EMPLOYMENT TRIBUNALS

BETWEEN

Claimant		**Respondents**
Mr Barry Helsdown	AND	J&B Disaster Management Limited (In Administration) (1) Secretary of State for Business Energy and Industrial Strategy (2)

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

HELD REMOTELY BY CVP **ON** 4 April 2024

EMPLOYMENT JUDGE N J Roper

Representation
For the Claimant: **In person**
For the Respondent: **Mr P Soni of the Redundancy Payments Service**

JUDGMENT

The judgment of the tribunal is that the claimant was not an employee and his claims against the second respondent are dismissed.

RESERVED REASONS

1. This is the judgment following a preliminary hearing to determine the employment status of the claimant. In this case the claimant Mr Barry Helsdown is pursuing payment from the National Insurance Fund under the provisions of sections 166 and/or 182 of the Employment Rights Act 1996 (namely for redundancy pay, notice pay and holiday pay). The Secretary of State does not admit that the claimant was an employee, and asserts that the claimant is not entitled to these payments.
2. I have heard from the claimant, and I have heard from Mr Soni on behalf of the Secretary of State, the second respondent. The first respondent is in administration and did not attend. The Administrator of the first respondent gave his consent for these proceedings to continue by letter dated 24 August 2023.
3. There was a degree of conflict on the evidence. I found the following facts proven on the balance of probabilities after considering the whole of the evidence, both oral and documentary, and after listening to the factual and legal submissions made by and on behalf of the respective parties.

4. The first respondent is J&B Disaster Management Limited. This is a limited company which entered administration on 4 April 2023. The claimant Mr Barry Helsdown confirms in his originating application that he was a director of the first respondent from its inception on 31 March 2016 "to it being placed into administration on 31 March 2023". He claims to have been "an employee working at this company for all of that time". Section 5 of his originating application also asserts that he was the Finance Director from 31 March 2016 until 31 March 2023. On 15 May 2023 the claimant made an online application to the Redundancy Payments Service for redundancy pay, notice pay and holiday pay on the basis that his former employer (the first respondent) was insolvent. The second respondent the Secretary of the State refused to make these payments on the basis that the claimant was not an employee of the first respondent, and that therefore he was not entitled to these payments. The claimant commenced the Early Conciliation process with ACAS on 6 July 2023, and ACAS issued the Early Conciliation Certificate on 10 July 2023. The claimant then presented these proceedings on 21 July 2023. This hearing was then listed to determine whether or not the claimant had been an employee of the first respondent, which decision will inform the parties whether the Secretary of State has been correct to deny payment to the claimant.
5. Some of the evidence which the claimant gave was inconsistent with the contemporaneous documents, and his application to the Secretary of State. The second respondent had required the claimant to provide further information in connection with his application. The claimant confirmed that he had never held any of the following documents: (i) a written contract of employment; (ii) a statement setting out the terms and conditions of his employment; (iii) a letter of appointment; nor (iv) any written memorandum of a director's contract in his capacity as an employee by reference to section 318 of the Companies Act 1985. The claimant suggested at this hearing that he had completed a contract of employment online with the help of HR advisers, but that it did not exist as a physical document.
6. The claimant also asserted that he had worked a fixed 40 hour week at a fixed weekly wage of £314.26 (which equates to an annual salary of £16,341.52). This is different from the assertion in paragraph 6 in his originating application that he was paid £2,237.00 per month gross for a 40 hour week with normal take-home pay of £1,436.00. Similarly, this was again inconsistent with HMRC form P60 for the year ended 5 April 2023 which suggested that he had received gross pay of £16,386.66 for that tax year.
7. The claimant also confirmed that he was a 50% shareholder of the first respondent, and that he had received payment of the following dividends: 31 March 2019 £2000; 31 March 2020 £10,000; 31 March 2021 £65,549.31; and on 31 March 2022 £23,100. The claimant confirmed today that it was only in the latter stages of the company's existence, namely the last three months or so, following the Covid pandemic and consequential financial difficulties, that he and Mr Marple decided to pay themselves less in dividends and more by way of potential salary. The company had approximately 20 employees and the claimant explained that they wished to ensure that they were paid.
8. The first respondent limited company was a family company, and it was effectively a quasi-partnership. It was owned jointly by the claimant and his son-in-law Mr Marple. They were both directors, and each of them was a 50% shareholder. This effectively meant that no decisions could be taken against the claimant's interest without his agreement.
9. As noted above, the second respondent asserts that the documentary evidence supplied by the claimant did not support payment of the wages claimed, and in addition it showed an income below both the figure claimed, and the National Minimum Wage ("the NMW"). The documentary evidence supplied confirmed that the claimant had been receiving payments below the level of the NMW since 1 July 2016. The second respondent asserts that under the NMW Regulations, company directors as officeholders are not entitled to receive the NMW for work they do as an officeholder. They are entitled to set their own rate of remuneration. However, if they are also an employee or a worker then they must be paid at least the NMW for the work done as an employee. This was not the case with the claimant.
10. Having established the above facts, I now apply the law.

11. Employees and workers are defined in section 230 of the Employment Rights Act 1996 ("the Act"). An employee is an individual who has entered into or works under (or, where the employment has ceased, worked under) a contract of employment. 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.
12. I have considered the following cases to which I have been referred: Secretary of State v Neufeld and Howe [2009] EWCA Civ 280; Secretary of State v Knight [2023] UKEAT/0073/13/RN; Eaton v Robert Eaton Ltd & Secretary of State [1988] IRLR 83 EAT; Fleming v Secretary of State [1997] IRLR 682 CS; Rainford v Dorset Aquatics Ltd UKEAT/0126/20/BA; Rajah v Secretary of State [1995] EAT/125; Autoclenz Ltd v Belcher and Others [2010] IRLR 70 CA and [2011] UKSC 41; Ready Mixed Concrete (South East) Ltd v Minister of Pensions and National Insurance [1968] 2 QB 497; Pimlico Plumbers Ltd & anor v Smith [2017] EWCA Civ 51; Aslam Farrar & Others v Uber BV and Others 2202550/2015; Addison Lee Ltd v Lange and Others UKEAT/0037/18/BA; Nethermere (St Neots) Limited v Gardiner [1984] ICR 612; Express and Echo Publications Ltd v Tanton [1999] IRLR 367.
13. In the first place there is no reason in principle why someone who is a director and shareholder of the company, cannot also be an employee of that company under a contract of employment. Whether or not a shareholder and director is an employee of the company is ultimately a question of fact (see Neufeld). As confirmed in Eaton, a director of the company is normally the holder of an office, and not an employee, and evidence is therefore required to establish that the director was in fact “employed”. Such evidence would include whether there was an express contract of employment or a board minute, or written memorandum constituting an agreement to employ the person and/or the extent to which he might be under the control of the Board of Directors. In this case the claimant suggests that there was some online version of a contract of employment, which was not a physical contract, which is inconsistent with his earlier information to the second respondent that he thought there was some sort of “verbal agreement”. In any event I have not seen any written contract of employment and certainly no written memorandum which might constitute an agreement by the company to employ the claimant.
14. Although the claimant has received some payments which were treated as salary, these payments were below the level of the National Minimum Wage, and I agree with the second respondent’s submission that this does not reflect the legal wage to which an employee would be entitled from an employer. The claimant received some salary near to the threshold for payment of sums which were aimed at minimising the payment of tax and National Insurance contributions (in addition to dividends) which the second respondent notes is a benefit not afforded to a bone fide employee of the company.
15. In Rajah it was confirmed that the relevant date for the purposes of deciding whether the second respondent is liable as the date at which the company became insolvent. In this case the claimant accepts that he finished work on 31 March 2023, but the first respondent did not enter administration and become insolvent in the statutory sense until 4 April 2023.
16. Further considerations as to employment status are these. As confirmed in paragraphs 18 and 19 of Lord Clarke's judgment in Autoclenz in the Supreme Court: “18 : As Smith LJ explained in the Court of Appeal of paragraph 11, the classic description of a contract of employment (or a contract of service as it used to be called) is found in the judgement of McKenna J in Ready Mixed Concrete (South East) Ltd v Minister of Pensions and National Insurance [1968] 2 QB 497, 515C : "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 master. (iii) The other provisions of the contract are consistent with its being a contract of service … Freedom to do a job either by one's own hands or by another’s is inconsistent with a contract of service, though a limited or occasional power of delegation may not be". 19: Three further propositions are not I think contentious: i) As Stephenson LJ put it in Nethermere St Neots

Ltd v Gardiner [1984] ICR 612, 623 "There must … be an irreducible minimum of obligation on each side to create a contract of service"….

17. The Supreme Court has upheld the Court of Appeal in the Autoclenz decision, and the approach to be adopted where there is a dispute (as in this case) as to an individual's status. In short, the four questions to be asked are: first, what are the terms of the contract between the individual and the other party? Secondly, is the individual contractually obliged to carry out work or perform services himself (that is to say personally)? Thirdly, if the individual is required to carry out work or perform services himself, is this work done for the other party in the capacity of client or customer? And fourthly if the individual is required to carry out work or perform services himself, and does not do so for the other party in the capacity of client or customer, is the claimant a "limb (b) worker" or an employee?
18. I adopt and apply this test in that order.
19. First, as to the terms of the contract, I do not accept on the balance of probabilities that the claimant has discharged the burden of proof upon him to establish that there was a contract of employment in place. His original statement that there was some form of verbal agreement is inconsistent with his evidence today that there was a contract of employment prepared but never printed. I have not seen any written document to suggest that there was a contract of employment in place which had been authorised by the company.
20. As to the second limb of the Autoclenz test, I find that the claimant was not contractually obliged to carry out services personally. There was no "irreducible minimum" of employment status. The claimant was a 50% shareholder in what was effectively a quasi-partnership. He could not be obliged to do anything without his express consent. On balance I find that there was no "irreducible minimum": there was no mutuality of obligation; no requirement for personal service; and insufficient direct control. These are all primary factors which are inconsistent with a contract of service.
21. Other legal principles are relevant in this case. First, in the absence of a contract, there clearly can be no employment relationship. A contract can only be implied where it is necessary to do so, see James v Greenwich London Borough Council. Where the inference is that the parties would have acted in exactly the same way if there had been no contract, and this will be fatal to the implication of a contract, see Tilson v Astom Transport.
22. For all of these reasons I find that the claimant was not an employee of the first respondent and I therefore dismiss his claims.

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Employment Judge N J Roper
Dated 04 April 2024

Judgment sent to Parties on 19 April 2024

For the Tribunal Office