EMPLOYMENT TRIBUNALS

Claimant: Mr Desmond Wilmott

Respondent: Secretary of State for Business and Trade

Heard at: Croydon (by CVP) **On:** 24 July 2024

Before: Employment Judge Richter

REPRESENTATION:

Claimant: In person
Respondent: Mr Soni (Representative)

JUDGMENT

The judgment of the Tribunal is as follows:

1. At a public preliminary hearing held on 24 July 2024 I heard evidence and submissions from Mr Wilmott in support of his claims as set out below. I heard submissions made by Mr Soni representing the respondent Secretary of State. I have also had regard to bundle of 208 pages ("the Bundle") prepared for this hearing and I have read the authorities in a 95 page bundle submitted on behalf of the respondents in this matter.

The Claims

2. It is agreed that on 13th October 2022 JJADS W Limited ("the company"), a cleaning company based in South London, entered into Creditor Voluntary Liquidation.

3. Mr Wilmott was the sole director of the company and owned a 99.8% share of it. Asserting that he was an employee of the company he made a claim to the Insolvency Service for payments of sums he says were owed to him by the company when it entered liquidation. His claim was review and rejected by the

Insolvency Service by letter dated 8 February 2023 which is at pages 104-105 of the Bundle.

4. On 20th November 2023 Mr Wilmott presented an ET1 form to the Employment Tribunal making claims in respect of:

1) a redundancy payment - pursuant to s.166 of the Employment Rights Act 1996 ("the Act"); and

2) claims for unpaid holiday pay, arrears of pay and notice pay - pursuant to s.182 of the Act.

Claims for Holiday Pay, Arrears of Pay and Notice Pay

5. As far as the second set of claims are concerned s.188(2) of the Act sets out that a claim should be presented to the Employment Tribunal before the end of the period of three months beginning with the date on which the decision was communicated, or within such further period as the tribunal considers reasonable in a case where it is not reasonably practicable for the claim to be presented before the end of that period.

6. Given the date of the presentation of the ET1 the second set of claims appears to be out of time unless it was not reasonably practicable for Mr Wilmott to have presented the claim within 3 months of the February letter and he presented the claim within such further period as was reasonable. I have therefore heard evidence from Mr Wilmott on these issues.

7. Mr Wilmott gave evidence that the initial delay in his presentation of the claim to the Employment Tribunal was caused as he incorrectly sought to make the claim to the Employment Appeal Tribunal ("the EAT"). He has produced his correspondence with the EAT (see pages 4-8 of the Bundle). I note in particular an email of 5th May where he asked to lodge a claim and sent his appeal notice, a P60 and his employment contract and an email of 20th September where Mr Wilmott chased a response to the same. He received a reply to that second email and on 2nd October 2023 a further response which informed him he needed to make his claim to the Employment Tribunal.

8. In between the first two emails Mr Wilmott sent he gave evidence that he had telephoned the EAT offices to enquire as to the progress of his claim and was told that 'the matter was being looked at'. He can not now recall when or how often he made the calls or who he spoke to.

9. Mr Wilmott explained in evidence that he commenced corresponding with the EAT as he was 'confused by advice he received from ACAS' at an early stage. He has not described how exactly the advice led to confusion although he has pointed out the similarity between the names of the Employment Tribunal and the EAT.

10. Mr Soni for the respondents' points to the fact that the decision letter of 8 February sets out very clearly what must be done if the recipient does not agree with the decision that has been made. The letter expressly says that it is the Employment Tribunal which is the correct forum to commence a claim. The letter also contains a 'hyperlink' which navigates through to the government website with information on how to commence the claim – see page 105 of the Bundle.

11. Whilst I accept Mr Wilmott's evidence that he was confused by advice he had received in relation to starting a claim what I have to determine is if it was reasonably practicable for Mr Wilmott to have brought the claim in time. In my judgment it was. The letter of 8 February does clearly state the correct forum to commence the claim. Having seen and heard Mr Wilmott giving evidence it is clear to me that he is an intelligent man who has accepted that he had access to and was well used to operating the internet. He has also given evidence about how his job involved elements of work concerning employee matters such as TUPE and health and safety and I have no doubt that he would have been aware of the existence of the Employment Tribunal. Although Mr Wilmott may have been confused he could easily have remedied any such confusion by reading the letter provided or using the link on the letter or even undertaking limited research on the internet. I am therefore satisfied that it was reasonably practicable for the claim to be brought within the 3 month period established by s.188(2) of the Act.

12. In any event, even if I was wrong in that conclusion there is then a further period of delay between Mr Wilmott learning that the EAT was not the right forum and the lodging of the ET1 form. Having been informed on 2 October 2023 that the claim needed to be presented to the Employment Tribunal Mr Wilmott engaged in the early conciliation service with ACAS on 16 October 2023 with the process concluding and a certificate being issued to him on 18 October 2023. There is then a further delay of over a month from the issue of the certificate to the filing of the ET1 on 20 November 2023. Mr Wilmott gives evidence explaining that this further delay was caused by him being out of the country in France for some weeks. He accepts however that he did have internet connectivity whilst in France and could have processed paperwork but he says he could not file an ET1 as he did not have all the details of his claim which were stored on a computer based at his home.

13. Whilst I appreciate these difficulties I do not accept that an ET1 could not have been presented much sooner than it was. In particular given that Mr Wilmott appreciated that there had already been a significant delay due to the correspondence with the EAT. I therefore would not have concluded that the claim was brought within such further period as was reasonable even if I had found that it was not reasonably practicable for the claim to have been presented in time. These claims are therefore dismissed as the Tribunal has no jurisdiction in respect of them.

Redundancy pay

14. No such time issue arises in respect of Mr Wilmott's claim for a 'redundancy payment'. The issue which arises in respect of this claim is whether, as Mr Wilmott contends he was an employee of the company, or as the respondents argue he did not have that status.

The Facts

15. It is agreed that Mr Wilmott set up the Company in 2017. He signed a Franchise Agreement ("the FA") with another company NIC Services Group ("NIC") on 15th May 2017 and began to operate shortly thereafter.

16. I have heard evidence from Mr Wilmott as to his work and I find as a fact that at that time he established the Company he was working as an office holder being the sole director and majority shareholder of the company. He had no contract of employment at that time but given his unchallenged evidence I find as a fact he was completing a number of tasks including:

Hiring and inducting staff to the business

Training staff

Monitoring compliance with Health and Safety requirements

Managing the cleaning contracts

Completing service reviews with customers

Marketing the business

And if the need arose actually completing cleaning work itself in situations where the company was short staffed.

17. I find as a fact that on a day to day basis Mr Wilmott controlled his own work. He was the director of the company and completed the tasks to ensure the success of the company.

18. Mr Wilmott has given evidence that he would have monthly performance meeting with a development manager from NIC who would review the performance of the Company and would discuss matters such as how much the Company had upsold products over the period. Further Mr Wilmott gives evidence that he was required to report times when he would be absent to NIC and he would need to put in place a supervisor to manage the company whilst he was absent.

19. In respect of renumeration Mr Wilmott explains that initially he took no money from the business at all supporting himself through personal savings before eventually taking limited drawings from the Company business account.

20. As far as the administration of the Company was concerned Mr Willmott explained that NIC would invoice the company's clients and receive payment. NIC would then deduct staff salaries and any costs for lease equipment, making payments directly for these elements as required, before remitting any additional income to the Company's bank account.

21. On 22 May 2019 Mr Wilmott signed a written contract of employment with the Company (see p.155-156 of the Bundle). The contract described his employment as being a 'Regional Manager'. It said it required him to work from 8am to 5pm for 5 days a week. It said he would be paid at £8.50 per hour. It set out provisions for holidays, sick pay, notice pay and such. It was accompanied by an employee handbook produced by NIC. The contract itself was signed by Mr Wilmott as both employer and employee.

22. After signing the employment contract Mr Wilmott started to receive wage slips and P60 documents (see bundle p.178 – 208) . The respondent points out that the sums recorded on these document are considerably below that which would be associated with the expressed hours under the contract. They highlight that in most periods the payments are below the National Minimum Wage which is required to be paid to employees.

23. When he was cross examined Mr Wilmott confirmed in evidence that as far as his work was concerned there was no difference between the first years of the Company and after signing the employment contract. He said that nothing had changed after signing the contract but the contract was a way to 'regularize' him being paid. In respect of the low level of his wages Mr Wilmott explained that he had control of what he was paid and would 'adjust' his salary. He said he was aware of what was going to be paid by NIC to the company and so he would take what wages he felt could be 'afforded' whilst leaving some money to be paid into the Company business account from which the running costs of the business were met. He explained that if he took too much money in wages then this would not leave enough money being paid by NIC into the Company bank account. He acknowledged that no other employee of the company was paid wages in this way,

they would all receive payment which corresponded to the hours which they had worked.

The law

24. For these purposes an 'employee' is defined at s.230(1) and (2) of the Employment Rights Act 1996 as 'an individual who has entered into or works under a contract of employment' (which is itself defined at ss.(2)). There is no issue in this case that a document purporting to be a contract of employment exists as set out above.

25. As noted above I have considered all the authorities provided by the respondent but for this judgment just note the following essentials. As set out in the Secretary of State for BERR v Neufeld & Howe [2009] EWCA Civ 280, whether or not a director or shareholder is also an employee of the company is a question of fact. The mere label of director or shareholder is not determinative and the evidence must be examined in each case.

26. I remind myself as set out in Autoclenz v Belcher [2011] UKSC 41, that where there is a dispute as to the written terms in an employment contract the focus must be on discovering the actual legal obligations of the parties. All the relevant evidence must be considered including how the parties conducted themselves in practice and their expectations of each other.

27. In the older case of Ready Mix Concrete v Minister of Pensions [1968] 2 QB 497 the essential requirements for a contract of service were distilled to the propositions that; 1) the servant agrees that, in consideration of a wage or other renumeration, he will provide his own work and skill in the performance of some service for his master; 2) the servant agrees, expressly or impliedly, that in the performance of that service he will be subject to the other's control in sufficient degree to make that other his master; and 3) the other provisions of the contract are consistent with it being a contract for service.

Discussion and Conclusions

28. As set out above I must then determine whether as a fact the signed document at p.155 – 156 was a genuine contract of employment. In Autoclenz 3 minimum considerations were identified which it is necessary to consider in this case:

1 – Mutuality of obligation – that is an obligation on the employer to provide work and obligation on the employee to accept and perform the work offered. In this case it instructive to consider the position before and after the contract was signed. Was there a change in the relationship between Mr Wilmott and the Company? How did any mutuality of obligation work in practice? As Mr Wimott accepts nothing in fact changed from how he worked before signing the contract

to after it. He continued to perform the all tasks that he had been doing as an office holder. Was he now subject to any enhanced obligation to perform those tasks? I find as a fact that he was not. Again, as admitted by Mr Wilmott, the contract had nothing to do with regulating or clarifying the work he was doing for the Company it was solely designed to allow him to receive wages as opposed to simply drawing from the Company bank account. Mr Wilmott was the sole director of the company and responsible for managing his own work, although he highlights the performance review meetings which took place monthly it must be noted that they were with representative of the Franchisor, a separate entity to the Company. The review meetings were not concerned with the performance of work under the purported contract of employment but rather were concerned with the obligations arising from the Franchise agreement. I find therefore that they do not assist Mr Wilmott in asserting that he was genuinely working under a contract of employment. Nor does the requirement for him to arrange cover for his periods of leave which again concerns obligations arising from the Franchise agreement rather than stemming from the purported contract of employment.

2 – Control – namely whether the ultimate authority over the purported employee rests with the employer. I find as a fact on the evidence I have heard that Mr Wilmott had ultimate authority over the management of his own work. Although again Mr Wilmott seeks to highlight the need for him to attend performance meetings with a representative of the Franchisor this again does not assist, in my assessment, with considering the level of control over Mr Wilmott within the Company. The fact that the Company had obligations under the Franchise agreement which were the subject of the performance meetings does not alter the position that it was Mr Wilmott who determined how and when he would complete his tasks for the Company.

3 – Personal Service – the employee must be obliged to perform the work personally, subject to the delegation of power. Whilst I find it is clear Mr Wilmott did undertake the work personally he did also, as he acknowledges arrange his own cover for periods when he was away. The obligation to perform his work, on the evidence I have heard, I find flows from his own position as sole director rather than truly having become a servant to master under the purported contract of employment.

29. I have also had regard to the 3 factors set out in Ready Mix Concrete which similarly lead to me the conclusion that the purported contract of employment was not one that genuinely led to Mr Wilmott becoming an employee of the Company. In particular in respect of proposition 1) whilst I remind myself that consideration under a contract of employment can come in many forms, in this case the Claimant's ability to adjust his pay to a wage which did not reflect the hours he had worked and was very low does not establish this element. The way in which Mr

Wilmott controlled his own pay was, I find, in contrast to all the other employees of the Company and evidences the control which Mr Wilmott exerted over the company as opposed to the other way around. This feature is, in my view on the facts of this case, inconsistent with a finding that Mr Wilmott was an employee.

30. Having considered all of the evidence in this case with care and despite this being a case where a written contract exists, where Mr Wilmott received pay slips and P60 documentation and that this is not a case where Mr Wilmott was otherwise drawing large sums from the company, I find as fact that Mr Wilmott was not an employee within the meaning of s.230(1) and (2) of the Employment Rights Act 1996 and so this claim is dismissed.

Employment Judge Richter
Dated: 14 August 2024

Note
Reasons for the judgment were given orally at the hearing. Written reasons will not be provided unless a party asked for them at the hearing or a party makes a written request within 14 days of the sending of this written record of the decision.

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