EMPLOYMENT TRIBUNALS

Claimant: R Beadle

Respondent: Capital Computer Care Ltd

RECORD OF A PRELIMINARY HEARING

Heard at: London South Employment Tribunal

On: 7 June 2023

Before: Employment Judge Burge

Appearances
For the Claimant: Mr Heard, Counsel
For the Respondent: Mr MacFarlane, Solicitor

RESERVED
PRELIMINARY JUDGMENT

It is the Judgment of the Tribunal that:

1. the Claimant was not an "employee", nor a "worker" of the Respondent within the meaning of s.230 Employment Rights Act 1996. The Tribunal therefore has no jurisdiction to hear the Claimant's complaints of unfair dismissal, wrongful dismissal and holiday pay and they are dismissed; and

2. the Claimant was not in "employment" within the meaning of s.83 Equality Act 2010, but he did hold an "office" within the meaning of s.49

Equality Act 2010 of the Respondent. His claims of age discrimination therefore continue.

REASONS

1. A one day Preliminary Hearing had been listed to decide:

    a. Was the Claimant a worker, an employee or neither for the purposes of the Employment Rights Act 1996? Should the complaint of unfair dismissal be dismissed because the Claimant was not the employee of the Respondent as defined in section 230(1) and (2) of the Employment Rights Act 1996?

    b. Whether the complaints of unlawful discrimination contrary to the Equality Act 2010 should be dismissed because the Claimant is not entitled to bring it if he was not in the "employment" of the Respondent as defined in section 83 of the Act or he is not an "office holder" (section 49)?

    c. Whether the Claimant's complaints should be dismissed on grounds of illegality?

    d. Case management and listing for final hearing, if appropriate.

2. I heard evidence from the Claimant, Mr Beadle, on his own behalf and from Mr Tomlins on behalf of the Respondent. A bundle of documents running to 313 pages was provided to the Tribunal. I only read the pages I was taken to.

3. Both representatives provided skeleton arguments and gave oral closing submissions.

Findings of fact

4. The following facts are only found in relation to the employment/worker/office holder status of the Claimant.

5. Mr Beadle and Mr Tomlins were old friends who at first ran a partnership together and then set up the Respondent in May 1988 with themselves as the directors and shareholders. The Respondent provides services to businesses including cleaning and computer services.

6. I accept the evidence from both witnesses that they took advice on their pay arrangements from their accountants and so this was the reason why they paid themselves as they did. They paid themselves a nominal amount through PAYE of £624 a month and they also paid themselves shareholder dividends. The nominal PAYE amount meant that they would have full NI contributions. Mr Beadle and Mr Tomlins were 50% shareholders, prior to each granting 5% of their shareholding in 'C' shares to David Usher, Director, on 24 November 2016. From this point, the Claimant and Mr Tomlins held 45% 'A' shares each, with the remaining 10% being held in 'C' shares by Mr Usher.

7. When their business first started Mr Beadle and Mr Tomlins would both attend the office on a daily basis, Mr Beadle became in charge of services and Mr Tomlins was in charge of sales. At its most successful in around 1999 the Respondent turned over £1.8 million. Mr Beadle and Mr Tomlins paid themselves shareholder dividends of between £5000 - £6500 per month at that time. At that time the Respondent had around 80 employees and had two people working in its human resources department.

8. After 2000, the respondent went into steady decline and quickly lost a significant amount of business. In 2001 Mr Beadle and Mr Tomlins entered into a shareholders agreement.

9. By 2015 Mr Beadle was working entirely from home. I accept the evidence of Mr Tomlins that Mr Beadle was manipulating figures on spreadsheets and checking invoices but he was not working very much at all after 2015. The amount of pay that Mr Beadle received via PAYE never changed, it remained £624 per month.

10. New Articles of Association were adopted in 2016 which included a provision for the appointment of Alternate Directors:

> *"16 Alternate Directors*
> *16 1 Any director (other than an Alternate Director or an Additional Director) may at any time appoint any person (including another director) to be an Alternate Director and may at any time terminate such appointment Any such appointment or termination shall be effected in like manner as provided in Article 18 4 The same person may be appointed as the Alternate Director of more than one director."*

11. By 2021 there were only 3 employees plus the Directors.

12. Mr Beadle and Mr Tomlins did not have contracts of employment. The employees at the Respondent did have them and it was Mr Beadle who was the one responsible for issuing them. There was a staff handbook that contained various provisions such as sickness reporting and sick pay entitlement (SSP only), grievance and discipline procedures which Mr Beadle never followed for himself. He always got paid the same £624 PAYE, regardless of how many hours he worked, whether he was on holiday or absent through sickness. The amount of shareholder dividends that were paid to Mr Beadle and Mr Tomlins was decided by themselves, and it depended upon how well the Respondent's business was doing at the time.

13. If Mr Tomlins suggested that Mr Beadle should do something about his area of responsibility (the service team) then Mr Beadle may or may not do it, it was up to him.

14. Emails between Mr Beadle, Mr Tomlins and Mr Usher from 2019 show that Mr Beadle was not working on a day to day basis for the Respondent. Mr Tomlins stated:

> *"We also need to recognise that Dave, Liz and Sam are the main ones managing the company now, they will have formed relations with suppliers that we might have previously been the main contact for, and quite right too. We should not be involved in anything on a day to day basis. Those days are gone."*

15. Mr Beadle would occasionally attend senior management, sales and board meetings.

16. Emails between Mr Beadle, Mr Tomlins and Mr Usher show that their decisions on how and what to pay themselves were driven by tax efficiency. In an email on 17 December 2019 Mr Usher wrote to Mr Beadle:

> *"• Paying own Taxes - due to the available funds that Capital have available at present, you mentioned that if needed you could possibly look at paying your taxes this time and that this was a conversation that would be needed with Eddie regarding the situation, once finalised details were known.*
> *• Moving to PAYE - we discussed that as you are now of 'Retirement Age' you don't have the pay NI, the premise was to look at if it was more tax efficient for you to be paid wholly or mostly under PAYE, this would also save on the amount of Corporation Tax which we pay, due to this being calculated on the profits before dividends are*

drawn. We were going to provide a spreadsheet of all known premeditations to discuss with the accountants in the New Year"

17. On 28 February 2020 Mr Beadle wrote:

"With regard the PAYE I think that needs a discussion first between us and then with Oscar Fairchild. A few things immediately come to mind regarding this, first I doubt our cashflow could handle the additional monthly Tax and NI payments on what Ed and I are drawing at the moment. I have tried to work this out this morning and I think it could add as much as £4000 a month if you include Employers NI. I do though think there is stil a case for upping the amount we currently pay ourselves in this way, another thing I will bring up with Andy as we did ask him to look into this for us when we met him before Christmas.

If I'm right about the £2000 each Tax and NI that would be due monthly, it's a lot more than what we paid this year and it also takes away the option of paying it personally if we needed to as we did last month. That was also our 2018/19 Tax so this years would still need to be paid in July and January on top of the PAYE."

18. When the pandemic hit Mr Beadle was furloughed based on his nominal PAYE amount.

19. On 5 November 2020 Mr Beadle was removed as a Director by Mr Tomlins and Mr Usher with immediate effect. The disciplinary and grievance procedures in the staff handbook were not used.

The Law

20. Section 230 Employment Rights Act 1996 ("ERA") sets out the definition of "employee" and "contract of employment":

"(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. Case law has established that personal service, control and mutuality of obligation are required in an employee/employer relationship under the ERA. However, the focus must be on the statutory wording (*Uber BV and ors v Aslam and ors* 2021 ICR 657).

22. Section 230(3) ERA sets out the definition of "worker":

> *(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;*
> *and any reference to a worker's contract shall be construed accordingly."*

23. For claims under the Equality Act 2010 ("the EQA") the definition of "employment" is set out in section 83 EQA as follows:

> *(2)"Employment" means—*
>
> *"(a) employment under a contract of employment, a contract of apprenticeship or a contract personally to do work*
> *…"*

24. In *Ready Mixed Concrete (South East) Ltd v Minister of Pensions and National Insurance* [1967] 2 QB 497:

> *"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…'*
>
> *As to (ii). Control includes the power of deciding the thing to be done, the way in which it shall be done, the means to be employed in doing it, the time and the place where it shall be done. All these aspects of control must be considered in whether the right exists in a sufficient degree to make one party the master and the other his servant. The right need not be unrestricted…"*

25. In *Pimlico Plumbers Ltd v Smith* [2018] IRLR 872, the Supreme Court made it clear that even though the s.83 EQA definition does not expressly exclude from the concept a contract in which the other party has the status of a client or customer, "this distinction has been held to be one without a difference" (per Lord Wilson, at paragraphs 13 and 14).

26. In the case of *Uber BV and ors v Aslam and ors* 2021 ICR 657, the Supreme Court considered *Autoclenz Ltd v Belcher and ors* 2011 ICR 1157 and in

the judgment of Lord Leggatt, "*the primary question was one of statutory interpretation, not contractual interpretation".*

27. In *Sejpal v Rodericks Dental Limited* [2022] EAT 92 the Employment Appeal Tribunal reminded Tribunals that when determining whether an individual is a worker pursuant to s.230(3)(b) ERA, it is the statutory test that needs to be applied:

> *"Concepts such as "mutuality of obligation", "irreducible minimum", "umbrella contracts", "substitution", "predominant purpose", "subordination", "control", and "integration" are tools that can sometimes help in applying the statutory test, but are not themselves tests. Some of the concepts will be irrelevant in particular cases, or relevant only to a component of the statutory test. It is not a question of assessing all the concepts, putting the results in a pot, and hoping that the answer will emerge; the statutory test must be applied, according to its purpose."*

28. In *Clark v Clark Construction Initiatives Ltd* [2008] ICR 635, the EAT upheld a tribunal's finding that the claimant was not an employee of the respondent. There was no employment contract, he was receiving only a minimal salary and was instead relying on loans from the company to cover his living expenses.

29. In *Secretary of State v Neufeld* [2009] EWCA Civ 280 per HHJ Shanks:

> *"…In many cases involving small companies, with their control being in the hands of perhaps just one or two directors/shareholders, the handling of such matters may have been dealt with informally and it may be a difficult question as to whether or not the correct inference from the facts is that the putative employee was, as claimed, truly an employee. In particular, a director of a company is the holder of an office and will not, merely by virtue of such office, be an employee: the putative employee will have to prove more than his appointment as a director. It will be relevant to consider how he has been paid. Has he been paid a salary, which points towards employment? Or merely by way of director's fees, which points away from it? In considering what the putative employee was actually doing, it will also be relevant to consider whether he was acting merely in his capacity as a director of the company; or whether he was acting as an employee (para. 85).*
>
> *…*
>
> *[It will not ordinarily be of any special relevance in deciding is a claimant is an employee because of] …the fact that he will have share capital invested in the company; or that he may have made loans to it; or that he has personally guaranteed its obligations; or*

that his personal investment in the company will stand to prosper in line with the company's prosperity; or that he had done any of the 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 company. However, they do not show that the 'owner' cannot also be an employee (paragraphs 85 and 86)."

30. In *Dugdale v DDE Law Ltd* (unreported, EAT, HHJ Richardson, 4.7.17) the EAT upheld the tribunal's decision a working shareholder/director receiving payments from a company was not an employee:

"It is not fanciful to suppose that the Claimant and her fellow directors and shareholders intended to operate the company through its corporate structures, without individual contracts of employment, drawing against available funds through directors' loan accounts and receiving dividends in due course. There may have been an underlying shareholders' agreement of some kind; but it does not follow that there were contracts of employment between the shareholders and the Respondent."

31. The case of *Bradley Rainford v Dorset Aquatics Limits* EA-2020-000123-BA (previously UKEATPA/0126/20/BA) involved brothers who were co-directors and 40/60 shareholders in the respondent. The claimant worked as site manager and both brothers were each paid, on the advice from accountants, an equal "salary" agreed between them (latterly £1,500 per month) and had PAYE and NI deducted/paid in respect thereof. They also agreed between them on the amount of dividends to be paid at the end of the year in accordance with their shareholdings. The EAT upheld the Tribunal's decision that the claimant was not an employee or a worker for the purposes of s 230 of ERA 1996. Per HH Judge Shanks:

"From Clark and Neufeld (see: paras [79] to [90] in particular) we take the following propositions in relation to the question whether a director/shareholder is also an employee of a company (which are likely to apply equally to the wider concept of "worker"):

(1) There is no reason in principle why someone who is a shareholder and director of a company cannot also be an employee, even if the person has total control over the company;

(2) Whether the shareholder/director is an employee is a question of fact for the tribunal;

(3) In cases where matters have been dealt with informally it may be a difficult question as to whether the correct inference is that the shareholder/director was truly an employee;

(4) In considering the issue it will be necessary in particular to consider how the parties have conducted themselves, what they have actually done and how they have been paid;

(5) Where the conduct of the parties is inconsistent with the existence of a contract of employment or is in some areas not governed by such a contract, that will be an important factor pointing away from a finding that the shareholder/director is an employee;

(6) It follows that the lack of any written employment contract or other record thereof, is likely to be an important consideration;

(7) The fact that the shareholder/director has control of the company or that his personal investment in it will stand to prosper with the company will be "part of the backdrop" but will not ordinarily be relevant to the issue and can and should therefore be ignored (see: Neufeld para [86])."

32. Section 49 EqA provides the following in relation to personal office holders:

> *"49 Personal offices: appointments, etc.*
>
> *(1) This section applies in relation to personal offices.*
>
> *(2) A personal office is an office or post—*
>
> > *(a) to which a person is appointed to discharge a function personally under the direction of another person, and*
> >
> > *(b) in respect of which an appointed person is entitled to remuneration.*
>
> *…*
>
> *(6) A person (A) who is a relevant person in relation to a personal office must not discriminate against a person (B) appointed to the office—*
>
> > *(a)as to the terms of B's appointment;*
> >
> > *(b)in the way A affords B access, or by not affording B access, to opportunities for promotion, transfer or training or for receiving any other benefit, facility or service;*
> >
> > *(c)by terminating B's appointment;*
> >
> > *(d)by subjecting B to any other detriment.*
>
> *(7)A relevant person in relation to a personal office must not, in relation to that office, harass a person appointed to it.*

…

(10)For the purposes of subsection (2)(a), a person is to be regarded as discharging functions personally under the direction of another person if that other person is entitled to direct the person as to when and where to discharge the functions..."

Conclusions

33. Mr Heard submitted that it was important to note that Mr Tomlins had not questioned employee status until the Tribunal had raised it. I do not think this makes a difference. Status is a jurisdictional issue that the Tribunal is bound to raise. Employment status involves complicated legal concepts that are not familiar to many in the legal profession, never mind to lay people.

34. Mr MacFarlane submitted that it was the Respondent's case that Mr Beadle was not an employee, nor a worker but he conceded that as a director he was an "office holder" under section 49 of the Equality Act 2010. Mr Heard agreed that Mr Beadle met the definition under s.49.

35. There was no suggestion from either side that employment arrangements existed but they were a sham.

36. There was no contract of employment. Indeed it was Mr Beadle who was responsible for providing contracts for employees and he did not provide one for himself or for Mr Tomlins. This is an important consideration. The two were old friends, they started the business together, first as a partnership and then as the Respondent. The fact that as a shareholder/director Mr Beadle has control of the company and that his personal investment in it will stand to prosper with the company is "part of the backdrop" but it does not tell us whether or not there is an implied contract of employment.

37. There is no reason in principle why someone who is a shareholder and director of a company cannot also be an employee, even if the person has total control over the company. I must look at how the parties acted, how they treated and paid themselves. On the advice of their accountants they structured their payments as a nominal PAYE payment in order to ensure they paid the minimum amount to get a full NI contribution record and they decided how much to pay themselves as shareholders in the form of dividends. It is particularly telling that the nominal PAYE payment did not vary at all over the years, despite the changes in hours of work. Starting from 2015 Mr Beadle was not working much at all, Mr Beadle would occasionally attend senior management, sales and board meetings and would manipulate figures on spreadsheets and check invoices, he was not involved in the day to day work of the Respondent and yet he continued to receive the same nominal PAYE payment.

38. Mr Beadle and Mr Tomlins treated themselves differently to the employees they employed. Unlike the employees, Mr Beadle did not only obtain SSP when he was sick. He would let Mr Tomlins know when he was going on holiday but this was very different to the reporting obligations placed on employees. There was no "control" of Mr Beadle by the Respondent – he worked the hours he chose, he went on holiday when he chose, he did the work that he chose, he was not subject to the provisions of the staff handbook like employees were. He did not do a certain amount of work for a particular wage. Considering what he was actually doing, I conclude that he was acting in his capacity as a director of the Respondent, he was not carrying out work under the control of the Respondent.

39. There was an expectation that the Directors would work so as to ensure profitability of the Respondent but how Mr Beadle did that was up to him. It is difficult to assess whether personal service is a requirement where there is no contract of employment, nor any discussion about whether there is a right of substitution. It does, of course, not matter if substitution is used in fact or not. I conclude that Mr Beadle could have employed someone to fulfil the work that he was doing, had there been enough profits to warrant such an appointment and he could also have appointed an Alternative Director as provided for by the 2016 Articles of Association. I accordingly conclude that there was no requirement of personal service. Mr Beadle was not an employee of the Respondent within the meaning of section 230(1).

40. Turning to whether he was a "worker", section 230(3)(b) ERA requires there to be "any other contract… 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". It is not suggested that Mr Beadle is a client or customer of any profession or business undertaking carried on by him and so that part of the test is not relevant. However, Mr Beadle also does not fulfil the personal performance requirement. As concluded above, given his director status he could have employed someone else to do the work or appointed an alternate Director under the Articles of Association. He therefore does not meet the definition of "worker". Further, given that the "employment" definition of the s.83 Equality Act is a distinction that has been held to be one without a difference, it follows that Mr Beadle does not meet that definition either. He does, however meet the definition under s.49 Equality Act in relation to his appointment as a Director.

41. As I have decided that Mr Beadle was not an employee of the Respondent, the question of illegality does not arise.

Employment Judge Burge

12 June 2023