



EMPLOYMENT TRIBUNALS

Claimant: Mr Christopher Beard

Respondents: (1) Phasor Electrical Limited (Creditors in Voluntary Liquidation)
(2) The Secretary of State for Business and Trade

Heard at: East London Hearing Centre

On: 24 November 2023

Before: Employment Judge J Farrall

Representation

For the Claimant: Not in attendance
For the First Respondent: Not in attendance
For the Second Respondent: Mr Soni

JUDGMENT

The judgment of the Tribunal is that: -

1. The Claimant's claim for redundancy pay, notice pay, holiday pay and arrears of wages from the National Insurance Fund is not well-founded and is dismissed.

REASONS

Background

2. By a claim presented to the Tribunal on 19 April 2023, after an Acas conciliation period between 4 April 2023 and 18 April 2023 the Claimant claims redundancy pay, notice pay, holiday pay and arrears of wages from the National Insurance Fund.

3. The First Respondent did not respond to the claim and did not take part in the proceedings.
4. In its ET3 the Second Respondent (SOS) disputes that the Claimant was an employee of Phasor Electrical Limited within the meaning of s.230 of the Employment Rights Act 1996 at the time of insolvency and is therefore not entitled to any payment.

Preliminary Issues

5. Mr Soni attended on behalf of the Second Respondent, hereafter referred to as “the Respondent”.
6. The Claimant did not attend. I decided to allow a short adjournment so that the Tribunal could contact the Claimant via email to remind him that the hearing was due to take place and gave him some time to attend. The Claimant did not respond to the email and did not attend the hearing.
7. The Claimant lives in Thailand which has a time difference of 7 hours to the UK. I was not satisfied that he would have seen this email. I had also seen correspondence between the Claimant and the Tribunal where it was confirmed that he would not be permitted to give evidence at the substantive hearing via CVP from Thailand. I had also seen an email to Tribunal sent by the Claimant on 16 November 2023 which suggested to me that he did not understand that he could still attend to make representations should he wish to do so. The Tribunal had not replied to this email in advance of the hearing.
8. I decided to proceed with the hearing in the Claimant’s absence, pursuant to rule 47 of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013. The issues in the case appeared to be relatively straightforward and there was a large amount of documentary evidence available to me to assist in making the necessary findings of fact. Despite some apparent confusion in the correspondence there was no positive indication that the Claimant wished to attend the hearing to make any additional representations which is all that he would be entitled to do from Thailand. Considering the overriding objective I did not consider it proportionate to postpone the matter which would result in undue delay in bringing this matter to a conclusion. In order to ensure fairness to all the parties, and with the consent of the Respondent, I decided to reserve judgment and allow the Claimant time to make any further written representations should he wish to do so.
9. Written directions were issued to the parties on 20 December 2023 allowing the Claimant 21 days to provide any further written representations in relation to his claim and the Respondent 14 days after that to reply.
10. On 7 January 2024 the Claimant sent an email to the Tribunal to state:

“I have resent my previous information of the facts as no further information can be supplied. I or RPS have given you a contract of employment I believe confirmed by Begbies Traynor. My wage slips, a copy of the bank statements showing company salary runs and P60’s.”

11. The Respondent did not reply.

The Hearing

12. The hearing took place via CVP.
13. I had before me the ET1, ET3, the second Respondent's evidence bundle of 227 pages and authorities bundle of 99 pages.
14. I heard submissions from the Respondent and reserved judgment, issuing the directions as set out above.

Issues

15. Whether the Claimant was an employee of Phasor Electrical Limited within the meaning of s230 of the ERA.
16. If so, whether the Claimant is entitled to the payments claimed from the National Insurance Fund as per the statutory scheme.

Submissions

17. The Claimant relies on a written contract of employment dated 26 February 2006, payslips, P60s and bank transactions to prove that he was an employee of Phasor Electrical Limited at the point of liquidation within the meaning of s230 of the ERA.
18. The Respondent submits that the contract of employment is either not genuine or was discharged before the date of insolvency.
19. The Respondent submits that the contract dated 28 February 2006 pre-dates the incorporation of Phasor Electrical Limited and does not reflect the terms of employment as submitted by the Claimant in his application for payment from the National Insurance Fund. The Respondent also points to discrepancies between amounts shown on the Claimant's payslips and the corresponding bank transactions.
20. The Respondent also submits that the Claimant's earnings at the point of insolvency were below minimum wage, suggesting that the Claimant was not an employee but a director and shareholder. The Claimant did not pay tax or National Insurance and cannot therefore be regarded as an employee for the purposes of the statutory scheme.

Findings of Fact

21. The Claimant was a director and 100% shareholder of Phasor Electrical Limited which was incorporated on 18 April 2006 and went into voluntary liquidation on 30 June 2022.
22. In an application to the Redundancy Payments Service submitted on 30 June 2022 the Claimant stated that he worked a fixed 50-hour week earning £1041 per month. This amounted to an annual salary of £12,491.86. His P60 for 2022 records earnings of £12,492.

23. He also declared that he paid himself a monthly dividend of £1200.
24. In further online submissions to the Respondent, dated 7 December 2022 and in response to a request for further information, the Claimant stated that his role and responsibilities were “*managing the business*” and under the request for “” the Claimant wrote “*N/A*”.
25. In a decision dated 24 January 2023 the Insolvency Service Redundancy Payments Service refused the Claimant’s application, finding that he was not an employee of Phasor Electrical Limited at the time of insolvency.
26. The Claimant requested a review of this decision and provided the Respondent with a copy of a letter dated 26 February 2006 from Phasor Electrical Distributors offering him the role of Operations Manager. This letter set out the following proposed terms:
- i. Working hours of 8am-12pm Monday to Friday
 - ii. 20 days paid holiday
 - iii. Provisions in relation to sick pay
 - iv. One month notice period
 - v. Annual salary of £95,000
27. The bottom of the letter reads:
- “Could you please sign below and date that you accept the terms in this contract”*
- It is signed by the Claimant, signature dated 28 February 2006.
28. There is no amended written contract to reflect the Claimant’s terms of employment at the time of insolvency as per his application to the Respondent for payment from the National Insurance Fund. There is no supporting evidence from the Claimant to support the assertion that this contract was amended informally, other than documents in relation to payments that he received from Phasor Electrical Distributors Limited. There is no evidence before me in relation to the duties and responsibilities of the Claimant’s role and how he performed these.
29. The Claimant’s payslip dated 31 March 2022 records that the Claimant was paid £791 (R/B p.116). Bank Statements from Phasor Electrical Limited show the following payments to the Claimant in March 2022:
- i. £1600 on 8 March 2022 (R/B p206)
 - ii. £411.69 on 18 March 2022 (R/B p.208)
 - iii. £1000 on 24 March 2023 (R/B p210)
 - iv. **£791.04 on 31 March 2022** (R/B p.212)

30. The Claimant's payslip dated 29 April 2022 states that the Claimant was paid £915.96 (R/B p.117). The bank statements show the following payments to the Claimant:
- i. £2000 on 6 April 2022 (R/B p.214)
 - ii. £1200 on 19 April 2022 (R/B p.215)
 - iii. £404.49 on 19 April 2022 (R/B p.216)
 - iv. £300 on 28 April 2022 (R/B p.217)
 - vi. **£915.96 on 29 April 2022 (R/B p. 218)**
31. The Claimant's payslip dated 31 May 2022 states that the Claimant was paid £915.96 (R/B p.118). The bank statements show the following payments to the Claimant:
- i. £1300 on 16 May 2022 (R/B p.222)
 - ii. £500 on 19 May 2022 (R/B p.223)
 - iii. £400 on 23 May 2022 (R/B p. 223)
 - iv. £200 on 24 May 2022 (R/B p.223)
 - v. **£915.96 on 1 June 2022 (R/B p.225)**
32. There are further transactions showing payments to the Claimant in June 2022 as follows:
- i. £4000.74 on 10 June 2022 (R/B p.226)
 - ii. £1500 on 15 June 2022 marked as "salary" (R/Bp.226)

The Law

33. Sections 166, 167 and 168 of the Employment Rights Act 1996 (ERA) provide for a scheme whereby if an employee claims that his employer is liable to pay him a redundancy payment, notice pay, holiday pay and arrears of wages and the employer is insolvent, the debt passes to the Secretary of State and payment will be made.
34. Section 182 of the ERA provides that if, on an application made in writing by an employee, the Secretary of State is satisfied that the employer is insolvent and employment has been terminated on the appropriate date, the employee is entitled to be paid the whole or part of any debt to which this part applies.
35. Subject to section 186 the Secretary of State shall pay the employee out of the National Insurance Fund the amount to which, in the opinion of the Secretary of State, the employee is entitled in respect of the debt.
36. Section 184 outlines the debts to which the part applies which includes:
- i. Any arrears of pay in respect of 1 or more (but not more than 8) weeks;

- ii. Any amount in which the employer is liable to pay the employee for the period of notice required by Section 86(1) or (2) or for any failure for the employer to give the period of notice required by Section 86(1);
 - iii. Any holiday pay in respect of a period or period of holiday not exceeding 6 weeks in all and to which the employee became entitled during the 12 months ending with the appropriate date.
37. Section 185 provides that the appropriate date in relation to arrears of pay and holiday pay is the date on which the employer became insolvent.
38. Section 230 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.
 - (3) In this Act “worker” (except in the phrases “shop worker” and “betting worker”) means an individual who has entered into or works under (or, where the employment has ceased, worked under) –
 - (a) a contract of employment, or
 - (b) any other contract, whether express or implied and (if it is express) whether oral or in writing, whereby the individual undertakes to do or perform personally any work or services for another party to the contract whose status is not by virtue of the contract that of a client or customer of any profession or business undertaking carried on by the individual; and any reference to a worker’s contract shall be construed accordingly.
39. Section 54 of the National Minimum Wage Act 1998 provides that:
- (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.
40. Section 1 of the National Minimum Wage Act 1998 provides that employees are entitled to be paid the national minimum wage.
41. The case of *Ready Mixed Concrete (South East) Ltd v Minister of Pensions and National Insurance* [1968] 2 QB 497 sets out the following criteria to apply when considering whether there is a contract of service:

- (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; and
- (iii) the other provisions of the contract are consistent with its being a contract of service.

Company Directors

42. In principle Company Directors can be both employees and office holders. In Clark v Clark Construction Initiatives Ltd. [2008] ICR 635 it was held that circumstances in which there may not be a binding contract of employment were: firstly, where the company itself was a sham; secondly, where the contract was entered into for an ulterior purpose; and thirdly, where the parties did not conduct their relationship in accordance with the contract. The onus is on the party seeking to deny the effect of a contract to satisfy the Court that it was not what it appeared to be. Secondly, the mere fact that an individual had a controlling shareholding did not of itself prevent a contract of employment arising. Third, the fact that the individual had built the company up or would profit from its success would not militate against a finding that there was a contract in place. If the parties' conduct was in accordance with the contract, that would be a strong pointer towards the contract being valid and binding. Other relevant factors include:

- i. 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.
- ii. 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.
- iii. The mere fact that the individual has a controlling shareholding does not of itself prevent a contract of employment arising, and nor does the fact that he in practice is able to exercise real or sole control over what the company does.
- iv. 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.
- v. Conversely, if the conduct of the parties is either inconsistent with the contract 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.
- vi. Although the Courts have said that the fact of their being a controlling shareholding is always relevant and may be decisive, that does not mean that the fact alone will ever justify a tribunal in finding that there was no contract in place.

43. In the case of Secretary of State v Neufield and Howe [2009] EWCA Civ. 280 it the Court held:
- (1) There was no reason in principle why a shareholder, or controlling shareholder, and director of a company could not also be an employee of the company under a contract of employment. It would, in particular, be no answer to his claim to be such an employee to argue that the extent of his control of the company meant that the control condition of a contract of employment could not be satisfied. The relevant control was in the company, Lee v Lee's Air Farming Ltd [1961] AC 12 PC (NZ) applied. Also it would be no answer to say that the practical control he had over his own destiny, including that he could not be dismissed from his employment except with his consent, had the effect in law that he could not be an employee, Secretary of State for Trade and Industry v Bottrill [2000] 1 All ER 915 CA (Civ. Div) applied.
 - (2) The Court issued guidance in deciding whether in any particular case a shareholder and director was also an employee:
 - (a) it was a question of fact requiring consideration of whether the putative contract of employment was a genuine or sham contract and whether, assuming it was a genuine contract, it amounted to a true contract of employment;
 - (b) in cases involving an alleged sham, the Court's task was to decide whether a purported formal written employment contract or memorandum purporting to record or evidence the creation of such a contract amounted to a sham, particularly having regard to the circumstances of the creation of the document and the parties' conduct under the purported contract of employment, Snook v London and West Riding Investments Ltd [1967] 2 QB 786 CA (Civ. Div) applied, and Protectacoat Firthglow Ltd v Szilagyi [2009] EWCA Civ. 98 considered. The fact that the putative employee had control over the company, and so was instrumental in the creation of the very contract that he was asserting, would be relevant to whether the contract was a sham;
 - (c) in cases that raised no allegation of sham, it would or may be necessary to inquire into what had been done under the claimed contract, given that the critical question was whether the putative employee was an employee at the time of the company's insolvency. For the employee to make good his case, it may well be insufficient merely to place reliance on a written contract made years earlier. The court would want to know that the claimed contract, perhaps as subsequently varied, was in place at the time of the insolvency;
 - (d) in a case in which the alleged contract was not in writing, or was only in brief form, it would usually be necessary to inquire into how the parties had conducted themselves under it;
 - (e) in deciding whether a valid contract of employment was in existence, consideration would have to be given to the requisite conditions for

the creation of such a contract and the Court would want to be satisfied that the contract met them;

- (f) the following features would not ordinarily be of any special relevance and should be ignored in deciding whether the putative employee had a valid contract of employment: his controlling shareholding in the company, share capital invested by him in the company, loans made by him to the company, his personal investment in the company and his other actions that an owner of business would commonly do on its behalf;
- (g) the Court agreed with the essence of the factors set out in a case to determine whether a contract of employment should be given effect, *Clark v Clark Construction Initiatives Ltd [2008] ICR 635 EAT* applied. In cases where the putative employee was asserting the existence of an employment contract, it would be for him to prove it and the mere production of what purported 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 was challenged, the Court would need to be satisfied that the document was a true reflection of the claimed employment relationship, for which purpose it would be relevant to know what the parties had done under it. If the parties' conduct under the claimed contract pointed convincingly to the conclusion that there was a true contract of employment, the Court would not wish employment tribunals to seize too readily on the absence of a written agreement as justifying the rejection of the claim.

Conclusions

- 44. The Claimant's directorship does not preclude him from being an employee if there was a contract of employment in place.
- 45. It is not in dispute that there is no written contract of employment to reflect the terms as asserted by the Claimant at the time of insolvency. I have therefore considered whether there is sufficient evidence before me to infer that there was a contract of employment in place.
- 46. I note that the Claimant was provided with payslips and a P60. I have also considered the payments that were made to the Claimant from the Phasor Electrical account. I do not find that there are discrepancies between the amounts shown in the Claimant's payslips and bank statements from Phasor Electrical Limited as asserted by the Respondent. These factors support the Claimant's assertion that he was an employee.
- 47. There is no evidence before me as to the Claimant's role, other than his assertion that he managed the business and no details as to how he performed his side of the contract.
- 48. Although there are payments to the Claimant that are consistent with the amounts shown in the payslips, I note that they are not for a regular amount and that in June 2022 the Claimant was paid £1500 in salary shortly before the company went into liquidation. None of these payments accord with the salary

which the Claimant claimed in his application to the insolvency fund (£1,041 a month).

49. This, and the erratic nature of the payments to the Claimant suggests that there was no obligation on Phasor Electrical Limited to provide regular payment in a fixed amount as would be expected in a contract of employment. This points away from the existence of contract providing for mutual obligations between the parties. It also suggests that the Claimant had more control over his circumstances than an ordinary employee.
50. The fact that the Claimant was not paid the national minimum wage and did not pay tax or national insurance on his salary are also factors pointing away from employee status.
51. The Claimant's controlling shareholding of 100% is not decisive, but in combination with all the other factors set out above, supports a finding that he was not an employee.
52. I therefore find that the Claimant has not discharged the burden of proof that he was an employee of Phasor Electrical Limited at the date of its insolvency and he is not entitled to payment from the Respondent. The claim is dismissed.

Employment Judge J Farrall
Date: 6 March 2024

Notes

Reasons for the judgment having been given orally at the hearing, written reasons will not be provided unless a request was made by either party at the hearing or a written request is presented by either party within 14 days of the sending of this written record of the decision.

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<https://www.judiciary.uk/guidance-and-resources/employment-rules-and-legislation-practice-directions/>