlap. The first, and logically preliminary one, will be whether the putative contract is a genuine contract or a sham. The second will be whether, assuming it is a genuine contract, it amounts to a contract of employment (it might, for example, instead amount to a contract for services). We make clear that we are not of course suggesting that cases raising the first issue are likely to be common, and we think it probable that they will be relatively exceptional. Despite the repeated references in the authorities to the theoretical possibility of a contract being a sham, no such case has been discovered in the principal authorities to which we have been referred. We make no attempt to give any prescriptive guidance as to the resolution of such issues, but we at least offer the following general observations.

82. In cases involving an alleged sham, there will, as we have said, almost invariably be what purports to be a formal written employment contract, or at least a board minute or a memorandum purporting to record or evidence the creation of such a contract. The task of the court or tribunal will be to decide whether any such document amounts to a sham in the sense of the Snook guidance (and see also Protectacoat, to which we referred in paragraph [37]). Any such inquiry will usually require not just an investigation into the circumstances of the creation of the document but also into the parties' purported conduct under it, which will be likely to shed light on the genuineness or otherwise of the claimed contract. The fact that the putative employee has control over the first respondent and the board, and so was instrumental in the creation of the very contract that he is asserting, will obviously be a relevant matter in the court's consideration of whether the contract is or is not a sham. It will usually be the feature that prompted the inquiry in the first place.

83. An inquiry into what the parties have done under the purported contract may show a variety of things: (i) that they did not act in accordance with the purported contract at all, which would support the conclusion that it was a sham; or (ii) that they did act in accordance with it, which will support the opposite conclusion; or (iii) that although they acted in a way consistent with a genuine service contract arrangement, what they have done suggests the making of a variation of the terms of the original purported contract; or (iv) that there came a point when the parties ceased to conduct themselves in a way consistent with the purported contract or any

variation of it, which may invite the conclusion that, although the contract was originally a genuine one, it has been impliedly discharged. There may obviously also be different outcomes of any investigation into how the parties have conducted themselves under the purported contract.

It will be a question of fact as to what conclusions are to be drawn from such investigation.

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 first respondent 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 first respondent; 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 first respondent gave him control of the first respondent, 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 first respondent; or that he may have made loans to it; or that he has personally guaranteed its obligations; or that his personal investment in the first respondent will stand to prosper in line with the first respondent'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 first respondent. However, they do not show that the "owner" cannot also be an employee.

87. We have, however, twice -- and deliberately -- used the word "ordinarily" in the last paragraph. We have used the word not because we foresee other circumstances but because "never say never" is a wise judicial maxim."

45. The Employment Appeal tribunal in **Secretary of State for Business, Innovation and Skills v Knight [2014] IRLR 605**, EAT rejected the contention that because an employee had forfeited a salary for periods of time that meant that her status had changed from being an employee.

46. I have considered two more recent authorities. In **Dugdale v DDE Law Limited UKEAT/0168/16/LA** the Employment appeal Tribunal considered an Employment Judge who applied the guidance in **Neufeld** had not erred in law. In **Rainford v Dorset Aquatics Ltd UKEADT/ 0226/20/BA** where it was held it would certainly be an error of law to suggest that a person cannot be both an employee of a first respondent and a director/share holder and in deciding what was and was not agreed between the parties it is open to the employment tribunal to take into account views expressed by the parties themselves which are relevant to the nature of their relationship and any agreement between them.

47. The Employment Appeal Tribunal in **Rajah v Secretary of State EAT 125/95** held that the relevant date for the purpose of deciding whether the Secretary of State is liable to make payments from the National Insurance fund to an employee is the date of insolvency. If a claimant was not an employee of the insolvent first respondent at the date of insolvency he would not be entitled to payment from the fund.

Notice Pay

48. As the right is in relation to a contract of employment only, the right to statutory minimum notice applies only in relation to employees.

49. Section 86 (3) of the Employment Rights Act 1996 stipulates that the contract of employment can specify a longer period of notice but, where the contract provides for shorter notice than the statutory minimum, the contract is treated as giving the statutory entitlement.

50. The parties can agree to waive their rights to statutory minimum notice on any occasion, or they can agree to payment in lieu of statutory minimum notice (per section 86(3) of the Employment Rights Act 1996).

Conclusions

51. I turn to my conclusions having regard to the findings which I have made, the issues and the law.

Were the claimant's employees of the first respondent?

52. I have considered the claimant's together, because other than carrying out different tasks for the first respondent, their employment circumstances in all other respects was the same or similar including the hours they worked, the pay they received, how they booked leave and how they managed their responsibilities in their capacity as directors and employees. I considered factors which were relevant to the issue of whether the claimants were employees of the first respondent at the relevant time.

Contract of employment

53. There was no written contract of employment for either of the claimants. This was accepted by the claimants who explained in their evidence that no employee of the first respondent was issued an employment contract for the duration of their employment. **Neufeld** clarified that in cases where the putative employee is asserting the existence of a contract, it is for him to prove it. The assertion that there is a genuine contract will be undermined if the terms have not been identified or reduced into writing (**Fleming).**

54. The claimant's gave evidence that at the point of incorporation each of the 3 directors, in accordance with advice from the accountant, became employees and split their time carrying out their roles as employees and directors. I find the evidence given by the claimants to be both reliable and compelling. Both claimants confirmed that when the first respondent was incorporated, they did not have any other employees and if they only worked in their capacity as directors, the first respondent would not be able to operate. By trade Mr Yates and Mr White were mechanics and Mr Hughes an MOT Tester. In the absence of the first respondent hiring other employees, I accept that they must have carried out duties as employees maintaining and repairing vehicles for the first 4 years that the business operated and beyond. This is supported by tax records [139, 188] pay slips [140-163 and 191-201].

55. The fact that the contract of employment has not been reduced in writing is one factor which I must take into account. I must also consider whether the claimants conducted themselves in a manner that was consistent with a contract being place. I find that the conduct of the claimants was consistent with their being a verbal contract of employment being in place. I will return to this issue later.

Obligation of mutuality

56. In considering the points raised with Ready Mixed Concrete I must determine whether there was an obligation of mutuality on the claimants to accept the work provided by the first respondent. I first considered whether the claimants agreed to provide their work and skill in the performance of their service to the first respondent, in consideration of a wage.

57. The claimants gave evidence that, by trade, they were a mechanic and an MOT tester, and these were the skills they brought to their roles as employees. They had agreed to work 20-25 hours week and did so. For this work they received a payment of salary. They were held accountable for the work completed by each other. I find the evidence of the claimants is reliable as their evidence was consistent when challenged by way of cross examination. I also find their evidence was plausible, as if they hadn't accepted the work the viability of the business would have been at risk. This was a small business, where for the first 4 years only the directors were employed by the first respondent, if the directors were not working on maintaining and repairing vehicles at that time there would have been no income for the employees. There was an obligation on the first respondent to provide work and wages and an obligation on the employees to accept the work in return for payment. I accept the evidence of both claimants that they continued to work as employees until the first respondent ceased trading under a continuing contract of employment.

58. The Secretary of State contended that the level of pay received by the claimants was low and was not a genuine salary of an employee, as other mechanics were paid £15 per hour.

59. The claimants were questioned about their level pay by the Secretary of State, which the Secretary of State considered to be lower than the national minimum wage. The claimants explained that in their statements they used average figures but asserted that the figures on the pay slips and tax records were accurate. Mr White explained that neither of the claimants' strengths laid in handling finances and paperwork, which is why they always hired a secretary and an accountant. The pay rates for all employees were recommended by the accountant and the recommendations were always followed. The low pay rate they received for their part-time work as employees was recommended by the accountant after consideration was given as to what could be managed by the business.

60. Having considered the figures in the pay slips and tax records and the hours work as set out in the claimant's statements and oral evidence, I am satisfied that they were paid a rate above the minimum wage save for the period between April 2022 and June 2022. Up until the end of June 2022 both claimants were working 20 hours per week and received a weekly pay of £183. This equates to an hourly rate of £9.15. The national minimum wage increased from £8.91 to £9.50 in April 2022. However, I note that from the beginning of July 2022 both claimants increased their hours and received a pay raise, where they received an hourly rate of £9.68. There is a short period of 3 months where the claimants worked for pay below the national minimum wage threshold, however, for almost 20 years they worked at a rate above the national minimum wage. Whilst being paid below the national minimum wage would point away from employment, it is not a determinative factor. In this case, in the context of the length of employment, the pay fell below the national minimum wage threshold for only a short period and pay was adjusted, shortly thereafter. Further, I accept that the

claimant's relied on the accountants to guide them with regards to the pay rate and were paid at a rate above the national minimum wage for the majority of the employment. This would suggest that the claimants were employees of the first respondent.

61. It was contended by the Secretary of State that the claimants benefited from "the optimum director's salary", or a threshold near it, for the relevant fiscal year in order to take advantage of the most tax efficient salary for a director to pay themselves, a benefit, they argued, that is not afforded to a genuine employee [67].

62. It was confirmed by both claimants that they received dividends, and this income was declared via self-assessment forms completed by the accountant. They asserted that they were entitled to the dividends because they completed tasks that employees were not employed to do and which would be outside of their scope as a mechanic or MOT Tester. Mr White, in his evidence stated that in his capacity as a director he would set the pricing for jobs, he would collect and drop vehicles, interview and hire new employees and make decisions about the business. The role of a mechanic did not include these tasks. Mr Hughes gave evidence that he would withdraw money and issue wages to employees, place orders for the business and also make decisions that impacted the business with Mr White. They were clear about which role each of the tasks related to. They were paid a part-time wage between 20 and 25 hours per week and the remainder of the time they were directors.

63. In **Dugdale,** the court considered whether the employee salary was merely a device to use up the personal allowances of the directors during each year by reference to how the claimant was remunerated. In that case the claimant received payment by loans which were later repaid from dividends on her shares. This case can be distinguished, as the weekly salary paid to the claimants was distinct from the dividends, which were paid less frequently and varied in amount. The salary was consideration for their work as a mechanic and MOT Tester and they were paid in accordance with the PAYE scheme. This has been reflected in the financial records produced to the Tribunal. For these, reasons I am satisfied that any dividends or directors salary paid for their role as directors was separate and distinct from the salary paid in consideration for work done in their capacity as employees.

64. Evidence was also provided of first respondent accounts [85-92] and the first respondent bank account [202-332]. Mr White and Mr Hughes confirmed that they both had access to the first respondent's bank account, and it was used solely for business purposes. Invoices were issued by the first respondent and any payments received were received into the first respondent's bank account. Mr White produced copies of invoices which were consistent with the evidence given [RW/9]. The bank account transactions also demonstrate that it was used for business purposes and cash withdrawals were for payment of salaries. Furthermore, Mr Hughes explained that the accountant would have oversight of the bank account and to ensure that the transaction records were reconciled. They were accountable to each other and the

accountant for any spending from the account. Having considered the bank statements and the evidence of the claimants, I am satisfied that the bank account was not used for personal expenses or to top up salary and was subject to the control of the first respondent.

65. In **Ready Mixed Concrete** the further conditions demonstrating mutuality of obligation were that the claimants agreed to be the subject of the first respondent's control in the performance of their services as employees and that the other provisions of the contract are consistent with its being a contract of service.

66. The claimants confirmed that they each held a 50% share in the first respondent. **Clark** sets out that even if someone has total control over the operation of a first respondent that person can enter in to a binding and effective contract of employment with the first respondent. The claimants contended that as 50% shareholders, they were accountable to each other not only as directors but also as employees.

67. The claimants were able to demonstrate this by giving evidence of their conduct as employees. The explained that each attended work for the day for the duration of the operating hours. During the day they would report their working times to the secretary, who would record them and communicate those to the accountant to prepare wage slips. All employees were required to this. Further, they explained that they would book leave only after checking the diary and request leave on a day that other employees were working to ensure the smooth running of the business. All employees were required to do this. Mr White explained that he would check with Mr Hughes before booking any leave and Mr Hughes gave evidence that there has never been an occasion where he has cancelled the leave of a colleague to take leave himself.

68. Mr Hughes also gave evidence that if he could not attend due to absence, he would report that absence to Mr White and Mr White would make arrangements to ensure that the work was covered. He would not be expected to provide a substitute and has not done so.

69. Mr White, in his evidence, said that potentially he could be dismissed as an employee. He explained that Mr Yates was dismissed as an employee by him and Mr Hughes, due to his conduct in handling financial matters. Mr Yates was dismissed as an employee first and shortly thereafter he resigned as director.

70. This demonstrates that they abided by the procedures of the first respondent and is persuasive in establishing that the claimants conducted themselves in a manner that was consistent with the contract of employment and that, in their capacity as employees, they had agreed to be the subject of the first respondent's control when performing their duties as a mechanic and MOT tester. This evidence also demonstrates that the provisions (booking leave, reporting sick absence, potential to be dismissed) were consistent with a contract of employment.

71. Taking these factors together, I find that the there was an obligation of mutuality for the first respondent to provide work and the claimants to accept that work, demonstrating an employer employee relationship.

72. In summary, the following factors taken together demonstrate that Mr White and Mr Hughes were employees of the first respondent:

    a. They attended work for the duration of the operating hours each day
    b. There was a clear distinction between their roles as an employee and their role as a director
    c. They worked for set hours between 20 and 25 hours per week
    d. They were paid a regular salary which was subject to the PAYE scheme
    e. Pay slips and P60 tax documents were issued
    f. They conducted themselves in the same way as other employees when absent and when booking leave
    g. There is no evidence that they could substitute another for the role of an employee
    h. There is no evidence that they used first respondent money as personal money
    i. They were accountable to each other and the accountant
    j. They did not work anywhere else

73. Therefore, I am satisfied on the balance of probabilities, that the claimants were employees of the first respondent.

Redundancy Calculation

74. I calculated the redundancy payment in accordance with the provisions as set out within the Employment Rights Act.

75. The Secretary of State submitted that the end date for the purposes of a redundancy calculation, is the date the claimants became aware of the insolvency taking place. The claimants gave evidence they became aware approximately a month before their dismissal date of 28 October 2022, on or around 28 September 2022. The claimants would have completed 20 full years of service by 05 September 2022 therefore using one date over the other will not result in a different outcome.

76. Both claimants were in receipt of £242 per week for working 25 hours per week at the relevant date. Mr White was 45 years old at the time of his dismissal and he was employed for a full 20 years. His redundancy payment is therefore £5,342. Mr Hughes was 59 years old at the time of his dismissal and he was employed for a full 20 years. His redundancy payment is therefore £7,018.

Other Payments

77. Both claimants withdrew their claim for holiday pay after reflecting on the figures and amount of holiday taken. Accordingly, the claim for holiday pay is dismissed upon withdrawal.

78. Mr White and Mr Ross did not provide a schedule of loss but confirmed that they were seeking payment for a notice period of 1 month. This is a period shorter than the statutory minimum notice period, which is 12 weeks. Neither claimant expressly waived their right to a longer notice period and the claimants had given evidence that they were aware of the insolvency 1 month before the termination of their employment. In view of this, 8 weeks' notice pay was due and was calculated using a weekly pay of £242. They are therefore entitled to £1936 notice pay each.

Employment Judge Hussain

Date 01 May 2024

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