

RM



## THE EMPLOYMENT TRIBUNALS

**Claimant:** Mr James Howard  
**Respondent:** Brilliant IT Limited  
**Heard at:** East London Hearing Centre  
**On:** 14 November 2018  
**Before:** Employment Judge Burgher

### Representation

**Claimant:** In person  
**Respondent:** Mr P Maratos (Consultant)

## JUDGMENT

**The Claimant's claims fail and are dismissed.**

## REASONS

### Issues

1. This is a claim brought by the Claimant, Mr James Howard against Brilliant IT Ltd. The Claimant brings claims unfair dismissal and notice payment.
2. At the outset of the hearing the Tribunal identified the following issues were identified for determination.
  - 2.1 Whether the Claimant was an employee of the Respondent. If the claimant was not an employee there would be no entitlement for him to claim unfair dismissal.
  - 2.2 If the Claimant was an employee, consideration would be given to whether the Claimant had been constructively dismissed or whether he

was actually dismissed by the Respondent. Following hearing the evidence it was clear that the Claimant was asserting that he had been constructively dismissed as a result of an incident on the 25th of April 2018.

- 2.3 If the Claimant was constructively dismissed, I would consider whether he caused or contributed to his dismissal and if so to what extent.
- 2.4 Separately to the above, I would also consider whether, in view of the circumstances, the Claimant's employment would have continued in any event.
- 2.5 Finally, whether the Claimant had taken reasonable steps to mitigate his loss.

### **Evidence**

3. The Claimant gave evidence on his own behalf. Mr Michael Howard, the Claimant's father and director of the Respondent, gave evidence on behalf of the Respondent. Both witnesses gave evidence by way of sworn evidence provided in a written witness statements and they able to be cross-examined and answer questions from the Tribunal. I was also referred to relevant pages in an agreed bundle consisting of 142 pages.

### **Facts**

4. I have found the following facts from the evidence.

5. The Respondent company is a family run company established by Mr Michael Howard in 2001. Mr M Howard ran the company initially with his then wife r Mrs Marie Therese Howard who were 50% shareholders.

6. The Claimant commenced work in the Respondent company on on the 1 May 2010. He was trained and inducted on how the Respondent operated and was able to develop his business understanding on the management of the Respondent. The Claimant's brother, Mr Warren Howard, also had an opportunity to work within the company however he left the Respondent at some stage prior to the events that concern me.

7. On 19 May 2016 the Claimant was sufficiently developed and impressive for Mr M Howard to offer the Claimant a 30% shareholding in the company. The Claimant's mother, Mrs T Howard had 30% of her shareholding transferred to the Claimant to facilitate this and she retained a 20% shareholding. Mr M Howard had the remaining 50% shareholding.

8. It is clear that from this time that the dynamics of the relationship of running the company changed. The Claimant was able, and did, assert operational and logistical control over day to day operations and was able to be involved in for decisions about the future direction and strategy of the company.

9. The Claimant states that he was able to agree the amount that he was paid and the way in which it was being paid, whether it was by dividend or by salary to achieve most tax efficient outcome. He was able to decide on a salary structure of £953.24 monthly salary and £1512.50 monthly dividend.

10. At paragraph 10 of the Claimants witness statement he says that he ran about 80 to 90% of the day to day operations of the Company. He says that this was due to Mr M Howard taking a back seat for a few years as Mr M Howard had become more comfortable with the rest of the family running the company for him. At paragraph 11 of his statement the Claimant states that his role of the director included the following:

- 10.1 Planning, researching, creating and marketing new services and contracts.
- 10.2 Procuring new client e.g. meetings and quotes.
- 10.3 Day-to-day technical work including PC repairs, on-site and remote IT support and website design and development.
- 10.4 Analysing business accounts for tax efficiency.
- 10.5 Customer relations and issuing resolving.
- 10.6 Managing repair centre employees.
- 10.7 Recruiting and interviewing employees (sometimes shared with Mr M Howard and Mrs T Howard).

11. The Claimant was in a position to recruit any person to undertake any of the relevant duties if he felt it was appropriate to do so.

12. In respect of day to day decisions in the company there was much dispute. The Claimant stated that throughout the period of 8 years he worked at the Respondent he had been consistently subjected to abusive and unreasonable treatment from Mr M Howard. However the Claimant did not do anything about this because at the relevant time he did not think was anything exceptional about it and it was only after he had time to reflect with the support of relevant friends and family that he was able to decide that he was no longer than to put up with such behaviours. Mr M Howard denied such behaviours and stated that there were tensions as the Claimant was a stubborn, determined and ambitious person he went off and did things his way even when it was against the things he believed in.

13. When assessing the evidence and competing accounts I find that from time to time the Claimant made proposals that Mr M Howard disagreed with and tension and argument ensued. However, there was no suggestion during these arguments that Mr M Howard was able to impose his will on the Claimant in respect of the operation of the Company and stop the Claimant doing as he wished. The Claimant stated that decisions were made on a group basis and the Claimant was ultimately able to proceed as he wished.

14. On the 28 February 2018 Mrs T Howard resigned as a director of the company and filed for divorce from Mr M Howard. Mrs T Howard transferred her 20% shareholding in the company to the Claimant and he therefore had 50% ownership of the company.

15. The divorce created significant turbulence in the respective family relationships, not only between Mr M Howard and his estranged wife but clearly but between the Claimant and Mr M Howard. Mr M Howard was deeply concerned and upset that the Claimant had seemingly taken his mothers side and supported her rather than providing any support to him. This had a significant negative impact on the ensuing relationship between them.

16. On 25 April 2018 there was an incident that resulting in Mr M Howard attacking the Claimant. Mr M Howard sought to prevent the Claimant from organising business insurance on a personal car. The Claimant ignored this request and proceeded to make a telephone call to arrange the insurance. Mr M Howard repeated his objection to the Claimant seeking to arrange the insurance during the call and the Claimant told Mr M Howard to “shut the fuck up”. Mr M Howard attacked the Claimant following the perception that the Claimant was being disrespectful to him. Following this incident, the Claimant left the business.

17. Mr M Howard did visit the Claimant’s house on the 25 April 2018 to see whether the Claimant was going to return to work and the Claimant made it clear that he was not going to do so.

18. However, the Claimant did return to the Respondent’s offices on 28 April 2018 to process the payroll for himself but did not return to undertake any further duties for the Respondent.

19. Discussions between the Claimant and Mr M Howard then took place about the ownership of the business and buying each others shares, future operational controls and protection of company clients. The Claimant proceeded to set up a company in competition with the Respondent. However, these matters do not concern at the matters that I have to deal with.

## Law

20. When considering employee status I considered section 230 of the Employment Rights Act this states that.

*Section 230 ERA Employees, workers etc.*

- (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.***

21. I therefore have to consider whether the Claimant worked under a contract of service at the time the incident on 25 April 2018. The relevance of that is if there is no employment status there is no entitlement for the Claimant to bring a claim for unfair dismissal.

22. Mr Maratos, on behalf of the Respondent referred me to the case of discussion put forward by the respondents representative Mr that referred me to the case of Buchan & Ivey v Secretary of State for Employment [1997] IRLR 80, EAT to assert that as the Claimant was a 50% shareholder he could not be an employee.

23. However, I referred the parties to the higher level and more recent authority of Secretary of State for Trade and Industry v Bottrill [2000] 1 All ER 915, CA and informed the parties of the guidance that I would apply. The guidance given by Lord Woolf MR was as follows:

*“... whether or not an employer or employee relationship exists can only be decided by having regard to all the relevant facts. If an individual has a controlling shareholding that is certainly a fact which is likely to be significant in all situations and in some cases it may prove to be decisive. However, it is only one of the factors which are relevant and certainly is not to be taken as determinative without considering all the relevant circumstances.*

...

*The first question which the tribunal is likely to wish to consider is whether there is or has been a genuine contract between the company and the shareholder. In this context how and for what reasons the contract came into existence (for example, whether the contract was made at a time when insolvency loomed) and what each party actually did pursuant to the contract are likely to be relevant considerations.*

*If the tribunal concludes that the contract is not a sham, it is likely to wish to consider next whether the contract, which may well have been labelled a contract of employment, actually gave rise to an employer/employee relationship. In this context, of the various factors usually regarded as relevant (see, for example, Chitty on Contracts 27th ed. (1994) para. 37-008), the degree of control exercised by the company over the shareholder employee is always important. This is not the same question as that relating to whether there is a controlling shareholding. The tribunal may think it appropriate to consider whether there are directors other than or in addition to the shareholder employee and whether the constitution of the company gives that shareholder rights such that he is in reality answerable only to himself and incapable of being dismissed. If he is a director, it may be relevant to consider whether he is able under the Articles of Association to vote on matters in which he is personally interested, such as the termination of his contract of employment. Again, the actual conduct of the parties pursuant to the terms of the contract is likely to be relevant. It is for the tribunal as an industrial jury to take all relevant factors into account in reaching its conclusion, giving such weight to them as it considers appropriate.”*

24. The case paragraphs above are set out in full to highlight the importance of assessing the factual basis all the relevant circumstances including what actually happened on a day-to-day basis when considering whether there is a contract of service.

25. I have also considered the case of Ready Mixed Concrete (South East) Ltd v Minister of Pensions and National Insurance [1968] 2 QB 497 QB, where MacKenna J stated:

*“...a contract of employment exists if these conditions are fulfilled: (i) The servant agrees that, in consideration of wage or other remuneration, he will provide his own work and skill in the performance of some service for his master. (ii) He agrees, express 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.”*

26. In respect of control MacKenna J stated that this *“includes the power of deciding the thing to be done, the way in which it shall be done, the means to be employed in so doing it, the time when, and the place where it shall be done. All these aspects of control must be considered in deciding whether the right exists in a sufficient degree to make one party the master and the other his servant. The right need not be restricted.”*

27. Whilst control and the mutuality of obligation are quintessential ingredients of the a contract of service employment they are not the sole requirements and the tribunal. Control and mutuality of obligation are quintessential ingredients of a contract of employment. They are not the sole requirements. I am required to weigh up other factors that go towards the worker being an employee.

28. Whilst there was no written contract of employment which would have specified various aspects of control and reporting, the Claimant was on payroll and subject to being paid on a PAYE basis. I did not hear any evidence about holiday pay or disciplinary or grievance arrangements. There was no evidence that the Claimant invested in the Company or undertook any personal risk.

29. Having considered the evidence, I conclude the Claimant was not subject to the control of anyone within the Respondent. The Claimant was able to countermand decisions, agree decisions, decide how much he was going to be paid. He was able to decide the hours he worked, when he worked and what he did. He was able to employ others to undertake work for him within the Company and decide to be paid and the most tax efficient structure. As at 25 April 2018 the Claimant was not subject to any operational controls within the Respondent and could do, and did, as he wished. These are factors which place the Claimant in a position where he was not subject to the control of any other director or the company. In these circumstances I conclude that that he was not subject to a contract of service at the relevant time.

30. The Claimant did not therefore work under a contract of employment and as such he is not entitled to bring a claim for unfair dismissal. His claim for unfair dismissal is therefore dismissed.

31. Had I found that the Claimant was an employee I would have found that he was constructively dismissed. Being attacked by a fellow worker to whom he reported would have been sufficient to have amounted to a constructive dismissal for the Claimant not to return to work.

32. I make no findings as to whether there was a history or campaign of attacks or verbal abuse by Mr M Howard against the Claimant however I am prepared to find clearly on the evidence of this case that was a very difficult relationship between a Father and a son and estranged wife. However, I would not have found that the Claimant caused or contributed to his dismissal. Arguments can take place from time to time but not sufficient to have resulted in an attack

33. In respect of whether the relationship would have continued in any event, I would have concluded that from February 2018 when Mrs T Howard left the, writing was on the wall and the relationship between father and son was unsustainable in view of the difficult personal circumstances and the positions being adopted by those involved. On the evidence I would have concluded that dismissal would have been likely to have taken place within 8 weeks. However, as the Claimant is not an employee these conclusions are irrelevant.

34. The Claimant is not an employee and therefore the Tribunal does not have jurisdiction to consider a payment in respect of statutory notice pay under section 86 of the Employment Rights Act 1996.

35. The Claimant is not an employee and therefore the Tribunal does not have jurisdiction to consider a claim for contractual payment for the Claimant's claim for notice under the Employment Tribunal Extension of Jurisdiction Order 1994.

36. The Claimant's claim for notice pay is therefore dismissed.

Employment Judge Burgher

19 November 2018