



# EMPLOYMENT TRIBUNALS

**Claimant:** Mr L Riley

**Respondent:** Liverpool Brewing Company

**Heard at:** Manchester (remotely, by CVP)

**On:** 11 October 2022

**Before:** Employment Judge K M Ross

## REPRESENTATION:

**Claimant:** In person

**Respondent:** Ms Warren, Solicitor

# REASONS

**JUDGMENT** having been sent to the parties and oral reasons having been given on 11 October 2022 and written reasons having been requested in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided:

1. The preliminary hearing was to determine:
  - (1) Whether the claimant was an employee or a worker within the meaning of section 230 of the Employment Rights Act 1996; and
  - (2) Whether the claimant's claim was presented within time, and if not whether the Tribunal should exercise discretion to extend to extend time.
2. I found the claimant was an employee within the meaning of s 230 ERA 1996 and that the claim was presented within time.

3. I had a small bundle of documents prepared by the respondent. At the outset of the hearing the claimant said the bundle did not include documents he had sent to the Tribunal. Accordingly the documents attached to the claimant's email to the Tribunal of 8 August 2022 at 16.56 were included in and referred to at the hearing.
4. I had a witness statement for the claimant and for Mr Shea for the respondent and heard from them both.
5. I found these facts.
6. The claimant with a group of others set up the respondent company in 2018, having purchased assets from the Liverpool Organic Brewery. I find the respondent is a producer of craft and cask beers, based in Liverpool.
7. It is not disputed that the claimant was a shareholder and director in the business.
8. I find that the shareholders were the claimant, the A Davidson, Mr M Crump (for Mrs Crump), Mr French, Mr Mercer, Mr Shea and Mr Akshay.
9. The claimant was not a controlling or majority shareholder. He held approximately 20% shareholding.
10. I find the claimant worked as managing director of the respondent business from October 2018 until the working relationship ended on 24 September 2021. I find the claimant initially worked at other premises along with a member of administrative staff but from December 2018 worked at the respondent's premises until 24 September 2021.
11. I find the claimant's duties included oversight of the day to day brewing operation, new beer planning, beer production planning and scheduling, purchase of raw materials, staff recruitment and management, company sales and development, sales forecasting, brand development and business development and planning.
12. I find the claimant had management responsibility for all the staff employed by the business on the payroll: the brewer, the assistant brewer, the delivery driver and the administrative assistant. I find it was a small business.
13. I find that although the claimant, as managing director, had a high degree of autonomy, he reported back to regular meetings of the other shareholders, which were held usually every 2 weeks, where his sales figures and budget forecasts and other plans were considered, discussed and were subject to approval. I accepted the claimant's evidence on this point. I found the suggestion of Mr Shea, the finance director, that the spreadsheet forecasts produced by the claimant of the type adduced to the Tribunal, were not considered because the type was too small, to be implausible. I took into account that this was a new small business in which the shareholders had all invested personally and the fact that as Finance director Mr Shea had a responsibility to scrutinise financial plans. I find it unlikely he failed to do so because a document was in small type.

**Applying the law to the facts.**

14. I turn to s 230(3) Employment Rights Act 1996. Employee status can be a complex issue and it has exercised many Tribunals over very many years. It is a particular challenge in certain circumstances. I rely on my finding that the respondent there was a small start-up business, and the claimant was a director and a shareholder within the business.

15. I reminded myself there are a number of cases dealing with situations such as this and providing guidance.

16. The Tribunal will have regard to whether there is mutuality of obligation, whether there is control over the individual, whether there is personal performance, whether there is any written contractual documentation. The Tribunal will have regard to any other factors.

17. In cases such as this involving a claimant who is also a director and shareholder the higher courts have suggested the Tribunal should consider these factors:-

(1) 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

(2) 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.

18. I must look at all these various different factors and then weigh them up.

19. I am satisfied that the claimant has told me truthfully in his statement of the day-to-day tasks and strategic responsibilities he was responsible for in his role in the business as a Managing Director. Mr Shea did not dispute that evidence. I find his role as Managing Director was a position with a high degree of autonomy, as it is in most organisations. I am satisfied that there was mutuality of obligation: there was a wage/work bargain. It is not disputed the claimant was not paid a salary. The claimant was in a start-up business in which he invested, and I find he agreed at the outset that he would not draw a salary, but that he would be remunerated in the future by way of a salary when the business could afford it. I find that once the period of May to August 2021 was reached the claimant could no longer afford this arrangement and he put a proposal to the respondent as set out in his spreadsheet, that he should be paid a salary and I am satisfied from his evidence that his proposal was discussed with the shareholders present at the meeting in May 2021 and agreed.

20. Mr Shea disputed there was any agreement to pay the claimant salary May-Aug 2021. I did not find Mr Shea's evidence convincing in relation to the payments that were indisputably made to the claimant in this period. First of all, Mr Shea said he could not recall what was said at the shareholders meeting in May 2021 and then he said that he did not think that the agreement had been reached that the claimant should receive wages. He said that the spreadsheet provided to him at the meeting by the claimant dealing with this issue was too small to see. However Mr Shea told me he was the Finance Director and he was responsible for processing financial arrangements. I am not satisfied that that it is plausible with that financial responsibility, he would fail to scrutinise a document because it was in a in small font.

21. I turn to the way the claimant received remuneration in that period May-August 2021. There is no dispute that the claimant was not put on the payroll and he was not paid PAYE, unlike other more junior employees, such as the brewer or the brewer's assistant. I find the respondent chose how to process the payments they made to the claimant, and I am satisfied that however the company chose to process them, and in the way that they did, was as salary. I find the way the claimant was paid was the way the company chose to do it, not the claimant. I am satisfied that there was no agreement that at that stage the claimant was repaying his business loan despite the fact that part of the remuneration was recorded that way.

22. I find there was mutuality of obligation because even though the claimant was a shareholder and he had invested in this business, there was an unwritten agreement that in exchange for devoting his personal time and energy full time to the business as managing director, he would in the future draw a salary and there was an agreement to remunerate him between May and August 2021.

23. The next issue is control. Who had the control? I find the claimant as a Managing Director had a very high degree of control like many senior individuals in businesses do. He was not subject to supervision in the way somebody in a very large company may be, but he was subject to what the other shareholders said he could and could not do, and I am satisfied that at the regular shareholders' meetings the claimant informed them of what his plans were and they informed him whether or not that was appropriate or whether they were in agreement or not, and he was therefore subject to the control of the respondent company through the shareholders.

24. A further critical piece of evidence in relation to control is how the claimant's working relationship came to an end. In September 2021 (page 52) Mr Davidson, a director and shareholder, informed the claimant he was to cease his activities as director, and he did so. I find this was despite the fact that the claimant was also a shareholder. He was not a controlling shareholder, and that is a critical distinction in many of the cases. It is possible to be an employee and a controlling shareholder, but that is unusual. I find on the facts here that the power lay with the other shareholders together, and when they told the claimant, the managing director, to leave the business he had no alternative but to do so. I therefore find the respondent company had control over the claimant.

25. I turn now to the contract. There was no written contract of any type, but I find that there was a verbal agreement for the claimant to work as managing director in this small business from the beginning, and I am satisfied that it was agreed at the

outset that in due course he would be remunerated when the business became successful. I find there was an agreement to remunerate him May -August 2021.

26. I heard evidence about the furlough scheme. The respondent argued that as the claimant was not placed on furlough in accordance with the Government's Coronavirus Job Retention Scheme during the Covid 19 lockdown in 2020, he was not an employee. I find this is something of a red herring.

27. I find the brewer and assistant brewer (and possibly the one or two other junior employees who were answerable to the claimant) were placed on furlough as they were on payroll at the relevant date in February 2020. I find the claimant was not drawing a salary or any kind of remuneration from the company at that point so he was not on the payroll. Thus he was not eligible for furlough because he was not on the payroll at the date identified by the government. I find it is not a factor which points against employee status.

28. In summary, I am satisfied that the claimant did not work for any other organisation, that he worked on the company premises from January 2019, that he had a company email address, that his role was to progress the business of the company as set out in his witness statement, and for all those reasons he is an employee. Some of the more conventional factors in employment relationships were not there, but I find that is largely because of the claimant's senior position. For example, he did not have to agree his holidays with anybody but I find that is because he was the Managing Director and had a high degree of autonomy. The claimant has not been subject to a formal disciplinary procedure and had no written contract of employment or copy of any disciplinary procedure although the reality was the respondent did remove him from his position as managing director. (I find this was a different process to removing the claimant as a company director which occurred in October 2021.)

29. For these reasons outlined above I find the claimant was an employee within the meaning of section 230 of the Employment Rights Act 1996, and having found that I do not need to determine worker status because any rights the claimant is seeking to rely upon are covered as an employee

30. I turn to the issue of time limits. At the outset of the hearing I indicated to the respondent's representative that once the provisions of section 207B(3) and (4) Employment Rights Act are taken into account having regard to the dates on the ACAS EC Certificate, the date the employment ended and the date the claim was presented, the claim appeared to be in time. The respondent's representative did not indicate agreement and accordingly I heard submissions on the time limits issue (although neither party specifically addressed sections 207B(3) and (4) ERA 1996). I found as follows.

31. The claimant relies on 24 September 2021 as the date his employment ended, his effective date of termination. The respondent did not dispute this date (although the response also refers to a later date when the claimant was removed as a director in October 2021)

32. Normally a claim to the Employment Tribunal must be presented within three months of that date, so that would be 23 December 2021. The claimant did not present his claim until some weeks later i.e., until 1 March 2022. On the face of it, it

looks like the claimant's claim is significantly out of time. But I reminded myself of the extension to time limits under ACAS early conciliation rules found in the Employment Rights Act 1996 at section 207B(3) and (4). There are two provisions. S207B(3) ERA 1996 is sometimes referred to as the "stop the clock" provision. The reason for that provision is so that claimants are not disadvantaged by the time limit clock running down whilst they are in contact with ACAS.

33. When determining whether a time limit has been complied with, the period beginning the day after the early conciliation request is received by ACAS up to and including the day when the early conciliation certificate is deemed to have been received by the claimant is not counted. In other words the clock is stopped.

34. The clock in this case was stopped from 21 December 2021 through to 31 January 2022, so that gives the claimant ten days at the end of December and a further 31 days in January. It stops the clock for 41 days.

35. I must consider the primary time limit which I find expires on 23 December 2021 and I must then add on 41 days when the clock was stopped. That takes me to 2<sup>nd</sup> February 2022 but I must add on another day because time starts to run again the day after the claimant receives the early conciliation certificate, so 3<sup>rd</sup> February 2022.

36. I now turn to section 207B(4) ERA 1996 . If the time limit is due to expire during the period beginning with the day ACAS receives the request and one month after the claimant receives the certificate, the time limit expires instead at the end of that period. This effectively gives the claimant one month from when he receives the certificate to present the claim. This section applies here because the claimant went to ACAS on 21 December 2021 and the original time limit was due to expire on 23 December 2021, ie during the relevant period.

37. I remind myself that case law from the Employment Appeal Tribunal has determined that these 2 provisions apply cumulatively not in the alternative. See Luton Borough Council v Haque 2018 ICR 1388,EAT.

38. In other words, the limitation date should first be extended by 207B(3) which in this case takes the date to 3 February 2022 and then should be extended by 207B(4) which is another calendar month, in this case to 3 March 2022. The claimant presented his claim to Tribunal on 1 March 2022. Accordingly, the claim was presented within the time limit.

39. Therefore there is no need to go on to consider s111(2)(b) ERA 1996 namely whether it was reasonably practicable to present within time and if not, whether the claimant presented within such further time as was reasonable because the claim was presented within time.

40. I apologise for the delay in producing these reasons which is due to the pressure of other judicial business.

Employment Judge K M Ross

Date: 9 November 2022

REASONS SENT TO THE PARTIES ON

16 November 2022

FOR THE TRIBUNAL OFFICE

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