



EMPLOYMENT TRIBUNALS

Claimant

Mr D McBrearty

Respondents

AND

1. M. A. C. Services international Limited (in liquidation)
2. The Secretary of State for Business and Trade (the SOS)

Heard by CVP :

Date: 7 December 2023

Before: Employment Judge Nicolle

For the Claimant: In person and supported by his wife Mrs B McBrearty

For the Respondents: (R1) Did not appear

(R2) Ms S Ware, Lay Representative

JUDGMENT

1. At the time the First Respondent entered a creditors' voluntary liquidation on 12 April 2023 the Claimant was an employee of the First Respondent in accordance with s.230 of the Employment Rights Act 1996 (the ERA).

The Hearing

2. The Hearing took place by CVP. There were no connectivity issues.

3. There was a bundle of documents comprising of 272 pages.

4. The Claimant and Mrs McBrearty gave evidence. Whilst they did not have formal witness statements I was able to ask them relevant questions and Ms Ware had the opportunity to put questions to them on behalf of the Second Respondent.

Relevant Background

5. There had been a Case Management Hearing on 27 September 2023 before Employment Judge Havard. The case had been listed for a Final Hearing

but he considered that there was insufficient documentation for him to make a determination as to the Claimant's employment status and therefore ordered that the Claimant should provide certain categories of documents by way of disclosure.

Findings of Fact

6. The Claimant started a Sole Trading Company in 1972. The business is that of electrical contractors. At one point the First Respondent employed ten electricians but in the period prior to the First Respondent entering a creditors voluntary liquidation it employed five or six electricians. It had an office in Marylebone.

7. The Claimant was the only director of the First Respondent. He was also the majority shareholder with his wife holding the remainder of the shares.

8. The Claimant's level of involvement in the business decreased significantly over recent years. He is now 79 and says that over the last few years he has typically been working for one or two hours per day four days a week.

9. In a letter dated 17 April 2023 Nicholas Simmonds, Joint Liquidator, advised the Claimant that he had been made redundant as a director on 29 March 2023. He should, therefore, regard his service as termination with effect from 29 March 2023.

10. The Claimant subsequently submitted a claim for various prescribed payments potentially recoverable from the National Insurance Fund, to include statutory redundancy, arrears of pay, holiday pay and compensation for loss of notice. In a letter from Caroline Beasley, RPS Tribunal Officer for the Second Respondent, dated 30 October 2023 the Claimant's claims were rejected on the basis that he was not an employee under s.230 of the ERA. Ms Beasley set out a detailed analysis of the relevant statutory provisions and case law regarding employee status. She contended that the Claimant had not satisfied the threshold for demonstrating that he was an employee and the factors she had taken into account in reaching this determination included his absence of a written contract of employment, the lack of mutuality of obligation, control and personal service to support an irreducible minimum of obligations without which there cannot be a contract of employment. Further, that the Claimant had stated that he worked a fixed 40 hours a week at a fixed weekly rate of £230.14 which would have involved an hourly rate below the minimum wage under the National Minimum Wage Regulations (the NMW).

11. It was agreed that the sole issue for me to determine was that of the Claimant's employment status. If I were to determine that the Claimant was an employee the SOS would then calculate his entitlements in respect of the various sums claimed from the National Insurance Fund.

12. The Claimant said that he had not paid himself a dividend in the last five or six years. He says that over the last seven or eight months he had received a flat monthly salary of £1,000. Mrs McBrearty said that approximately ten years

ago the Claimant was receiving an annual salary £40,000 but was working full time at this stage. Over the last ten years he has progressively reduced his hourly involvement in the business. More recently he rarely attends the Marylebone Office and his role primarily involves invoicing. He also participates in a weekly Monday morning Zoom meeting.

13. The Claimant's payslips for 30 November 2022 and 30 December 2022 show a monthly salary of £1,000. They also show the deduction of PAYE. The payslip dated 30 December 2022 showed total net pay for the tax year to date of £7,678.40 with tax deducted of £853.20.

14. The Claimant's P60 for the tax year to 5 April 2022 showed pay in his employment with the First Respondent of £7,545 and tax deducted of £893.

15. The Claimant confirmed that he did not have any other employment. Further, he confirmed that he did not have any benefits arising from his employment with the First Respondent.

16. The Claimant said that it was at his discretion when he took holiday. He would not receive any variation in his payments whether he was at work or on holiday or on sick leave.

17. Ms Ware questioned the Claimant and Mrs McBrearty regarding various transfers from the First Respondent's NatWest bank account. In particular, she questioned transactions of 21 November 2022 and 23 December 2022 where it would appear that the sums of £14,500 and £10,125 were transferred from the First Respondent's bank account to the Claimant's personal bank account. The Claimant was very uncertain as to the basis of these payments. Mrs McBrearty was called to give evidence as she appeared to have greater familiarity with the First Respondent's financial arrangements. Whilst I do not consider the questions directly relevant to the Claimant's employee status the evidence of the Claimant and Mrs McBrearty was to the effect that the First Respondent had taken a loan of £100,000 a few months before it went into a creditors voluntary liquidation and various payments were made to reimburse Mr McBrearty for payments made from his personal bank account to settle parking and other expenses made by the company's employees on company credit cards.

The Law

18. S230 of the ERA provides:

(1) In this Act "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 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.

19. In Flemming v SOS [1997] IRLR 683 the Court of Session held that whether or not a person is an employee is a question of fact. The fact that a person is a majority shareholder is always a relevant factor and maybe decisive. However, the significance of that factor will depend on the circumstances and it would not be proper to lay down any rule of law to the effect that a person is a majority shareholder necessarily and in all circumstances implies that a person is not an employee.

20. In determining whether the Claimant was an employee I need to consider the well-known factors as set out in Ready Mixed Concrete (South-Eastern) Ltd v Minister of Pensions and National Insurance [1968] 2 QB 497 to include there being a mutuality of obligation, control over the purported employee in the performance of his work and personal service by the individual claiming employee status.

21. I need to reach the decision as to the Claimant's status as at the point of the First Respondent entering an insolvency process. This is in accordance with Rajah v Secretary of State EAT/125/95 where the EAT ruled that "the relevant date for the purposes of deciding whether the Secretary of State is liable to make payments out of the National Insurance Fund to employees of an insolvent company, is the date at which the company became insolvent.

Discussion and conclusions

22. I consider that the Claimant has satisfied the Tribunal in demonstrating that at the time the First Respondent entered into a creditors voluntary liquidation that he was an employee of the First Respondent. In reaching this decision I have taken account of the fact that the Claimant was a majority shareholder and director of the First Respondent. However, it is clear from the case law that an individual being a shareholder/director does not preclude their also having employee status. This is a question of fact to be determined considering the individual circumstances of the case.

No contract of employment

23. Whilst the absence of a written contract of employment is a relevant factor I do not consider it determinative. It is necessary to consider the situation in the context of the specific business. The First Respondent was a small family owned business and it would not be unusual for such businesses to be operated on a relatively informal basis. Given that the Claimant was the majority shareholder, with the balance of the shares being held by Mrs McBrearty, it might be considered somewhat artificial for him to have a written contract of employment which would then need to be periodically updated to reflect any changes in his working hours/salary.

Mutuality of obligation, control and personal service

24. Whilst it is necessary for me to consider the standard criteria, to include mutuality of obligation, control and personal service, I consider that in the context of a business of which the Claimant was the majority shareholder that these criteria are somewhat artificial. The reality being that as the majority shareholder and sole director he clearly had control over the business and the extent to which he was going to provide his services, when and in what manner.

Local used by Joint Liquidator not definitive

25. I have taken into account the Claimant's duration of service with the First Respondent. He contends that he was an employee of the First Respondent from 1 January 1988 until 31 January 2023. It is not clear why he relies on this date which is earlier than when the joint liquidator says that his position as a director was made redundant. I consider that the letter from the Joint Liquidator dated 17 April 2023 is ambiguous as to whether it supports the Claimant's contention that he was an employee as he was made redundant. The wording used refers to him being made redundant as a director on 29 March 2023. However, the word redundancy is correctly used in the context of an employment relationship, but it does not necessarily mean that its use by Mr Simmonds in that letter, constitutes an acceptance that the Claimant's status was that of an employee and maybe reflects a relatively loose use of language rather than a definitive statement.

Remuneration

26. I consider it significant that the Claimant had not received any dividend or other payments from the First Respondent for at least six or seven years. I also consider it significant that he received a regular monthly salary in the period of at least six months prior to the First Respondent entering into a creditors voluntary liquidation. It is also relevant that he was able to produce monthly payslips and a P60 showing appropriate deductions for PAYE. I therefore do not consider that this was a sham arrangement from a HMRC/tax perspective.

27. I accept the Claimant's evidence that he continued to perform some, albeit substantial diminished, services for the First Respondent. The question I need to consider is what was the basis for him doing so. Absent any evidence that the Claimant was receiving payments of dividends from the First Respondent I conclude that the consideration for the provision of his services was the payment of a salary and that that salary was paid to him as an employee.

Hours worked and the NMW Act

28. I do not accept the Second Respondent's argument that the Claimant did not receive a full contractual salary to be considered as an employee for the purposes of S 230 of the ERA or S 54 of the NMW Act. I accept the Claimant's

evidence that his original reference to a 40 hour working week was erroneous and he was working substantially fewer hours than this and therefore his hourly wage would have exceeded the minimum threshold under the NMW Act.

29. Whilst the Claimant's role had undoubtedly progressively diminished, and become increasingly ad hoc and informal, I am nevertheless satisfied that he continued to perform the minimum level of personal services and mutuality of obligation to give rise to a continuing employment relationship. As such I conclude that he has satisfied the Tribunal in demonstrating that he was an employee for the purposes of s.230 of the ERA and therefore has a prima facie entitlement to the various potential entitlements from the National Insurance Fund.

Employment Judge Nicolle

Dated: **19 December 2023**

Sent to the parties on:

19/12/2023