



Eatons

Is a Director an Employee?

When a company becomes insolvent, whether or not a shareholder and director is an employee, within the meaning of section 230 of the Employment Rights Act 1996 (ERA), for the purposes of a claim for statutory redundancy payment from the Secretary of State for Trade and Industry, can be difficult to ascertain. The Employment Appeal Tribunal (EAT) considered this issue in the case of *Nesbitt and Nesbitt v Secretary of State for Trade and Industry*.

Mr and Mrs Nesbitt were directors of APAC Computer Training Ltd. They managed the company on a day-to-day basis and between them owned 99.99 per cent of the shares.

From the start, they had written contracts of employment with the company, in the same form as those of other company employees. They were paid salaries commensurate with their roles as the senior managers of the business but did not receive directors' fees or dividends.

In the course of 2006, the company became insolvent and on 3 July of that year the remaining employees, including Mr and Mrs Nesbitt, were made redundant by the liquidator. The couple applied to the Insolvency Service for redundancy payments under the insolvency provisions of the ERA. Their claims were rejected on the ground that they were not employees within the meaning of the Act.

The Employment Tribunal agreed with the Insolvency Service on the basis that the Nesbitts were in joint control of the company.

In this case, apart from the level of control they had over the company, all the indications were that Mr and Mrs Nesbitt were employees. They had proper employment contracts (equivalent to those issued to other employees), they received all their remuneration by way of salary and they 'behaved like employees'.

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The EAT overturned this decision on appeal. In its view, the fact of the Nesbitts' control over the company was not sufficient of itself to deprive them of employment status if they otherwise satisfied all the criteria for employment. Mr Justice Underhill stated, "I believe that the law is that the fact that a claimant under the employment protection legislation is a majority shareholder and a director of the company which employs him does not affect his status as employee unless the tribunal finds that the company is a 'mere simulacrum'... and thus, by the same token, that the contract between it and the putative employee is a sham."

One of the relevant factors to be taken into consideration in cases such as this is the contract of employment. We can assist you to ensure that your employment terms make sure you have the appropriate contractual relationship with your company.

To discuss any employment related issues please contact Maureen Singleton, Head of Corporate and Employment Department, on Tel: 01274 728 327.

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