



IN THE EMPLOYMENT TRIBUNAL (SCOTLAND) AT EDINBURGH

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**Judgment of the Employment Tribunal in Case No: 4102773/2024 Issued
Following Final Hearing Heard at Edinburgh on the 11th of June 2024 with
consideration of written submissions on 5th July 2024**

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Employment Judge J G d’Inverno

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Mr John Crawford

Claimant

Represented by:

Mr Holland, Solicitor

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1. The Secretary of State for Business & Trade

1st Named Respondent

Represented by:

Mr Soni, Consultant

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**2. Airco Developments Limited (In Compulsory
Liquidation) Not appearing and not**

2nd Named Respondent

represented

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JUDGMENT OF THE EMPLOYMENT TRIBUNAL

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The Judgment of the Employment Tribunal is:

ETZ4(WR)

(First) That the claimant was an employee of the second named respondent in terms of section 230 of the Employment Rights Act 1996 at the material time for the purposes of his claims.

5 (Second) That the claimant is entitled to receive and the Secretary of State shall pay to the claimant;

(a) A redundancy payment of £5,076:33 pence gross

10 (b) Notice pay of £2,900:76 net

(c) £773:60 net in compensation for 16 days accrued but untaken paid annual leave entitlement

15 (d) £1,047:50 net arrears of pay in respect of the month of October 2023.

Employment Judge J G d'Inverno

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Date of Judgment 31 July 2024

Date sent to parties 31 July 2024

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I confirm that this is my Judgment in the case of Crawford v The Secretary of
30 State for Business & Trade and that I have signed the Judgment by electronic signature.

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REASONS

1. In this case the claimant, a Director and the principal shareholder of the respondent, as at the date of its liquidation, 16th November 2023, presents 5 claims under section 166 and sections 182-188 of the Employment Rights Act 1996 (“ERA 1996”), in his asserted capacity as a former employee of the 2nd respondent.

2. The claims advanced are claims for:-

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(a) A redundancy payment;

(b) Arrears of wages in respect of the month of October 2023;

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(c) Notice pay (12 weeks); and

(d) Payment in compensation for asserted accrued but untaken accrued proportionate paid annual leave entitlement, of 16 days, in the holiday year commencing 1st January and

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terminating as at the date of liquidation, 15th November 2023.

3. Prior to raising his proceedings before the Employment Tribunal the claimant made a claim, for the payments sought, to the Secretary of State, the 1st named respondent. The Secretary of State declined to make payment 25 putting the claimant to his proof in respect of his assertion that he was while

admittedly a Director, simultaneously and as at the point of liquidation, an employee of the 2nd respondent within the meaning of section 230 of the ERA 1996. The claim had originally been made against the first respondent for redundancy pay, holiday pay and arrears of pay. At the start of the Hearing the claimant sought to add a claim for unpaid notice pay, for a period of 12 weeks. This had been sought in the claimant’s original application to the RPS (page 72 of the bundle) but had been omitted from the ET1. The claimant made application to, and the first respondent not objecting in the

circumstances, the Tribunal granted Leave to the claimant to add, the claim for 12 weeks notice pay by way of amendment.

4. Separately and in any event, let it be assumed that the claimant was an employee, the 2nd respondent puts the claimant to his proof as to the calculation of "a week's pay" for the purposes of computing his various statutory entitlements in relation to each claim.

5. It is the claimant's contention that his week's wages fall to be computed by 10 reference not only to the basic wage which in the 12 week period prior to the date of liquidation he received, being a net figure of £1,047.50 per month, but in addition by reference to instalments payments of dividends received by him in the additional amount of £4,000 per month. It is the claimant's assertion, on that premise, that his contracted for salary was just under £63,000 per 15 annum during that 12 week period and that variously, in the course of his

directorship and employment at the company, his salary had been paid to him either as a combination of a basic wage and a proportionate share of dividend, or entirely as a basic wage during periods when a dividend could not be paid because of the company's lack of profitability.

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6. In all these matters the 1st named respondent puts the claimant to his proof contending, on an esto basis, let it be assumed that the claimant was an employee that his various entitlements which would then arise should be calculated by reference to his basic pay at the rate of £1,047.50 per month 25 gross (in relation to redundancy payment) and at the rate of £1,026.40 net in

relation to notice pay, arrears of pay and holiday pay.

7. The issues for determination by the Tribunal at Hearing were accordingly:-

(First) Whether the claimant, at the material time, (that is as at the date of liquidation of the 2nd respondent) was an employee within the meaning of section 230 of the ERA 1996 and in terms of and for the purposes of section 54 of the National Minimum Wage Act 1999 ("the NMW Act").

(Second) Whether the claimant's "week's wage" falls to be calculated in the circumstances, by reference to the claimant's basic PAYE wage or, by reference to that plus a proportionate share of the

5 dividend payments received by him in the relevant 12 week period prior to the date of liquidation of the 1st named respondents (let it be assumed that the claimant was an employee within the meaning of section 230 of the ERA).

10 (Third) Let it be assumed that the claimant was an employee, what was the balance of any proportionately accrued paid annual leave entitlement untaken by him as at the date of liquidation and in respect of which he is entitled to be compensated.

15 (Fourth) Let it be assumed the claimant was an employee, what gross and net sums is he entitled to receive respectfully by way of redundancy payment and payments of, notice pay, arrears of pay and holiday pay.

20 Sources of Oral and Documentary Evidence

8. The claimant gave evidence on his own behalf answering questions in cross examination, re-examination and questions put by the Tribunal. In addition the Tribunal heard evidence on behalf of the claimant from Mr Alan Speedy, a 25 former colleague and internal accountant. Both witnesses gave evidence on affirmations.
9. Each party had lodged a bundle of documents, that on behalf of the Secretary of State extending to some 386 pages, that on behalf of the claimant to some 19 pages to which there was added a twentieth page being a Schedule of the employee's holiday entitlement prepared by the 2nd respondent for use by the liquidator and an up to date Schedule of Loss in which the claimant's representative set out the calculation of each entitlement, let it be assumed

that the claimant was an employee based upon two alternative contended for quantifications of “a week’s pay”.

5 10. I found Mr Speedy to be a credible and wholly reliable witness and accepted his evidence as to matters of fact to which he was able to speak directly.

11. I did not find the claimant to be an incredible witness. His oral evidence was in part lacking in detail where it was not supported by documentary evidence.

10 The Applicable Law

12. The statutory provisions in terms of which the claimant advances his claims on the one hand and which regulate the Secretary of State’s obligations to make payment on the other include sections 166 and 182 of the Employment 15 Rights Act 1996 (“the ERA 96”) and sections 167, 168, 184, 185 and 186 of

the 1996 Act; All provisions with which parties’ representatives were fully familiar and was in general terms in agreement as to their construction.

13. Relevant also is the definition of employee contained within section 230 of the 20 ERA and the definition of employee (which appears in the same terms, in section 54 of the National Minimum Wage Act 1998 (“the NMW Act”).

14. Section 230 of the ERA 1996 is in the following terms:-

25 “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.

30 (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

5 (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

10 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.

(4) In this Act “employer”, in relation to an employee or a worker, 15 means the person by whom the employee or worker is (or, where the employment has ceased, was) employed.”

Section 54 of the NMW Act is in the following terms:-

20 “Meaning of “worker”, “employee” 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.

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(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.

30 (3) In this Act “worker” (except in the phrases “agency worker” and “home

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
5 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;

10 and any reference to a worker’s contract shall be construed accordingly.

(4) In this Act “employer”, in relation to an employee or a worker, means
15 the person by whom the employee or worker is (or, where the employment has ceased, was) employed.

(5) In this Act “employment”—

(a) in relation to an employee, means employment under a contract
20 of employment; and

(b) in relation to a worker, means employment under his contract;

25 and “employed” shall be construed accordingly.”

15. An employee may apply to the Secretary of State for payment in circumstances where his employer is liable to pay him an employer’s payment and the employer is insolvent and the whole or part of the payment remains unpaid, (section 116(1)(b) paragraph 16) 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 5 the whole or part of any debt to which this part applies, (in the

instant case 16th November 2024)

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.

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16. In the instant case it is a matter of agreement between the parties that the second respondent, Airco Developments Limited were insolvent for the purposes of section 183 of the ERA, having entered liquidation on the 16th of November 2024.

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17. Section 184, ERA 1996 prescribes the "debts" taken into account to be paid to an employee:-

"(1) This part applies to the following debts –

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(a) any arrears of pay in respect of 1 or more (but no more than 8) weeks

(b) any amount which the employer is liable to pay the

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employee for the period of notice required by section 86(1) or (2) or for any failure of the employer to give statutory notice

□ (1 week for each year of continuous employment)

(a) any holiday pay

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- (i) in respect of period or periods of notice not exceeding 6 weeks in all and
- (ii) to which the employee became entitled during the 12 months ending with the appropriate date.

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(b) any basic award of compensation for unfair dismissal or so much of an award under a designated dismissal procedures agreement as does not exceed any basic award of compensation for unfair dismissal to which the employee would be entitled but for the agreement. In other words, the “redundancy payment” due to the employee.

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18. Section 185 of the ERA 1996 provides that the appropriate date for the purposes of the applicable provisions is the date on which the employer became insolvent (s.185(b)(1), ERA 1996 – in the instant case 16th November 2023 in the SOS’s contention, but the earlier date of cessation of trading in the case of the contention of the claimant.

20 19. Section 188, ERA 1996 – complaints to Employment Tribunals, provides:-

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

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- (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.

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20. Section 188(2) of the Act provides that an Employment Tribunal shall not consider a complaint unless it is presented before the end of the period of 3 months beginning with the date on which the decision of the Secretary of State was communicated.

21. In the instant case the Secretary of State has failed to make a payment, and therefore, the claimant now brings his complaints under section 188(3) ERA 1996 seeking:

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(a) That the Tribunal 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.

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22. Only persons who were at the relevant time (as at the date of insolvency) Employees of the insolvent legal entity, in terms of section 230 of the ERA, have entitlement to claim and receive from the Secretary of State payments of the type advanced by the claimant in the instant case.

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23. The holding of appointment as a Director in a Limited Liability Company and the performance of duties in that capacity by a person who is a majority shareholder is not fundamentally incompatible with that individual concurrently working for the company under a Contract of Employment.

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24. Whether or not a Director/majority shareholder is an employee of the Company is a question in fact to be determined by the Tribunal on the preponderance of the evidence and on the balance of probabilities.

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25. The case authority to which the Tribunal was referred and in which guidance is to be found on the approach to be taken to determining such a question of fact included:-

1. Secretary of State v Neufeld and Howe [2009] EWCA Civ 280
2. State v Knight [2013] UKEAT/0073/13/RN

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3. Autoclenz Ltd v Belcher [2011] ICR 1157 SC
4. Ready Mixed Concrete (South East) Ltd v Minister of Pensions and National Insurance (“Ready Mixed Concrete”) [1968] 2 QB 497
- I.C.R 612 5. Nethermere (St Neots) Ltd v Gardiner [1984]
- 83 6. Eaton v Robert Eaton Ltd & SOS [1988] IRLR
7. Fleming v SOS [1997] IRLR 682
8. Rainford v Dorset Aquatics Ltd
- UKEAT/0126/20/BA 5 9. Rajah v Secretary of State EAT/125/95

26. The above cases are authority for the following generally applicable propositions:-

- 10 (a) That there is no reason in principle why an individual who is a Director and a shareholder/majority shareholder of a company cannot also be an employee of the company (within the definition of section 230) of the ERA 1996;
- 15 (b) Whether in any particular case a shareholder/Director is an employee is a question of fact for determination by the Tribunal;
- (c) Key considerations in approaching the determination of that question of fact include:-
 - 20 (i) whether there exists a genuine Contract of Employment; and
 - 25 (ii) whether the Contract of Employment is a sham in principle consideration within the Contract of Employment (reciprocal reward for the performance of work) can come in many forms
- (d) Where there is a dispute as to the genuineness of a written term

in an employment contract, the focus of enquiry should be to discover the actual legal obligations of the parties. That will involve an examination of the relevant evidence 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.

- 5 (e) The questions fall to be answered in terms of the law of contract and whether, at the relevant time, there was a contract between the parties, considering whether terms were agreed expressly (in writing or verbally).
- 10 (f) Whether further terms ought to be implied on the basis that the Tribunal can presume that it would have been the intention of the parties to include them in the agreement.
- 15 (g) There is no single test for determining whether an individual is an employee within the meaning of section 230(1). Each case depends on its own fact. There is however an irreducible minima without which there can be no Contract of Employment; these include:-
- 20 (i) mutuality of obligation – an obligation on the employer to provide work and on the employee to accept and perform the work offered;
- 25 (ii) control – put simply, that ultimate authority over the purported employee in the performance of his or her work must rest with the employer; and

- (iii) personal service the employee must be obliged to perform the work personally, subject to a limited power of delegation

- (h) The onus of proof sits with the putative employee to establish the existence of an employment contract.

- (i) The essential requirements of a genuine Contract of Employment are to be found summarised by MacKenna J in Ready Mixed Concrete; viz,
 - 5 (i) the servant agrees that, in consideration of a wage or other remuneration, he will provide his work and skill in the performance of some service for his master;

 - 10 (ii) the servant 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

 - 15 (iii) the other provisions of the Contract are consistent with it being a contract of service.

- (j) The starting position is that a Director of a company is normally the holder of an office, not an employee and evidence is
20 therefore required to establish that the Director was in fact "employed".

- (k) The tax treatment of consideration is not of itself determinative of the existence of a Contract of Employment. It can, however,
25 serve to point in one direction or another and or to the genuineness of any Contract of Employment. For example, while Directors may under an approved revenue scheme benefit from
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what is referred to as the “optimum Director’s salary” with a view to taking advantage of the most tax efficient means available of a Director effectively paying themselves. That is a benefit which is not afforded to bona fide employees of a company who would not ordinarily have that privilege.

(l) 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 may be decisive. However, the significance of that factor will depend on the circumstances and it would not

5 be proper to lay down any rule of law to the effect that a fact that a person is a majority shareholder necessarily and in all the circumstances imply that that person is not an employee.

(m) The relevant date for the purposes of deciding whether the
10 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, not the position as it was two years ago, 5 years or 10 years previously.”

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Findings in Fact

27. In the paragraphs which follow (“SOS” plus a number”) is a reference to a page
20 number in the Secretary of State’s bundle. Reference to (“C” plus a number”) is a reference to a page number in the claimant’s bundle.

28. On the oral and documentary evidence presented the Tribunal made the following essential Findings in Fact restricted to those relevant and necessary to the determination of the issues.

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29. Airco Developments Limited was incorporated on the 5th of March 2008.

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30. Airco Developments Limited (“the Company” and the “second named respondent”) entered compulsory liquidation on the 16th of November 2023 (R48).
31. The Company ceased trading on the 31st of October 2023.
32. The Company was insolvent on the 31st of October 2023.

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33. The 31st of October 2023 is the relevant date for the purposes of the claimant's claims (let it be assumed that the claimant was an employee as at that date).
34. The Company was a sheet metal business, with a speciality in offering bespoke metal products to the hospitality sector.
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35. The claimant did not immediately start working as an employee of the Company due to issues with the Company start up in 2008.
36. The claimant started working for the Company on the 12th of January 2009. At that time his job title was "Managing Director".
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37. At that time he was the sole and majority shareholder, holding 100% of the issued shares.
38. Subsequently Audrey Thorburn became a fellow Director and a 10% shareholder, that in July of 2015 Audrey Thorburn resigned as a Director and
- 20
- relinquished her 10% shareholding.
39. Both Audrey Thorburn and the claimant had management roles.
40. The claimant and Audrey Thorburn had management meetings on a regular
- 25
- basis.
41. There was a contract entered into between the 1st respondent Airco Developments Limited and the claimant, in terms of which the claimant carried out work for the 1st respondent.
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42. The Contract was constituted by the written offer dated 12th January 2009, issued by the claimant in his capacity as Director and agent of the 1st named respondent from its business premises, via the Company Secretary Gwen Graham, to the claimant in his personal capacity at his home address then, on the one hand, and,

on the other, by the claimant's acceptance of that offer, either expressly or impliedly on or about that same date.

- 5 43. An unsigned copy of the written offer is produced at (C-1).
44. The Contract between the parties was subject to terms contained within a document headed "Statement of Particulars of Employment Under the Employment Rights Act 1996 section 1
10 From Airco Developments Limited
To John Crawford
Date 12th January 2009"
A copy of which is produced at C-3-5.
- 15 45. The copy of the terms which is produced, is a copy which is unsigned by either party.
46. It was contained within a filing cabinet in which the Contracts of some 8 or 9 other individuals who were employees of the Company were kept, at the
20 Company's business premises.
47. The majority of the copy terms kept within the filing cabinet were signed by both parties.
- 25 48. In the case of the terms relating to the claimant, and to some 2 or 3 other individuals, the latter being employees, the retained copy had not been signed.
49. It was the intention of both parties to the Contract, at the time of entering into it that the Contract would be regulated by the terms contained in the copy
30 document produced at C-3 to 5.

50. As at the last date of his employment, the date upon which the Company ceased trading being 30th October 2023, the parties to the Contract had conducted themselves and were continuing to conduct themselves in a manner which was consistent with the written terms relied upon by the

5 claimant:-

(a) The claimant attended at the 1st respondent's place of business on a daily basis generally between 8 and 5.30 pm with the exception of Fridays where the business closed at 3 (except
10 when out of office engaged in pursuing his sales duties);

(b) In terms of his working hours with the business the claimant was

15 (i) working Monday-Friday, generally from 8-5.30 pm, although on occasion later, throughout the period 2009-2023. He would on average work 1 day from home.

20 (ii) that he had no other employment or external appointments outwith the Airco Developments Limited.

25 (iii) that he was paid a salary through PAYE which was itemised on his wage slips. He also received dividends as a Director on the advice of the Company's external accountant.

(iv) that he was paid some level of salary through PAYE, and paid Income Tax and National Insurance through the payroll throughout his employment, from January 2009-2023.

- (v) that he was paid sick pay, for periods in which he was “off ill”.

5 (c) The claimant had no other employment apart from that which he had with Airco Developments Limited nor did he provide services as part of a business to any other third party;

10 (d) The claimant was paid a salary through PAYE from which PAYE Income Tax and Employee’s National Insurance contributions were deducted.

15 (e) The claimant received dividends paid to him on a monthly basis in conjunction with his PAYE salary in accordance with the applicable Revenue Scheme at or about the “optimum Director’s salary” level for tax efficiency purposes.

(f) The level of the claimant’s PAYE wage and the decision to pay dividends to the claimant, and the apportionment of the claimant’s income between the two mechanisms, were matters 20 decided on by the claimant in his capacity as Managing Director of the Company in accordance with advice received from the Company’s external accountants.

(g) The claimant received income via dividend combined with 25 optimum salary payments at times when, on the advice of the Company’s external accountants and the Company’s internal Finance Director, the performance level of the Company was sufficient to justify the paying of dividends.

25 52. The claimant accrued and took annual leave on the same basis as other individuals who were employees of the Company accrued and took their annual leave. In practical terms the parties conducted themselves such that the claimant only took leave when he could be satisfied, that other employees whose absence combined with his own would impact upon Company performance were not on leave and further, that the needs of the Company could facilitate his doing so.

53. Although Managing Director and majority shareholder, the claimant was not in practice free to act in whatever way he chose both in relation to the performance of his own duties and the taking of decisions that impacted upon the Company's operational efficiency, profitability and or growth.

54. The claimant made contributions to and the 1st named respondent made 5 contributions to an employee's pension scheme (NEST) on behalf of the claimant.

55. The claimant headed up the Sales Division of the Company providing a skill set which was essential to the Company's profitability.

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56. As at the Effective Date of Termination of his employment the claimant had taken a total of 8 days off his pro rata holiday allowance for the holiday year 2023 leaving a balance of proportionate accrued but untaken paid annual leave entitlement of 16 days.

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57. The claimant received a P45 and a P60.

58. The claimant received no pay from the company for the month of October 2023. His last payment from the Company was received on 2nd October for

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20 the previous month September 2023.

Mutuality of Obligation

59. In terms of his contractual relationship with the Company the claimant 25
undertook to provide his own work and skill, personally and on a non
delegated basis, in return for remuneration which was paid to him partly as
wages through the payroll and partly by way of dividend:-

(a) The claimant performed all the tasks normally expected of a
Managing Director working as a full time employee of a Limited
Liability Company.

(i) The claimant functioned as Head of the sales staff and
a Project Manager. He was latterly involved in
design work and direct sales to new businesses.

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(ii) He met with clients and potential customers
completing surveys and estimating for the carrying
out of work by the Company.

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(iii) He worked both in office on a regular basis and out
of office when meeting customers.

(iv) He chaired meetings of the Management Group
every Tuesday and Thursday reporting to the
Group on sales figures.

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- 15 (v) He used office equipment and “machinery” to perform the duties of his role.
- (vi) He worked around 40 hours a week and was paid remuneration by the Company in
20 consideration of that work.
- (vii) He met regularly with his fellow Director and Alan Speedy to discuss and monitor the Company’s trading and financial position, doing
25 so latterly on a daily basis when performance began to drop off.

- (b) In return for the services personally performed the claimant received wages through the PAYE system paying tax from which tax and National Insurance contributions were deducted. He also received dividend payments in respect of his shareholding.
- (c) The claimant received sick pay and holiday pay. He was paid throughout his employment from 2009 onwards.
- (d) The rate at which the claimant was paid via the PAYE system 5 was a relatively low rate in relation to the duties which he was performing in the role of Managing Director of a Company with a circa £3 million turnover.
- (e) The low rate of “paid wages” reflect the fact that upon external
10 tax advice and in order to maximise his use of personal
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allowances, and as is commonly the practice, the claimant chose to pay himself and to receive dividends in circumstances where the external accounting advice indicated that the Company could properly make such payments.

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- (f) The right to opt to be remunerated in such a hybrid form, commonly referred to as the right to benefit from the “optimum Director’s salary”, or a threshold near it for a relevant fiscal year, in order to take advantage of the most tax efficient salary, is a benefit not normally afforded to bona fide employees of a Company who would not ordinarily enjoy such a privilege.

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- (g) For significant parts of his period of employment the “paid wage” which the Company paid to the claimant was below the level of the then applicable national minimum wage.

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- (h) Mutuality of obligation existed between the claimant and the Company.

Control

60. Although functioning as Managing Director of the Company with all the normal authority that that role will normally imply, the claimant was subject to an element of control in the contractual relationship.

- (a) The claimant was expected to and required to be in the work place around 4 days a week and in the balance of time not in the office to turn up on a daily basis to a particular place in order to discharge his duties, for example meeting with

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potential customers, conducting surveys etc.

- 10 (b) The claimant required to and did attend regular meetings with the Senior Management and Sales Team and to report to that body on the performance of his Sales Team which he headed (every Tuesday) and Thursday.
- 15 (c) The claimant took holidays but in reality could only do so, and only did so when the requirements of the Company were able to accommodate the same in terms of the number and persons of other employees on leave.
- 20 (d) The claimant had one to one weekly management meetings with Alan Speedy.
- 25 (e) The claimant enjoyed no power of substitution; that is to say he had no right to instruct someone to discharge the duties of Managing Director in his place, it being an essential condition of the contract between the claimant and the Company that he personally perform those duties.
- (f) There were occasions when the claimant's desired course of action or proposed decisions in relation to matters were strongly disagreed with by senior management and on some such occasions the claimant felt constrained to depart and departed from what had been the preferred or intended course of action in the face of that disagreement.

- (g) The claimant's previous Co Director Audrey Thorburn and the claimant not infrequently disagreed on matters such that the claimant in accommodation of his fellow Directors' views did not always progress his own views or take decisions as he had initially wished to do.

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61. The claimant had accrued some 14 years of service with the Company.

62. The claimant delivered his services substantially from within the Company's 10 business premises in Newbattle utilising the Company's IT, HR staff to run what was a busy office. When working with clients away from Newbattle the claimant utilised communications equipment and computer facilities provided by the company.

15 63. The claimant was paid while on holiday "paid wages" component of the claimant's remuneration was paid to him by the Company through the Company payroll in the same way as wages were paid to members of staff whose employment status is not in dispute. The payments were subject to deduction of PAYE and both employee's and employer's National Insurance 20 contributions.

64. The claimant had access to and paid into the "NEST" pension scheme in common with other members of staff whose employee status is not in dispute.

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65. The claimant received both P45 and P60.

66. With the exception of the claimant taking the benefit of a "optimum Director's salary and the beneficial tax treatment associated with the same, the other

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factors presented in evidence are not inconsistent with the existence of a Contract of Service.

Finds in Fact and in Law

67. In the period from 12th January 2009 to 31st October 2023 inclusive the claimant was an employee of the second respondent, “the Company” in terms 5 of section 230 of the Employment Rights Act 1996, and is eligible for payment from the Fund.

Findings in Fact continued Quantum

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68. The claimant’s gross monthly basic pay for the purposes of section 221 of the Employment Rights Act 1996 at the relevant time was £1047.50 (pages 102104 of the Hearing bundle).

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69. The claimant had a contractual notice entitlement of 12 weeks.

70. The claimant’s date of birth is 23rd 11 1966. The claimant’s dates of employment with the respondent were from 12th January 2009 to 31st of October 2023 inclusive.

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71. In the period the claimant had accrued 14 complete years of continuous service.

72. The claimant’s age at the Effective Date of Termination of his employment.

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73. The claimant’s gross weekly basic pay for the purposes of calculating a redundancy payment (capped at £643) was £241.73.

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74. The claimant's net weekly basic pay for the purposes of calculating his other entitlements was £241.73.

75. The claimant is entitled to a redundancy payment of £5,076.33.

76. The claimant is entitled to notice pay (12 x £241.73) in the sum of £2,900.76 net.

5 77. The claimant is entitled to receive compensation in respect of 16 days of accrued but untaken holiday pay (16 x £48.35) in the sum of £773.60.

78. The claimant is entitled to receive arrears of pay in respect of the days worked by him in the month of October 2023 in the sum of £1,047.50.

10 Parties Submissions

Discussion and Decision

79. On the claimant's behalf it was submitted that the circumstances of the claimant's engagement and service with the second named respondent (the 15 Company) was such as to bring him within the terms of the first leg of section 230 of the Employment Rights Act 1996. That is to say that the claimant fell to be regarded, in terms of that section as having worked for the Company as an employee under a Contract of Employment; and further, by way of primary position, that the calculation of "a week's pay" for the purposes of quantifying 20 the claimant's entitlement in the face of the claims advanced should be made

not only by reference to the "basic" pay which he received through the Company's payroll, which was recorded on his pay slips and for income tax purposes was subject to a deduction of PAYE and National Insurance contribution but also, in addition, by reference to the dividend payments 25 received by him.

80. In the alternative it was submitted on behalf of the claimant that his entitlements should at least be calculated by reference to the basic wage received by him.

81. The respondent, (the Secretary of State) while accepting that there was no reason in principle why someone who is a Director and shareholder of a company cannot also be an employee of the company under a Contract of Employment, submitted that the evidence did not support such a finding in the instant case, the essence of the respondent's position being that the claimant was a self employed person engaged in a contract for the supply of services and thus had no entitlement to the sums claimed by him.

5 82. On an esto basis, let it be assumed that the Tribunal were to find that the claimant was an employee, it was submitted on behalf of the Secretary of State that the claimant's entitlements should be calculated by reference only to the basic pay received by him and recorded through the Company payroll process and thus that payment received by him in the name of dividends 10 should be excluded from the calculation of "a week's pay" for the relevant statutory purposes.

83. On the basis of the evidence presented and of the Findings in Fact which it has made the Tribunal concluded, and has found in fact and in law, in the 15 particular circumstances, that the claimant while also a Director and majority (on occasions sole) shareholder in the Company, he was simultaneously in the period 12th January 2009 to 31st October 2023, he was simultaneously a "limb A or 1 employee" fulfilling the role of "Managing Director" of the

Company in terms of section 230(1) of the Employment Rights Act 1996.

20 (The claimant did not offer to prove that he had worker status as defined in

section 230(3) of the Act). The Tribunal accordingly has determined that the claimant had entitlement to receive payment from the Secretary of State in respect of:-

- 25 (1) Arrears of pay for the month of October 2023 (from the 1st to the 31st of October 2023)
- (2) Redundancy pay based on the gross weekly cap applicable in 2023, if appropriate
- (3) Holiday pay in respect of 16 days accrued but untaken entitlement
- (4) On amendment allowed at the outset of the Hearing, 12 weeks notice pay being both a contractual entitlement and statutory entitlement.

5 84. In relation to the issue of calculation of a week's pay both the claimant's representative's primary submission was that relevant amounts were to be arrived at by combining both the claimant's PAYE income and the balance payments paid to him as "dividends income" in respect of his shareholding.

10 He submitted on the claimant's behalf that that reflected the reality of the position, it being self evident that someone discharging the responsibilities of the claimant, and in the role of managing Director, would expect to be paid more than approximately £1000 per month. The Tribunal was not persuaded by that submission. Director employees have available to them by reason of their holding appointment and their discharging certain responsibilities in the 15 office of Director of a Company, an ability to derive financial benefit from the Company's activities either through the vehicle of being paid in their capacity as an employee what they consider to be a full consideration for the

work that they carry out, or by paying themselves a significantly smaller wage while receiving income by way of dividend. Director employees who find 20 themselves in such a position are entitled to seek to so order the way in

which they extract financial benefit from the Company as to maximise the benefit of personal tax allowances (such as to receive the “optimum Director’s salary”).

25 85. Although the claimant’s representative is correct when he states the receipt of “dividend payments” is not something expressly excluded from the definition of wages. The purpose of the legislative provisions which impose upon the Secretary of State an obligation to make certain payments out of the public purse is to provide protection to employees (or workers) and not to the holders of the office of Director nor, for that matter, to shareholders in a Company who are not Directors. The claimant relies upon the definition of wages in section 27(1) of the ERA – “(a) wages mean, any sums payable to a worker in connection with his employment etc. The receipt of dividend payments however is a matter which is connected with (arises from) the fact

that an individual receiving the payments is a holder of shares in the Company. Such a right exists regardless of whether the individual is a Director who is also an employee of the Company, an employee of the Company who is not a Director or, for that matter, a party at arm's length who
5 although a shareholder has no involvement with the Company beyond that legal relationship. To that extent the payments which the claimant opted in his capacity as a shareholder to receive and in his capacity as Director to make payment of through the mechanism of dividend payments, albeit with the benefit of external tax advice, are payments payable to him in connection, 10 not with his employment, but rather with and arising from the fact of his

shareholding. While no criticism attaches to the claimant for opting to make and receive payments from the Company through that mechanism, in doing so the proportionate payment so received falls outwith the scope of the statutory protection designed by Parliament and expressed in the provisions
15 upon which the claimant relies.

86. For those reasons the sums which the Secretary of State is directed to pay to the claimant are calculated by reference to the wage received by him through the Company payroll and PAYE system and do not include sums received by
20 way of dividend payment.

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Employment Judge J G d'Inverno

Date of Judgment 31 July 2024

Date sent to parties 31 July 2024

I confirm that this is my Judgment in the case of Crawford v The Secretary of
35 State for Business & Trade and that I have signed the Judgment by electronic signature.

