Neutral Citation No. [2014] NICA 26 | *Ref:* **WEA9160**

*Judgment: approved by the Court for handing down (subject to editorial corrections)** | *Delivered:* **20/02/2014**

IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

ON APPEAL FROM AN INDUSTRIAL TRIBUNAL

BETWEEN:

HEATHER CRAWFORD

First-named Claimant/Respondent

-and-

ROGER DUNLOP

Second-named Claimant/Respondent

-and-

DEPARTMENT FOR EMPLOYMENT AND LEARNING

Respondent/Appellant.

Before: Girvan LJ Coghlin LJ and Weatherup J

WEATHERUP J (delivering the judgment of the court)

[1] When does a director and shareholder of a company fall to be treated as an "employee" of the company for the purposes of redundancy and insolvency payments from the National Insurance Fund administered by the Department of Employment and Learning? That is the issue which arose in the present proceedings.

[2] Adamsez (NI) Ltd ("the company") began trading in October 1987. The claimants are brother and sister who were directors and shareholders of the company. Lawrence Dunlop, father of the claimants, was also a director and shareholder of the company. The company got into financial difficulties and HMRC

presented a winding-up petition in August 2011. The company was unable to extract itself from its financial difficulties and ceased trading on 29 February 2012.

[3] Where a company becomes insolvent and an employee's employment has been terminated and the employee was entitled to be paid certain debts by the company, the Department shall become responsible for the payments, as provided by the statutory scheme set out in Part XIV of the Employment Rights (Northern Ireland) Order 1996.

[4] Article 3 of the 1996 Order provides -

> (1) In this Order "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 Order "contract of employment" means a contract of service or apprenticeship, whether express or implied, and (if it is express) whether oral or in writing.

[5] The claimants and their father claimed the redundancy and insolvency payments from the Department under the statutory scheme. The Department refused to make the payments as it was not satisfied that the claimants or their father were "employees" for the purposes of the statutory scheme.

[6] The claimants and their father applied to the Industrial Tribunal for a declaration under article 233 of the 1996 Order that the Department ought to make the payments.

[7] The claimants' cases were heard together in the Industrial Tribunal in February 2013. By decisions issued to the parties on 18 April 2013 the Tribunal decided that both claimants were employees and were entitled to payments made up of a statutory redundancy payment, notice pay, arrears of pay and holiday pay. It was declared that the first named claimant ought to be paid £18,291.17 and the second-named claimant ought to be paid £26,351.14.

[8] The first-named claimant was stated to be employed as Marketing Director. The second-named claimant was stated to be employed as Managing Director. The shareholding of the first-named claimant was 8% and the second-named claimant 11%. Each worked 40 hours per week, received a monthly salary from which Income Tax and National Insurance were deducted and did not receive dividend payments. Each received a specific holiday entitlement. There were no written contracts between the claimants and the company. Particular attention was paid to certain months where each claimant received no salary or a reduced salary, not only in the period immediately preceding the company ceasing to trade but also during an earlier 6 month period of financial difficulty. In the case of the second-named

claimant there was also an earlier period of 3 months where, for reasons that were not stated and may not have been examined, no salary was paid.

[9] The Department appealed against the decisions of the Tribunal. Mr McGleenan QC and Mr Kennedy appeared for the Department and Mr Mulqueen appeared for the claimants.

[10] The application of Lawrence Dunlop, the father of the claimants, was heard by a different Industrial Tribunal in November 2013. By a decision issued to the parties on 24 January 2014 the Tribunal decided that the father was not an employee of the company and accordingly was not entitled to recovery of the redundancy and insolvency payments claimed. The claimants' father had claimed to have been employed as a designer and he held a shareholding of 14%. The Tribunal found that he had a verbal contract with the company although the nature and terms of that contract were not identified. He shared some of the features of the relationships with the company identified in respect of the claimants. However there were found to be two of the working arrangements that were not consistent with the status of employee. They were the irregularity of salary payments and the absence of a claim by the claimant or acceptance by the company of a debt to the claimant in respect of the payments not made by the company.

[11] The operation of the equivalent statutory scheme in Great Britain was considered by the Court of Appeal in England and Wales in Neufeld & Anor v Secretary of State [2009] EWCA Civ 280. In the course of the judgment Rimer LJ adopted guidance to tribunals formulated by Elias J in Clark v Clark Construction Initiatives Ltd [2008] IRLR 364 and added comments on some of the aspects of that guidance. Set out below is the guidance and in italics the comments.

> 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.
>
> *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 had 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.

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

(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.

(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 [acting in a manner which suggests the contract is being set at nought or is treated as no more than an irrelevant piece of paper] 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.

It may perhaps have put a little too high the potentially negative effect of the terms of the contract not having been reduced to 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.

(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. It would wholly undermine the approach [in Lee v Lee's Air Farming [1961] AC 12] 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 that fact alone will ever justify a tribunal in finding that there was no contract in place. That would be to apply the test [in Buchan and Ivey v Secretary of State for Employment [1997] IRLR 80] 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 these doubts one way or another.

The Court of Appeal commented on the seventh and eighth factors that 'never say never' is a wise judicial maxim. In that regard the Court of Appeal stated that "ordinarily" a claim to be an employee of the company would not be defeated by a shareholding that gave control of the company, by share capital invested in the company, by loans made to the company, by personal guarantees of the company obligations, by personal investment in the company by which the claimed employee stands to prosper in line with the company's prosperity nor any of the other things that the owner of a business would commonly do on its behalf. These considerations are usual features of the sort of companies giving rise to the type of issues 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.

[12] The present cases did not involve alleged contracts that were said to be a sham. They were not cases that relied on written contracts. The question was whether the claimed oral contracts amounted to true contracts of employment. An answer to that question required an inquiry as to what agreements had been reached between the claimants and the company, whether any agreements amounted to contracts of employment and whether the conduct of the claimants in the course of their relationships with the company was consistent with the agreements and with contracts of employment.

[13] The inquiry would have involved consideration of the indicators of contracts of employment referred to in the decisions. However the substance of the matter concerned the nature of the agreements reached and the conduct of the claimants in purporting to act in accordance with such agreements. The conduct of the claimed employee is important when there is a written contract, as appears from the Court of

Appeal comments on the first of the guidelines, and is also important when there is no written contract, as appears from the Court of Appeal comments on the sixth guideline.

[14] When the claimants' appeals came on for hearing it readily became apparent that the circumstances of the formation of any contracts of employment between the claimants and the company and the terms and conditions of any such contracts of employment and the conduct of the claimants in the performance of any duties under any claimed contracts of employment had not been the subject of adequate inquiry by the Tribunal. Accordingly the appeals require to be remitted to an Industrial Tribunal for further inquiry as to the circumstances of the relationships between the claimants and the company.

[15] Counsel for all parties, at the invitation of the Court, drew up a schedule which they considered reflected the considerations that ought to have been addressed by the Tribunal in undertaking the necessary inquiries into the relationship between the claimants and the company. We annex to this judgment that schedule subject to some modifications which we consider make the schedule somewhat clearer.

[16] The Tribunal, in conducting its inquiries of the nature and extent outlined above, should set out its findings based on the evidence received. It is not sufficient for the Tribunal to set out the respective claims of the parties without making appropriate findings.

[17] The applications of the claimants and that of their father were heard by a Tribunal with a chairman sitting alone. The Industrial Tribunals (Northern Ireland) Order 1996 provides for the composition of a Tribunal at article 6.

> The starting point is that proceedings before a Tribunal shall be heard by the chairman and two other members (article 6(1)).
>
> However, specified proceedings shall be heard by the chairman alone (article 6(2)).
>
> The specified proceedings include proceedings on a complaint under article 233 of the 1996 Order (payment on insolvency of employer) (article 6(3)(a)) – being the present cases.
>
> However, the specified proceedings shall be heard by a chairman and two other members, if, having regard to whether there is a likelihood of a dispute arising on the facts which makes it desirable for the proceedings to be heard by a chairman and two other persons, it is so decided (article 6(5)(a)).

[18] The claimants' article 233 applications and that of their father were heard by the chairman alone. The applications are such that at a preliminary stage it should have been apparent that there were disputes arising on the facts. It is not apparent whether any consideration was given to the desirability for the proceedings to be heard by a chairman and two other members. Such consideration should be given to the rehearing of these claims.

[19] An application has been made for a review of the decision made in respect of Lawrence Dunlop. The Court was informed that consideration may be given to an appeal if the decision is not altered on review. It would be desirable, if there is to be a reconsideration of all three cases, that all three claimants be dealt with together by one Industrial Tribunal.

[20] The appeals are allowed and the applications remitted to the Industrial Tribunal for reconsideration.

SCHEDULE

Part 1

1. The following matters fall to be considered by the Tribunal:

    1) Job Title;
    2) Start Date;
    3) Salary/Overtime;
    4) National Minimum Wage Compliance (but see Part 2);
    5) Working Time Directive Compliance (but see Part 2);
    6) Pension Provision;
    7) Expenses;
    8) Benefits in Kind;
    9) Hours;
    10) Duties;
    11) Management/supervision of the Individual;
    12) Place of Work;
    13) Holiday Provisions;
    14) Sick Pay and Absence Provisions;
    15) Performance Reviews;
    16) Disciplinary/grievance procedures;
    17) The difference between the individual's role as director and their role as employee (but see Part 2);
    18) The issue whether the individual held any other posts in any other businesses, linked or not to the insolvent company (but see Part 2);
    19) The issue whether there were any differences between the treatment of the individual in question and other employees in particular where the purported contract terms are the same or comparable;
    20) The issue of compliance or non-compliance with the requirements on Director's Service Contracts under Article 228 of the Companies Act 2006;
    21) Dividends and Loans (to or from the company):-
        a) Whether Loans and Dividend Payments were paid as part of Directors' remuneration;

b) How were Loan and Dividend payments agreed;

c) Frequency of payment.

22) Changes to all of the above (Including when, how and by whom agreed);

23) The Implementation of and adherence to the terms along with any variations in the above, and;

24) How the above operated in reality.

2. The Tribunal should inquire as to:

1) When was the claimed contract agreed?

2) Who agreed the terms?

3) Who was the employer representative?

4) What was agreed with reference to the matters listed at 1) – 24) above?

5) Were any variations agreed or introduced?

a) If so, what were the variations?

b) How were they agreed?

c) Who agreed them?

6) Whether the agreement or any part thereof was ever committed to writing and if not why not?

7) Compliance or non-compliance with legal requirement to provide written terms & conditions.

3. The following are potentially relevant documents and the presence or absence of any such documents is potentially relevant:

1) Written signed and agreed statement of Main Terms and Conditions and any notification of changes;

2) Written evidence of agreement, which may be found in:-

a) A Memorandum or note as required under Section 228 Companies Act 2006;

b) Memorandum and Articles of Association, and;

c) Board Meeting Minutes.

3) Payslips;

4) Pay Records;

5) Claims for expenses including but not limited to fuel and Benefits in Kind (or such documentation as exists verifying the existence of an entitlement to claim expenses);
6) P60s;
7) P45;
8) Self-Assessment Return;
9) P11Ds;
10) RD18 – National Insurance Contribution Records;
11) Interactions with company as evidenced in writing;
12) Holiday records;
13) Pension documentation;
14) Overtime records;
15) Timesheets/clocking cards;
16) Performance Reviews;
17) Sickness absence and sick pay records;
18) Any other variation documentation;
19) Disciplinary/Grievance records, and;
20) Staff handbook.

4. The question whether the claimant received reduced and/or no pay during the course of their purported period of employment is of relevance. If so, the reasons for the reduction or cessation of payment are potentially relevant as is the issue of whether the claimant consented to receiving reduced or no pay.

Part 2

Points at Issue in Respect of Part 1

No.	Element	Appellant's Comment	Claimants' Comment
1.4)	National Minimum Wage Compliance;	The Appellant consider this to be a relevant consideration as any payment made below the minimum wage is not consistent with a lawful contract of employment.	The Claimants for the reasons set out in their skeleton argument reject that the National Minimum Wage Regulations should be a consideration when determining who is an employee.
1.5)	Working Time Directive Compliance;	The Appellant considers this to be relevant as workers and employees are covered by the Working Time Directive whereas a Director would not be. An opt out should be signed by any worker or employee working beyond the restrictions of the Working Time Directive.	The Claimants do not accept that the Working Time Regulations (NI) 1998 assist the Court in determining who is an employee. These Regulations apply to employees, workers, agency workers and non-employed trainees. Further, the only opt out provisions are contained at Regulation 5 in relation to opting out of the requirement not to work more than 48 hours in any 7 days.
1.17)	The Tribunal should investigate the difference	The Court of Appeal raised this issue during	It has been accepted by the Appellant that

No.	Element	Appellant's Comment	Claimants' Comment
	between the individual's role as Director and their role as employee;	submissions. A person may be titled 'Marketing Director' but the actual functions/duties carried out may be that of an employee only or may not be as described.	an employee can also be a Director. Therefore, any duties undertaken as a Director will be of little assistance to the Tribunal in determining who is an employee.
1.18)	Whether the individual held any other posts in any other business, linked or not to the insolvent company;	The Appellant considers that this is relevant to determining whether or not the Claimant worked solely for the company and is therefore relevant to employee status. The Appellant considers that a Director could easily split time between different companies which would not be the case if that person were an employee.	The Claimants do not accept that whether an individual has any other business interests will assist the Tribunal in determining who is an employee.
1.19)	Whether there were any differences between the treatment of the individual in question and other employees in particular where the purported contract terms are the same or comparable;	The Appellant considers this to be a relevant consideration and, in particular, given that in this case all employees had written contracts save for the Directors.	Contractual terms can differ depending on the position held. This may explain the difference in the manner and treatment afforded to employees. Further, the question of whether an employee has written terms is

No.	Element	Appellant's Comment	Claimants' Comment
			covered at point 5.
4.	Did the Claimant receive reduced and/or pay during the course of the purported period of employment?	The Appellant does not consider this to be necessary given that points 1.3, 1.4, 1.21. 1.22, 1.23 and 1.24 address this issue.	