EMPLOYMENT TRIBUNALS

BETWEEN

Claimant		**Respondent**
MR W BOARDMAN	**AND**	**CHAUFFEURS IN CHESTER LTD (IN CREDITORS VOLUNTARY LIQUIDATION) (R1)**
		THE SECRETARY OF STATE FOR BUSINESS ENERGY AND INDUSTRIAL STATEGY (R2)

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

HELD AT: CARDIFF ON: 22ND MAY 2023

EMPLOYMENT JUDGE MR P CADNEY (SITTING ALONE) **MEMBERS:**

APPEARANCES:-

<u>FOR THE CLAIMANT:-</u>

<u>FOR THE RESPONDENT:-</u>

<u>JUDGMENT</u>

The judgment of the tribunal is that:-

1. The claimant was not at the date of the insolvency an employee of Chaffeurs in Chester Ltd (in Creditor's Voluntary liquidation (R1)) within the meaning of s230 Employment Rights Act 1996.

2. The claimant's claims against Chaffeurs in Chester Ltd (in Creditor's Voluntary liquidation) for unpaid redundancy pay, unpaid notice pay, unpaid holiday pay and unpaid wages are not well founded and are dismissed.

3. The claimant's claim that the Secretary of State (R2) is liable to make payments to him pursuant to s166/182 Employment Rights Act 1996 is not well founded and is dismissed.

Reasons

1. By this claim the claimant brings claims against R1 for a statutory redundancy payment, notice pay, unpaid wages and unpaid holiday pay. He asserts that he was an employed director.

2. He also pursues the claims against the Secretary of State (R2) for payments from the National Insurance Fund pursuant to s166/182 of the Employment Rights Act 1996.

3. R1 has not entered a response. R2 accepts that R1 is insolvent within the meaning of those sections but disputes liability on the basis that it asserts that the claimant was not an employee of R1.

Facts

4. In 2010 the claimant and two others purchased a corporate chauffeur business in Chester. It was not at that stage incorporated, but the claimant and his colleagues incorporated the business as a limited liability company in January 2010. The claimant and his colleagues were equal shareholders and became directors of the company. In March 2016 the claimant purchased the shareholding of the other shareholder/directors and became the sole shareholder/director in the first respondent. On the 18th May 2022 it entered into creditors voluntary liquidation as a result of trading and financial difficulties caused by the consequences of the Covid 19 pandemic.

5. The first respondent has not entered a response, or participated in this hearing, but as set out above the second respondent disputes its liability to make any payment to the claimant on the basis that he was not an employee of the first respondent at any stage.

6. The respondent company provided chauffeur driven car services to a number of corporate clients. The process was for a particular job to be booked via telephone or e-mail, and once booked a driver would be allocated to the job. In the early years of the operation of the company, each of the three shareholder directors also drove, and there were two other drivers who were used. The non-shareholder/director drivers would be paid a fixed fee of 1/3 of the agreed fee for that particular job. They were not paid according to the hours they worked. In addition there was a salaried

manager and a part-time administrator. The claimant's evidence is that both were employees, but neither was provided with a written contract of employment.

7. It is not at all clear when the claimant asserts that he became an employee of the first respondent. In evidence he stated that he never drew any distinction between a director and an employee and always considered himself to be employed by the company. However, when he became the sole owner of the company in March 2016 he was advised to pay himself an income via PAYE by his accountant. In his submissions to the Secretary of State he has given a date of the 1st June 2016 as the point at which he became an employee. The exact provenance of that date is not clear. It postdates his becoming the sole director/shareholder in the first respondent, although only by a few months, but pre-dates any PAYE payments. There was no written contract of employment created for him or signed by him setting out the start date of his employment. In addition there is no assertion by him that at any point there was any distinction drawn as to any hours which were attributable to his employment, and/or any particular activity which is attributable to employment rather than any duties as a director. As is set out below he did draw a distinction when calculating his pay but that does not appear to be referrable either to any written contract or to any specific arrangement as to which hours related to his employment ,and which to his director's duties. The claimant accepts that he never understood there to be any distinction between the two.

8. In his submission to the Secretary of State he records himself as working a 75 hour week and that he was remunerated at £9.50 an hour, which was the then national minimum wage, and which corresponds to a weekly salary of £712.50, and an annual salary of some £37,000. However his evidence is that for the reasons set out below he was not paid an hourly rate at all and does not know where the figure of £9.50 an hour comes from. Immediately before the insolvency he was effectively the sole worker of the company and would deal with all of the booking of jobs, the administration and the driving. All of the work other than they driving was effectively unpaid. The claimant accepted that if all of the hours he claimed as working hours were referable to employment, that he was not paid the national minimum wage. His evidence is that he never considered the national minimum wage as being applicable to him, and as set out above the method of calculating the amount he was paid was simply to take an amount which approximated with the amount referable to driving which was itself not referable to any hours actually worked. In terms of any sums paid to him as an employee HMRC records show that for the tax year April 2017 - April 2018 he had no taxable income. The first year for which any taxable income is shown is the tax year April 2018 -April 2019 in which he has a taxable income from employment of £7146.60. For the tax year 2019-2020 he was paid a total of £12,677.18. For the tax year April 2020- April 2021 he received £13,661.13. For the final tax year he is shown as receiving £11,909.09. However in his oral evidence he contends that that is in fact wrong and that he was not paid for the last few months before the company entered into creditors voluntary liquidation because the company was not in a position to pay him. All of the sums are sufficiently low that no income tax or national insurance was ever paid in respect of them

9. The claimant's evidence as to the payments to him is that he adopted a very similar policy for payment to himself as that set out above. Prior to 2016 he and his fellow/shareholder/directors had paid themselves simply for the driving work they did. The company's software automatically allocated one third of the fee for a particular job to the driver. Initially the three shareholder directors and then from 2016 onwards the claimant on his own, took no income for any other duties but simply paid themselves approximately the amounts recorded as owed to them specifically for driving. The figures that are recorded as his PAYE income were derived in this way.

10. One of the claims is for unpaid holiday pay. The claimant asserts that he had a right to 28 days paid holiday, and in his submission to the Secretary of State claimed that he had 20 days held over from the holiday year 2021, and had taken no holiday for the holiday year at 2021-2022. In evidence he stated that the holiday year ran from the 1st January to 31st December, but in his submission to the Secretary of State the holiday year was said to run from the 1st June, which is the anniversary of the date on which, in his submissions to the Secretary of State, he claimed to have become an employee. The claimant accepts that at no point did he keep any records of any holiday taken or any remaining, and that he did not know where the figure of twenty days had come from. There is no specific evidence before me that there is in fact any unpaid holiday pay.

11. As shareholder/director he had personally guaranteed loans taken out for the purchase of new vehicles, and he has had to re-mortgage his house to repay them.

<u>Law</u>

12. There are a number of matters not in dispute. Directors of companies are office holders, and do not become employees simply by reason of being directors. However directors can also be or become employees of the companies of which they are directors. There is considerable case law as to the employment status of directors who have a controlling interest in a company. The Secretary of State has helpfully supplied a bundle of the relevant authorities.

13. The Secretary of State relies on the well definition of employment set out in Ready Mixed Concrete (Southeast) Ltd v Minister of Pensions and National Insurance [1968] 2 QB 497 (McKenna J):

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) The servant degrees, expressly or impliedly, that in the performance of that service he will be subject to the others control in a sufficient degree to make that other master; and
iii) The other provisions of the contract are consistent with its being a contract of service.

14. In addition it relies on a number of authorities as to the question of whether a controlling shareholder/ director is also an employee of the company. It is not necessary to refer to all of them; but the Secretary of State principally relies on the principles as set out in Neufeld and Clark as set out below (these are broadly taken from the summary in the IDS Handbook which are in my judgement an accurate summary of the principles) :

i) In *Clark v Clark Construction Initiatives Ltd and anor 2008 ICR 635, EAT*, the EAT set out a list of factors that a tribunal faced with deciding whether a majority shareholder has 'employee' status might find helpful:

a) 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 and thus, on the face of it, has earned the right to take advantage of the benefits that employees may derive from such payments;

b) 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, in practice, he or she is able to exercise real or sole control over what the company does;

c) the fact that the individual is an entrepreneur, or has built the company 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 company's success, as will many employees with share option schemes;

d) 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;

e) conversely, if the conduct of the parties is either inconsistent with the contract, or in certain key areas is in fact not governed by the contract as one would expect, that would be a potentially very important factor militating against a finding that the controlling shareholder is an employee;

f) if contractual terms have not been identified or reduced into writing, that will be powerful evidence that the contract was not really intended to regulate the relationship in any way;

g) the fact that the individual takes loans from the company 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, such practices may well be necessary, and;

h) although the courts have stated that the existence of a controlling shareholding is always relevant and may be decisive, that does not mean that this alone will ever justify a tribunal in finding that there was no contract in place.

2.103

ii) In *Secretary of State for Business, Enterprise and Regulatory Reform v **Neufeld** and anor 2009 ICR 1183, CA*, the Court of Appeal made the following modifications to the eight factors identified by the EAT in Clark:

a) first factor: where an individual's employment status is in dispute, the court or tribunal must be satisfied that any relevant document is a true reflection of the claimed employment relationship, and for this purpose it will be relevant to know what the parties have done under it. The alleged employee may, therefore, have to do rather more than simply produce the contract itself, or a board minute or memorandum purporting to record his or her employment;

b) sixth factor: the EAT may have overstated the potential negative effect of the terms of the contract not being in writing. While this was an important consideration, if the parties' conduct pointed to the conclusion that there was a true contract of employment, tribunals should not seize too readily on the absence of a written agreement to justify rejecting the claim;

c) seventh and eighth factors: loans, guarantees and the existence of a controlling shareholding would ordinarily be irrelevant but 'never say never' is a wise judicial maxim.

Conclusions

15. It is difficult not to have a degree of sympathy with the claimant who has not sought to hide the fact that he does not understand the distinction between a director and an employee, and he effectively simply invites the tribunal to determine this issue. He does not and has never understood that there is a difference between being a director and an employee and regarded them as meaning the same thing. He himself has never drawn a distinction between the two. All he has done is attempt to run a profitable business, which was undermined by the Covid 19 lockdown and forced into insolvency. He is effectively unable to assist in determining the answer to the legal question of whether he became an employee and if so when.

16. The respondent submits that in order for the Secretary of State to be liable for any of the amounts claimed that he claimant would need to fall within the definition of "employee" in s230 Employment rights Act 1996. This is clearly correct.

17. Secondly the Secretary of State submits that he was not an employee within that definition. It contends that a combination of the following factors, none of which is individually determinative, means that when looked at overall he was not an employee:

i) The claimant was the 100% sole owner of the first respondent;

ii) The claimant was never in receipt of any written contract of employment;

iii) It is for the claimant to prove the existence of an employment contract (Neufeld para 88) and given that there was no written contract, and there is no evidence from the claimant himself as to how any verbal contract was entered into or what its terms were, the claimant is necessarily not able to do so. In addition the contrast between the claimant's oral evidence and the evidence submitted to the Secretary of State is so great that it is impossible to draw any meaningful conclusions as to his status.

iv) That the claimant fails the "control" test in that he was subject to his own destiny and not subject to or subordinate to anybody else.

v) In the information supplied to the Secretary of State he contended that his rate of pay was £9.50 per hour and hat he worked a 75 hour week which, if true would mean that he was paid below the national minimum wage; which is consistent with him being remunerated as a director, but not as an employee. However as set out above, the claimant now contends that the information is completely wrong and that he was never paid an hourly rate at all.

vi) The fact that the sums paid as income from employment were below the level at which he would be required to pay tax or national insurance leads to the conclusion that in reality these were sums paid to maximise the tax efficiency of

payments as a director, rather than being referrable to any particular type or hours of work and/or indicating a genuine employment contract;

18. The starting point for my purposes is the question of whether there was a contract, and if so whether it was a contract of employment. There are a number of factors which in my judgment militate against the claimant genuinely being an employee none of which are in of themselves necessarily determinative:

a) There was no written contract of employment;

b) There is no evidence as to how or when a verbal contract came into existence or what its terms were;

c) There was never any record of, and the claimant, (other than by reference to how he decided to pay himself), has given no evidence of which duties were attributable to his employment or his directorship; as he readily acknowledges he never drew any distinction between the two.

d) He took holiday as and when he wished and no record was kept in relation to holiday. In addition in none of the payslips is any holiday pay recorded;

e) The purpose of arranging for him to be paid via PAYE as an employee appears to have been a suggestion from his accountant and does not appear to have effected or reflected any change in the way the claimant worked or conducted the business.

f) The claimant himself was unable in evidence to state when he became an employee. There are three possibilities, he was one from the beginning, he became one in 2016 as asserted to the Secretary of State, or he became one in April 2018 when he began to be paid via PAYE.

19. In my judgement there is no evidence that any contract of employment was in place prior to the claimant becoming the sole owner of the company in 2016. It is not suggested that either he or either of his co-shareholder/ directors at any stage sought to become employees of the company, and in my judgment simply no evidence at all that they were employed by it. If that is correct in order for the claimant to be an employee his status must have altered at some subsequent point. As set out above he states in his submissions to the Secretary of State that his status changed on 1st June 2016, and he began to pay PAYE, indicating employment status at least for tax purposes, in 2018. His evidence is that he was advised at that point by his accountant to become an employee or at least to be paid as an employee, It follows that that is in my judgement the earliest point at which he could have become an employee.

20. In my judgement the only factor which could indicate that he could have become an employee is payment of his income via PAYE from April 2018. Other than the fact that he was paid via PAYE there is nothing at all to indicate that he became an employee of the company at any stage. However at that point there is no evidence

that anything had in reality changed, and in my judgement the Secretary of State is correct, particularly given that the amounts paid were sufficiently low not to attract tax or national insurance, to assert that the PAYE payments , on the balance of probabilities, are more likely to represent a tax efficient means of remunerating him as a director rather than indicating the existence of a genuine underlying contract of employment.

21. Looked a overall there is insufficient evidence in my judgement from which it is possible to conclude that a contract of employment was entered int and if so when and what its terms were.

22. It follows that the claims for redundancy pay, notice pay and unpaid wages against the first respondent are bound to fail as in the absence of an employment contract they fall outside the jurisdiction of the employment tribunal. In respect of the holiday pay claim I have heard no argument as to whether the claimant was in fact a ”worker” of the first respondent entitling hi to paid holiday. However even if he were in my judgment there is no evidence before me that there is in fact any untaken or unpaid holiday and that claim would have failed in any event on the facts.

23. As he was not at the date of the insolvency, in my judgement for the reasons given above, an employee of the first respondent it follows automatically that no liability attaches to the second respondent to make payments pursuant to s166/182 ERA 1996 and those claims are also dismissed.

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EMPLOYMENT JUDGE CADNEY

Dated: 25th May 2023

Judgment entered into Register
And copies sent to the parties on 31 May 2023

for Secretary of the Tribunals Mr N Roche