



EMPLOYMENT TRIBUNALS

BETWEEN

Claimant and Respondent

Mr G Brown

Secretary of State for Business,
Energy and Industrial Strategy

HELD AT: Croydon

ON: 21 June 2019

BEFORE: Employment Judge K Bryant QC

Appearances:

For the Claimant: In Person

For the Respondent: Mr J Hunter (lay representative)

Judgment already having been sent to the parties on 13 July 2019 and written reasons having been subsequently requested by the Claimant in accordance with Rule 62(3) of the Rules of Procedure 2013:

REASONS

Claims and issues

1. At the start of the hearing the tribunal discussed with the parties the basis of the Claimant's case and the issues to which it gave rise.
2. The Claimant's case involves references under sections 170(1)(b) and 188(1)(b) of the Employment Rights Act 1996 ('ERA').
3. The Claimant applied to the Respondent for a redundancy payment under section 166 of the ERA and for notice pay, arrears of pay and holiday pay under sections 182 and 184 of the ERA.

4. The Respondent accepted those applications, including as to the number of days / weeks in respect of each claim. However, the Respondent did not accept the rate of pay claimed by the Claimant. The Claimant claimed on the basis that he was entitled to a gross salary of £50,000 per annum. The Respondent did not accept that the Claimant was entitled to that, or any, level of pay and so calculated payments to the Claimant on the basis of national minimum wage.
5. The key, indeed sole, issue in this case is to what salary the Claimant was entitled at the date of his dismissal and in the weeks immediately preceding that dismissal.

Evidence and findings of fact

6. The Respondent provided the tribunal with a small bundle of documents. The Claimant produced one further document. The only witness evidence was from the Claimant who had not produced a witness statement but was asked questions by the tribunal and was also given the opportunity to add anything else he wished before being cross-examined by the Respondent's representative.
7. On the basis of the evidence heard and read by the tribunal, the following findings of fact are made:
 - 7.1 Brown's Operating System Services Limited ('the Company') was incorporated in 1978. It became insolvent within the relevant ERA definitions on 23 March 2018. All employees, including the Claimant, were dismissed on that date.
 - 7.2 The Claimant had been the managing director of the Company throughout its existence. At the time of its insolvency he held around 55% of its shares. The Respondent accepts that the Claimant was an employee of the Company, as well as a statutory director and its majority shareholder.
 - 7.3 The Claimant had control of all matters concerning the operation of the Company, albeit having consulted the other directors and staff. The Claimant accepted in evidence that how much he was paid was mainly decided by him.
 - 7.4 The Claimant was provided with a written contract in the 1980s at a time when 51% of the shares were owned by a different company, but those shares were bought back after about 8 years and no new written contract had been issued since then.
 - 7.5 No written contract or other document containing terms and conditions of employment was shown to the tribunal by either party.
 - 7.6 HMRC records give the pay received by the Claimant from the Company for each tax year since 1997/1998. The amount varied from year to year up to 2006/2007. The highest amount was around £140,000 and the lowest around £43,000.
 - 7.7 The Claimant said in evidence, and the tribunal accepts, that he was paid what he felt the Company could afford each year.

- 7.8 From 2007/2008 onwards, the Claimant continued to work full time apart from holidays and periods of sick absence. However, he was not paid anything by the Company at any time from that tax year onwards, ie for a period of over 10 years.
- 7.9 The Claimant said, and again the tribunal accepts, that this was because he felt the Company could not afford to pay him anything. He was hoping that investment in a new product would pay off but unfortunately it did not and the Company became insolvent.
- 7.10 The Claimant's claim is put on the basis of an entitlement to £50,000 per annum, even though he was not paid that sum in any year. He said in evidence that £50,000 was an average figure for the salary that he had been paid, although it is unclear over which period that average had been calculated.

Submissions

8. The Respondent provided the tribunal with a short skeleton argument which was supplemented by brief oral submissions. Reference was also made to a number of authorities, namely *Secretary of State for Business, Enterprise and Regulatory Reform v Neufeld* ([2009] IRLR 475, CA), *Rajah v Secretary of State for Employment* (UKEAT/125/95, unreported 7 July 1995) and *Paggetti v Cobb* ([2002] IRLR 861, EAT). Essentially, the Respondent's contention was that even if the Claimant had a contractual entitlement to salary at one time, his contract of employment must have been varied to remove such entitlement at some point during the period of more than 10 years when he decided not to pay himself anything.
9. The Claimant also made brief oral submissions. He said that he had put in a claim to the Company's receiver for around £500,000 which, he said, was evidence of what he was owed by the Company. When asked, he accepted that the claim to the receiver had not yet been accepted. He also said that no one he knows would do the work that he had done for national minimum wage.

Discussion and conclusions

10. As noted above, the sole issue for the tribunal is to what level of pay the Claimant was entitled at the date of his dismissal and in the weeks leading up to it. That is a question of contractual construction. In the absence of any written contract being shown to the tribunal, including the 1980s contract referred to above, the Claimant's contractual entitlement to pay, if any, must be construed from such other evidence as is available.
11. The question is what the contracting parties agreed at the relevant time and whether it was subsequently varied. In this case, the contracting parties were the Claimant and the Company, of which he was managing director and majority shareholder.
12. In fairness to the Claimant he has not sought to over-egg his case and the tribunal accepts that he was doing his best to assist the tribunal. However, on

- the basis of the Claimant's evidence it is clear to the tribunal that the agreement between the Claimant and the Company concerning pay, at least from the 1990s onwards, was to the effect that he was entitled to be paid at whatever rate the Company assessed (mainly through the Claimant) that it could afford from time to time. No fixed rate was agreed and nor was any minimum rate agreed.
13. Clearly there was a statutory entitlement to national minimum wage once the relevant legislation had come into force, but as a matter of contractual entitlement there was no entitlement to be paid at any particular rate. If, in any year, the Company assessed that it could not afford to pay the Claimant then under the terms he had agreed with the Company he had no entitlement to be paid anything.
 14. The tribunal is aware that the Claimant's entitlement in relation to previous years is the subject of a separate claim in the insolvency process and nothing in these reasons should be taken as trespassing on the issues in that claim in respect of previous years. The question for the tribunal here is what entitlement there was to pay at the time of the Claimant's dismissal and in the weeks immediately leading up to that dismissal.
 15. The tribunal finds that the Claimant had no entitlement to pay in the relevant period above his statutory entitlement to national minimum wage.

Employment Judge K Bryant QC
3 August 2019 – Croydon