



EMPLOYMENT TRIBUNALS

Claimant
Mr A Beck

Respondent
The Secretary of State

Heard at: Watford (CVP)

On: 25 October 2024

Before: Employment Judge S Moore (sitting alone)

Appearances

For the Claimant: In person

For the Respondent: Ms L Whalley, lay representative

RESERVED JUDGMENT

The Claimant was not an employee at the date of insolvency and the claims for redundancy pay, notice pay, holiday pay and arrears of wages are dismissed.

REASONS

Introduction

1. The Claimant is bringing a claim for payment from the National Insurance Fund (“the Fund”) under s.166 and/or s.182 Employment Rights Act 1996 (ERA), namely for redundancy pay, notice pay, holiday pay and arrears of wages.
2. The Claimant says he was employed by D & S Services (UK) Limited (“the Company”) from 23 February 2015 until 13 September 2023 as a Maintenance Engineer.
3. The Respondent accepts that the Company is insolvent within the meaning of s.166 and s.183 of the ERA, having entered into a creditor’s voluntary liquidation on 24 October 2023. However, it does not accept that the Claimant was an employee of the Company.
4. Although the Claim Form states the Claimant’s employment ended on 13 September 2023 and the date of insolvency was 24 October 2023, I have not

regarded the difference between the two dates as material for the purposes of this judgment.

Background

5. The company was incorporated on 16 September 2014. The Claimant's wife, Mrs Vikki Beck (VB), was the sole director and shareholder of the company. The business of the Company was property maintenance.
6. On 6 January 2020 the Claimant became a director of the company.
7. On 24 January 2023 VB resigned as a director and her shareholding was transferred to the Claimant so that he owned 100% of the shares.
8. On 24 October 2023 the company entered into a creditor's voluntary liquidation.
9. On 31 October 2023 the Claimant made an online application to the Redundancy Payments Service (RPS) and on 2 November 2023 submitted a Director's Questionnaire.
10. In his online application he said he had been employed by the Company as a Maintenance Engineer since 23 February 2015.
11. He said his gross income was £1,500 per month and that he worked 40hrs per week, Monday to Friday.
12. He further stated his gross earnings in the year:
 - Ending 5 April 2023 had been £12,825
 - Ending 5 April 2022 had been £17,450
 - Ending 5 April 2021 had been £8,363

(The figures are slightly different from the figures in the Claimant's P60s for April 2021 and April 2022 (see below at paragraph 27) however nothing turns on this.)
13. The Claimant also stated that he hadn't been paid any wages since December 2022.
14. In the Director's Questionnaire the Claimant left blank the question: "If you had a contract of employment or statement setting out the main conditions/terms of your employment: When were you issued with these documents?". The form then states: "If you did not have a written contract of employment or if it does not include the information below, answer the following questions" and the Claimant answered those questions.
15. By letter of 6 November 2023 the Claimant was informed by the Insolvency Service that his claim had been rejected because they were not satisfied that he had been an employee of the Company at the time it became insolvent.
16. By email of 7 November 2023 the Claimant maintained he had been an employee and said he hadn't been paid due to lack of funds/company cashflow. That the decision not to be paid had been made on a month-by-month basis and was not pre-planned.
17. The Claimant subsequently had a conversation with the Insolvency Service. On 11 November 2023 he sent an email stating: "Having had a discussion with your

office I can now see where the error has been made. I put down 40-hour week (as this was my only employment) however I worked 25 hours per week for the salary of £1,500 per month”.

18. It appears that this change/correction of information was in response to the Claimant being informed that according to the information he had provided in his online application he had been paid less than the National Minimum Wage.
19. The Claimant then submitted an amended Director’s Questionnaire in which he stated he worked 25 hours per week for the (same) salary of £1,500 per month.
20. On 20 November 2023 he sent a further email to the Insolvency Service stating: ‘I have attached the new documents signed 10 November which your office advised me to send, which was the correct hours showing that I was paid correctly.’
21. The amended Directors Questionnaire again made no reference to the Claimant having a written contract of employment.

Evidence

22. At the hearing today the Claimant said that in fact he did have a written contract of employment. He had not provided the Insolvency Service with it, apparently because someone at the Insolvency Service had told him that it was too old to be relevant because it dated from 2015.
23. The Tribunal and Ms Whalley were subsequently provided with his document.
24. The contract is dated 20 February 2015 and provides that the Claimant’s position is that of Maintenance Engineer, that his hours of work are 8am-5pm Monday to Friday, and that his pay is at the rate of £270 per week (payable monthly) (which is an annual salary of £14,040). The contract is signed by the Claimant and VB.
25. As regards sick pay, the contract provides that if the Claimant was absent for 7 days or less, he had to complete a self-certification form in respect of each day of absence and if absent for more than 7 days provide a medical certificate from a GP. It also provided that the Claimant would be paid statutory sick pay during his absences.
26. The Claimant was asked about the fact that according to the contract he had worked 40 hours per week yet he had told the Insolvency Service he worked 25 hours per week. The Claimant said he had reduced his hours in 2019 or 2020 because of his back problems so from then he only did what he could manage. However, he didn’t suggest the contract had been changed or that he had been required to work particular hours on particular days. Further, he said his salary hadn’t been reduced and he had still received £270 per week until January 2023, when he stopped being paid altogether.
27. The Claimant was also asked about the fact that the P60s he had submitted, for April 2021, April 2022 and April 2023 were not consistent with the Claimant being paid pursuant to the contract. According to his P60s his gross earnings for those years were respectively: £8,187.82, £17,100 and £12,825. It was also put to the Claimant that his P60 for April 2023 was not consistent with a salary of £18,000 (the amount in his claim to the Insolvency Service). In that latter

respect, the Claimant said that since the last time he had been paid had been December 2022, the figures were not that different. As regards the other discrepancies, the Claimant initially said he thought the P60s were wrong as he had been paid the same wages every month. However, after a break during which the Claimant apparently spoke to his wife and looked at some old bank statements, he said that in fact he had been paid a different amount each month since 2015.

28. As regards dividends, the Claimant initially said he took dividends “now and then” and then said his wife took dividends when she was the director.
29. As regards holiday, the Claimant said he hadn’t had a holiday since about 2019 but had taken some days off.
30. As regards what he would do if he was sick, the Claimant said he would just tell his wife he didn’t feel up to it that day, who would rearrange any appointments.

Conclusions

31. The issue is whether the Claimant was an employee of the company at the date of insolvency, namely 24 October 2023.
32. Section 230 ERA provides:
 - (1) In this Act, “employee” means an individual who has entered into or works under (or where the employment has ceased, worked under) a contract of employment.
 - (2) In this Act “contract of employment” means a contract of service or apprenticeship, whether express or implied, and (if it is express) whether oral or in writing.
33. The Claimant relies on a written contract of employment dating from 2015 (“the 2015 contract”). However, I am not satisfied this contract is genuine; the Claimant made no mention of it in his application to the RPS, in his subsequent email communications or in his Claim Form, and I do not find his explanation that he was told the contract wasn’t relevant because it dated from 2015 to be a credible one.
34. In any event, “the relevant date for the purposes of deciding whether the Secretary of State is liable to make payments out of the National Insurance Fund to employees of an insolvent company, is the date when the company became insolvent, not the position as it was two years ago, five years ago or ten years previously” (*Rajah v Secretary of State* EAT/124/95).
35. I consider the 2015 contract had ceased to govern the parties’ relationship by October 2023 (if, indeed, it ever did) and that by that date there was no contract of employment between the parties at all (if there had ever been one).
36. First, the Claimant said that he stopped working 40 hours per week and began to work 25 hours per week from about 2019/2020, yet no change was made to the 2015 contract. Further, the Claimant said that he received the same wages after the reduction in his hours as he had done beforehand, then later in his evidence said his pay had in fact varied from month to month since 2015. Moreover, it is apparent from the Claimant’s P60s for April 2021 and April 2022 that the fluctuations in the Claimant’s pay were significant.

37. Secondly, as at the date of the insolvency, the Claimant was a director and shareholder of the company. There is no reason in principle why someone who is a director and a shareholder of a company cannot also be an employee of that company, if there exists a genuine contract of employment between them. However a genuine contract of employment requires there to be (i) mutuality of obligation to offer work (on the part of the employer) and to perform the work offered (on the part of the employee) (ii) control in that ultimate authority over the purported employee in the performance of their work must rest with the employer (iii) and an obligation to perform the work personally on the part of the employee. In this case, as at the date of the insolvency, the Claimant was the sole director of the company and owned 100% of the shares. It is difficult to see how in those circumstances the company could exercise any meaningful authority over the Claimant since the only circumstances in which he could be dismissed, other than in the event of insolvency, would be in the event of a sale of his shareholding – which would be under his own control.
38. Thirdly, there is no evidence of the Claimant behaving as if he was bound by an employment contract with the Company or of the Company behaving as if it was bound by an employment contract with the Claimant. The Claimant reduced his hours at his own behest and there is no evidence that his reduced hours were worked to any required pattern, or that he filled in self-certification forms when he was sick or that he was paid statutory sick pay (rather than his normal pay) when sick or that he took holiday. For its part, the Company did not pay the Claimant a regular salary and there is no evidence the amounts paid related to the number of hours worked. Further, the Company did not pay the Claimant any salary at all for the last 9 months of his employment.
39. It is true that the Claimant has provided P60s for 2021, 2022, and 2023 and pay slips for October, November and December 2022 and August and September 2023 (the latter two pay slips recording zero pay), which record deductions for tax and National Insurance. However, the total amounts paid are relatively small, and since the last wage received by the Claimant was in December 2022 he did not pay any tax or National Insurance in the 9 months before the Company became insolvent. I am therefore not satisfied that this factor is sufficient to outweigh the other considerations set above.
40. Accordingly, I am not satisfied the Claimant was an employee of the Company at the date of insolvency and the claims are therefore dismissed.

Employment Judge S Moore

Date: 27/10/2024

Sent to the parties on: 9/12/2024

For the Tribunal: N Gotecha