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DIRECTORS AND CONTROLLING SHAREHOLDERS CAN STILL CLAIM AS EMPLOYEES

New Guidance was laid down in the case of Secretary of State BERR vs. Neufeld and Howe, Court of Appeal 2009 IRLR 475 at the behest of the Government as to when in the circumstances of a Company's' insolvency Directors as controlling Shareholders can also be Employees and thus entitled to claim redundancy pay, notice pay and holiday pay from the National Insurance Fund under Section 182 of the Employment Rights Act 1996.

In both Neufeld and Howe, the Secretary of State appealed against the EAT's decision to support a finding of employment status for the relevant Director / controlling Shareholder.

N joined NP Ltd as a Salesman in 1982 and became a Director and Shareholder in 1988 and when this Company was transferred to AN Ltd then he owned 90% of the shares in the Company, agreed with his 2 co-Directors he would be Managing Director and also be employed as part of the Sales Team. There was no written Contract of Employment, but he was paid a weekly wage subject to tax and national insurance and he worked on average 60 hours a week and did not take all his holiday entitlement and provided personal guarantees for the Company and also lent money to it.

In the case of H, he set up the Business in 1979 and in 2004 transferred his assets to TRM Ltd of which he held 100% of the shares, was sole Director and was paid a weekly wage from which tax and national insurance were deducted. Again there was no written Contract of Employment, again guarantees for liabilities were given to suppliers and also a bank loan and then when it had financial difficulties he put it into voluntary liquidation and like N claimed monies from the National Insurance Funds.

Clearly the Court must be wary of sham Contracts of Employment and in particular whether or not the Contract was a true Contract of Employment, as opposed to, for example, a Contract for services.

Once that had been disposed of the Tribunal would look at a non exhaustive list of perhaps 8 factors to be taken into account when deciding whether a majority Shareholder had an Employee's status.



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1. The Contract of Employment if there was one, would not necessarily be definitive if employment status was in dispute. The Court would need to delve into what exactly the Parties had done under that Contract.
2. Employed status was not precluded by the Employee having a controlling shareholding or real or sole control over the Company's activities.
3. Being an entrepreneur building up the Company or profiting from its' success did not militate against the existence of a Contract.
4. Working the hours stipulated and not taking more than the stipulated holiday pointed strongly towards the Contract being valid and binding.
5. Conversely if the alleged Employee's conduct is inconsistent with the Contract or certain key areas not governed by it as one would expect, then it may be easier to make a finding of non Employee status.
6. The lack of a Contract in writing could be evidence that the Contract was not really meant to regulate the relationship, however Parties' actual conduct could tip the balance towards there being a Contract after all. Tribunal must be wary of relying too heavily on the absence of a written document.
- 7&8. While the facts of the individual taking loans from the Company or guaranteeing its' debt or having a controlling shareholding would ordinarily be irrelevant, careful consideration of the reality of the situation needs to be undertaken and "never say never" should be the maxim.

In the above cases N and H were found to be genuine Employees and the Secretary of States' appeals against those findings were dismissed.

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