EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 8001452/2024

Hearing held by CVP in Edinburgh on 27 November 2024

Employment Judge Sangster

Mr J Cook	**Claimant** **In person**
Secretary of State for Business & Trade	**Respondent** **Represented by** **Mr P Soni** **Lay Representative**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The judgment of the Tribunal is that:

1. The Tribunal has no jurisdiction to consider the claimant's complaints under section 188 of the Employment Rights Act 1996, as they were not lodged within the requisite time limits.

2. The claimant had no entitlement to a statutory redundancy payment, as he was not an employee. He was not therefore entitled to apply, under section 166 of the Employment Rights Act 1996, to the respondent in these proceedings for payment of that sum.

3. The claimant's complaints are accordingly dismissed.

The judgment of the Employment Tribunal is that the Tribunal does not have jurisdiction to consider the claimant's complaints under sections 166 and 182 of the Employment Rights Act 1996. Those complaints are accordingly dismissed.

REASONS

Introduction

4. The claim was set down for a final hearing to determine the claimant's complaint against the respondent. That included:

   a. complaint under s188 ERA, that the respondent failed to make payment of sums to the claimant, in respect of wages and holiday pay, which he asserts were due to him under s182 ERA.

   b. A complaint under s166 ERA, that the claimant is entitled to a statutory redundancy payment.

5. The respondent denied that the claimant was entitled to any sums, on the basis that he was not an employee at the relevant times, and asserted that the complaint under section 188 ERA was not submitted in the requisite time limits.

6. Parties lodged separate bundles of productions for the hearing, extending to 60 and 179 pages respectively.

7. As the hearing had only been set down for 2 hours, there was a discussion at the outset as to how to best progress the claim. It was agreed that time would be used to hear evidence on the preliminary issues regarding time bar and employment status. Judgment would then require to be reserved and issued in writing.

8. The Tribunal heard evidence from the claimant only.

Issues to be Determined

9. Was the complaint under s188 ERA lodged within the relevant time limits?

10. Was the claimant an employee at the relevant time?

Findings in Fact

11. The Tribunal found the following facts, relevant to the issues to be determined, to be admitted or proven.

12. J&L Leisure Limited (**the company**) was incorporated in October 2018. The claimant was appointed as a director on incorporation. The only other officer of the company was his wife, who was appointed as a director. Each held 50% of the shares.

13. The company started trading, operating a restaurant, in February 2019. The claimant undertook the role of General Manager and Head Chef. His wife, who was the only other director and shareholder, undertook a full time employed role elsewhere, and had no involvement in the day to day operation of the company.

14. In March 2020, on the advice of employment consultants and along with all others working in the restaurant, the claimant was provided with a Statement of Main Terms of Employment. This stated that the claimant had commenced employment in February 2019 as a General Manager, that his salary was £11,908 and that he would be required to work 60 hours per week, in accordance with a rota, which would be notified to him on a weekly basis. It confirmed that his holiday entitlement was to 28 days' holiday per annum.

15. The claimant was the most senior individual working within the company. He was responsible for the day to day running of the company. He was not supervised or managed. He supervised and managed others working in the restaurant. He set the rota, so determined the hours that everyone worked, including himself. He did not receive any additional payments if he worked in excess of 60 hours, nor did he expect to do so.

16. Despite the Statement of Main Terms of Employment stating that *'We will ensure compliance with the law on National Minimum Wage/National Living Wage at all times'* the claimant was not paid the national minimum wage. He received £11,908 per annum in each year from March 2020 onwards (other than during covid lockdowns), and worked at least 60 hours per week (other than during covid lockdowns). His hourly rate was accordingly around £3.82. This remained the case in the financial year 2023/24, despite the applicable national minimum wage rate being £10.42 at that time. The claimant, as Director, did not pay himself more, as his view was that the company could not afford to do so. Everyone else engaged to work in the restaurant always received an hourly rate in excess of the national minimum wage.

17. In the 5 years the company was trading, the claimant took approximately 6 days' holiday. Simply taking this, when he wished to do so. Everyone else engaged to work in the restaurant took all/nearly all of their full holiday entitlement, making a request to the claimant to do so on each occasion.

18. By January 2024, the company was experiencing financial difficulties. The claimant ensured that all individuals engaged to work in the restaurant received their salary, but did not pay himself, as he did not feel the company had sufficient funds to meet a further payment to himself.

19. The company ceased trading, and was placed into creditors voluntary liquidation, on 13 February 2024. Insolvency practitioners were appointed, who provided advice to the claimant. This included the possibility of the claimant submitting a claim to the respondent for a statutory redundancy payment, unpaid wages and holiday pay. They also advised the claimant that, if the respondent refused his application, he could make a complaint to an employment tribunal.

20. On 12 March 2024, the claimant made an application to the respondent for a statutory redundancy payment, unpaid wages (from 1 January to 13 February 2024) and outstanding but unpaid holiday pay (400 hours/33.333 days,

including carry over from previous years). The claimant was advised of the respondent's decision, to refuse his application, by letter dated 24 May 2024.

21. In the letter rejecting his claim, the respondent explained that the claimant had a right to make a claim to an employment tribunal if he thought he had been paid the wrong amount and that there were time limits for doing so. In the letter a link was provided to further guidance regarding time limits and how to make a claim to an employment tribunal The link was to a factsheet 'Guidance – Explaining your redundancy payments'. Section 12 of that document was entitled ***'Making a claim to an employment tribunal'.*** It stated ***'****If you disagree with our decision, you can also make a claim to an employment tribunal. You have 3 months from the date of your letter to make a claim to an employment tribunal unless your claim is relating to redundancy pay (as opposed to holiday pay, loss of notice pay). There are different time limits if your claim includes redundancy pay which is usually 6 months from the date of your dismissal.'* The claimant reviewed the factsheet at the time it was sent to him.

22. The claimant produced additional evidence to the respondent, requesting that they review the decision to reject his claim. He was sent an email on 20 June 2024 confirming that the respondent had reviewed the additional evidence, but that it had not changed their original decision to reject his claim. He was provided with a further link to the factsheet referenced in paragraph 18 above and informed that, if he made a claim to an employment tribunal, he should list his '*former employer as the first respondent and the Secretary of State as the second respondent.'*

23. The claimant presented this claim, against the Secretary of State for Business & Trade, to the employment tribunal on 15 September 2024.

Submissions

24. Mr Soni, for the respondent, gave a brief submission. He adopted the Grounds of Resistance attached to the respondent's ET3 form as his submission and, in summary, stated:

a. The claimant was not an employee of the company: The tests set out in s230 ERA, and the relevant case law (as referenced in the ET3) are not satisfied. The written Statement of Main Terms of Employment does not reflect the reality of the situation, so was not genuine/was a sham. If a contract did exist, it was discharged well before the date of insolvency. The reality of the situation was that there was no mutuality and no control. The claimant was not an employee of the company.

b. The complaints in relation to arrears of pay and holiday pay were not lodged in time and the claimant has not demonstrated that it was not reasonably practicable for him to do so. These complaints should therefore be rejected.

25. The claimant simply invited the Tribunal to consider the evidence and find that he was an employee of the company.

Relevant Law

Preliminary Issue - Time Limits

26. The relevant time limits are set out at s188(2) ERA. This states that a Tribunal shall not consider a complaint unless it is presented to the Tribunal before the end of three months beginning with the date on which the decision of the respondent was communicated to the claimant, or within such further period as the Tribunal considers reasonable in a case where it is satisfied that it was not reasonably practicable for the complaint to be presented before the end of that period of three months. There is no requirement to participate in early conciliation in relation to proceedings of this nature. Time limits are accordingly not extended to allow for that.

27. The Tribunal accordingly requires to consider the following questions:

a. Were the complaints presented within the primary time limit?

b. If not, was it reasonably practicable for the complaints to be presented within that period?

c. If not, were they presented within such further period as the Tribunal considers reasonable?

28. The question of what is reasonably practical is a question of fact for the Tribunal. The burden of proof falls on the claimant. Whether it is reasonably practicable to submit a claim in time does not mean whether it was reasonable or physically possible to do so. Rather, it is essentially a question of whether it was 'reasonably feasible' to do so (***Palmer and Saunders v Southend-on-Sea Borough Council*** [1984] IRLR 119).

29. Whether the claim was presented within a further reasonable period requires an assessment of the factual circumstances by the Tribunal, to determine whether the claim was submitted within a reasonable time after the original time limit expired (***University Hospitals Bristol NHS Foundation Trust v Williams*** UKEAT/0291/12).

Employment Status

30. Section 230(1) ERA defines 'employee' as *'an individual who has entered into or works under (or, where the employment has ceased, worked under) a contract of employment.'* Section 230(2) provides that a contract of employment means *'a contract of service or apprenticeship, whether express or implied and (if it is express) whether oral or in writing.'*

31. The issue of the status of a person as employee, worker or neither of those terms has been the subject of much case law. The essential test for employment status was set out in ***Ready Mixed Concrete (South East) Ltd v Minister of Pensions and National Insurance*** [1968] All ER 433, which referred to the need for personal service, control and other factors consistent with a contract of service.

32. Guidance on determining whether an individual has employee status was provided in ***Hall (Inspector of Taxes) v Lorimer*** 1994 ICR 218, CA, where the Court of Appeal upheld the decision of Mr Justice Mummery in the High Court (reported at 1992 ICR 739), who had said:

'this is not a mechanical exercise of running through items on a checklist to see whether they are present in, or absent from, a given situation. The object of the exercise is to paint a picture from the accumulation of detail. The overall effect can only be appreciated by standing back from the detailed picture which has been painted, by viewing it from a distance and by making an informed, considered, qualitative appreciation of the whole. It is a matter of evaluation of the overall effect of the detail... Not all details are of equal weight or importance in any given situation.'

33. It is established law that a company may enter into a contract of employment with a person who is the principal shareholder and in sole control of the company (***Lee v Lee's Air Farming Limited*** [1961] AC 12). In ***Secretary of State for Business, Enterprise & Regulatory Reform v Neufeld & another*** [2009] IRLR 475, Rimer LJ stated, at paragraph 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 [Secretary of State for Trade & Industry v] Bottrill [[1999] IRLR 326] of the reasoning in Buchan [v Secretary of State for Employment [1997] IRLR 80].'

34. It does not, however, follow that such a contract necessarily existed. Whether there was a contract between a shareholder/director and the company, and if so whether it was a contract of employment, is to be decided by the application of ordinary principles. Thus, in ***Neufeld***, Rimer LJ said at para 85:

"In deciding whether a valid contract of employment was in existence, consideration will have to be given to the requisite conditions for the creation of such a contract and the court or tribunal will want to be satisfied that the contract meets them. In Lee's case the position was ostensibly clear on the documents, with the only contentious issue being in relation to the control condition of a contract of employment. In some cases there will be a formal service agreement. Failing that, there may be a minute of a board meeting or a memorandum dealing with the matter. 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.'

35. At paragraph 89 of ***Neufeld,*** Rimer LJ considered cases where there was no written agreement. He stated '*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'.

Discussion & Decision

Preliminary Issue - Time Limits

36. The complaints under s188 ERA were not brought within the three month time limit. The claimant was informed of the respondent's decision on 24 May 2024. The relevant time limit accordingly expired, at the latest, on 23 August 2024. The claim was submitted on 15 September 2024, after the expiry of the relevant time limit.

37. The Tribunal then considered whether it was reasonably practicable for the claim to have been presented within the primary time limit. The claimant's position was that he understood the time limit ran from the date he was notified of the appeal outcome, rather than the date of the original decision.

38. Where a claimant asserts that they were unaware of their right to bring a complaint and/or the time limits for doing so, correct test is not whether the claimant knew of his or her rights but whether he or she *ought to have known of them.* The Tribunal must consider: What were his opportunities for finding out that he had rights? Did he take them? If not, why not? Was he misled or deceived? Was he reasonably ignorant of the time limits? (***Dedman v British Building and Engineering Appliances Ltd*** 1974 ICR 53, CA, ***Wall's Meat Co Ltd v Khan*** [1978] IRLR 499).

39. In the correspondence rejecting his claim, the respondent explained that the claimant had a right to make a claim to an employment tribunal, if he thought he had been paid the wrong amount. They explained that there were time limits for doing so. In the correspondence a link was provided to further guidance, if the claimant felt the payment was wrong, or wished further information about employment tribunal time limits and when and how to make a claim to an employment tribunal. The link was to a factsheet entitled 'Guidance – Explaining your redundancy payments'. Section 12 of that document was entitled *'**Making a claim to an employment tribunal'.*** It

clearly stated that the claimant had three months from the date of the letter he had received to make a claim to an employment tribunal. The claimant reviewed that document on receipt, in May 2024. He also had access to advice from an Insolvency Practitioner, who had informed him of the possibility of presenting a claim to an employment tribunal, in the event that his application to the respondent was rejected.

40. Given all the circumstances the Tribunal found that the claimant did not demonstrate that it was not reasonably feasible for him to lodge a claim in the period up to 23 August 2024. He knew, or at very least ought to have known, of his ability to bring an employment tribunal claim and time limits for doing so. Any misunderstanding on his part, that time may run from the date he was informed of the outcome of a review, rather than the date of the original decision, was not reasonable in the circumstances, given the terms of the letter received on 24 May 2024. Any ambiguity could have been readily resolved by making appropriate enquiries, or conducting appropriate research.

41. In light of the above, the Tribunal concluded that it was reasonably practicable for the claimant to have lodged his claim within the primary time limit. As he did not do so, the Tribunal does not require to consider whether the claim was submitted in a reasonable further period.

42. The Tribunal accordingly has no jurisdiction to consider the claimant's complaints under s188 ERA. These are dismissed.

Employment Status

43. Determination of a person's status is a question of fact for the Tribunal, to be ascertained by examining the particular circumstances of each case. Where a business becomes insolvent, the relevant date for considering an individual's status is the date of insolvency. In this case 13 February 2024 (the **Relevant Date**).

44. While there was a written contract (the Statement of Main Terms of Employment, prepared in March 2020), the Tribunal agreed with the respondent's submission that this did not reflect the reality of the situation, as at the Relevant Date. It was not a genuine employment contract. Had it been, the claimant would have received the national minimum wage and would have taken the holidays referred to.

45. Adopting the approach expressed by Mummery J in ***Hall***, the Tribunal concluded, based on the evidence presented, that the reality of the relationship between the claimant and the company was that the claimant was not an employee of the company, as defined in section 230(1) ERA, as at 1the Relevant Date. In reaching that conclusion, the Tribunal took into account all the evidence, including the following:

a. The fact that no control was exercised by the company over what the claimant did, or how or when he did it. This was not consistent with an employment relationship.

b. The manner in which the claimant was remunerated, which also pointed away from an employment relationship. Whilst the claimant was paid via PAYE, the sums received by the claimant were not set by reference to the hours worked by the claimant, or the national minimum wage, but what considered the company could afford and, the Tribunal concluded, the levels at which tax and national insurance become due. This arrangement was not consistent with the claimant working under a contract of employment.

c. The claimant did not take holidays or time away from the business. This was not consistent with an employment relationship.

46. As the claimant was not an employee at the Relevant Time, he had no entitlement to a statutory redundancy payment and was therefore not entitled

to apply, under s166 ERA, to the respondent in these proceedings for payment of that sum. That complaint is therefore dismissed.

Employment Judge: M Sangster
Date of Judgment: 18 December 2024

Date sent to parties 19/12/2024