EMPLOYMENT TRIBUNALS

Claimant: **Ms J Weiss**

Respondent: **1. Miami Weiss Ltd- In Liquidation**
2. The Secretary of State for Business and Trade

Heard at: **East London Hearing Centre (via CVP)**

On: **7 July 2023**

Before: **Employment Judge M Hallen**

Representation

Claimant: In person
Respondent: Mr P. Soni- Lay Representative

RESERVED JUDGMENT

This has been a remote hearing which has not been objected to by the parties. The form of remote hearing was by Cloud Video Platform. A face-to-face hearing was not held because the relevant matters could be determined in a remote hearing.

The judgment of the Tribunal is that the Claimant was not an employee of the first Respondent pursuant to section 230 of the Employment Rights Act 1996 ('ERA') and is not entitled to any payments from the second Respondent under sections 166 and 182 ERA.

REASONS

Background and Issues

1. The Claimant was a director and owned all of the shares in the first Respondent which went into creditors voluntary liquidation at the end October 2022. She made a claim for statutory guaranteed payments from the National Insurance Fund in respect of redundancy pay, notice pay, arrears of wages and holiday pay under section 166 and 182 to 186 of the ERA arguing that she was employed at the time of the insolvency as an employee under a contract of employment pursuant to section 230 of the ERA. The claim to the Tribunal was made on 3 February 2023.

2. The second Respondent in its Response Form resisted the application stating that at the date of insolvency, the Claimant was not an employee of the insolvent company

because she was not employed under a contract of employment and was therefore not entitled to any payments from the National Insurance Fund. The issue for me in today's hearing was to determine on the facts whether the Claimant was an employee as defined and if she was an employee what payments were due to her from the National Insurance Fund. The second Respondent helpfully conceded at the outset that it was not arguing that there was a sham contract of employment. It was merely arguing that the Claimant was not an employee of the first Respondent as she did not have an express or implied contract of employment under the legal provisions that are outlined below.

3. I had before me an agreed bundle of documents made-up of 131 pages prepared by the second Respondent, a case law bundle of documents prepared by the second Respondent, a short witness statement from the Claimant made-up of eight paragraphs, a short witness statement from Mr Rob Shipley, a chef employed by the first Respondent, a short witness statement by Alexander Vines who was the head chef employed by the first Respondent and an example of a weekly worksheet for the month of July 2022. Mr Shipley and Mr Vines did not attend the Tribunal to give oral evidence or be subject to cross examination. As a result, I read the witness statements and placed some weight on what was said in them.

Facts

4. The Claimant set up the LightHaus Cafe ('the Café') in East London in April 2017 and was one of two directors at the time owning 75% of the shareholding in the company along with Alexander White. Mr White left the company in November 2020 and the Claimant acquired the whole shareholding in the company. At the time of commencement of the Café, the Claimant employed four staff. She agreed with her accountant to take out £1,000 per month from the business for the first year and from 2018 it was increased to £1,200 which was within her personal allowance, so she did not pay tax on it.

5. For the first few years the Claimant undertook long hours in the business although she did not produce any time sheets to show the hours that she did. She confirmed that she had a clocking in and out system for her employees, but she was not subject to it herself. She confirmed that although she paid the employees of the Café above the national minimum wage there were times during the early years of the business that she did 50 hours per week and the amount that she paid herself was below the national minimum wage. She said that she would take money out of the business during months when it did well to make up for the shortfall as and when the Café had a good month. This she said did not occur often. I saw three payslips produced by the Respondent for the months July to September 2022 towards the end of the company's trading existence which showed wages of £1,200 per month net. There were no other payslips produced. The Claimant also produced P60 forms for 2020 to 2022 which showed annual pay of £12,501, £12,0001 and £10,024 respectively.

6. After the lockdowns in 2021, the Claimant decided to open the Café during the day and the evening to try to increase revenues. The Café now provided a day and evening service serving small plates. The Claimant hired a workforce of 15 staff along with a manager. The manager prepared contracts of employment for the staff as the Claimant was advised by her accountant to do so at this time. These contracts included the wages, holiday entitlement, pension entitlement and hours of work for the staff. Although the Claimant gave evidence that a contract of employment was prepared for her, she said that she did not have it as the landlord of the shop in which the Café was based had prevented

her access to all of the contracts of employment when the business closed down. I did not accept this evidence. I found that it was likely that the manager employed by the Claimant prepared contracts of employment for the Claimant's employees she did not do so for the Claimant. I come to this conclusion on the basis of the Claimant's own evidence that she did not pay herself the national minimum wage but ensured that her employees received it and was not subject to clocking in and out as were her employees. These discrepancies in the Claimant's evidence showed me that it was unlikely that the manager would have prepared contracts of employment for the staff that had fairly regular and consistent terms as set out in section 1 of the ERA but would then have prepared a wholly different one for the Claimant showing that she had no regular hours, was not entitled to the national minimum wage and was not entitled to paid holidays (see later).

7. The Claimant confirmed that she had two young children during the five years when the Café was open with the second child being born in 2022. During the last year and a half that the Café was open (May 2021 to October 2022), the Claimant undertook less hours in the Café as she had to look after her two children. It was put to her, and she agreed that during this period, she could choose herself what hours that she did and during the last year of the business she did less hours due to a child rearing commitment. She agreed she was free in effect to do as much or as little hours as she wished to do as she had no set hours of work. Indeed, her two witnesses in their witness statements say this. Mr Shipley says, '*For most of my time at Lighthaus (October 2020 to February 2022), Jen was either pregnant or on maternity leave…… She worked sporadically during my time at Lighthaus…… she was very rarely formally on the rota.'* Mr Vines also says that from November 2020 to March 2022 when he worked for the Café, the Claimant was '*not involved in the day to day running'* of the Café. Both of these witnesses refer to the Claimant in their witness statements as the business owner and do not refer to her as an employee.

8. During the last year and a half of business of the Café, the Claimant agreed that the manager prepared the rotas and shifts and effectively ran the Café. The manager reported to the Claimant who would be on call to provide direction/instruction and step in to cover shifts as and when needed. This was in accordance with the rota produced by the Claimant for 1 to 7 July 2022 which showed that the Claimant did two shifts that week. On Tuesday 2 July for an hour and Friday 5 July from 2 to 6 pm.

9. The Claimant agreed that although the staff of the Café had holidays that equated to the statutory national minimum entitlement (28 days per annum), she did not take holidays in accordance with this requirement. She took a week at Christmas and a week in August. She agreed that she was not paid for her holiday entitlement but that the staff employed at the Café did receive paid holidays. The Claimant also agreed that she was not subject to a disciplinary procedure or a grievance procedure although the staff of the Café were pursuant to the contracts of employment prepared by the manager.

10. The Claimant agreed that she was took all the major decisions in respect to the running of the business and had no one to answer to. The manager that was employed at the Café from May 2021 reported to her and she made all of the important decisions relevant to the business. Unlike the employees of the Café, the Claimant was not part of the pension scheme that operated during the last year of business. In addition, she agreed that although the staff of the Café were subject to the statutory minimum notice pursuant to their contracts of employment, she was not as made clear in her questionnaire answers to the second Respondents application form. In relation to sick pay, the Claimant said that

sickness was not a problem in the business, and she never took time off work due to illness.

Law

11. Under the Employment Rights Act 1996 an 'employee' is defined as an individual who has entered into or works under (or, where the employment has ceased, worked under) a 'contract of employment'.

12. For these purposes, a 'contract of employment' is defined as a contract of service or apprenticeship, whether express or implied, and (if it is express) whether oral or in writing.

13. The most common judicial starting point for identifying a contract of employment was provided by Mr Justice Mackenna in the case of **Ready Mixed Concrete (South East) Ltd v Minister of Pensions and National Insurance 1968 1 All ER 433, QBD** in which he said, *''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 the master. (iii) The other provisions of the contract are consistent with its being a contract of service.'*

14. The continuing relevance of this passage was confirmed by the Supreme Court in **Autoclenz Ltd v Belcher and ors 2011 ICR 1157, SC**, where Lord Clarke called it the 'the classic description of a contract of employment' and said that the Read Mixed Concrete case can be condensed into three questions: (a) did the worker agree to provide his or her own work and skill in return for remuneration? (b) did the worker agree expressly or impliedly to be subject to a sufficient degree of control for the relationship to be one of employer and employee? (c) were the other provisions of the contract consistent with it being a contract of service?

15. Following the Ready Mixed Concrete decision, the courts have established that there is an 'irreducible minimum' without which it will be all but impossible for a contract of service to exist. It is now widely recognised that this entails three elements: (a) Control; (b) personal performance or service, and (c) mutuality of obligation and control.

16. From **Clark v Clark Construction Initiatives Ltd [2008] ICR 635 (EAT, Elias J) and Secretary of State v Neufeld [2009] EWCA Civ 280** in particular I take the following propositions in relation to the question whether a director/shareholder is also an employee of a company: (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]).

Conclusion and Findings

17. Following the **Ready Mixed Concrete** decision, I reminded myself that the courts have established that there is an *'irreducible minimum'* without which it will be all but impossible for a contract of service to exist. It is now widely recognised that this entails three elements: (a) Control; (b) personal performance or service, and (c) mutuality of obligation and control.

18. I find that the Claimant failed to prove on the balance of probability that all of the above three elements existed in the relationship that she had with the first Respondent at the time of the insolvency of the first Respondent. In particular I find that there was no mutuality of obligation, and the Claimant was not subject to control from the first Respondent. I sent out the reasoning for this below. Although as a business owner, I would have expected her at the outset of the company’s existence to work long hours for little pay and without holidays, I find that the Claimant did not prove that she was subject to a contract of employment whether express or implied.

19. The Claimant had complete control of the business and from November 2020, she was the sole shareholder owning 100% of the shareholding. She had no one to answer to and made all of the important decisions in running the business. She agreed herself that although from about May 2021, other staff employed by the business had contracts of employment drafted by her manager pursuant to section 1 ERA the terms that impacted them as employees did not impact her. The employed staff were subject to a minimum number of hours of work (having to clock in and out), payment beyond the national minimum wage and a statutory entitlement to 28 days holiday a year. However, the Claimant was not subject to this. She could effectively pick her own hours doing as much or as little work that she wanted to do. Prior to the insolvency of the company, she had two young children to look after and left the running of the company to her manager (employed from May 2021). The manager reported to the Claimant as to how the business of the Café was running and if the Claimant was needed at the Café, she would come in to provide cover as shown on the rota produced for the first week in July 2022. The Claimant was able to pick and choose when and what she did. This was effectively confirmed by her witnesses Messrs Shipley and Vines who both said she was able to pick and choose what she did and when she did it.

20. As I say above, when the manager of the Café had prepared contracts of employment for the staff of the Café in or around May 2021, she did not do so for the Claimant. I find that the likely reason for this was that the Claimant probably knew at the time that she was not an employee of the company. This is consistent with the Claimant’s own evidence that she had no regular set hours and could set her own working week or choose not to work if she wanted to. As a result, I do not find that there was mutuality of obligation as the Claimant could choose as and when she worked.

21. In addition, there were other examples of practices that were inconsistent with a contract of employment. The Claimant said she paid herself £1,200 per month irrespective of the hours that she did throughout the five years of trading of the Café. Sometimes this

would equate to more than the national minimum wage and sometimes it would be far less. She said that she could top up the wage from profitable months to make up the shortfall, but this did not happen very often. She had no right to paid holiday although other staff employed by the Café did. She was not entitled to a pension although other members of staff were. She was not subject to clocking in and out although other members of staff were. She was not subject to the company's disciplinary or grievance procedure although other members of staff were. She was not subject to management or supervision although other members of staff were. She was not entitled to minimum notice to terminate her employment although other members of staff were. Indeed, she was not subject to termination of the relationship at all as she readily admitted.

22. For the above reasons, I find that the Claimant was not employed under a contract of employment. Accordingly, I dismiss the Claimant's claim.

Employment Judge M Hallen

11 July 2023