

RadcliffesLeBrosseur



Employment Briefing

February 2010

Case of the month

In *Ashby v Monterry Designs Limited* (UKEAT/0226/08) the Employment Appeal Tribunal (EAT) reviewed the rules that determine whether a director of a company who is also a controlling shareholder may also be an employee. The Employment Tribunal (ET) held that the claimant was self-employed. There was no written contract so the tribunal heard evidence from the claimant about her role. The ET relied in particular on the fact that the claimant ran the company and although she also performed work as a machinist she had with a fellow director equal control over the day-to-day management of the business and over any major financial decisions. The ET decided that there was a basic element missing from the employment relationship, namely that there should be an irreducible element of control by the company over the claimant as an employee and that this was missing because of her 50% shareholding in the business. Accordingly it held that although the claimant had been an employee from the date she sold her shares in the business four months before her resignation that did not allow her enough service to pursue her constructive dismissal claim.

On the appeal the EAT pointed out that the decision of the ET had been given before the case of *Secretary of State for Business Enterprise and Regulatory Reform v Neufeld and Howe* [2009] EWCA Civ 280 had been decided by the Court of Appeal. Unluckily for these employers that judgement entirely changed the approach that needed to be taken in such cases.

The correct approach is to accept that there is no reason in principle why a shareholder and director of a company may not also be an employee of the company even if the shareholding effectively gives the director control. The status of such an individual has to be determined by a court or tribunal as a matter of fact in each case. Two questions have to be asked and answered. The first is whether the contract being relied on is genuine or a sham. Secondly if it is genuine does it amount to a contract of employment rather than a contract of someone who is self-employed? In the case of small companies where matters may have been dealt with informally it may be difficult to determine the exact nature of the contract. However the court cannot regard as determinative that the individual has a controlling shareholding.

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Further Information

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