



Reserved judgment

EMPLOYMENT TRIBUNALS

BETWEEN

Claimant

Respondent

AND

Mr G Aston

Secretary of State for Business
Energy and Industrial Strategy

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

HELD AT Birmingham **ON** 22nd October 2019

EMPLOYMENT JUDGE Richardson

Representation

For the Claimant: Mr Frew

For the Respondent: No attendance

JUDGMENT

The judgment of the Tribunal is that

REASONS

Background and Issues

1. The claimant was employed by Ultra Furniture Limited as Managing Director between 5th July 1999 until dismissal on 7th April 2018. The company went into administration on 21st June 2018. The claimant brought claims against the company for unfair dismissal and wages/holiday pay. He was awarded the sum of £126,822.63 by an Employment Tribunal. The claimant applied to the National Insurance fund for capped sums totalling £20,878.80.
2. The claimant owed the company £34,174.35 by way of a director's loan at the date he was dismissed. The Secretary of State offset the debt owed by the claimant to the company in administration and refused to pay the claimant's claim for £20,878.80 awarded to him by the Employment Tribunal, relating to the basic award, notice pay, arrears of pay and holiday pay out of the National Insurance Fund.
3. The question before me is whether the debt of £34,174.35 is set off against the debt of £126,822.63 to ascertain the debt owed to the employee

before the Secretary of State considers the payment out of the National Insurance Fund, which would result in the claimant obtaining a payment of £20,878.80 and proving for the balance of [] in the liquidation. Or whether the Secretary of State is entitled to 'set off' the claimant's debt to the company of £34,174.35 extinguishing the claim against the National Insurance fund of £20,878.80.

Evidence

4. The respondent sent notice that it did not intend to be represented at the hearing, relying on written submissions 20th May 2019. I have read the submissions and taken them into account.
5. I was provided with a bundle of documents by the claimant which I have read. I was also provided with an opinion by Edward Capewell of Counsel, together with legal materials including a excerpt from the publication of Corporate Insolvency: Employment Rights 6th Edition (2016) by David Pollard; **Westwood v Secretary of State for Employment [1985] ICR 209** and **Secretary of State for Employment v Wilson & Ors [1997] ICR 408**.

Findings of Fact

6. The facts are not in dispute in this case. The agreed facts are:
 - 4.1 On 7th April 2018 the claimant was summarily dismissed from his employment of the company Ultra Furniture Limited (UFL).
 - 4.2 On 21st Jun 2018 UFL went into administration.
 - 4.3 On 26th June 2018 the claimant brought claims against UFL in the Employment Tribunal for unfair dismissal and for wages and holiday pay.
 - 4.4 The claim was determined on 5th March 2019. The claims were upheld.
 - 4.5 The claimant was awarded the total sum of £126,822.63 made up as follows:
 - compensation for unfair dismissal of £97,144 being a basic award of £13,462 and a compensatory award of £83,682;
 - damages for wrongful dismissal in the um of £25,000;
 - a sum in respect of unlawful deduction from wages of £2,519.26;
 - a sum in respect of accrued holiday pay of £2,149.37.
 - 4.6 The claimant made an online application for payment of monies out of the National Insurance Fund on about 11th March 2019. He disclosed that he owed UFL the um of £34,174.35 pursuant to terms of a director's loan agreement dated 14th December 2017 under which no repayments had been made at the date of the application to the National Insurance Fund.

- 4.7 The Secretary of State refused the application by email on 12th March 2019 confirmed by email on 21st March 2019 in the following terms:
“as a result of the RPS policy, the overall debt owed to the company by the debtor would be reduced. The RPS steps in as statutory guarantor to make payments according to the debts owed by the employer in sections 166 and 184 ERA. This is offset against money owed to the employer by the employee as per rules 14.24 and 14.25 of Insolvency Rules 2016. However, in turn this reduced the RPS claim in the insolvency. Any surplus from the RPS set off from the amounts owed by the employee would then be owed in the insolvency. The RPS can only offset the amount Mr Aston owed against this statutory entitlements and if he is owed any other money by his former employer he will have to register in the insolvency as a creditor for the company.”
- 4.8 The claimant made a further claim to the ET on 27th March 2019 seeking payment of £20,878.80 representing the capped sums to which he claimed to be entitled to payment out of the National Insurance Fund.
- 4.9 The Secretary of State entered grounds of resistance to the claimant’s claim in which the ground of rejection for the application for payment made in March 2019 are repeated and the claimant is put to proof of his entitlement to any payments out of the National Insurance Fund.
- 4.10 UFL is insolvent as defined in section 183(3)(aa) ERA (to include administration).
- 4.11 The Tribunal found that the claimant’s employment was terminated by UFL.
- 4.12 The claimant is only entitled to payment in respect of an unfair dismissal basic award; notice pay for the statutory minimum period of notice of 12 weeks; 1.4 weeks arrears of pay and 1.2 weeks holiday pay. Payments are subject to the statutory weekly maximum of £508 prescribed by s186 ERA.
- 4.13 The Secretary of State has made a payment out of the National Insurance Fund to a work colleague of the claimant, Mr D Milligan, a fellow director when he also had an outstanding loan of the same amount.

The Law

7. Part XII ERA 1996 makes provision in connection with insolvency of an employer, implementing the UK’s obligations at least in part of Directive 2008/9/EC on the protection of employee in the event of in the insolvency of their employer.
8. The relevant sections in Part XII ERA 1996 are Sections 182, 187(1), 186, 188, 189 and 190.

9. Shortly stated S182 provides for an application to the Secretary of State where the employee's employer has become insolvent, the employment has terminated and on the appropriate date the employee was entitled to be paid whole or part of any debt to which this Part XII applies.
10. S 187(1) makes provision for the Secretary of State obtaining a statement of debt owed by the company to the employee from the relevant officer in the insolvency.
11. S188 makes provision for an application by the employee to the Employment Tribunals under S182 in respect of a payment of less than the amount which should have been paid,
12. S189 provides for the Secretary of State to have subrogated rights to prove in the employer's insolvency once a guarantee payment under Part XII has been made.
13. The leading authorities as stated above are **Westwood v Secretary of State for Employment [1985] ICR 209** and **Secretary of State for Employment v Wilson & Ors [1997] ICR 408**.

Conclusions

14. Neither **Wilson & Ors** nor **Westwood** specifically address the question: at what point does one apply the rules of set-off to determine what is owed by the employer (if anything) to the employee? The question is critical for the claimant. If as the Secretary of State has done, the debt owed by the claimant of £34,174.35 is 'set off' against the claim for capped payments from the National Insurance Funds of £20,878.80, the claimant is left with no payment out of the National Insurance Fund and the company's debt to him of £126,822.63 is reduced by £20,878.80 leaving him to prove in the insolvency for £126,822.63, less £20,878.80, less £13,295.55 (the difference between his debt of £34,174.35 to the company and the claim on the National Insurance Fund which has been 'set off'). That is, the claimant must prove in the insolvency for £92,648.28.
15. The alternative calculation is to determine first what the company owes the claimant: which is £126,822.63, less his director's loan of £34,174.35. leaving him with a £92,648.28 debt owed, and then to deduct the sum of £20,878.80 payable by the National Insurance Fund paid to the claimant, leaving him with a debt owed by the company to him of £71,769.48 for which he can prove in the insolvency.
16. Obviously the first calculation at paragraph 7 leaves the claimant £20,87.80 out of pocket.
17. I have read carefully the authority of **Wilson** and set out the entirety of the conclusions in that case:
"(1) The statutory obligation of the Secretary of State under section 122(1) is to pay to the employee the amount to which, in the opinion of the Secretary of State, the employee "is entitled in respect of that debt". Under section 122(1)(b) the Secretary of State must be satisfied that, on the relevant date, the employee "is entitled in respect of that debt".

(2) The “debts to which this section applies” are specified debts owed by the insolvent employer to the employee for arrears of pay, notice pay, holiday pay and so on at the relevant date.

(3) The obligation of the Secretary of State is simply not to discharge or pay “that debt” to the employee. It is to pay to the employee the amount “which the employee is entitled to be paid in respect of that debt”. “Entitled means legally entitled and section 122(1)(b) expressly contemplates that the employee may only be entitled to “part of the debt”.

(4) The critical question is therefore to what debt or part of a debt, was the employee legally entitled to be paid by his employer on the relevant date? The answer to that question cannot be found within Part VII of the Act of 1978 or in any other part of the Act. It can only be found by determining the legal position as between the employee and his employer in accordance with relevant general principles of law, such as the law of contract, and if, as section 122 predicates, the employer is insolvent, by application of the relevant provisions of insolvency law.

(5) The provisions of insolvency law include the mandatory, self-executing set-off provisions of rule 4.90 of the Insolvency Rule 1986. That rule has to be applied to determine what, if anything, is owed by BCCI to an employee such as Mrs Wilson. If the sum owed by Mrs Wilson to BCCI is set off against the sum owed to Mrs Wilson by BCCI, she is only legally entitled, on the termination of her employment, to a credit balance (if any) in her favour. If the result of applying the set-off is a nil balance, she is entitled to nothing. What is clear is that Mrs Wilson is not entitled to claim against BCCI what is owed to her without regard to what is owed by her to BCCI. This result is compatible with the provisions of Council Directive (80/987/EEC)(OJ 1980 L283 p23) in which the scheme is that of a “guarantee” of the employee’s claims against employers in insolvency.

(6) If that were not the correct position, anomalous consequences would follow. For example if the Secretary of State paid an employee in full without regard to set-off, the Secretary of State would be entitled to prove in the liquidation of BCCI for all that he had paid. That would be unfair to other creditors whose proof of debt is subject to set-off. It is clear that rule 4.90 of the Rules of 1986 makes no different or special provision for set-off in the case of employees or in the case of the Secretary of State. On the other hand the application of set-off is not unfair to the employee. If set-off is applied it will, it is true reduce, possibly extinguish, the debt due to the employee from BCCI and consequently the sum paid by the Secretary of State on the default of BCCI. The set-off will however also reduce the amount owed by the employee to BCCI.

(7) This approach is consistent with the general principle stated by Lord Bridge of Harwick in Westwood v Secretary of State for Employment

[1986] ICR 209 216C where he said: "The liability of the Secretary of State cannot exceed that of the insolvent employers." That statement was made in the context of the application of the rules of mitigation of loss, but is authority for the proposition that the Secretary of State is not under a statutory obligation to pay the whole of the sum claimed by the employee. He is only liable to the extent to which the employee is legally entitled to make a claim against his employer under the general law. The Secretary of State is not, in such cases, applying or relying on the law of set off; the application of the law of set off as between the employer and the employee determines the amount which is owed by the employer to the employee. The Secretary of State is only liable to pay that sum.

(8) It is of course important that, in a many cases as possible, the employee should promptly receive the sum to which he is entitled. But delay caused by genuine disputes between the employee and his employer, acting through the liquidators, is not a justification for imposing on the Secretary of State an obligation to pay the full debt, if the words which impose that liability in the statute do not have that effect. For the reasons explained they do not"

18. In the **Wilson** case the set off between the Mrs Wilson and BCCI resulted in the extinguishment of Mrs Wilson's entitlement from BCCI to notice pay, holiday pay etc. It was right that therefore the Secretary of State would not be under an obligation to pay her any statutory capped claim as the employer owed her no debt. In this case the set off between the claimant and UFL leaves the claimant with a significant debt still owed to him by UFL.
19. **Wilson** clearly refers to set off being applied between employer and employee. It then refers to the Secretary of State only being liable to the extent to which the employee is legally entitled to make a claim against his employer under the general law. Following **Wilson** the first step is therefore to identify what claim the employee can make against his employer under general law, and then apply any set off between them to establish the final debt to the employee if any. **Wilson** confirms that the Secretary of State is not applying or relying on the law of set off it - can only be applied between employer and employee. Once the set off is applied and the claimant is still 'in credit' only then can the Secretary of State, according to **Wilson** identify the sum owed to the employee and this determines extent to which the employee's claims against the National Insurance Fund may be paid. As the claimant in this case, unlike BCCI, is in 'credit' after the set off of his director's debt against his employment tribunal award in the sum of over £92,000 it follows that the National Insurance Fund should meet his claims against the National Insurance Fund.
20. Counsel's opinion referred to an alternative interpretation of **Wilson** which suggests that set off only applies to the element of the debt to the

employee which falls within Part XII ERA. However it appears to me that the more obvious interpretation of Wilson is set out in paragraph (7) and it is clear that in general law the debt owed by the employer to the employee must first be identified after applying any set off. The alternative interpretation requires more to be read into the words to achieve the Secretary of State's current position of setting off part of the tribunal award against the employee's debt to the company. The preferred interpretation, that the set off director's loan is first set off against the total debt of the employer to the employee is in accordance with the spirit of Directive 2008/94/EC which is intended to protect employees in the event of the insolvency of their employer. It is also the opinion of the distinguished author of *Corporate Insolvency: Employment Rights 6th Ed (2016)* at 25.40 – 25.45 which states Wilson is authority for the set off being applied first and that it is also the approach in the BERR Guide, Employees' Rights on Insolvency of Employer.

21. Although I have not seen any documentation relating to the respondent's approach to the claimant's work colleague's claim against the National Insurance Fund, I have no reason to doubt his evidence that his work colleague, who was in the same position as the claimant, received payment from the National Insurance Fund because the caseworker in that case applied the set off between employer and employee first, reducing the employer's debt by the amount owed under the director's loan. I make no finding that that occurred but if it did, then it is clearly incumbent on the respondent to maintain a consistent approach to the question of when to apply set off. It is not acceptable that the Secretary of State's application of set off between employer and employee is inconsistent.
22. In summary, I find for the claimant. He is entitled to claim on the National Insurance Fund in the sum claimed of £20,878.80.

Signed by: Employment Judge Richardson
Signed on: 24th January 2020