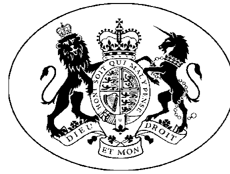

EMPLOYMENT TRIBUNALS

Claimants: Mrs V Rux-Burton
Mr J Rux-Burton

Respondent: 1. Rux-Burton Associates Ltd
2. Secretary of State for Business, Energy & Industrial Strategy

Heard at: **Reading** **On:** **6 December 2024**

Before: **Judge Harrison**

Representation

Claimants	In person represented by Mr J Rux-Burton
First Respondent	No attendance
Second Respondent	Mr P Soni, Senior Employment Tribunal Representative for the Secretary of State

RESERVED JUDGMENT ON LIABILITY

1. The Claimants' applications to amend their claims to include claims for disability discrimination are refused. These were applications to add claims within Part 3 Equality Act 2010 which the Employment Tribunal does not have jurisdiction to determine.

2. The Claimants' applications for orders that neither Claimant nor the First Respondent's name be disclosed to the public are refused having given weight to the principle of open justice and as the application related to matters linked to the application to amend at paragraph 1.

3. The Claimants were both employees of the First Respondent within the meaning of section 230 Employment Rights Act 1996 **(ERA).**

4. The Claimants claims for arrears of pay under section 184 (1) (a) ERA are dismissed following a withdrawal of these claims by the Claimants.

5. The remedy hearing will go ahead on 2 May 2025.

6. The parties will be sent a separate case management order setting out required steps for preparing for the remedy hearing.

REASONS

Introduction

1. These claims are brought by the Claimants against both Respondents. The Claimants say that they were employees of the First Respondent (the **Company**) until it became insolvent on 9 March 2023 (the **Insolvency Date**). The Claimants say that on the Insolvency Date they became redundant, and that as employees of an insolvent employer, they became entitled to a redundancy payment under section 166 ERA and other payments under sections 182 and 184(1) ERA. The Second Respondent (the **SoS**) says that neither Claimant was an employee, so neither is entitled to the payments claimed.

2. This claim was heard in person at the Reading Employment Tribunal on 6 December 2024.

3. The Claimants were both represented by Mr Rux-Burton, the Second Claimant.

4. The Company has not submitted a response to the claim, nor was it represented however I was able to proceed with the hearing as Judgment is sought only against the SoS. The SoS was represented by Mr Soni, Senior Employment Tribunal Representative.

Claims and issues

5. After dealing with the matters at paragraphs 10-11 in these Reasons it was agreed with the parties that the issue to be considered at the hearing was as follows: For the purposes of determining whether the Claimants are protected by sections 166 and 182 ERA, were the Claimants employees of the Company within the meaning of s230 ERA?

6. The claims remaining if the issue set out at paragraph 5 was decided in the Claimants' favour were those arising under:

    a. section 166 ERA a redundancy payment;
    b. section 184(1) (a) ERA arrears of pay;
    c. section 184 (1) (b) ERA a period of notice; and
    d. section 184 (1) (c) ERA holiday pay.

7. During our discussion of the issues Mr Soni for the SoS conceded that both an insolvency and a situation giving rise to redundancy within the relevant parts of ERA were admitted, and that if I were to find that the Claimants were employees of the Company then relevant payments would be payable under sections 166 and 184(1)(b) ERA, however, both section 184 (1) (a) and 184 (1) (c) ERA were in dispute.

8. At the end of the hearing, and in respect of section 184 (1) (c), Mr Soni made a similar concession subject to any relevant pro-ration.

9. During the hearing the Claimants withdrew their claim under section 184 (1) (a).

Procedure, documents and evidence

10. At the start of the hearing I asked if the parties agreed that the issue in question was as set out in paragraph 5 above. Mr Rux-Burton said he understood that he had amended the claims by an email to the Tribunal in October 2023 to include claims for disability discrimination and to make a request for anonymity. No such application being evident on the Tribunal file or having been considered, and Mr Rux-Burton being unrepresented I explained the process under the Rules for applying for an amendment and anonymity, and the issues I would need to consider in relation to such applications. I heard the applications from Mr Rux-Burton. Mr Soni had an opportunity to reply to the applications, but he did not do so.

11. After I had heard the applications, I reached agreement with the parties on the issues subject to my consideration of those applications. Mr Soni made the concessions recorded in paragraph 7 of these Reasons. At this point Mr Rux-Burton raised the fact that he thought the hearing would also consider the national minimum wage. No application to amend had been made. After a short discussion it was agreed that the minimum wage point was only relevant as evidence about the issue I had to decide, i.e. whether the Claimants were employees or not.

12. After an adjournment I gave Judgment on the two preliminary applications.

13. The Claimants gave oral evidence. They had both produced witness statements upon which they were questioned by Mr Soni. Mr Rux-Burton re-examined Mrs Rux-Burton briefly. The SoS did not call witnesses.

14. I had a bundle provided to me which ran to 770 pages, few of which were mentioned at the hearing. A further 9 pages numbered 771-779 were added to the bundle and these were used during the hearing.

15. The time taken on preliminary applications and agreeing the issues meant that the Claimants did not start to give evidence until 12.15. At the end of the morning session, and with the assistance of both parties, I fixed a timetable for the rest of the hearing to ensure that issues of liability could all be considered within the day. Mr Soni explained how much time he needed to question the witnesses, and he completed his questions within this time. The evidence was not rushed.

16. After oral evidence was complete, I turned to submissions. Mr Soni went first. He had asked for 10 minutes for oral submissions as he said that the SoS's ET3 would stand as a statement of his submissions, together with a bundle of cases, 10 of which were referred to in the ET3. Mr Rux-Burton had handed in a 58-page document headed Written Argument and he asked

for this to stand as his submissions. The first 13 of these pages were not relevant to the agreed issues in the case. The rest of the Written Argument included references to further cases and several of the same cases provided to me by Mr Soni and referred to in the ET3.

17. As Mr Rux-Burton was acting in person, I had explained to him before submissions that this was not an opportunity to bring forward further evidence, but to summarise his case and the law upon which he relied in support of his claim. He did seek to rely on a further document, now at pages 774-779 of the bundle. Mr Soni did not object to this document being added. It was a letter from the SoS to the Claimants setting out in bullet points extracts from the SoS's redundancy payments manual which were not disputed. Mr Soni was afforded, and took, an opportunity to respond to Mr Rux-Burton's submissions on this document.

18. After submissions and a short adjournment I told the parties that I would reserve my decision and set a provisional date for a remedy hearing. As the question of holiday entitlement was still in dispute I asked the parties about this and Mr Soni made the concession recorded at paragraph 8. It was then agreed by the parties that if the Claimants succeeded at this hearing then the relevant number of days holiday unclaimed in the last holiday year before the Insolvency Date were as recorded at pages 106 and 108 of the bundle, being 18 days for Mrs Rux-Burton and 8 days for Mr Rux-Burton.

Fact finding

19. Whilst the facts in this case arise out of a shared background, the Claimants arrangements and histories are different.

20. The Company became insolvent within the meaning of ERA on the Insolvency Date, 9 March 2023.

<u>First Claimant: Mrs Rux-Burton</u>

21. Mrs Rux-Burton joined the Company as an employee in 2004 when she was issued with a written contract, (an unsigned copy is page 176 of the bundle). This contract was issued in about March 2004 and Mrs Rux-Burton gave evidence which I accept that she signed it in April 2004. Mrs Rux-Burton was not issued with another contract after 2004 when her role, salary or other arrangements changed.

22. Mrs Rux-Burton describes the way in which her contract with the Company developed and operated between 2004 and 2023 at paragraphs 9-16 of her statement. The evidence at sub-paragraphs (a) to (c) was unchallenged, and I find that:

    a. Mrs Rux-Burton started work in 2004 as a Programme Supervisor and by 2016 she was Director for Strategic Development

b. Mrs Rux-Burton's starting salary was £20,000 and this increased from time to time to £45,000
c. Mrs Rux-Burton was a member of the Company pension scheme from 2016 when it opened
d. Mrs Rux-Burton's pay was put through the Company payroll. She received payslips and I accept Mrs Rux-Burton's oral evidence that at least until she was absent from work following an accident in August 2022 her pay was paid to her bank account monthly in accordance with the arrangements in her written contract.
e. Mrs Rux-Burton could not explain why her pay did not show as a payment to her from the Company in its bank statement in November 2022. She was unable to speak to the period after August 2022 because of her accident and I do not find that she made a request about how her November 2022 salary be paid.

23. From paragraphs 17-21 of her witness statement Mrs Rux-Burton explained how her position changed in 2018 when she became a director of the Company. I find as follows:

    a. Mrs Rux-Burton became a director of the Company in August 2018. From this time onwards her pay was adjusted to a level below the National Minimum Wage. Her salary went down to £8,580. She received a portion of her consideration in pay and the rest in the form of dividends. Mr Soni took Mrs Rux-Burton to her P60s at pages 192-194 of the bundle which she accepted were correct. Mrs Rux-Burton's pay arrangement was put in place on advice from the Company's accountants in what she described as a 'tax effective' arrangement.
    b. The Company was a wholly owned subsidiary of a holding company, Nuko 76 Ltd (**Nuko**), which was incorporated in February 2007. In 2018 Mrs Rux-Burton was granted Class B shares with non-voting rights in Nuko.
    c. Mrs Rux-Burton's Nuko shares were converted to Class A shares in 2020. The exact number of shares held by Mrs Rux-Burton was given as different percentages by the parties in evidence and submissions. It was common however that this holding was below 20%. Mrs Rux-Burton never had a controlling interest in either the Company or Nuko.

24. Paragraphs 22 to 32 of Mrs Rux-Burton's witness statement contain evidence of the way in which her contract operated as to holidays, day to day management of client work (including reporting lines in practice when working with clients), provision of Company equipment, claiming mileage expenses in line with Company policies, and recording and taking time off in lieu. This evidence was unchallenged, and I find it to be a reflection of the operation of both her written contract and how she worked in practice.

25. The Claimants entered into a business plan and investment agreement in February 2022 (unsigned copy at bundle page 516 onwards). Mrs Rux-

Burton at paragraph 36 of her witness statement refers to a salary of £75,000 which would have taken effect in 2023 when the agreement took effect. I find that a proposal for Mrs Rux-Burton to move to a salary of £75,000 was made, however this salary did not as a matter of fact ever take effect.

Second Claimant: Mr Rux-Burton

26. Mr Rux-Burton established the Company in September 2002 with his former wife and together they owned the shares in, and built up, the business until he bought her out in around 2007.

27. Mr Rux-Burton was questioned by Mr Soni about the nature of his shareholdings in the Company and Nuko. He was taken by Mr Soni to pages 61, 65, 67 and 74 of the bundle all being print outs of Companies House documents about the Company and Nuko. He accepted these and did not deny the nature of his shareholdings or control of the Company or Nuko. In his oral evidence when questioned about these he was clear and open. He accepts at paragraph 39 of his witness statement that he 'had a majority shareholding' in the Company. I find as a matter of fact that Mr Rux-Burton was a director of both the Company and Nuko with a controlling interest in both from formation until the Insolvency Date.

28. I find that Mr Rux-Burton did not have a written contract with the Company when it was established in 2002, however he was issued with a written contract, a copy of which appears at page 184 of the bundle. I find that this contract was issued and signed on 6 April 2014. Mr Rux-Burton was the Managing Director.

29. Mr Rux-Burton gave evidence in his witness statement about how and why he said his contract operated in practice. This evidence was unchallenged and I find it to be a reflection of the practical operation of his contract and his day to day working arrangements. Facts I find from this evidence are:

   a. that Mr Rux-Burton took advice when forming the Company about the risk of an owner treating their business 'as a fiefdom' to which he paid heed and built processes which applied to himself as well as others working in the business
   b. that in respect of particular client projects Mr Rux-Burton worked to targets set by others and reported to others when on client site
   c. that a complaint about Mr Rux-Burton might go to his 'boss' on a piece of work if a client were not happy with his performance, and that this could, and in the example given in evidence did, result in him coming off a client job after a complaint
   d. that as the Company grew, it drew up policies for HR compliance reasons and that this was why he entered into a contract like employees of the Company
   e. that Mr Rux-Burton had holiday arrangements consistent with other staff

f. that Mr Rux-Burton adhered to his working hours which were the same as for other staff
g. that Mr Rux-Burton's entitlement to sick pay was set out in his contract, and that he took sick pay in accordance with his contract
h. that Mr Rux-Burton was not in the Company pension scheme but that this was an error and the Company accountant erred in not correcting this when instructed to do so
i. that Mr Rux-Burton had no right of substitution
j. that Mr Rux-Burton did not take loans from the Company
k. that in 2019 Mr Rux-Burton engaged an HR consultancy who developed staff policies to apply to all staff including himself.

30. I accept Mr Rux-Burton's evidence in respect of the section of his contract relating to disciplinaries (pages 187-188 of the bundle) that when he engaged HR consultants in 2019 he took advice from them about how in his position this could work in practice given his role. They explained that they could charge him for such services if needed. Mr Rux-Burton's evidence about how he withdrew from a piece of work after a complaint from a client was clear and supports his evidence on this point.

31. Mr Rux-Burton was paid salary at a level below the National Minimum Wage. Mr Rux-Burton was told by his accountants to structure his pay this way to be 'most tax efficient'. This finding of fact is supported by an email from 2014 from the Company's accountants (pages 771-772 of the bundle). Mr Rux-Burton followed the advice given to him by his accountants.

32. Mr Soni questioned Mr Mr Rux-Burton in detail about the arrangements for the way he received his pay. He took Mr Rux-Burton to his payslips and to the Company accounts to show that payments were not made out of the Company accounts each month to Mr Rux-Burton when other salaries were paid. The facts I find can be summarised thus:

    a. Mr Rux-Burton received monthly payslips and annual P60s
    b. Mr Rux-Burton's pay was not regularly transferred to his personal bank account each month from the Company bank account in the way employees at the Company were paid or in accordance with the Remuneration paragraph of his contract (at page 184 of the bundle)
    c. each month Mr Rux-Burton directed the accounts function about how to deal with his pay, for example sometimes it was paid to his personal account, sometimes it was paid in cash, sometimes it was paid into his director's loan account. He described this process as a 'shortcut'
    d. whilst Mr Rux-Burton provided one example of a senior employee agreeing to receive their salary late, the method of payment described at sub-paragraph (c) was not open to employees of the Company and was a function of his control of the Company as a director.

33. Mr Soni also questioned Mr Rux-Burton about the way he managed the company accounts more generally. I find, and Mr Rux-Burton accepted under questioning, that as a director, he had control over the Company accounts and finances. No other employee had such control. Mr Rux-Burton articulated his understanding of a distinction between his roles as (he asserted) an employee and as a director with directors' duties and authority. His control over the Company accounts as a director was evidenced for example in payments into and out of this Company account relating to a property owned by his mother before her death. His control of the Company accounts flowed from his position as a director of the Company with a controlling interest.

34. The Claimants entered into a business plan and investment agreement in February 2022 including changes to take effect to the nature of Mr Rux-Burton's role including for example good and bad leaver arrangements and changes to corporate governance for example requiring investor approval to award dividends. At paragraph 74 of his witness statement Mr Rux-Burton refers to a future salary payable to himself once the new structure took effect of £100,000. He said this would have taken effect in Spring 2023. Whilst I find that this proposal for Mr Rux-Burton to move to a salary of £100,000 was made, I also find that this salary did not as a matter of fact ever take effect.

Law

35. The definition of an employee and a contract of employment for the purposes of ERA are set out in section 230 as follows:

> **230 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.

Further sub-sections 4 and 5 set out the definition of employer and employment.

> (4) In this Act "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.
>
> (5)In this Act "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.

36. As to the right to claim a redundancy payment upon insolvency the relevant part of section 166 ERA reads:

166 Applications for payments.

(1)Where an employee claims that his employer is liable to pay to him an employer’s payment and either—

(a)that the employee has taken all reasonable steps, other than legal proceedings, to recover the payment from the employer and the employer has refused or failed to pay it, or has paid part of it and has refused or failed to pay the balance, or

(b)that the employer is insolvent and the whole or part of the payment remains unpaid,

the employee may apply to the Secretary of State for a payment under this section.

(2)In this Part “employer’s payment”, in relation to an employee, means—

(a)a redundancy payment which his employer is liable to pay to him under this Part....

37. As to other employee rights on an insolvency at issue here these are set out at section 182 ERA, and the debts to which these rights apply are at section 184 (1) ERA

184 Debts to which Part applies.

(1)This Part applies to the following debts—

(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 or 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

38. I have been referred to a long list of authorities by both parties, in the Claimants’ Written Argument and in the Respondent’s case bundle and ET3. I do not refer to them all here though I have read them all and considered how they apply to the facts in this case.

39. The starting point for consideration of a case about employment status is the test set out in ***Ready Mixed Concrete (South East) Ltd v Ministry of Pensions and National Insurance*** **[1968] 2QB 497 HC**, where McKenna J said:

> A contract of service exists if the following 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; and (iii) the other provisions of the contract are consistent with its being a contract of service.

40. Both parties referred me to the case of ***Secretary of State for Business Enterprise and Regulatory Reform v Neufeld and another*** **[2009] EWCA Civ 280**. This Court of Appeal case considered two appeals which arose out of company insolvency. In both the respondents in the Court of Appeal had been controlling shareholders and directors of the companies that had become insolvent. In response to a request from the SoS the Court was asked

> to clarify the approach to be taken by employment tribunals when faced with cases involving such a feature.

41. The Court of Appeal reviewed many of the earlier cases about employment status to which I am referred by the parties and summarised what they regarded as the principles applicable to cases of this sort. Before dealing with what the Court said in Neufeld I will mention that their review of authorities included consideration of the case of ***Clark v Clark Construction Initiatives Ltd*** **[2008] IRLR 365**, also relied upon by both parties and heard in the EAT where in his Judgment the President Mr Justice Elias said the following

> **98** How should a tribunal approach the task of determining whether the contract of employment should be given effect or not? We would suggest that a consideration of the following factors, whilst not exhaustive, may be of assistance:
>
> (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 company does (*Lee*).

(3) Similarly, the fact that he 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 (*Arenascene*).

(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 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 it will be necessary for the controlling shareholder personally to have to give bank guarantees precisely because the company assets are small and no funding will be forthcoming without them. It would 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.

42. The Court of Appeal in *Neufeld* said of these factors

[88] We respectfully agree with the essence of the factors referred to by Elias J in para 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.

43. The Court of Appeal in *Neufeld* also considered and agreed with *Clark* as to when a Tribunal may find on the facts that the purported contract is not a genuine contract

[75] We come finally to the decision of the Employment Appeal Tribunal in *Clark v Clark Construction Initiatives Ltd and another* [2008] IRLR 364, [2008] ICR 635. This was not a claim against the Secretary of State but, in circumstances we need not explain, the case raised the like question of whether the controlling shareholder of a company was also its employee. The employment tribunal approached the resolution of that question by purporting to apply the guidance of (inter alia) *Bottrill*. They said:

“[That guidance] would seem to establish that what we have to do is to look at the whole picture which we have done. We should balance out all the factors and make a reasoned conclusion. We do that balancing exercise. It seemed to us that during the first and middle phases the Claimant was in business on his own account and not employed.”

[76] In his judgment on the appeal to the appeal tribunal, Elias J reviewed the authorities and cited the guidance given by this court in

> *Bottrill.* He referred to *Connolly* (as a case in which the employment tribunal "had been unduly swayed by the single feature of the controlling shareholding"), *Gladwell* and *Nesbitt.* Elias J then suggested three circumstances in which it may be legitimate for a tribunal or court not to recognise what is on its face a legitimate employment contract. First, the exceptional case in which the company is itself a sham (which we understand to mean the case in which it is regarded simply as the *alter ego* of the individual). Second, where the contract was entered into for an ulterior purpose, for example to secure some statutory payment from the Secretary of State. Third, where the parties do not conduct their relationship in accordance with the contract. This will either be because they never intended to and the purported contract was a sham in the sense of Diplock LJ's description in *Snook v London & West Riding Investments* [1967] 2 QB 786 at 801, [1967] 1 All ER 518, [1967] 2 WLR 1020; or because the relationship has ceased to reflect the contractual terms. The latter type of case is the one that the *Bottrill* guidance had in mind in twice emphasising the potential relevance of whether the conduct of the parties is consistent with the contract.
>
> **[77]** We respectfully agree with Elias J's summary of the types of case in which the court or tribunal may find on the facts that the purported contract is not a genuine contract. But, as we have said, that type of issue does not arise under either appeal before us, we received no argument on it and we were not invited to attempt to provide general guidance on it. We propose, therefore, to say no more about Elias J's suggested categories save two things. First, we would not wish to be taken as saying that there may never be other factual circumstances in which a conclusion of sham might be made. Second, an investigation of how the parties have conducted themselves under the purported contract may prove different things. We explain what we here have in mind in our summary of the relevant principles that we set out below.

44. In considering whether a written term is genuine, I note the Supreme Court's decision in ***Autoclenz Ltd v Belcher* [2011] IRLR 824**, specifically the following quote from Smith LJ in her Judgment in ***Firthglow Ltd (t/a Protectacoat) v Szilagya* [2009] EWCACiv 98**

> where 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.

45. I also note the following quote from *Neufeld* in considering whether what might have started as a genuine contract has over time been discharged so

that at the time of the insolvency someone who was once an employee, no longer is

> 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.

46. Further the Court in *Neufeld* said about the position of a shareholder and director that

> **[80]** There is no reason in principle why someone who is a shareholder and director of a company cannot also be an employee of the company under a contract of employment. There is also no reason in principle why someone whose shareholding in the company 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 company and its business means that he is in practice properly to be regarded as their "owner" can also be an *employee* of the company. 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 company 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 company; 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 company 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.

47. In considering at what date the issue before me falls to be considered I refer to ***Rajah v Secretary of State for Employment*** **1995 EAT/125/95** to say that I must look at the position on the Insolvency Date

> There may well have been a change, during the life of the company, in Mr Rajah's relationship with it. The company started as a partnership company. Originally, there were other shareholders. There were other directors. What we have to look at, however, and what the Industrial Tribunal had to look at, was the position at the relevant date. The relevant date for the purposes of deciding whether the Secretary of State is liable to make payments out of the National Insurance Fund to employees of an insolvent company, is the date at which the company became insolvent, not the position as it was two years, five years or ten years previously.

48. Finally, I mention two cases about what salary is paid. First, in ***Secretary of State for Business, Innovation and Skills v Knight*** **[2014] IRLR 605** the EAT held that

> **20**
>
> The fact that an employee decides not to require her company to pay her salary as an employee does not necessarily lead to the conclusion that she must be taken to have entered into an agreed variation of the contract or a discharge of that contract. That proposition is amply supported by the guidance to which I have already referred and is underlined by paragraph 51 of the decision in *Neufeld*, which is in these terms:
>
> 'As to his not drawing his salary, we can see that it would point against the existence of a contract of employment if his remuneration had been generally irregular. But we find it difficult to see how it could be concluded that he was not entitled to the payment of a salary if it had been paid with regularity until the final month: and if he was contractually entitled to it, the fact that he did not take it could not retrospectively diminish his right.'

49. Secondly in the 2002 Employment Tribunal case of ***Fazal v Secretary of State for Business, Energy and Industrial Strategy & Anor*** the Tribunal dealt with a situation where employment status was found when salary was paid at a rate below the national minimum wage.

Conclusions

50. I move on to express my conclusions based on considerations of the issues before me, the facts I have found and the applicable law.

51. The SoS in its ET3 and its submissions groups the Claimants together, however, I shall consider them separately as their facts are not the same and the way I reach my conclusions therefore differs.

First Claimant: Mrs Rux-Burton

52. Based on my findings of fact Mrs Rux-Burton joined the Company as an employee in 2004 and was employed under the terms of an express written contract of employment. On the facts it is clear this was originally a genuine contract, not a sham, so I considered whether things had changed such that the contract had been discharged by the Insolvency Date.

53. A considerable number of factors tend to point towards Mrs Rux-Burton being an employee from the start of her employment until the Insolvency Date. These are recorded in the facts I have set out at paragraphs 19, 20(a) to (c) and 22 of these Reasons. All the characteristics of an employment contract set out in *Western Excavating* were in place when she joined the Company and although some variations to the contract were effected (for example as to pay rate and role) the contract was broadly operating in accordance with its written terms throughout the whole of her period working for the Company.

54. A factor that may point away from employment status is at paragraph 20(f), that Mrs Rux-Burton ceased to be paid the national minimum wage from 2018 when she became a director. I accept the reasons given by Mrs Rux-Burton to explain why she was paid a lower rate, I do not consider that this factor determines the case against Mrs Rux-Burton. Further I do not consider that this point outweighs the other, mostly unchallenged, evidence about the nature of Mrs Rux-Burton's relationship with the Company.

55. Mrs Rux-Burton was not a controlling shareholder of the Company or Nuko and I conclude in respect of Mrs Rux-Burton that there existed until 2018 clear control of her in her role as an employee by the Company, and after that when she had shares, sufficient control that she remained an employee.

56. I have considered whether the general conduct of Mrs Rux-Burton's express written contract as reflected in the facts means that over time a genuine contract was discharged such that it was no longer in place. Weighing all the facts I do not find that this is what happened.

57. Based on the legal principles applied to the facts, including a consideration of the 8 points in *Clark* approved by *Neufeld*, I conclude that Mrs Rux-Burton

became an employee of the Company when she joined it in 2004 and remained so at the Insolvency Date.

Second Claimant: Mr Rux-Burton

58. Based on my findings of fact Mr Rux-Burton joined the Company on its formation in 2002. From 2014 he was engaged under the terms of an express written contract.

59. Factors that tend to point to Mr Rux-Burton being an employee are recorded in the facts I have set out at paragraphs 29 (a) to (k) and paragraph 30 of these Reasons. Looking at the characteristics of an employment contract set out in *Western Excavating* Mr Rux-Burton was receiving consideration (on which see further below) and was providing services personally. As to the general operation of his contract this was broadly operating in accordance with the terms set out expressly in writing in 2014 and I take note that in the 8 *Clark* reasons this may be strong pointer of an employment relationship.

60. Factors that may point away from employment status are at paragraphs 31 to 33 of these Reasons, that Mr Rux-Burton was not paid the national minimum wage and that as a controlling shareholder and director he might not be subject to the necessary control essential to a contract of employment.

61. In respect of the failure to pay the minimum wage I accept the reasons given by Mr Rux-Burton to explain why he was paid a lower rate. I do not consider that this factor determines the case against him. It is part of a wider set of facts about the way in which the contract operated and is one factor for me to consider. I take note that in the 8 *Clark* reasons this may be an important factor.

62. Mr Rux-Burton was a controlling shareholder of the Company and Nuko. It was common ground, and recorded in the SoS's ET3, that there is no reason in principle why someone who is a director and shareholder of a company cannot also be an employee. Mr Rux-Burton articulated his clear understanding of two separate roles: employee and director. He had control of the business and its finances, and this extended to the way in which his pay was accounted for each month, and the way in which he managed the Company accounts. On the other hand, although not done in accordance with his contract, he had the benefit of the sum owed to him as remuneration each month and he did not take loans from the Company.

63. I conclude that Mr Rux-Burton went to some lengths to ensure that he implemented corporate HR structures with which he complied, for example in respect of sick pay, holidays, working hours, and the practical operation of client work when which he reported to others.

64. Applying the law to the evidence I heard and facts I found, I conclude that Mr Rux-Burton's express written contract of 2014 was not a sham, nor was it entered into for an ulterior purpose.

65. I have considered whether the general conduct of Mr Rux-Burton's express written contract as reflected by the facts means that it was either not genuine as the parties did not in fact conduct themselves in accordance with it, or because over time the contract was discharged such that it was no longer in place. My conclusion based on the facts in this case is that Mr Rux-Burton's engagement with the Company was broadly consistent with his contract and that where it was not, this did mean that the contract was discharged.

66. Turning to the question of control. Although Mr Rux-Burton was a director and controlling shareholder, on the facts this was not determinative of the question of control. I conclude that Mr Rux-Burton recognised the different roles of director and employee and that he subjected himself to the control of the company to a sufficient extent to be an employee.

67. Based on the legal principles and weighing all the facts I have concluded from the evidence before me, I conclude that Mr Rux-Burton was an employee of the Company on the Insolvency Date.

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Employment Judge Harrison
Date: **11 December 2024**

RESERVED JUDGMENT & REASONS SENT TO THE PARTIES ON

17/12/2024

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