

INSOLVENCY NEWSFLASH

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Team Specialists

CONTROLLING SHAREHOLDERS ARE ENTITLED TO REDUNDANCY PAYMENTS

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The Redundancy Payment Service (RPS) has habitually refused to make redundancy payments to directors who are controlling shareholders of companies and who also claim to be employees.

This is especially common in small businesses where there may or may not be a written contract of employment and a director/shareholder takes some income out as dividends and some as salary.

The RPS has argued that a director/shareholder is not an employee of the company entitled to redundancy because he in effect controls his own destiny. Therefore it is impossible for him to lose his job or be subject to the control exerted over a normal employee.

The cases decided by the courts to date have not been clear, which has meant that a large number (over 600) of claims by directors to Employment Tribunals had built up.

The Court of Appeal test case of BERR –v- Nuffield & Howe has now clarified the position and made it much easier for insolvency practitioners to advise director/shareholders as to their entitlements.

This case clearly decided that there is no reason in principle why someone whose shareholding gives him or her total control over a company cannot be an employee who is entitled to redundancy payments.

The Court of Appeal stressed that the decision on whether an individual is an employee of the company is a question of fact. Any tribunal or court should determine firstly whether or not a putative contract is a genuine contract or a sham. The second stage, assuming the contract is a genuine one, is to determine whether or not the contract is a contract of employment rather than a contract for services or otherwise. This is of course the same test that every employee must go through.

Clearly this decision has improved the position of the director/shareholder when it comes to redundancy and has clarified the law for all concerned.

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