EMPLOYMENT TRIBUNALS

Claimant: Mr P Willie

Respondents: 1. AKA Electrical Services Ltd (in creditors' voluntary liquidation)
2. Secretary of State for Business, Energy and Industrial Strategy

Heard at: Leeds by video (CVP) On: 8 February 2023

Before: Employment Judge Bright

Representation
Claimant: In person
1st Respondent: Not in attendance
2nd Respondent: Not in attendance

RESERVED JUDGMENT

The claimant was not an employee of the respondent within section 230 of the Employment Rights Act 1996. The claim is dismissed.

REASONS

Claims

1. The claimant is pursuing payments for redundancy pay and compensatory notice pay from the National Insurance Fund ("the Fund") under sections 166 and section 182, respectively, of the Employment Rights Act 1996 ("ERA").

2. The second respondent, the Secretary of State for BEIS ("the SoS") accepts that the first respondent, AKA Electrical Services Limited ("the Company") is insolvent within the meaning of sections 166 and section 183 ERA, having entered into creditors voluntary liquidation on 18 July 2022. The Company's liquidators have not responded to the claim and it is only the SoS who is actively defending the claim.

3. The SoS rejected the claimant's application for payment from the Fund on the grounds that the claimant was not an employee of the company within the meaning of section 230 ERA. The claimant therefore presented a claim on 1 November 2022 (following ACAS conciliation from 27 October to 31 October 2022) for a reference under section 170 ERA and compensatory payment under section 188 ERA. His grounds of claim (box 8.2) state, "Was made redundant after the company went into voluntary insolvency. Initially made a claim as a director. This was rejected as I was told I was not considered as an employee and I had to prove that I was being paid a regular amount, on a regular basis, with a pay slip, as an employee would be. I believe that all the info I have produced clearly shows that I had a regular wage paid into my bank account at the same time each month, which was not associated with any dividends I may have received".

4. The SoS contended, by its response presented on 20 December 2022, that the claimant did not have a contract of employment, either express or implied, as per the provisions of section 230 ERA, with the Company at the relevant date, for the SoS to consider payments and that the claimant was engaged in a contract for service, not a contract of service.

The preliminary hearing

5. It was not anticipated that the Company would be represented or in attendance at the preliminary hearing. However, previous correspondence suggested that the SoS would be represented at the preliminary hearing. However, when the hearing commenced at 10.00 no representative for the SoS was present. The Tribunal therefore telephoned the two numbers provided on correspondence, but was unable to reach anyone. The Tribunal emailed to inform the SoS's representatives that the hearing would start late, at 10.20, to give the SoS's representatives the opportunity to attend, but when the hearing re-convened at 10.20 no representative for the SoS was in attendance. In view of the comprehensive pleadings in the SoS's ET3, referencing the relevant caselaw and the position taken by the SoS, along with the file of authorities and file of evidence which had been provided by the SoS, I took the view that it was possible to hear the case on the basis of the SoS's pleadings and papers and with the claimant only in attendance.

6. Having heard from the claimant, I decided to reserve judgment. Having done so, just as the preliminary hearing was ending, I was informed by the Tribunal clerk that the representative for the SoS intended to join the hearing late. However, having already reserved judgment, by that point the hearing had effectively concluded and I therefore took the view that the appropriate course of action would be to continue to make my decision and issue my reserved judgment.

7. The Tribunal subsequently received an email from the representative for the SoS stating that they had not received the amended notice of hearing, changing the time of the hearing from 2pm to 10am.

The issues

8. The only issue in the case was whether the claimant was an 'employee' of the Company at the time of the insolvency. If he was, then he enjoyed the protection given by sections 166 and 182 ERA. If not, then the claims must be dismissed.

Evidence

9. The claimant gave evidence orally and answered questions I put to him. I also had the benefit of an agreed file of documents sent to the Tribunal in advance of the hearing by the representative for the SoS. References to page numbers in these reasons are references to the pages in that file of documents.

Submissions

10. The claimant did not make formal oral submissions, but was emphatic in his pleadings and in his evidence that he considered himself to be entitled to a statutory redundancy payment and other payments from the SoS by virtue of having been an employee of the Company. He accepted there was nothing in writing, but considered that he had an implied contract of employment, mainly because he had received a regular salary from the Company and worked 'on the tools'. He seeks payment of a statutory redundancy payment of £5,815.32, based on the salary he was earning. He says his salary was originally above the national minimum wage ("NMW"), but failed to keep pace with it, and was topped up with dividends. He told me he did not believe he was owed any money for notice pay, as he had got a new job almost immediately and mitigated his loss.

11. The submissions contained in the SoS's pleadings were, in essence, that:

11.1. The facts of the case are such that claimant was not an employee at the date of the insolvency, as the verbal contract asserted by the claimant was not genuine or was discharged several years prior and did not exist at the relevant date and the claims should therefore be disallowed;

11.2. The claimant's claim to the Redundancy Payments Service ("RPS") was based on wages of £14,400 per annum (£276.92 per week). However, the documentary evidence submitted to the RPS showed an income below the figure claimed and below the NMW since 23 January 2008. Company directors, as office holders, are not entitled to receive the NMW for the work they do as an office holder. They are entitled to set their own rate of remuneration. However, if they are also an employee or a worker, they must be paid the NMW for the work they do as an employee. The definition of 'employee' is the same for the purposes of section 230 ERA and section 54 NMW. The claimant benefitted from dividends and confirmed that he took £11,705 in 2022, £13,250 in 2021 and £14,975 in 2020.

11.3. The basic elements of an employment relationship were not present, in particular the element of control. The claimant was in charge of his own destiny and was not subject to or subordinate to anybody else. The level of the claimant's control over the company is referable to his status as a director/shareholder and not directly relevant to the question whether he was an employee or worker;

11.4. The claimant asserts that he had a verbal contract of employment and it is therefore for him to prove it. There was no board of directors or written memorandum or contract of employment appointing the claimant to work for the company and, as the rate of pay asserted by the claimant was not paid by the Company, any asserted rate of consideration was not adhered to;

11.5. The claimant's P60 for the year ending 5 April 2022 shows that income tax was based on income of £14,400. Such a low sum would itself indicate that any asserted rate of pay was not adhered to in line with any alleged verbal agreement and does not reflect the legal wage to which an employee would be entitled from an employer. The claimant has benefitted from the optimum director's salary or a threshold hear it for the relevant fiscal year in order to take advantage of the most tax efficient salary for a director to pay themselves. This is a benefit not afforded to a bona-fide employee of a company, who would not ordinarily have this privilege.

11.6. As there were no other directors or workers within the Company, no board of directors and the claimant was not receiving a salary in line with the NMW, no contract of employment existed, either verbal or implied, and there was no party with whom the claimant could have a master/servant relationship. If any such verbal contract did exist, it had been discharged as a result of the variances in the agreement and there was no contract of employment in existence at the date of insolvency.

Findings of fact

12. I have made the following findings of fact on the balance of probabilities from the documentary and witness evidence available to me.

13. The claimant explained during his evidence that, when the Company went into liquidation, he applied to the SoS for payment of his redundancy payment through a third party company, Redundancy Claims UK (RCUK). He completed the questionnaire at pages 102 – 120 on the telephone and by email with RCUK, but told me he could not account for nor did he understand the figures for wages claimed on page 116. He explained that he was claiming

statutory payments based on the salary he was actually paid, not the nominal salary he should have been paid in compliance with the NMW. There were some discrepancies (identified below) between the responses given on the questionnaire at pages 102 – 120 and the other evidence in the bundle, which supported the claimant's evidence that the answers on the questionnaire were not entirely accurate. There was insufficient evidence for me to make any finding as to how those discrepancies arose, but I find that the answers given in the questionnaire are unreliable where identified below.

14. It was agreed that the claimant did not have a written contract of employment, letter of appointment nor a statement setting out the terms and conditions of his employment in compliance with section 1 ERA. Nor was there any service agreement nor written memorandum giving the terms and conditions of a director's contract as an employee. The only documentary reference to the claimant as an 'employee' is on his payslips and in paragraph 3 of the notes to the Financial Statements for the Year Ended 31 May 2021 (page 88).

15. I accepted the claimant's evidence that he originally worked as a sole trader but, as his work grew and he began taking on help, his accountant suggested that he start a limited company. From the claimant's evidence, this decision appeared to be a purely financial one. The claimant was the sole director and a 50% shareholder in the Company. There was no discussion between the claimant and his accountant or anyone else of any contractual arrangements to define or regulate the claimant's relationship with the Company at the time of incorporation or subsequently.

16. The claimant told me that he took on a number of employees and that they all received written contracts of employment with the Company. There does not appear to be any question that their wages, holiday arrangements, or terms and conditions were in any way unlawful.

17. I accepted the claimant's evidence that he worked as Managing Director (although on the questionnaire he is identified as Operations Manager, page 112) of the Company. He worked in the office and also 'on the tools'. I accepted his evidence that the balance of his work shifted over the lifetime of the Company so that, more recently, he had spent more time in the office.

18. The claimant gave evidence that he generally worked office hours, but also such additional hours as the business required, including evenings and weekends. He told me he did not have fixed hours because he was "the boss". His duties included pricing work, meeting with clients, site meetings, purchasing, design and assisting with installations. His work was not subject to supervision or control by anyone else, because he was the sole director and manager.

19. The claimant received paid holidays. Although his questionnaire at page 103 states that he was entitled to 28 days' holiday each year, at the hearing his evidence suggested that his holiday arrangements were somewhat less structured. He told me tried to keep his holidays to a couple of weeks at a time and tried to take them around other people's holidays. He said that it was only in recent years that he had really started taking much holiday, that it was probably two or three weeks a year, but that he took his laptop and would be on the phone and working the whole time anyway. He appears to have broadly expected to take no more than 28 days' holiday per year, however I find that there was no contractual term to that effect and he appears to have been in a position to determine when and how much holiday he took. There was no evidence of any record keeping in relation to his holidays.

20. He furloughed himself along with all other staff of the Company during the pandemic, but went back to work full time in 2021 although the other staff remained on flexible furlough. He says did not take any sick leave nor claim sick pay, although he believed he would be entitled to do so if needed. There was no evidence of any sickness record keeping in relation to the claimant's sickness absences or potential sickness absences.

21. There was no evidence of the claimant substituting or seeking to substitute anyone to take his place or carry out his role, nor does it seem likely that he would have done so, given that it was his business and he was the Managing Director, unless it was to carry out work 'on the tools' under his direction.

22. I accepted the claimant's evidence that there was a basic grievance and disciplinary procedure in place at the Company, which applied to employees and required them to raise grievances with the claimant and empowered him to pursue disciplinary action against them if warranted. However, he told me that he was not subject to any disciplinary or grievance procedure because he was 'the boss' and it was his business.

23. I accepted the claimant's evidence that, at the Company's inception, he followed the advice of his accountant that he be paid a salary of £1,200 gross per month, irrespective of the hours worked. Deductions were made for tax and national insurance by PAYE and further deductions were made for employee contributions to a NEST pension of which the claimant was a member. The Company made employer contributions into the NEST pension.

24. The claimant's evidence shows that he consistently received a gross figure of £276.92 per week described as 'salary' (pages 103, 105, 114, 121, 127 - 129, 130 – 131 (P60s for years 2021 and 2022), 132 – 134 (wage slips for March, April, May 2022), 135 – 222 (bank statements May 2020 – May 2022)), with the same deductions, continuing until the date of the Company's insolvency. That accords with the figure the Claimant records as salary on the questionnaire (page 105). I have not seen any evidence showing an income below £276.92, referred to in the SoS' pleadings.

25. Until April 2016, based on a nominal full-time working week of 40 hours, his hourly rate of pay would therefore have been £6.92 gross which, at the time, was above the NMW. However, from April 2016 the claimant's salary was overtaken by the NMW rate of pay (which changed from £6.70 to £7.20 on 1 April 2016). The basis for the SoS assertion in its pleadings that the claimant received less than the NMW from 23 January 2008 is unclear. If he was working 48 hours per week (as identified in the questionnaire (page 114)) his gross hourly rate would have been £5.77 gross, meaning he received NMW until 1 October 2009. His wage does not ever appear to have been a gross hourly rate of £9.50 as stated in the questionnaire at page 114.

26. I accepted the claimant's evidence, supported by the Company accounts included in the file of documents for the preliminary hearing, that on top of his salary he received dividends from the Company. In the financial year 2018/2019 he received dividends of £20,265 (page 67). On his questionnaire (page 104) he recorded receiving dividends of £14,975.00 in 2020, £13,250.00 in 2021 and £11,705.00 in 2022. In addition to paying tax by PAYE on his salary, he completed tax returns to account for tax on his dividends.

27. The claimant told me that, when he started the Company, he treated the salary as basic pay and the dividends as a bonus. However, the financial evidence suggests that the dividends were a significant portion of his income. Moreover, the claimant was paying his employees NMW and it therefore seems surprising that, if he considered his wages to be 'basic pay' he was content for them to fail to keep pace with the NMW. I accepted the claimant's evidence that he left the financial arrangements of the company to his accountant, whose advice he followed. He did not know why his wages had not increased to keep pace with the National Minimum Wage but relied on his accountant to advise him on the amount of the wages, which suggests that this was not intended to represent basic pay at all but was instead merely a tax efficient way of remunerating the claimant.

28. There was no evidence of any requirement to submit evidence of expenses or any procedure for the claiming of expenses. Although there are references in the bank statements to meal allowances paid to other employees, there is no apparent evidence of expenses claims by

the claimant to the Company. The claimant did not provide personal guarantees for the Company but invested funds in the company. He operated a director's loan account.

Relevant law

29. The section 166 and section 182 rights the claimant seeks to enforce apply only to someone who was an 'employee' of the insolvent employer.

30. Section 230 ERA defines employee:

> 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.

31. Ready Mixed Concrete (South East) Ltd v Minister of Pensions and National Insurance [1968] 2 QB 497 established the essential requirements for the existence of a genuine contract of employment:

> A contract of service exists if these three conditions are fulfilled. (i) The servant agrees that, in consideration of a wage or other remuneration, he will provide his own work and skill in the performance of some service for his master. (ii) He agrees, expressly or impliedly, that in the performance of that service he will be subject to the other's control in a sufficient degree to make that other master. (iii) The other provisions of the contract are consistent with it's being a contract of service. [515]

32. In Nethermere (St Neots) Ltd v Taverna and Gardiner [1984] IRLR 241 the Court of Appeal held that, "for there to be a contract of service there must be an irreducible minimum of obligation on each side".

33. Beyond the 'irreducible minimum', it is now well established in case law that there is a multi-factoral approach to establishing whether someone is an employee under section 230 and each case depends upon its own facts.

34. The question whether the claimant was an employee has to be answered as at the date when the company became insolvent.

35. The key case law is:

35.1. Clark v Clark Constructions Initiatives Ltd and anor [2008] IRLR 364, in which Elias P set out factors to be considered in the assessment of whether what appeared to be a contract of employment should be given effect:

35.1.1. The onus is on the party denying a contract; where an individual has paid an employee's tax and NI, prima facie he is entitled to an employee's rights;

35.1.2. The mere fact of majority shareholding (or de facto control) does not in itself prevent a contract arising;

35.1.3. Similarly, entrepreneur status does not in itself prevent a contract arising;

35.1.4. If the parties conduct themselves according to the contract (for example, as to hours and holidays), that is a strong pointer towards employment;

35.1.5. Conversely, if their conduct is inconsistent with (or not governed by) the contract, that is a strong pointer against employment;

35.1.6. The assertion that there is a genuine contract will be undermined if there is nothing in writing;

35.1.7. The taking of loans from the company (or the guaranteeing of its debts) are not intrinsically inconsistent with employment;

35.1.8. Although majority shareholding and/or control will always be relevant and may be decisive, that fact alone should not justify a finding of no employment.

35.2. Secretary of State v Neufeld and Howe [2009] EWCA Civ 280, in which the Court of Appeal approved Clark, save that: the burden of proof lies on the putative employee who is asserting the existence of an employment contract; and Elias P's finding that the assertion that there is a genuine contract will be undermined if the terms have not been identified or reduced into writing was putting "a little too high the potentially negative effect of the terms of the contract not having been reduced into writing. This will obviously be an important consideration but if the parties' conduct under the claimed contract points convincingly to the conclusion that there was a true contract of employment, we would not wish tribunals to seize too readily on the absence of a written agreement as justifying the rejection of the claim". The Court of Appeal confirmed that:

35.2.1. There is no reason in principle why someone who is a shareholder and director of a company cannot also be an employee of the company under a contract of employment.

35.2.2. There is also no reason in principle why someone whose shareholding in the company gives him control of it, even total control, cannot be an employee. It will be no answer to his claim to be such an employee to argue that: (i) the extent of his control of the company means that the control condition of a contract of employment cannot be satisfied; or (ii) that the practical control he has over his own destiny – including that he cannot be dismissed from his employment except with his consent – has the effect in law that he cannot be an employee at all.

35.2.3. It is ultimately a question of fact whether or not a shareholder or director is an employee of the company.

35.2.4. There may be two issues: First whether the putative contract is genuine or a sham, secondly assuming it is genuine, whether it amounts to a contract of employment.

35.2.5. In cases where the alleged contract is not in writing, or is only in brief form, it is obvious that it will usually be necessary to inquire into how the parties have conducted themselves under it.

35.2.6. In deciding whether a valid contract of employment was in existence, consideration will have to be given to the requisite conditions for the creation of such a contract and the tribunal will want to be satisfied that the contract meets them.

35.2.7. In many cases involving small companies, with their control being in the hands of perhaps just one or two directors/shareholders, the handling of such matters may have been dealt with informally and it may be a difficult question as to whether or not the correct inference from the facts is that the putative employee was, as claimed, truly an employee. In particular, a director of a company is the holder of an office and will not, merely by virtue of such office, be an employee: the putative employee will have to prove more than his appointment as a director. It will be relevant to consider how he has been paid: whether he has been paid a salary, which points towards employment, or merely by way of director's fees, which points away from it. In considering what the putative employee was actually doing, it will also be relevant to consider whether he was acting merely in his capacity as a director of the company, or whether he was acting as an employee.

35.2.8. In cases where the putative employee asserts the existence of an employment contract, it will be for him to prove it. Although the absence of a written agreement will obviously be an important consideration, if the parties' conduct under the claimed contract points convincingly to the conclusion that there was a true contract of employment, tribunals should not seize too readily on the absence of a written agreement as justifying the rejection of the claim.

36. The representative for the SoS referred in its pleadings to the definition of employee at section 54 of the National Minimum Wage Act 1998 ("NMWA"):

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.

(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.

37. The respondent also referred to section 318 of the Companies Act 1985 which provides that:

(1) Subject to the following provisions, every company shall keep at an appropriate place –

(a) In the case of each director whose contract of service with the company is in writing, a copy of that contract;

(b) In the case of each director whose contract of service with the company is not in writing, a written memorandum setting out its terms; and

(c) In the case of each director who is employed under a contract of service with a subsidiary of the company, a cop0y of that contract or, if it is not in writing, a written memorandum setting out its terms.

38. The respondent also referred to:

38.1. Secretary of State for Business, Innovation and Skills v Knight [2014] IRLR 606 regarding consideration.

38.2. Eaton v Robert Eaton Ltd & Secretary of State for Employment [1988] IRLR 83, in which the EAT ruled that a director of a company is normally the holder of an office, not an employee, and evidence is therefore required to establish that the director was in fact 'employed'. Factors include:

38.2.1. Whether there was an express contract of employment or a board minute or written memorandum constituting an agreement to employ the person as a director;

38.2.2. whether remuneration was by way of salary as opposed to by way of director's fee, was fixed in advance rather than made on an ad hoc basis and/or was by way of entitlement rather than gratuitous;

38.2.3. the functions actually performed by the director, i.e. was he merely acting in a directorial capacity or was he under the control of a board of directors.

38.3. Autoclenze Ltd v Belcher [2011] ICR 1157 SC in relation to the genuineness of a contractual term ('sham' contracts): Where there is a dispute as to the genuineness of a written term in an employment contract, the focus of the enquiry 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.

38.4. Fleming v Secretary of State for Trade and Industry [1997] IRLR 682, one of the cases considered by the Court of Appeal in Neufield.

38.5. Rainford v Dorset Aquatics Ltd [2021] UKEATPA/0126/20, in which the Employment Appeal Tribunal upheld the decision of the Employment Tribunal that a director/shareholder of a company was not an employee. The EAT held that: "Although there is no reason in principle why a director/shareholder of a company cannot also be an employee or worker, it does not necessarily follow that simply because he does work for the company and receives money from it he must be one of the three categories of individual identified in s230(3)."

38.6. Dugdale v DDE Law Limited [2017] UKEAT/0169/16 in which the EAT upheld a decision of the Employment Tribunal that the claimant operated the company more as a partnership than as an employee. The EAT held "it was relevant…too take into account the overall method of operation by which the claimant and her fellow shareholders and directors were proceeding". The EAT also considered the ways in which a working director and shareholder may be remunerated by a

company. It held that payment by dividend will generally point away from employment status because "entitlement to a dividend derives from the shareholding; it is not dependent on the existence of a contract of employment." The EAT distinguished the case of Department for Employment and Learning v Morgan [2016] NICA 2, [2016] IRLR 350, in which the Northern Ireland Court of Appeal held that, in a situation where a director chose to be remunerated by way of dividends, that payment was in reality an emolument for services rendered for the company and he was entitled to statutory payments for redundancy on the insolvency of the company.

38.7. Rajah v Secretary of State for Employment [1995] EAT/125/95.

Determination of the issues

39. The SoS appeared to submit that the contract (or even the Company itself) was a sham because of the financial arrangements, in particular the failure by the Company to pay the claimant the NMW. The SoS referred to the claimant asserting a 'verbal contract'. However, the claimant accepted that there was no written or oral contract of employment. He relied instead on an implied contract of employment. There were therefore no contractual terms relied on, from which the true arrangements might deviate. There was therefore no 'sham' contract. The Company itself was clearly not a sham, given the evidence contained in the filed accounts, the employees employed by the company and the other evidence of its operation.

40. The claimant asserted that the existence and terms of his implied contract of employment could be determined from the conduct of the parties. It was common ground that there was no written contract, service agreement, statement of employment particulars nor any other written record of agreed terms nor memorandum of board minutes between the claimant and the Company regulating his relationship with the Company. If he was an employee, the lack of such a service agreement or memorandum recording the terms of such an agreement, put the Company in breach of section 318 of the Companies Act 1985 (CA).

41. The contrast between the contractual arrangements for the claimant and the other employees of the Company are particularly relevant, in my view. This was not a Company which was so small and informal that no one had a written contract of employment. There was a clear intention, knowledge and ability to create contractual employment relationships with employees which were recorded in writing. However, the claimant did not see any need to do the same for himself, suggesting that he did not intend to have an employment relationship with the Company.

42. The absence of any written record of a service agreement and/or the Company's failure to comply with section 318 CA is not determinative but, when contrasted with the treatment of the other employees of the Company, in my judgment it weighs heavily against the existence of an implied contract of employment with the claimant.

43. I find that there was mutuality of obligation between the claimant and the Company. The claimant's evidence, which I accepted, was that he worked solely for the Company on a full-time basis, doing such hours as were necessary, in return for remuneration which was a mix of wages and dividends. The claimant's duties appear to have shifted over the life of the Company from being more 'on the tools' to more in the office, although he told me that even in the final weeks of trading he spent significant time working on the tools. Having been a sole trader, he was prepared to do whatever was required for the Company, both office and hands on work. He was clearly not merely working as a 'statutory director'. I find that he only ever provided his own work and skill in the performance of his tasks as Managing Director and there was no suggestion that he substituted or would have substituted any other to carry out that part of his role. However, he presumably could and did substitute others to carry out work 'on the tools', as and when required.

44. The Court of Appeal in Neufeld examined at length the case law relating to the issue of control in the 'one man company'. At paragraph 86 it held that the level of control resulting

from a majority shareholding will obviously form, "a part of the backdrop against which the assessment will be made of what
has been done under the putative written or oral employment contract that is being asserted. But it will not ordinarily be of any special relevance in deciding whether or not he has a valid such contract. Nor will the fact that he will have share capital invested in the company; or that he may have made loans to it; or that he has personally guaranteed its obligations; or that his personal investment in the company will stand to prosper in line with the company's prosperity; or that he has done any of the other things that the 'owner' of a business will commonly do on it's behalf". It is clear therefore that the fact that the claimant was the sole director and a 50% shareholder of the Company is not of any special relevance to the question of control in respect of the Ready Mixed Concrete test for employment status.

45. However, the fact that there was no evidence of the claimant making formal holiday requests, keeping holiday records, keeping sickness records and the fact that he was not subject to any disciplinary or grievance procedures suggest that his level of control was absolute. He was not required to account to the Company for his actions. This appears to have been because he and the Company were, in effect, one and the same entity and any supervision or accountability would have been entirely artificial in the circumstances. His level of integration into the business is such that the business does not exist without him. In effect, he is the business.

46. The claimant's hours of work were not inconsistent with there being a contract of service. Many employees work more than their allotted full-time hours in accordance with the requirement of their contract to carry out such duties as their role requires. However, the claimant's dedication his role, such that he took his work on holiday with him, may also suggest that of a director/proprietor of a business who is wholly invested in its success. I find that the claimant's pattern of work is not determinative either way.

47. The claimant's remuneration was by way of 'wages' (£14,400 gross per annum) and dividends. The fact that part of his remuneration is called 'wages' and not 'director's fees' points to the claimant being an employee.
The payment of income tax and national insurance by PAYE, the existence of P60s, payslips and the employee and employer contributions into the NEST pension also all point to an employment relationship. As does the fact that he is identified as an 'employee' on his payslips and in the notes to the final set of accounts.

48. Company directors, as office holders, are not entitled to receive the NMW for the work they do as an office holder, but can set their own rate of remuneration. However, if they are also an employee or a worker they must be paid the NMW for the work they do as an employee. The fact that the 'wages' element of the claimant's remuneration was below NMW in recent years suggests that he 'set his own rate of remuneration' to be paid to him as a Company director, and that it was not intended to be paid to him as an employee. The SoS suggests that, had it been intended to be paid to him as an employee, it would have kept pace with the NMW. I have considered this submission carefully. Many employees are unlawfully paid below the NMW and that fact does not prevent them being 'employees' for the purpose of section 230 ERA. It may be the case that a company director who is ignorant of the law may pay themselves below NMW unlawfully and remain an 'employee' by virtue of their contractual arrangements. However, in this case, I do not accept that the Company was ignorant of the law. There is no suggestion that the other employees of the Company were unlawfully paid below the NMW and someone at the Company or acting on behalf of the Company must therefore have known the law. The fact that the claimant alone received less than the NMW suggests that his wages were not intended to be remuneration as an employee, but rather a part of his package of remuneration as company director alongside his dividends. The lack of expenses claims and the other financial arrangements between the claimant and the Company point away from an employment relationship.

49. While dividends can be paid as remuneration as part of a contract of employment, in this case, the claimant accepted that they were a reward for the success of the Company. He says he viewed them as 'a bonus'. In addition, it was the claimant's accountant who decided the amount of his wages and determined the wage arrangements for reasons of tax

efficiency. These facts suggest that the reason for the payment of the wages alongside the dividends was to maximise the tax efficiency of the claimant's remuneration as director of the business, not as a result of or in consideration of a contract of service with the Company.

50. In conclusion, I find that while there are elements of an implied contract of employment, such as mutuality of obligation and personal service, on balance the facts point away from the existence of such an arrangement. Whilst finely balanced, I conclude that the absence of any written terms, the absence of any apparent intention to create a contract of employment, the difference in the contractual arrangements for the other employees of the Company, the failure to comply with the NMW and section 318 CA and the nature, amount and origin of the claimant's remuneration are not consistent with a contract of service.

51. The claimant was not an 'employee' of the Company within the meaning of section 230 ERA at the date of the Company's insolvency. The claim therefore fails and is dismissed.

Employment Judge Bright
8 March 2023