EMPLOYMENT TRIBUNALS

Claimant: **Mr J Hamilton**

Respondents: **Barrier Ex Limited (In Administration) (1) Barrier Limited (2)**

Heard at: **Newcastle CFCTC by CVP** **On:** **10 May 2021**

Before: **Employment Judge Arullendran**

Representation:

Claimant: **In person**
Respondent 1: **No attendance**
Respondent 2: **Ms Sarah Furness (solicitor)**

RESERVED JUDGMENTON STRIKE OUT

The Judgment of the Tribunal is as follows:

1. The Claimant's claims against the second Respondent are struck out as having no reasonable prospect of success.
2. The second Respondent's application for a Deposit Order against the Claimant is dismissed.

REASONS

The Hearing

1. This has been a remote hearing which has not objected to by the parties. The form of remote hearing was video (V). A face to face hearing was not held because it was not practicable, no-one requested the same and all the issues could be determined in a remote hearing.

2. The issues to be determined by the Employment Tribunal were agreed by the parties and set out in the case management order of Employment Judge Aspden on 5 February 2021 as follows:

    i. To consider whether any of the complaints against the second Respondent should be struck out on the grounds that they have no reasonable prospect of success.
    ii. If any of the complaints are not struck out, to consider whether the Claimant should be required to pay a deposit as a condition of pursuing such complaints, on the basis that they have little reasonable prospect of success.

3. I explained to the parties that I am working remotely and do not have access to the Tribunal file in this matter, but that I have sight of a number of electronic copies of documents, such as the pleadings and correspondence between the parties and the Tribunal.

4. I was provided with an electronic joint bundle of documents consisting of 228 pages, including the index. The electronic bundle has been prepared by the Respondent, but not in accordance with the Presidential Guidance issued by the President of the Employment Tribunal on 24 September 2020. In particular, the index to the bundle is not in a separate documents and, therefore, the individual page numbers do not accord with the numbers on-screen, there are no bookmarks and the ocular character recognition function had not been carried out prior to the submission of the bundle which took 40 minutes of my reading time to perform, during which I was unable to access any of the PDF documents on my Judicial laptop. This left me with very little time to pre-read the relevant documents before the 3-hour hearing commenced. Ms Furness was unable to explain why the bundle had not been compiled in accordance with the Presidential Guidance and I asked her on two occasions whether she was aware of the Presidential Guidance, which she failed to answer directly and gave a general reply along the lines that they had encountered difficulties. I took her evasiveness to mean that she had not read the relevant Presidential Guidance. I explained that it is very difficult to make notes and navigate the electronic bundle in remote hearings where the page numbers do not match those in the search function and there are no bookmarks which I can use to access the relevant documents. It was acknowledged by the parties that the size of the bundle is excessive for a 3-hour hearing.

5. The Claimant had sent a statement to the Respondent and Tribunal on 9 March 2021 dealing with the issues arising in this hearing. However, this document was not in the joint bundle and I had not received a copy from the Tribunal. The second Respondent forwarded a further copy of this document to me at the beginning of this hearing and it was agreed that I would read it after the parties had made their submissions, before I give Judgment. I was also provided with a copy of the Claimant's further and better particulars, which was not included in the bundle. I am grateful to the second Respondent's representative for providing me with these documents.

6. The parties completed their submissions at 12.35pm. Given that the hearing was due to conclude at 1pm and I needed to read a large number of documents before making a

decision in this matter, it was agreed that I would reserve the Judgment and sent it out to the parties in due course.

The Claims

7. The Claimant has submitted claims to the Tribunal against both Respondents for unfair dismissal, a redundancy payment, breach of contract (notice pay) and unauthorised deduction of wages contrary to section 13 of the Employment Rights Act 1996.

8. The first Respondent is in administration and the administrator, whilst having given permission for the claims to proceed, has indicated that they shall not be taking part in any hearings, other than by way of written representations.

Submissions

9. The second Respondent ("the Respondent") made oral submissions and submits that the Claimant has no reasonable prospect of succeeding with any of his claims against the second Respondent and, in the alternative, argues that a Deposit Order should be made against the Claimant in the sum of £1,000 in respect of all the claims against the second Respondent on the grounds that he has little reasonable prospect of success.

10. The Respondent identified that the Claimant is arguing he was an employee on 3 grounds, namely (i) that he was employed by both Respondents under a single contract of employment; (ii) that he accepted instructions from Mr Bowles who was the director of the second Respondent; and (iii) that his salary was sometimes paid by the second Respondent.

11. The Respondent submits that there is a dispute between the parties as to the correct version of the contract of employment. The Claimant relies on the copy of the contract produced at pages 167 to 176 of the bundle, but the Respondent relies on the copy produced at pages 199 to 207 of the bundle. The Respondent submits that it is not named in the latter contract and that the contract is between the first Respondent and the Claimant only. In any event, the Respondent submits that, the Claimant's own case is that the second Respondent is named as a guarantor, rather than the employer, in the version of the contract at pages 167 to 176 of the bundle and paragraph 7 of that version of the contract states *"if "the company"* [first Respondent] *cannot make payments to "the employee" in accordance with the provision of any part of this contract of employment "the guarantor" shall make the payments and stand in the stead of "the company" and shall be responsible for any clause within this agreement that creates a fiscal liability to "the employee"."* The Respondent submits that this clause does not make it the Claimant's employer.

12. The Respondent submits that the Claimant has never stated in his ET1 that he was employed by the second Respondent. In fact, he states in his particulars of claim that he started his employment with the *first Respondent* in 2016. Further, in his email to the Tribunal dated 26 October 2020, which can be seen at page 219 of the bundle, the Claimant stated that *"In this matter Barrier Limited are the Guarantor to my contract whilst Barrier Ex were the employer …*". The Respondent submits that the Claimant has at no point in the particulars of claim stated that he was employed by the second

Respondent and that he has only sought to amend his approach to the claims after receiving the second Respondent's ET3 in which they state the Tribunal does not have jurisdiction to hear a breach of contract claim against a party who is not the employer, in accordance with the case of Oni v Unison Trade Union UKEAT/0092/17.

13. The Respondent submits that the Claimant's assertion that he was jointly employed by the two Respondents is in contradiction with his assertion that the second Respondent was contractually held to be a guarantor and would take the place of the first Respondent if the first Respondent went into administration (clause 7 of the contract of employment). If the Claimant is correct and the second Respondent was his employer, there would never be a need to have clause 7 in the contract of employment.

14. With regard to the Claimant having received instructions from the director of the second Respondent, Mr Bowles, to carry out work for the second Respondent, Ms Furness submits that there is no evidence of any emails of such instructions in the bundle. The only emails referred to by the Claimant show that some work was carried out by the Claimant for the second Respondent, such as pages 152, 153, 158 and 186-9 of the bundle, but they do not contain instruction to the Claimant to carry out work. The Respondent submits that it is common ground that Mr R Bowles owned shares in both the first and second Respondent companies, but the Respondent submits that those shares were not sufficient for them to be considered associated employers or group companies. The Respondent submits that the emails relied on by the Claimant in the bundle show a trading relationship existed between the companies and that they shared clients.

15. The Respondent submits that there are several companies which exist and operate under Barrier Group, but the first Respondent is not part of that group and was set up as a separate entity. The Respondent submits that all the employees in the various companies were given email address "@Barrier Group Ltd" and this is the reason for the emails from Mr R Bowles to the Claimant having this address in the "from" field of each message, although the Claimant's email address was @Barrier Ex Ltd, which shows that the first Respondent was not part of the group or a subsidiary of the group. It is also common ground that the different Barrier companies were housed in the same building as that of the first Respondent and the companies shared common services, such as administration.

16. The Claimant relies on the fact he was given a copy of the second Respondent's company handbook by Mr Bowles at the beginning of his employment. However, the Respondent submits that the covering email at page 29 of the bundle states that "*These are preliminary documents. They are based on standard templates we use, so there will be some anomalies*" which shows that the handbook was meant to be a precedent only. The Respondent submits that the document at page 216 of the bundle shows the front page of the handbook issued by the first Respondent to the Claimant and Ms Furness makes the point that the handbook was not incorporated into the contract of employment in any event.

17. With regard to the allegation that the Respondent made payments of PAYE on behalf of the Claimant to the Revenue, the Respondent submits that there was a loan account between the first and second Respondent companies and payments were made to the

first Respondent when they experienced cashflow problems. The Respondent submits that the documents at pages 193, 213, 214 and 189A of the bundle show payments which were made to the loan account.

18. With regard to the Claimant's salary, the Respondent submits that all the documents produced by the Claimant show that he received his wages from a company with the first 3 initials BAR. This is equally applicable to the first and second Respondent. Further, the Respondent submits that it does not use "faster payments", which is the method used to pay the Claimant's wages, and the second Respondent only makes salary payments by BACS, therefore the Claimant's wages have never been paid by the second Respondent. Further, all the payslips produced by the Claimant show that his wages were paid by the first Respondent.

19. The Respondent relies on the case of Ready Mixed Concrete (South east) Ltd v Minister of Pensions and National Insurance [1968] and submits that the Claimant cannot establish that he was required to perform personal service for the second Respondent, that there was no mutuality of obligation between the parties or that he had been integrated into the business or paid by the second Respondent.

20. The Respondent also relies on the case of Stephenson v Delphi Diesel Systems Ltd 2002 UKEAT/1314/01 and submits that there was no contractual relationship, but rather an agency relationship with the end user, especially as there was no mutuality of obligation between the parties.

21. The Respondent finally relies on the case of Troutbeck SA v White and another [2013] EWCA Civ 117 and submits that there is no evidence of the level of control required to find an employment relationship between the parties, whether that be contractual or otherwise.

22. The Claimants made oral submissions and I have taken into account the contents of his witness statement, the contents of which are not produced here. The Claimant submits that both Respondents are named in his contract of employment at pages 167 to 176 of the bundle, that he carried out work for the second Respondent and that they paid him his wages and deductions for PAYE to the Inland Revenue on his behalf, which, all indicate that he was an employee of both the first Respondent and the second Respondent.

23. The Claimant submits that, although the payment of salary into his bank account are all labelled "BAR", his bank has been unable to provide him with details of who made the payments through the faster payment scheme without permission from the payer to release that information, which has not been provided.

24. The Claimant relies on the document at page 179 of the bundle, which is a memo from the first Respondent, stating that the family and Barrier Group would continue to support the first Respondent in respect of their liability to pay wages. The Claimant submits that this memo has been signed by Mr Nightingale, who is a director of the second Respondent.

25. The Claimant submits that documents and emails he has produced during his employment are stored on the server for the second Respondent and the intellectual property he has generated has been accessed by the second Respondent, indicating that the second Respondent was his employer.

26. The Claimant relies on the copy of the second Respondent's company handbook at pages 29 to 127 of the bundle and submits that this was provided to him when he started his employment. He submits that at page 31 of the bundle it states that he is employed by Barrier Ltd and the duties set out at page 42 are duties to be carried out for the second Respondent. The Claimant relies on sections of this company handbook in respect of the requirement to supply work, his professional conduct, applying his whole time and attention to the employment, the right of the second Respondent having access to the intellectual property generated in the business and in respect of his employment prospects.

27. The Claimant submits that he does not dispute he was employed by the first Respondent, however his argument is that he was employed by both of them. In this regard, the Claimant relies on the fact that the second Respondent paid his first month's wages in 2016, as the first Respondent had not been incorporated at the start date of his employment. The Claimant submits that he does not dispute there were intercompany transactions between the first and second Respondents, but he maintains that he was paid directly by the second Respondent in respect of wages. However, the Claimant accepts that the payments he received from the second Respondent were sporadic and this is the reason why he does not appear on the payroll records for the Respondent.

28. The Claimant submits that the email he received from Mr Bowles, such as at pages 158 and 177 to 178 of the bundle, came from the second Respondent's email address, which shows that he was receiving instructions from the second Respondent.

The Law

29. Rule 37 of the Employment Tribunals (Constitution & Rules of Procedure) Regulations 2013, schedule 1 state:
"(1) at any stage of the proceedings, either on his own initiative or on the application of a party, the Tribunal may strike out all part of the claim or any response on any of the following grounds-
(a) that it is scandalous or vexatious or has no reasonable prospect of success; …"

30. Rule 39 of the 2013 Rules state:
"(1) where at a preliminary hearing (under Rule 53) the Tribunal considers that any specific allegation or argument in a claim or response had little reasonable prospect of success, it may make an order requiring a party ("the paying party") to pay a deposit of not exceeding £1000 as a condition of continuing to advance that allegation or argument.
(2) the Tribunal shall make reasonable enquiries into the pain party's ability to pay the deposit and have regard to any such information when deciding the amount of the deposit."

31. I refer to the case of Uber BV and others v Aslam and others [2021] UKSC 5 which set out the test to be applied in determining whether a Claimant is an employee or a worker.

At paragraph 84 of that Judgment, the Supreme Court referred to the decision in Autoclenz Ltd v Belcher [2011] UKSC 41, in which it was said, with reference to applying the definition of worker, that "the true agreement will often have to be gleaned from all the circumstances of the case, of which the written agreement is only a part."

32. I refer to the guidance given by the Employment Appeal Tribunal in the case of Cox v Adecco and Others UKEAT/0339/19/AT, particularly at paragraph 28 of that Judgment, about the analysis necessary to consider strike out, including taking the Claimant's case at its highest and a consideration of the claims and issues by hearing from the parties and taking into account the pleadings and any key documents in which the Claimant sets out the case.

33. The Claimant refers to the case of SD (Aberdeen) v Wright in his further and better particulars in respect of his argument that the Respondents are associated employers pursuant to section 231 of the Employment Rights Act 1996.

34. I refer to the guidance in the case of McTear Contract Ltd v Bennett and others UKEATS/0023/19/SS & UKEATS0030/19/SS in which the Employment Appeal Tribunal cited and approved the common law principle that a contract of employment may not be split between two employers (Laugher v Pointer [1824-34] All ER Rep 388) and gave more recent examples of this principle being applied in the field of employment law in the case of Dacas v Brook Street Bureau (UK) Ltd [2004] EWCA Civ 217 and Cairns v Visteon UK Ltd [2007] ICR 616. I note that in the case of Cairns and Patel v Specsavers Optical Group Ltd UKEAT/0286/18 it was held that, whilst there is a clear line of authority that a servant cannot have two masters at the same time on the same work, that does not prevent the employee from having different employers on different jobs.

Conclusions

35. Applying the relevant law to the submissions made by the Claimant and the second Respondent, I find that there is no reasonable prospect of success in the Claimant establishing that he was employed by both the first and second Respondents simultaneously. In particular, I am guided by the principles set out in Cairns and McTear Contract Ltd, above, and even taking the Claimant's case at its highest, I cannot see how he can possibly establish that he was employed concurrently by both Respondents throughout the whole of his employment from 2016 to the date of his dismissal. On he Claimant's own case, there is no evidence that there was a continuous or ongoing relationship between him and the second Respondent to carry out specific duties on a regular basis, nor does there appear to be any correlation between the projects the Claimant worked on and any alleged payments of wages he might have received from the second Respondent or payments of PAYE to the Revenue on his behalf. As such, there is no reasonable prospect of the Claimant in showing he had been integrated into the second Respondent's business, that they had to provide him with any work at all, or that he had to accept that work.

36. Even if the Claimant could establish that he had been provided with the second Respondent's handbook as being applicable to him when he started his employment, which there is considerable doubt about given that it was described by Mr Bowles as

being a precedent only, there is no evidence that the contents of that handbook were integrated into the Claimant's contract of employment at all.

37. Even if I accept the Claimant's position that the version of his contract of employment, which was in force at the time of his dismissal was that at pages 167 to 176 of the bundle, the second Respondent is named only as a guarantor and paragraph 7 of that contract clearly stipulates the circumstances in which the guarantor provisions would apply. Applying the guidance in the cases of Uber and Ready Mixed Concrete, and looking at the reality of the relationship between the Claimant and the second Respondent, taking the Claimant's case at its highest, there does not appear to be any mutuality of obligation between the Claimant and the second Respondent and the Claimant has provided no particularisation in respect of how often he was required to undertake any projects for the second Respondent. On his own case, the Claimant has submitted that payments he received from the second Respondent were sporadic, indicating, at best, that any work he undertook for them must also have been sporadic. Further, the Claimant accepts that his details would not be on the second Respondent's payroll records as he was not paid regularly by them. This is not a case where the Claimant was employed for a set period of time with the second Respondent in a second job and I note that the Claimant has not brought his claim on that basis in any event. If the Claimant was placed with the second Respondent on an agency basis, as suggested by the second Respondent, this would not give the Claimant the entitlement to claim unfair dismissal, redundancy pay, notice pay or the unauthorised deduction of wages from the second Respondent.

38. Looking at all the matters in the round and taking into account all of the above arguments, I find that there is no reasonable prospect of the Claimant succeeding in his argument that he was employed jointly by the first and second Respondents throughout his employment concurrently, and, therefore, I find that there is no reasonable prospect of the Claimant succeeding in his claims of unfair dismissal, redundancy pay, breach of contract (notice pay) and unauthorised deduction of wages against the second Respondent. Therefore, all the Claimant's claims against the second Respondent are struck out.

39. As the Claimant's claims against the second Respondent have been struck out, there is no requirement for me to consider the Respondent's application for a deposit order and that application is dismissed.

Employment Judge Arullendran

JUDGMENT SIGNED BY EMPLOYMENT JUDGE ON
.....11 May 2021….....