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**EMPLOYMENT TRIBUNALS (SCOTLAND)**  
**Case number: 4106257/2024**

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**Hearing on the  
Cloud Video Platform on 4 October 2024**

**Employment Judge A Jones**

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**Ms K Somerville**

**Claimant  
In person**

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**Angels' Share Glass Ltd (In liquidation)**

**First Respondent  
Not present**

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**Secretary of State for Business and Trade**

**Second Respondent  
Represented by  
Mr Soni,  
Lay representative**

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**JUDGMENT**

The claimant was not at the material time an employee for the purposes of section 230 Employment Rights Act 1996 ('ERA').

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**Introduction**

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1. The claimant had submitted an application to the redundancy payments service for a redundancy payment following the insolvency of the company Angels' Share Ltd in which she was a 100% shareholder. The Secretary of State had rejected her application as its position was that the claimant was not an employee

for the purposes of section 230 ERA at the material time and therefore she was not entitled to a redundancy payment. A hearing was listed to determine whether the claimant was an employee for the purposes of section 230. The second respondent had submitted detailed grounds of resistance. The first respondent  
5 took no part in the proceedings.

2. The Secretary of State (to whom I shall refer as 'the respondent') produced a bundle of documents in advance of this hearing together with a bundle of authorities. I will refer to the first respondent as 'the company' The claimant gave evidence and was cross examined. The respondent made submissions on the  
10 conclusion of that evidence. The claimant's submissions were that she had not wished to find herself in this position and had simply followed advice of experts.

### Findings in fact

3. Having listened to the evidence, considered the documents to which reference  
15 was made and the submissions of the parties, I found the following facts to have been established.
4. The claimant set up the company Angels' Share Ltd together with her father in 2013 and at that time had a 50% shareholding in the company as did her father. Her father sadly passed away in 2023 and at that time his shares automatically  
20 passed to the claimant who became 100% shareholder in the business.
5. Over the period of 2013 to 2024 the company employed between 8 and 12 employees. All employees were issued with a contract of employment.
6. The company had an advisory board made up of non-executive directors who were paid a monthly retainer. The advisory board had no power to discipline or  
25 dismiss the claimant. The members were appointed by the claimant.
7. The claimant had issued herself with a contract of employment which was produced at the time the company was set up. The contract was not signed. The contract stated that the claimant was employed as Director and that she was paid £6.09 per hour. It stated that she was entitled to 28 days holiday in any year. It  
30 made reference to a company handbook and procedures which would apply in relation to matters of capability and discipline
8. It stated that the claimant should apply to her "Manager" should she wish to appeal against any sanction. The claimant did not have a manager and did not

report to anyone other than to the advisory board by way of information and consultation. The contract was never updated.

9. The claimant took advice from accountants and directed that she should be paid the minimum director's salary and receive dividends in each year to meet an equivalent hourly rate consistent with that of the National Minimum Wage.
10. The claimant decided when she would take leave but rarely took leave and would ensure that production wasn't affected by any leave she took.

### Relevant law

11. Section 230 of ERA provides that an employee "means an individual who has entered into a or works under (or where the employment ceased, worked under) a contract of employment."
12. In **Secretary of State for Trade and Industry v Bottrill 1999 ICR 592**, the Court of Appeal suggested that in cases involving a person who is a sole or controlling shareholder, it might useful for Tribunals to consider the following questions.
- i. is there (or has there been) a genuine contract between the company and the shareholder (i.e. one which is not a sham)? It will be relevant to consider how and for what reasons the contract came into existence and what each party actually did pursuant to the contract, and
  - ii. if the contract is not a sham, does it actually give rise to an employer/employee relationship? In this regard, of the various factors usually considered to be relevant, the degree of control is always important. However, this is not simply a case of looking to see who has a controlling shareholding — a tribunal should consider where the real control lies, i.e. whether there are other directors, whether the articles of association give the individual the right to vote on matters in which he or she is personally interested, and whether the constitution of the company gives the individual rights such that he or she is in reality answerable only to him or herself and incapable of being dismissed.
13. In **Clark v Clark Construction Initiatives Ltd and another 2008 ICR** , the EAT suggested that the following might be relevant factors to consider:

- 5 i. 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 and thus, on the face of it, has earned the right to take advantage of the benefits that employees may derive from such payments;
- 10 ii. 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, in practice, he or she is able to exercise real or sole control over what the company does;
- 15 iii. the fact that the individual 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;
- 20 iv. 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;
- 25 v. conversely, if the conduct of the parties is either inconsistent with the contract, or in certain key areas is in fact not governed by the contract as one would expect, that would be a potentially very important factor militating against a finding that the controlling shareholder is an employee;
- 30 vi. if contractual terms have not been identified or reduced into writing, that will be powerful evidence that the contract was not really intended to regulate the relationship in any way;
- vii. 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, such practices may well be necessary, and

- viii. although the courts have stated that the existence of a controlling shareholding is always relevant and may be decisive, that does not mean that this alone will ever justify a tribunal in finding that there was no contract in place.
- 5 14. These factors were subsequently modified slightly by the Court of Appeal in **Secretary of State for Business, Enterprise and Regulatory Reform v Neufeld and anor 2009 ICR 1183**, as follows
- i. first factor: where an individual's employment status is in dispute, the court or tribunal must be satisfied that any relevant document is a true reflection  
10 of the claimed employment relationship, and for this purpose it will be relevant to know what the parties have done under it. The alleged employee may, therefore, have to do rather more than simply produce the contract itself, or a board minute or memorandum purporting to record his or her employment
- 15 ii. sixth factor: the EAT may have overstated the potential negative effect of the terms of the contract not being in writing. While this was an important consideration, if the parties' conduct pointed to the conclusion that there was a true contract of employment, tribunals should not seize too readily on the absence of a written agreement to justify rejecting the claim, and
- 20 iii. seventh and eighth factors: loans, guarantees and the existence of a controlling shareholding would ordinarily be irrelevant but 'never say never' is a wise judicial maxim.

### Discussion and decision

- 25 15. Taking these factors into account, the following facts were particularly relevant to my determination;
- i. While the claimant had a contract of employment, she had never signed it and the contract did not govern her relationship with the company in a number of material respects. In particular, the contract was not consistent  
30 with how the claimant took leave and reporting structures and that the contract appeared to be simply a template used for other employees who had reported to the claimant. It appeared to me that this contract did not

reflect the reality of the relationship between the claimant and the company.

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- ii. The claimant did not report to anyone and had complete control of the company including the appointment of the advisory board. She could not be dismissed or disciplined and no one could take action against her in relation to her performance.
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- iii. The claimant was paid an hourly rate far less than the national minimum wage. She was not paid a salary. While she took dividends which might, when added together with what she was paid directly meet the requirements of the minimum wage, it would not be open to an ordinary employee to direct that they should be paid in this manner. It appeared that this method of payment was more about the efficient use of the claimant's personal allowance for tax purposes than properly reflective of a salary which would normally be paid to a Managing Director of a small company.
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- iv. While the fact that the claimant had a controlling shareholding in the company was relevant, it was not determinative of the matter.
- v. The claimant's contract was never signed and never updated at any stage despite the long period over which she was said to be carrying out the
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- role.

16. Taking all of the facts of the case into account and bearing in mind the guidance from case law, I came to the conclusion that the claimant was not an employee of the company at the material time because of the factors listed above.

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**A Jones**  

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**Employment Judge**24 October 2024**Dated**

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**Date sent to parties**24 October 2024