



# EMPLOYMENT TRIBUNALS

**Claimant:** Mr G Preston

**Respondents:** 1. Supawarm Limited (in Voluntary Liquidation)  
2. The Secretary of State for Business, Energy and Industrial Strategy

**Heard via Cloud Video Platform**

**On: 9 May 2023**

**Before: Employment Judge Ayre (sitting alone)**

## Representation

**Claimant:** Mr N Coombes, solicitor  
**First Respondent:** Did not attend and was not represented  
**Second Respondent:** Mr P Soni, lay representative

# RESERVED JUDGMENT

The claimant was not an employee of the First Respondent. His claim therefore fails and is dismissed.

# REASONS

## The Background

1. The claimant was a statutory director and shareholder of the First Respondent. He asserts that he was also an employee and that his employment started on 6 February 2003 and ended on 30 June 2022. Shortly thereafter the claimant and his fellow director decided to wind up the business.
2. On 27 August 2022 the claimant submitted an online application for a payment to The Insolvency Service. He was asked to complete a Director Questionnaire and

did so on 13 October 2022. On 8 December 2022 The Insolvency Service wrote to the claimant informing him that his claim had been refused because The Insolvency Service considered that he was not an employee of the First Respondent.

3. Early conciliation began on 1 February 2023 and ended on 3 February 2023 against both respondents. The claim was issued on 1 March 2023 and included claims for holiday pay and for a redundancy payment.
4. No response was filed on behalf of the First Respondent. A response was however filed on behalf of the Second Respondent. In its response the Second Respondent noted that the First Respondent went into Creditors Voluntary Liquidation on 18 August 2022 and pleaded that the claimant was not an employee of the First Respondent but was engaged under a contract for service and is therefore not entitled to a redundancy payment or holiday pay.

### **The Issues**

5. The case was listed for a final hearing today. It was agreed by the representatives at the start of the hearing that the only issue that would be dealt with today was whether the claimant was an employee of the First Respondent within the meaning of section 230 of the Employment Rights Act 1996 (“**the ERA**”).
6. It was agreed that if I were to find for the claimant on that issue, there would then be another hearing to decide how much the claimant is entitled to be paid by way of a redundancy payment and holiday pay.

### **The Proceedings**

7. The hearing took place via Cloud Video Platform.
8. The claimant had prepared a witness statement running to four pages and a bundle of documents running to 184 pages. The Second Respondent submitted a bundle of authorities. I am grateful to the parties for these documents.

### **Findings of Fact**

9. The First Respondent was a Plumbing and Heating Engineers business. The business operated initially as a partnership between the claimant and Glyn Cory. In 2003 the First Respondent was incorporated as a limited company with two equal shareholders, the Claimant and Mr Cory. The claimant and Mr Cory each had 50 ordinary shares in the First Respondent, each share being worth £1.
10. The Claimant was a co-director of the First Respondent and also worked in the business. The claimant was listed on Companies House as being a director of the First Respondent.
11. The claimant was involved both in managing and in working in the First Respondent's business. He attended site and did plumbing and heating engineering work for

clients. On a typical day he would mend boilers, fit radiators and central heating systems, and carry out general domestic plumbing.

- 12.** The business was owned and run by the claimant and Mr Cory. Mr Cory's wife was responsible for the paperwork and administration. At times there were up to six people working in the business, although numbers varied from time to time. The core staff were the claimant, Mr and Mrs Cory.
- 13.** The business originally operated as a partnership between the claimant and Mr Cory. In 2002 they decided to incorporate the business on the advice of their accountant. They were worried about losing their homes if the business were to experience financial difficulties, as some customers had not paid for work that the partnership had carried out. The claimant and Mr Cory were advised that their homes would be protected if they 'went limited' and therefore decided to set a limited company, the First Respondent. There was no evidence before me to suggest that anything changed at the time the First Respondent was set up other than the legal structure of the business.
- 14.** The claimant did not have a written contract with the First Respondent and there was very limited evidence before me as to what the contractual arrangements were between the claimant and the First Respondent. There were no fixed hours of work, the claimant worked the hours needed to complete the work for customers and could start and finish work when he wanted.
- 15.** The claimant and Mr Cory received £400 a week each by way of pay, plus a monthly payment of £700, although these figures changed over time and the precise nature of the payments was not clear from the evidence before me. The claimant's pay did not vary with hours of work, and he was not paid overtime.
- 16.** The claimant did receive payslips, which were produced by Mrs Cory. There were three such payslips in the bundle. Those payslips show no deductions either for income tax or National Insurance Contributions. Also in the bundle before me were the claimant's P60s for the tax years ending in April 2019, April 2020, April 2021 and April 2022. These record the claimant's income as being £8,064 in the years to April 2019 and April 2020, £7660 in the year to April 2021 and £8379 in the year to April 2022. Each P60 records that no tax or employee National Insurance Contributions were deducted from the payments made. The claimant was unable to explain why no tax or National Insurance Contributions had been deducted from the payments he received.
- 17.** There was no company pension scheme. The claimant had a personal pension plan and the First Respondent contributed to that.
- 18.** The claimant was also paid dividends. In the Director Questionnaire that he completed for The Insolvency Service he stated that he had received a dividend of £24,400 for the year ended 30 April 2018, £18,500 for the year ended 30 April 2019 and £26,000 for the year ended 30 April 2020. By far the greatest proportion of his remuneration in those years therefore was paid by way of dividend.

- 19.** If the claimant wanted to take holiday, he did not have to ask permission. He would just tell his fellow director, Mr Cory, and would continue to be paid as normal whilst he was off work. No records were kept of holidays taken or of hours worked. The claimant's work was not supervised by anyone, and he was free to organise it as he saw fit, subject to meeting client needs.
- 20.** On one occasion the First Respondent received a large tax bill from HMRC. The claimant and Mr Cory split the cost of paying the tax bill between them so that they could continue to trade. Each of them invested £3,500 of their own money into the business so that it could pay the tax bill and continue to trade. The claimant used his own tools, although if he wanted new ones the company would buy them.
- 21.** In response to the question 'why do you say you were an employee', the claimant replied, 'because I worked for the company, I went out and got mucky'. The claimant accepted that it was he and Mr Cory who allocated the work amongst the staff, and that he could decide when to start work on any given day, although that would be driven by client needs.
- 22.** The claimant last worked for the First Respondent on 30 June 2022. In both his claim form and an application that he made to the Insolvency Service for a redundancy payment he puts his dates of employment as being from 6 April 2003 until 30 June 2002.
- 23.** On 18 August 2022 the claimant and his co-director Mr Glyn Cory decided to wind the First Respondent up and the company was placed into Creditors Voluntary Liquidation on that date.
- 24.** The claimant made a claim to the Insolvency Service. In his application form he wrote, amongst other things, that:

  - a.** He was paid monthly and the payments to him were described in the company's accounts as "Director's Remuneration";
  - b.** He was paid dividends in the years ending April 2018, April 2019 and April 2020;
  - c.** Notice had been given on 30 March 2022. There was no evidence before me of any written notice.
- 25.** On 8 December 2022 The Insolvency Service wrote to the claimant informing him that he was not entitled to a redundancy payment because "*We believe that you were not an employee as described in section 230(1) of the Act*".
- 26.** Mr Cory's claim was initially accepted by The Insolvency Service, but subsequently reviewed and Mr Cory has had to repay the money that he received.

## **The Law**

27. Section 230 of the Employment Rights Act 1996 defines an employee as follows:

*“(1) In this Act “employee” means an individual who has entered or works under (or, where the employment has ceased, worked under) a contract of employment.*

*(2) In this Act “contract of employment” means a contract of service or apprenticeship, whether express or implied, and if it is express) whether oral or in writing.”*

28. Sections 166 and 182 of the ERA give employees the right to apply to the Second Respondent for certain payments, including a redundancy payment, where their employer is insolvent. The Second Respondent has the power to make such payments, but only to employees.

29. Section 188 of the Employment Rights Act provides that:

*“(1) A person who has applied for a payment under section 182 may present a complaint to an employment tribunal –*

*(a) That the Secretary of State has failed to make any such payment, or*

*(b) That any such payment made by him is less than the amount which should have been paid.*

*(2) An employment tribunal shall not consider a complaint under subsection (1) unless it is presented –*

*(a) before the end of the period of three months beginning with the date on which the decision of the Secretary of State on the application was communicated to the applicant, or*

*(b) within such further period as the tribunal considers reasonable in a case where it is not reasonably practicable for the complaint to be presented before the end of that period of three months.*

*(3) Where an employment tribunal finds that the Secretary of State ought to make a payment under section 182, the tribunal shall –*

*(a) make a declaration to that effect, and*

*(b) declare the amount of any such payment which it finds the Secretary of State ought to make. “*

30. In **Secretary of State for Business, Enterprise and Regulatory Reform v Neufeld and another [2009] IRLR 475** the Court of Appeal held that there was no reason in principle why someone who is a shareholder and director of a company cannot also be an employee. Whether or not a director and shareholder is an employee is a question of fact. The Court of Appeal recognised that in small companies where matters have been dealt with informally it may be a difficult question as to whether

or not the correct inference from the facts is that the individual was truly an employee, and relevant considerations may include how the director has been paid and in particular whether he's been paid a salary or directors' fees. The fact that the individual owns shares in and has control of the company is not ordinarily relevant to the question of whether the contract is one of employment. They show an owner acting as owner, which is inevitable in a small business, and do not show that the owner cannot also be an employee.

31. In ***Clark v Clark Construction Initiatives Ltd and another [2008] IRLR 364*** the Employment Appeal Tribunal considered, amongst other things, the relevance of tax and national insurance. It held that where an 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 of employment. The mere fact that an individual has a controlling shareholding or is able to exercise control over what the company does not of itself prevent employment status.
32. The Court of Session held in ***Fleming v Secretary of State for Trade and Industry [1997] IRLR 682*** that an industrial tribunal was entitled to find that a managing director of a company in which he held 65% of the shares and who worked alongside other employees with the same hours of work, was not an employee. The question of employment status is one of fact.
33. More recently, in ***Rainford v Dorset Aquatics Ltd EA-2020-000123 – BA*** the Employment Appeal Tribunal upheld the decision of an Employment Tribunal that a co-director and shareholder in a small family company was not an employee and held that status as a director and/or shareholder is not mutually exclusive with employment status.
34. In ***Ready Mixed Concrete (South East) Ltd v Minister of Pensions and National Insurance [1968] 2 QB 497***, McKenna J set out the conditions required for a contract of service, namely that:“(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.*”
35. The key factors to be taken into account in determining whether an individual is an employee are:-
  - a. The degree of control that the employer has over the way in which the work is performed;
  - b. whether there is mutuality of obligation between the parties – i.e. was the employer obliged to provide work and was the individual required to work if required;
  - c. Whether the employee has to do the work personally; and

- d. Whether the other terms of the contract were consistent with there being an employment relationship.

36. Other relevant factors include:

- a. The intention of the parties;
- b. Custom and practice in the industry;
- c. The degree to which the individual is integrated into the employer's business;
- d. The arrangements for tax and national insurance;
- e. Whether benefits are provided; and
- f. The degree of financial risk taken by the individual.

### **Conclusions**

37. In considering whether the claimant was an employee or not, I have focussed on the position in the run up to the respondent's insolvency and have reminded myself that the burden of proving employment status lies with the claimant.
38. I have also reminded myself that the fact that the claimant was a director, and a shareholder of the First Respondent is not decisive. It can be a relevant factor, but status as a director and shareholder is not mutually exclusive with employment status.
39. This was a case in which there were no written contractual arrangements, and no evidence that consideration had been given at any point to the status of the claimant and his co-director Mr Cory. The evidence does however indicate that they were the owners and managers of the business, that they were in sole control of it and that they were the ones who made decisions about its future. It was the claimant and Mr Cory who decided to incorporate the business in 2003, and who subsequently decided to wind it up in 2022.
40. The claimant and Mr Cory agreed between them what their level of remuneration would be and how they would be paid, on the advice of their accountant. They were in day-to-day control of the business and also decided its long-term strategy.
41. Although some of their earnings appear to have been paid through PAYE, no tax or national insurance was deducted from those earnings, and it appears that the claimant may have been paid less than the National Minimum Wage. He was also paid dividends and, for the years in respect of which figures were provided, was paid substantially more by way of dividend than through PAYE.

42. There was no evidence to suggest that the respondent had any control over the way in which the claimant worked. He was free to start and finish work when he wanted, subject to client demands and did not record either hours worked or overtime. There was no evidence that the claimant was subject to any disciplinary procedures, or that the respondent had the power to dismiss him. The claimant had a large degree of autonomy in the way that he worked, and the only restrictions on him were due to client demands.
43. The claimant was entitled to take holiday when he wanted and did not need to ask permission. He was paid for the holiday that he took.
44. There was no evidence before me of any change in working practices when the legal structure of the business changed from a partnership to a limited company in 2003.
45. Applying the tests set down in **Ready Mixed Concrete**, it cannot in my view be said that the claimant's work was subject to any control by the respondent. The claimant was not in the service of the respondent, and the nature of the relationship was not one of master and servant. The claimant did provide his services personally, but he and Mr Cory were also free to engage other members of staff when they chose and when work levels justified it.
46. There was a degree of mutuality of obligation, in that the claimant was expected to work except when on holiday, but the remuneration arrangements were consistent with the claimant not being an employee.
47. There was no evidence before me as to the intention of the parties when it came to employment status, and no evidence of custom and practice in the industry. There was however evidence to suggest that the claimant took financial risk and invested his own money in the business, paying a large tax bill on behalf of the company in order to be able to continue to trade.
48. Whilst I have every sympathy for the claimant and for the situation in which he finds himself, I find on the evidence before me, on balance, that he was not an employee of the First Respondent.
49. As the claimant was not employed by the First Respondent, his claim fails and is dismissed.

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Employment Judge Ayre

Date: 29 May 2023

JUDGMENT SENT TO THE PARTIES ON

.....21 June 2023.....

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