EMPLOYMENT TRIBUNALS

First Claimant: Mr M Abbotson

Second Claimant: Mrs A Abbotson

First Respondent: La Maison Retail Limited (In Liquidation)

Second Respondent: The Secretary of State for Business & Trade

Heard at: Manchester Employment Tribunal (by CVP)

On: 8 August 2024

Before: Employment Judge L Cowen

REPRESENTATION:

First Claimant: In person

Second Claimant: In person

First Respondent: Did not attend

Second Respondent: Mr P Soni (lay representative)

RESERVED JUDGMENT

The judgment of the Tribunal is that:

1. The First Claimant was not an employee of the First Respondent for the purposes of section 230 of the Employment Rights Act 1996.

2. The Second Claimant was not an employee of the First Respondent for the purposes of section 230 of the Employment Rights Act 1996.

3. The Claimants' claims therefore fail and are dismissed.

REASONS

Introduction

1. The Claimants' claims were heard on 8 August 2024.

2. The Claimants were Directors of the First Respondent, La Maison Retail Limited ("the Company"). This company entered creditors voluntary liquidation on 1 August 2023. The Claimants both claim they are entitled to payments from the Redundancy Service following the company going into liquidation.

3. The First Respondent has not submitted a response to the claim. The Second Respondent submits that the Claimants are not entitled to payments from the Redundancy service as they are not employees of the company.

4. The Tribunal heard evidence from the First and Second Claimant. I also considered a bundle of documents and a bundle of caselaw authorities submitted by the Second Respondent. Both the claimants and Mr Soni also referred me to decisions of the Employment Tribunal which they submitted were of relevance. I have considered these cases, but have set out the relevant legal framework that I have adopted below.

Preliminary matters

5. The First Respondent did not attend and was not represented at the hearing. The liquidator of the First Respondent was contacted prior to the hearing commencing, and confirmed that they did not intend to attend the hearing, and they did not oppose the claim being heard today.

6. At the outset of the hearing, the Claimants confirmed that their claims were only against the Second Respondent.

Issues for the Tribunal to decide

7. The Claimants and the Second Respondent agreed that the Claimants' employment status was the first issue that had to be determined, and so the hearing today focused on this issue. The relevant issue for the Tribunal to decide was therefore whether the Claimants employees of the Company.

The Findings of Fact Relevant to the Issues

8. I have made the following findings of fact based on the balance of probability from the evidence I have read, seen, and heard. I do not make findings in relation to all matters in dispute but only on matters that I consider relevant to deciding on the issues currently before the Tribunal. I wish to be clear that I found both Mr and Mrs Abbotson to be clear and credible witnesses, and they clearly set out the arrangements that pertained to their involvement with the Company.

The Claimants' role in the business

9. The Claimants both confirmed that they were the only directors of the Company. They started the business together around 20 years ago. They were joint shareholders, each owning a 50% share of the Company. The Company employed many people throughout its duration.

10. There was no written contract setting out their roles and responsibilities. An agreement between each of the Claimants and the Company that was included in the bundle was prepared for their claim, rather than being an agreement in force during their work. Both Claimants referred to themselves as being a husband-and-wife team and that there was an unspoken contract between them.

11. The Claimants also explained the day to day work they did for the Company. They had responsibilities as directors, and in addition to these responsibilities Mrs Abbotson managed the shop, working on stock displays and working behind the counter. Mr Abbotson worked in the warehouse undertaking tasks such as unloading pallets and back-office work.

12. In their questionnaires submitted to the Secretary of State, both Claimants stated that they did not receive guidance or supervision from anyone in their performance of their work. The Claimants confirmed in their oral evidence that they did not have any line manager, and both emphasised in their evidence that they ran things at the Company. They also explained that they took holiday that they thought they were entitled to as employees, and they did not have to consult with anyone about what holiday to take.

Arrangements to pay the Claimants

13. The Claimants were normally paid the minimum wage, and this was done through PAYE. They were both paid on a monthly basis, and this was their sole income. Payments to them were described in the company accounts as "Directors Salary". They decided the amount that they would pay themselves with this being mainly a decision made by Mr Abbotson, though this would be discussed with Mrs Abbotson.

14. The Claimants also took dividends from the Company, though they did not take them in the final years of the Company**.** Mr Abbotson explained that this was

done on the advice of their accountant, and that when dividends were taken, tax was paid on these amounts. I accept Mr Abbotson's account of these arrangements.

15. Mr Abbotson also explained that others working for the Company could not take dividends in this way. He explained this by reference to the role that he and his wife had as directors of the Company, as well as being employees who worked for the Company.

16. Mr Abbotson also described the difficult years the Company had prior to going into liquidation. He described how he and Mrs Abbotson did not take dividends during this time, and that they had to contribute their own money to ensure their staff were paid.

17. I fully accept the Claimants' accounts of the difficult years the Company faced, and the determined and dedicated efforts they made to keep the Company afloat. I fully accept their account of how hard they worked to maintain the Company, and that Mr Abbotson's account of him and his wife as having "*lived and breathed the company*" was correct.

The law

18. The Claimants' claims are made under sections 166 and 182 of the Employment Rights Act 1996 ("ERA 1996"). I reproduce relevant parts of these sections below.

Section 166 of the ERA 1996

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.

Section 182 of the ERA 1996

Employee's rights on insolvency of employer

If, on an application made to him in writing by an employee, the Secretary of State is satisfied that—

(a) the employee's employer has become insolvent,

(b) the employee's employment has been terminated, and

(c) on the appropriate date the employee was entitled to be paid the whole or part of any debt to which this Part applies, the Secretary of State shall, subject to section 186, pay the employee out of the National Insurance Fund the amount to which, in the opinion of the Secretary of State, the employee is entitled in respect of the debt:

19. The Secretary of State is therefore only liable to make payments of the kind sought by the claimants to employees. Section 230 of the ERA 1996 defines the term "employee".

Section 230 of the ERA 1996

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.

(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.

(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.

20. I have had regard to the case of **Neufeld v Secretary of State for Business, Enterprise and Regulatory Reform [2009] EWCA Civ 280 ("Neufeld")** in which it was held that there is no reason in principle why a shareholder, or controlling shareholder, and director of a company could not also be an employee of the company under a contract of employment

21. Whether or not a shareholder/director is an employee of the company is a question of fact for the court or tribunal before which such issue arises (per Neufeld, at para [81] of the judgment). In Neufeld, further guidance was given regarding this assessment of fact in cases involving small companies. Lord Justice Rimer stated:

"*But in many cases involving small companies, with their control being in the hands of perhaps just one or two director/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*". (at para [87])

22. At paragraph [88], Lord Justice Rimer referred to factors that would not ordinarily be relevant to the inquiry regarding whether a contract amounts to a contract of employment. He stated that:

"What we have not included as a relevant consideration for the purposes of that inquiry is the fact that the putative employee's shareholding in the company gave him control of the company, even total control. The fact of his control will obviously form a part of the backdrop against which the assessment will be made of what has been done under the putative written or oral employment contract that is being asserted. But it will not ordinarily be of any special relevance in deciding whether or not he has a valid such contract. Nor will 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 has done any of the other 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".

23. The Court in **Neufeld** also approved, with some caveats, the factors identified by Mr Justice Elias in the case of **Clark v Clark Construction Initiatives Ltd** [**2008] 2 WLUK 769 ("Clark").**

24. In **Clark** the relevant factors identified by Mr Justice Elias may be summarised as follows:

(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 is practice able to exercise real or sole control over what the company does.

(3) 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.

(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 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. 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 give bank guarantees precisely because the company assets are small and no funding will be forthcoming without them.

(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 that fact alone will ever justify a tribunal in finding that there was no contract in place. 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 these doubts one way or another

25. The caveats expressed in **Neufeld** to which I have referred above are set out at paragraphs [88] –[90] of the judgment in that case. I do not reproduce them here, though I have had regard to them.

26. Of greatest relevance to this case is the expressed need for caution when dealing with cases that do not involve a written contract. On this, Lord Justice Rimer stated that if the parties' conduct under the claimed contract points convincingly to the conclusion that there was a true contract of employment, tribunals should not seize too readily on the absence of a written agreement as justifying the rejection of a claim.

The parties' submissions

27. I heard closing oral argument by each party. The submissions made by all parties are not repeated here but have been considered and taken into account in reaching this decision.

The Tribunal's conclusions

28. I have considered whether the Claimants fall within the definition of "employee" in section 230 of the ERA 1996, namely whether they are individuals working under a contract of employment, which means a contract of service. The fact that the Claimants were directors of the Company does not mean they cannot be employees. There is no written contract in this case. I have looked to the parties conduct to consider whether there was a contract of service, mindful of the fact that the lack of written contract is not determinative of this issue.

29. I have determined that the Claimants established the Company, and they were the only directors, and that they each held a 50% shareholding in the Company. None of these things of themselves are determinative of the Claimants' employment status.

30. I have considered the arrangements for work, and have determined that the Claimants exercised complete control over the circumstances of their work – the hours that they worked, when they took holiday, and what duties they would perform

during their work. They would discuss these matters with each other, and were not supervised or managed by anyone else in the performance of their work. On this, I conclude that key areas of their work were not governed by any contract, which was recognised in Neufeld as a factor pointing away from a finding that the individual was an employee.

31. I have also considered the arrangements for payment. The Claimant were both paid through PAYE, though they, as directors, could take dividends from the Company, and they did when finances permitted this. I fully accept that this did not happen in the final years of the Company. Other employees could not take a dividend. I consider the payment arrangements, and the autonomy that the Claimants had when deciding how much to pay by way of dividend, and how much they should be paid each month, to be a factor pointing away from a contract of service, and a relationship of employment in this case.

32. I do not consider the Claimants putting their own money into the Company to be a determinative factor, as was recognised in Neufeld, such arrangements may be one of the only means a small business has to secure funding.

33. Balancing all the factors that I have identified, I have determined that the Claimants were not employees of the company. I consider the Claimants to have had complete autonomy in the performance of their work and their pay. I do not conclude that they were working under a contract of service as is required by section 230 of the ERA 1996. I have determined that the Claimants' work was consistent with them being the owners and directors of the Company, and that their work was not in accordance with the performance of a contract of service between them and the Company.

34. For these reasons, I have determined that the Claimants were not employees of the First Respondent and they are therefore not entitled to payments from the Second Respondent.

Employment Judge L Cowen
Date: 4 November 2024

JUDGMENT AND REASONS SENT TO THE PARTIES ON
5 November 2024

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