



# EMPLOYMENT TRIBUNALS

## Claimant

Mr Glen Ford

## Respondent

v (1) Secretary of State for Business  
and Trade (the "SOS");  
(2) Paxford Composites Limited  
(in liquidation)

**Heard at:** Cambridge Employment Tribunal

**On:** 29 January 2024

**Before:** Employment Judge Z Islam

## Appearances

**For the Claimant:** In person (unrepresented)

**For the First Respondent:** Mr Soni

**For the Second Respondent:** Did not attend and was not represented

## RESERVED JUDGMENT

1. The Judgment of the Tribunal is that the Claimant was an employee for the purposes of the claims brought under s.166 and s.182 of the Employment Rights Act 1996.
2. Under s.163 Employment Rights Act 1996, it is determined that the Claimant is entitled to a redundancy payment of: £12,112.50.
3. The complaint in relation to notice pay is well founded. The Respondent shall pay the Claimant: £ 4,750. This figure has been calculated using gross pay to reflect the likelihood that the Claimant will have to pay Tax on it as Post Employment notice Pay.
4. The complaint in respect of holiday pay is well founded. In accordance with Regulation 14(2) Working Time Regulations 1998 the Claimant is entitled to: £ 1140 holiday pay.
5. The complaint in relation to arrears of wages is well founded. The Respondent shall pay the Claimant: £ 1520. The Claimant is responsible for the payment of any Tax and / or National Insurance.
6. Total amount payable by the Respondent to the Claimant: **£ 19, 522.50**

## REASONS

### Background

1. The Claimant presented a claim to the Tribunal on 20 January 2023 [page 3] and claims were brought under §.166 and 182 of the Employment Rights Act 1996 (“ERA”), for redundancy pay, compensatory notice pay, holiday pay and arrears of wages.
2. The First Respondent (“the SOS”) has defended these claims on the basis that the Claimant was not an employee of Paxford Composites Limited.
3. The Second Respondent, Paxford Composites Limited entered voluntary liquidation on 10 August 2022 and was dissolved on 16 May 2023. It has not entered a Response to the claim and has taken no part in proceedings.

### The Issues

4. The sole issue to be determined by the Tribunal and as agreed at the outset of the Hearing was whether the Claimant was an employee of Paxford Composites Limited, and as such, entitled to the payments being claimed.

### The Hearing

5. At the Hearing on 29 January 2024, the Claimant represented himself and the SOS was represented by Mr Soni.
6. There was an agreed Hearing Bundle of 168 pages (page references below are to this bundle). I heard evidence from the Claimant who was cross-examined by Mr Soni. I also asked questions of the Claimant. I heard submissions from both parties and had the benefit of a Bundle of relevant Case Law provided by Mr Soni.

### Findings of Fact

7. Having heard the evidence, I make the following findings of fact, and any that appear in the ‘Discussion and Decision’ section on the balance of probabilities.
8. The Second Respondent (“Paxford Composites Limited”) was incorporated on 25 January 1994 as a private limited company [page 46]. The company had several name changes and operated as Brookhouse Paxford Limited between August 1995 and February 2007 [page 47]. The Claimant worked as a General Manager of the business in February 2005. At this time, he was not a shareholder or director. In December 2005, the Claimant led a

management buyout of the business from its parent company, Brook House Holdings Limited with Mr Keegan. The Claimant was appointed as a director on 16 December 2005 [page 49]. At this point, the Claimant had a 52 percent shareholding. Over time, various other shareholders existed and were members of the board of directors of both the holding company and Paxford Composites Limited. The Claimant became the sole director and majority shareholder in July 2015, after the unfortunate death of Mr Appleby.

9. The Claimant had a signed 'Service Agreement' with Brookhouse Paxford Limited, dated 9 May 2006 [pages 120-137]. The Claimant said that the document was drafted by a solicitor after the management buyout took place. In the document, the Claimant is described as "the Executive" appointed to serve the company as Managing Director. It refers to "the Executive's employment" and states that the Executive's employment began with the company on 14 February 2005.
  
10. The 'Service Agreement' outlined the following of note:-
  - a. An outline of duties;
  - b. Remuneration: a salary at the rate of £60,000 per annum or at such higher rate as the Board may from time to time decide;
  - c. After the initial term, the Executive's employment may be terminated by either party by giving at least 6 months' written notice to the other;
  - d. The Executive's normal working hours shall be 8.30 to 5.00 Mondays to Thursdays and 8.30-2.30 Fridays inclusive with 30 minutes for lunch;
  - e. During his employment with the company, the Executive must not, without the Employer's written permission hold office in or be employed or engaged y any other business or organisation;
  - f. The Executive shall attend and work at any of the places of business of the Company and/or by the Group in the United Kingdom as determined from time to time by the Board;
  - g. Pension: the Executive will become a member of a personal private pension plan. The company shall contribute such sum as is equivalent to 5% of the Executive's salary to the pension plan on behalf of the Executive;
  - h. Holidays: the Executive shall be entitled to 25 days' paid holiday per annum. Holidays may only be taken at such times as are convenient to the Company and are agreed between the Executive and the Board;
  - i. Illness: if the Executive is absent from work as a result of ill health or injury for more for more than 7 consecutive working days he must provide a doctor's certificate to the Company. Provided that the Executive complies with the Company's sickness policy, he shall be entitled to receive his normal salary during the first 6 months in aggregate of absence in any 12 month period; and
  - j. On the termination by whatever means of this Agreement or, if earlier, on service of notice of termination the Executive shall at the request of the Company immediately resign from office as a director of the Company without claim for compensation and in the event of his failure to do the company is hereby irrevocably authorised to appoint some person in his name and on his behalf to sign and deliver such resignation or resignations to the Company.

11. The Service Agreement was not updated since 2006. The Claimant said that it was not a high priority to update it as he assumed that he had an ongoing contract of employment with the entitlements continuing. The aspects that varied time to time was in relation to remuneration and the constitution of the Board.
12. The Claimant explained that the company was established prior to him acquiring it. It was an engineering and manufacturing business specialising in composites. The Claimant described himself as an engineer and a “hands on” managing director. He did “a bit of everything as necessary”. He prepared regular accounts, had a reporting responsibility, processed one part of the payroll, and was involved with general governance. As an engineer, he worked on projects within the engineering function, and he was a senior member of the team, manufacturing large structural components. He liaised with customers, and from time to time worked in the factory if extra capacity was needed. This would happen 2-3 times a month. He described spending 20 percent of his time on the accounting and administrative roles, 60 percent on his engineering role with a focus on production, sales and customers and the remaining 20 percent of his time was spent on a variety of things including being on the shop floor, operating CNC machines, preparing products for a paint shop and spray-painting products. He said that these were his roles as the company evolved and that he had always been “hands on”.
13. The Claimant had consistent days and hours of work. His normal hours were between 8.30-5pm Monday to Thursday and 8.30-2.30pm on Fridays. He broadly worked within these hours and most days would stop late typically doing admin work. He worked overtime and typically worked 50 hours a week. Monday to Friday were his regular days of work with the occasional Saturday for factory cover. Saturday cover would depend on customer requirement schedules. The Claimant would “clock” into work every morning and evening as other staff would with a clock in card to record attendance.
14. The Claimant had 25 days per year holiday entitlement. This was recorded via the company’s computerised HR module which was the system for various HR functions such as training and holiday. All staff holidays were logged in this way. When the Claimant was on holiday, there were two other signatories who could process payments.
15. The Claimant’s sick pay entitlement was the same as other staff. It was based on service but effectively 13 weeks on full pay and 13 weeks half pay.
16. In terms of remuneration, the Claimant was initially paid on a PAYE basis. In January 2012 the arrangements were changed under the advice of the company’s accountants. The arrangements were changed to a mixture of PAYE, personal private pension contributions and shareholder dividends. The arrangement was maintained monthly in line with other staff members on the monthly pay cycle. This arrangement remained in place until March

2022. In March 2022, following advice from company accountants the Claimant ceased taking dividends and reverted to a PAYE salary, at a reduced amount to his contractual entitlement. This was due to the business financially struggling because of the coronavirus pandemic.

17. The Claimant received hard copy pay slips and I have had sight of payslips dated April 2022, May 2022 and June 2022 [pages 141-143]. The pay slip for April 2022 records net pay of £3299.04 with deductions for tax, NI and pension. The pay slip for May 2022 records net pay of £3034.18 with deductions for tax, NI and pension. The pay slip for June 2022 records net pay of £3008.78 with deductions for tax, NI and pension. The Claimant paid into a personal private pension plan consisting of employer contributions and some of his own from time to time. In evidence, the Claimant said that his payslips prior to this period of financial difficulty for the business would have shown approximately £9000 a month.
18. The Claimant received P60s. I have had sight of P60s for 2019/20 recording £8632 pay and NI contributions, 2020/21 recording £9504 pay and NI contributions and 2021/22 recording £9504 with NI contributions [pages 138-140].
19. A list of dividends the Claimant received is contained in the Bundle. He received 32 dividend payments between July 2019 and March 2022 [pages 107-108]. The amounts varied between £1000 to £5000.
20. The Claimant had an unsecured loan of £40,200 in the company and had provided a personal guarantee against a Commercial Invoice Discounting facility that was in place up until January 2022 [page 110].
21. The Claimant submitted a claim for redundancy and insolvency payments to the Insolvency Service, on 16 August 2022 [page 103]. The Claimant completed a 'Director Questionnaire' on 24 August 2022 as part of his claim [pages 106-111]. The Claimant's claim for payments from the Insolvency Service was rejected on 16 November 2022 on the basis that he was not an employee [pages 114-115].
22. The Claimant wrote by email to the Insolvency Service on 24 November 2022 having reviewed the information he had sent as part of his claim. He provided Companies House information to confirm that Brookhouse Paxford Limited, named in the Service Agreement, was the same company as Paxford Composites Limited. He asked for clarification as to the basis of the decision [pages 116-117].
23. On 8 December 2022 the Insolvency Service responded to the Claimant [page 116]. A key factor for the rejection was whether the Claimant, as a Director, had remunerated himself as an employee or an office holder and the fact that the Claimant had paid himself below the national minimum wage.

## Relevant Legal Framework

### Applications for Redundancy Payments – s.166 ERA 1996

24. Section 166 provides as follows:

**166 Applications for payments.**

(1) Where an employee claims that his employer is liable to pay to him an employer's payment and either—

(a) that the employee has taken all reasonable steps, other than legal proceedings, to recover the payment from the employer and the employer has refused or failed to pay it, or has paid part of it and has refused or failed to pay the balance, or

(b) that the employer is insolvent and the whole or part of the payment remains unpaid,

the employee may apply to the Secretary of State for a payment under this section.

(2) In this Part "employer's payment", in relation to an employee, means—

(a) a redundancy payment which his employer is liable to pay to him under this Part.

### Employee's Rights on Insolvency of Employer – s.182 ERA 1996

25. Section 182 provides as follows:

**182 Employee's rights on insolvency of employer.**

If, on an application made to him in writing by an employee, the Secretary of State is satisfied that—

(a) the employee's employer has become insolvent,

(b) the employee's employment has been terminated, and

(c) on the appropriate date the employee was entitled to be paid the whole or part of any debt to which this Part applies,

the Secretary of State shall, subject to section 186, 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.

### Employee Status

26. For a Claimant to be successful under s.166 and s.182 of the Employment Rights Act 1996 (“ERA”), they must be an employee.

27. Section 230 defines an employee as:

**230 Employees, workers etc.**

(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.

28. The criteria for there to be a contract of service is established in the case of Ready Mixed Concrete (South East) Ltd v Minister of Pensions and National Insurance [1968] 2 QB 497:

- “(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.”

29. In essence, in order for a person to be an employee, there must be a contract, and there are three essential elements which are required in order to establish a contract of employment: an obligation to provide work personally; mutuality of obligation; and the worker must agree to be subject to the control of the employer to a sufficient degree.

30. Where there is a dispute as to the genuineness of a written term in an employment contract, the focus must be to discover the actual legal obligations of the parties. All the relevant evidence must be examined, including: the written term itself, read in the context of the whole agreement; how the parties conduct themselves in practice; and their expectations of each other (Autoclenz Ltd v Belcher [2011] ICR 1157 SC).

Company Directors

31. Company directors can be both employees and office holders (Clark v Clark Construction Initiatives Ltd. [2008] ICR 635). It was said 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 was 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.
32. The factors outlined in Clark to be considered are:
- a) 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. 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.
  - b) 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.
  - c) Similarly, the fact that he is an entrepreneur, or has built the company up, or will profit from its success, will not be factors militating against a finding that there is a contract in place. Indeed, any controlling shareholder will inevitably benefit from the company's success, as will many employees with share option schemes.
  - d) 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. For example, this would be so if the individual works the hours stipulated or does not take more than the stipulated holidays.
  - e) 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.
  - f) In that context, the assertion that there is a genuine contract will be undermined if the terms have not been identified or reduced into writing. This will be powerful



evidence that the contract was not really intended to regulate the relationship in any way.

- g) The fact that the individual takes loans from the company or guarantees its debts could exceptionally have some relevance in analysing the true nature of the relationship, but in most cases such factors are unlikely to carry any weight. There is nothing intrinsically inconsistent in a person who is an employee doing these things. Indeed, in many small companies it will be necessary for the controlling shareholder personally to have to give bank guarantees precisely because the company assets are small and no funding will be forthcoming without them.
- h) 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.

**33. The case of Secretary of State for Business, Enterprise and Regulatory Reform v Neufeld and Howe [2009] EWCA Civ 289, set out helpful guidance to assist Tribunals in deciding cases where a shareholder and director was also an employee. Key principles are:**

- a) There is no reason in principle why a shareholder, or controlling shareholder and a director of a company could not also be an employee of the company under a contract of employment;
- b) It would 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] A.C. 12, [1960] 10 WLUK 37; and
- c) 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 E.R. 915, [1999] 2 WLUK 255.

**34. In determining whether a Shareholder and Director is also an employee, considerations include:**

- 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, 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 might 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. In order for the employee to make good his case, it might 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) 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; and
  - e) 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 might 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.
35. Additionally, in Neufeld the Court of Appeal held that an individual giving personal guarantees or loans to the company or having a controlling shareholding were irrelevant factors for the purposes of determining whether an employment contract was genuine. The Court of Appeal also held that failing to take full holiday entitlement was not a pointer against an employment contract.
36. In the case of Secretary of State for Business, Innovation and Skills v Knight [2014] IRLR 605, the Employment Appeal Tribunal upheld the Tribunal's decision that the claimant was an employee. This was despite the fact that she was Managing Director and sole Shareholder, and, during the last two years, had waived her salary to allow others to be paid. The issue was the Claimant's employment status at the point when the redundancy payment fell due. The question was whether, by the time of redundancy, the Claimant's Employment Contract had been varied or discharged as a result of her waiving her salary. The Tribunal (upheld by the EAT) found that on the facts, there was no variation or discharge, but that there was simply a choice by the Claimant not to take her salary.

National Minimum Wage

37. Section 1 of the National Minimum Wage Act 1998 sets out the entitlement of an employee to be paid the national minimum wage. Section 17 sets out that the employee is entitled to additional remuneration in the event that they qualify for the national minimum wage and are not paid it.
38. A week's pay must be calculated at the national minimum wage where that was not the actual pay received, when calculating remedy in accordance with claims brought by the ERA (Pagetti v Cobb [2002] IRLR 861 EAT). Paragraph 9.50 of the IDS Handbook confirms that the EAT's reasoning applies equally to the assessment of a week's pay for other purposes, such as calculation of redundancy or holiday pay.

**Submissions**

39. Mr Soni relied on the Grounds of Resistance and expanded on them in oral submissions. The First Respondent relies on the following factors as evidence that the Claimant was not an employee:
  - a) The Claimant paid himself less than the National Minimum Wage which suggests that he was remunerated as an office holder and not an employee;
  - b) The Claimant was the only officer in the company, with resignations of previous officers dating back to 2015;
  - c) The Claimant took dividends;
  - d) The Claimant operated a director's loan account;
  - e) The Service Agreement dated 9 May 2006 did not reflect the Claimant's position at the time of the insolvency or for some considerable time prior to the insolvency; and
  - f) No contract of employment existed as there was no party with whom the Claimant could have a master/servant relationship.
40. Mr Soni, also submitted that if the Tribunal determined that the Claimant was an employee, any payments awarded should be based on the amount contained in the Claimant's 2022 P60s.
41. The Claimant relied on his Witness Statement and expanded on it in oral submissions. He relied on the following factors as evidence that he was an employee:
  - a) He had always considered himself to be an employee, from before he owned the business. When he took over, he considered there to be a continuation of that status;
  - b) He received the same benefits of other employees including holiday arrangements, sick pay and pension;
  - c) He was subject to the same requirements as other employees e.g. having to clock in and book holidays and he had regular working days and hours;

- d) He performed an active work role on behalf of the business, directly involved with production, sales, accounting and engineering;
- e) Remuneration arrangements were changed on advice of the company accountant which the Claimant understood to be a standard way for director shareholders to be paid;
- f) Variation of pay and timing of when paid only occurred occasionally to manage cash flow within the business;
- g) Although the majority shareholder, this does not negate the presence of an employment contract; and
- h) He always operated on the basis of the written agreement and fulfilled his duties accordingly.

### **Discussion and Conclusions**

- 42. The determination of the Claimant's employment status is a question of fact and all relevant factors must be considered.
- 43. In accordance with the guidance given in Neufeld, the starting point is whether the Claimant has satisfied me that he had a contract of employment, and whether that contract was genuine or a sham. Assuming it is a genuine contract, the question is whether it amounted to a true contract of employment.

#### *Was the Contract genuine?*

- 44. The Claimant said that he did have a written contract of employment and a document titled '*Brookhouse Paxford Limited -and- Glenn Ford Service Agreement*' was produced in evidence. It is signed and dated 9 May 2006. Although the document is described a 'service agreement' it refers to the 'Executive's employment' throughout. I accept the Claimant's evidence that the document was drafted by a solicitor to govern the new arrangements after the management buyout, and that he had worked for the company prior to this.
- 45. Mr Soni took issue with the fact the service agreement had not been updated since 9 May 2006 and in his view, did not reflect the Claimant's position at the time of the insolvency and for some time prior to that. The Claimant explained that since Mr Appleby's sudden death in July 2015, he became the sole director of the business, despite efforts to find new shareholders and directors. He said that despite changes in name of the company, constitution of the Board and remuneration arrangements over time, in effect, arrangements remained the same and as such he did not consider it a high priority to update the service agreement. In his mind, there was an ongoing contract of employment with the same entitlements continuing, it was the same legal entity. He gave clear evidence about the nature of his responsibilities under the agreement and explained that arrangements such as his pension, holiday and sickness pay arrangements continued in accordance with the service agreement.

46. Whilst there were some aspects of the service agreement had not been updated, I do not consider that these factors point away from the contract being genuine, or that it had been discharged, but that it had not been reviewed and updated since it was drafted and signed. The reality of the arrangements at the time of insolvency, differed in terms of constitution of the Board, name of the company and remuneration arrangements, however I do not consider that these matters point towards the contract being a sham. Given the Claimant became the sole director since July 2015, in my view, he was entitled to vary the terms of the agreement, with himself and notably, the company's constitution allowed for a quorum of one director.
47. I consider the contract to be genuine and the next question to consider is whether it amounted to a true contract of employment and fulfilled the three conditions outlined in Ready Mixed Concrete: mutuality of obligation, personal service and control.
48. The SOS asserts that the control factor in particular, is not met and so I will address this first.

#### *Control*

49. Applying Neufeld, there is no reason in principle why a controlling Shareholder and Director of a company could not also be an employee. In respect of the control factor, there is no answer to the claim of employee status to argue that control of the company, meant that the control condition of a contract of employment could not be satisfied. Similarly, there is no answer to the claim of employee status, to say that the practical control he has over his own destiny, had the effect in law, that he could not be an employee. Neufeld also made it clear that loans made to the company, personal investment in the company and other actions that an owner of a business would commonly do on its behalf, are not ordinarily of any special relevance and should be ignored.
50. The Claimant gave examples in evidence where he was subject to the 'control' of others and accountable to them. He explained that he was accountable to all the employees and owed them a duty care, particularly in the context of health and safety and operating in a factory environment. He was not the sole signatory to process payments, he would arrange his holiday taking into account the holidays of other signatories. He would book his holiday in the same way as other staff via the online system and would clock in and out to record his attendance. In this sense, he was subject to the 'control' of the company. He received advice from an accountant about some financial decisions and between 2015 and 2022 received advice from a third-party advisory on governance, good practice and strategy. The company paid for a contracted HR service which provided support and on occasion conducted independent investigations into issues with staff. The existence of the business did not rely solely on the Claimant, in that there was a full complement of staff and established operations.

*Personal Service*

51. I accept the Claimant's evidence that he carried out his work personally and did not arrange for anyone to substitute for him. I was presented with no evidence that he delegated any of his roles and responsibilities. He explained that he personally undertook his roles and responsibilities. He clearly was very 'hands on' and in addition to his reporting and administrative roles as the business owner, he had significant engineering and project management responsibilities as part of his day-to-day work working with other staff members. Clause 3.4 of the service agreement contained an express term prohibiting the Claimant from holding office or being employed or engaged by any other business or organisation without the company's written permission. Therefore, it is clear in my view, that the intention when the Contract was made, was that there was an obligation for the Claimant to perform the work personally. The Claimant explained in evidence, that he continued to fulfil his duties throughout the operation of the business.

*Mutuality of Obligation*

52. I have already found that the Claimant generally worked 50 hours a week. He had regular days and hours of work. There was no evidence that he was selective in the roles he undertook or that he only worked as and when he wanted to. He was not entitled to work or hold office for another company or organisation without written permission. Although he could have granted himself this permission – he did not. He worked alongside other staff across the business undertaking his day-to-day work.
53. The Claimant's remuneration arrangements changed throughout the course of his time working in the company. He started on a PAYE basis but in January 2012 following advice from the company accountants, this changed to a combination of PAYE and shareholder dividends. These arrangements continued until March 2022. Following advice from company accountants, in March 2022 the Claimant reverted to a PAYE salary, although this was at a reduced level to his contractual entitlement due to financial difficulties in the business. The Claimant explained in evidence that he did not seek advice on whether changing the way he was paid would change his employment status. His assumption was that he continued to work as an employee but through a different mechanism. Whilst remuneration based on PAYE and shareholder dividends is a factor pointing away from employment status, at the time of the insolvency, the Claimant was being paid on a PAYE basis. The payslips produced in evidence show basic pay and deductions for tax and NI and show employer pension contributions. I am concerned with the position at the time of the insolvency.

*National Minimum Wage*

54. Company Directors are not entitled to receive the NMW for the work they do as an office holder but must be paid the NMW for their work as an employee. The fact that the Claimant did not pay himself the NMW is a factor pointing away from employee status.
55. The Claimant said that he did not consciously recognise that he was being paid less than the NMW following the change in his remuneration arrangements. He acted based on professional advice and considered he was still being paid at a reasonable level over the NMW. The Claimant provided an explanation as to why he paid himself lower than the contractual salary, which I accept. It did not appear to me, from the evidence, that the Claimant understood the significance of him not paying himself the NMW and therefore ignorant of the requirement to do so.
56. From March 2022, as a result of financial difficulties following the pandemic, the Claimant reverted to PAYE arrangements and what he was paid was varied. He explained that he was trying to do what was required for the continuation of the business and ensure that staff were paid on time as far as possible. I accept his explanation as to why he paid himself in this way. Applying the case of Knight, I do not find that there was a variation or discharge of the Contract, but simply a choice by the Claimant, following advice, to take a lower salary.
57. Balancing all these factors and after careful consideration of the submission made by the SOS, I accept the Claimant's explanation as to why he paid himself lower than the NMW. I find that he did not appreciate the legal requirement to do so, but that this does not, in the broader context of all the other factors pointing towards employment status, which I have already outlined, mean that he was not an employee.
58. I find, on balance, that the factors pointing towards employment status outweigh the factors pointing away from employment status.

**Sums to be Paid**

59. Mr Soni submitted that any calculations should be based on the figures contained within the Claimant's P60s. However, in light of the law set out above, I am satisfied that the calculations should be based on the NMW even though the Claimant was not paid the NMW.
60. The 'relevant date' for the purposes of s.145 and the redundancy payment is 22 July 2022.
61. It is determined that the Claimant is entitled to a redundancy payment of **£12,112.50**, at NMW, as it was at the date of dismissal, 22 July 2022, calculated as follows:

- a. Date of redundancy: 22 July 2022
  - b. Date of birth: 23 May 1961
  - c. Start date: 14 February 2005
  - d. Years of Service: 17
  - e. Weekly wage at NMW: £9.50 p/h x 50 hours = £475.00
  - f. 1.5 weeks' pay for each full year of service aged after 41 = £12,112.50
62. A claim for arrears of wages is made for 16 days in relation to the period between 1<sup>st</sup> to the 22<sup>nd</sup> July 2022. It is determined that the Claimant is entitled to arrears of wages calculated as **£475 x 3 weeks + 1 day = £1520**. The Claimant is responsible for the payment of any Tax or National Insurance.
63. A claim is made for holiday pay. The leave year started on 14 February 2022. It is determined that the Claimant is entitled to holiday pay of **£1140**, calculated based on the pro-rata entitlement.
64. A claim for notice pay is made and based on s.86 ERA 1996, the Claimant is entitled to 10 weeks' notice pay. The Claimant is entitled to notice pay, calculated based on **£475 x 10 weeks = £4750**. This figure has been calculated using gross pay to reflect the likelihood that the Claimant will have to pay Tax on it as Post Employment Notice Pay.

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Employment Judge Z Islam

Date: 14<sup>th</sup> April 2024

Sent to the parties on: 22 April 2024

For the Tribunal Office.

#### **Recording and Transcription**

Please note that if a Tribunal hearing has been recorded you may request a transcript of the recording, for which a charge may be payable. If a transcript is produced it will not include any oral judgment or reasons given at the hearing. The transcript will not be checked, approved or verified by a judge. There is more information in the joint Presidential Practice Direction on the Recording and Transcription of Hearings, and accompanying Guidance, which can be found here: <https://www.judiciary.uk/guidance-and-resources/employment-rules-and-legislation-practice-directions/>