EMPLOYMENT TRIBUNALS

Claimant: Mr H Goddard

Respondent: The Secretary of State for Business, Energy and Industrial Strategy

Heard at: **Bristol** **On:** **15 October 2020**

Before: **Employment Judge Livesey**

Representation:
Claimant: In person
Respondent: Mr Soni, representative

Following the Judgment dated 15 October 2020, which was sent to the parties on 2 November 2020, the Respondent requested written reasons in accordance with rule 62 of the Employment Tribunal's (Constitution and Rules of Procedure) Regulations 2013 on the same date. These reasons are duly provided.

REASONS

1. Claim

1.1 By a claim form dated 16 December 2019, the Claimant claimed that the Respondent had failed to make insolvency payments in accordance with s. 188 of the Employment Rights Act 1996.

2. Evidence

2.1 The Claimant gave evidence in support of his claim. The Respondent called no evidence. Mr Soni relied upon written submissions, which he supplemented orally.

2.2 The parties referred to documents within the joint hearing bundle (R1). Any page references cited within these Reasons are to pages within the hearing bundle unless otherwise stated and have been cited in square brackets.

3. Issues

3.1 The issue which fell to be determined was captured between paragraphs 1 and 6 of the Case Management Summary of 19 June 2020.

3.2 It was not disputed that the Claimant was employed by a company which became insolvent, that he was owed holiday pay, notice pay and wages at the point that his employment was terminated and that the Respondent had correctly calculated its liability to the Claimant in so far as the gross amount was concerned.

3.3 The dispute centred upon the gross to net calculation. The Respondent had deducted Class I National Insurance contributions in the total sum of £507.96 from the final payments. The Claimant was over 65 when the debt fell due and had no liability to pay National Insurance contributions and therefore contended that the payments which the Respondent had made ought not to have suffered those deductions.

3.4 The Respondent contended that it had no access to the Claimant's PAYE and/or HMRC details or status. It made payments in accordance with the principles under which it operated; such payments were always made net of basic rate tax and Class I National Insurance contributions. An applicant was able recover any tax or National Insurance wrongly deducted from HMRC.

4. Facts

4.1 The following factual findings were made on the balance of probabilities.

4.2 The Claimant was a director of Amaranta Restaurants Ltd which owned and/or operated a restaurant at The Dome, Hoe Road, Plymouth. The Claimant was also an employee. The Company went into liquidation in September 2019. Its insolvency was admitted by the Respondent (paragraph 10 of the Response). The Claimant was born in August 1952 and was therefore 67 years old at the date of the insolvency. At that point, as an employee, he had no liability to make further National Insurance contributions.

4.3 The Claimant submitted a claim to the Secretary of State's Insolvency Service or Redundancy Payments Service ('RPS') [131]. The application contained the Claimant's date of birth [132]. The RPS then made the following payments;

(i) A payment of £3,015.36 in respect of arrears of wages on 21 October, from which the sum of £344.64 was deducted by way of Class I National insurance contributions [46];

(ii) Two payments in respect of holiday pay of £613.33 and £466.43 on 21 and 24 October 2019 ([46] & [49]). Similar deductions were made in the sums of £77.16 and £43.08 respectively;

(iii) A payment of £376.92 in respect of notice pay on 10 October 2019 [41], from which a deduction of £43.08 was also made.

The total deductions for National Insurance amounted to £507.86. Basic rate tax was also deducted, but that was not an issue between the parties.

4.4 There followed a significant amount of correspondence between the Claimant and the Respondent and, subsequent to the issuing of the claim, between the Claimant and the Tribunal. The Claimant often adopted a somewhat patronising and convert if tone in his correspondence and the Tribunal file grew to a size which the judge considered to have been grossly disproportionate to the issues at stake.

4.5 In correspondence, the Respondent variously referred to its "*obligation*" to deduct tax and National Insurance from the payments which it made (for example [53]). It said that it did so because it did not have access to the details of a recipient's PAYE and/or tax status. It did not, however, refer to

the basis of its 'obligation' (see, further, below). The use of that word was subsequently corrected [36].

5. Legal framework

5.1 Where an employer was insolvent, an employee may apply to the RPS for certain payments to be made under Part XI of the Employment Rights Act.

5.2 'Insolvency' is defined within s. 183. The Claimant's employer's insolvency was not in issue in the case, neither was his 'employment'.

5.3 Under s. 182, if, on an application to the Secretary of State, he was satisfied that the employer had become insolvent, the employee's employment had been terminated and the employee was entitled to a debt covered by that Part of the Act, "*the Secretary of State shall, subject to s.186, pay the employee out of the National Insurance fund the amount to which, in the opinion of the Secretary of State, the employee is entitled in respect of the debt.*"

5.4 The debts to which the Part applies are set out within s. 184. They include;
- Any arrears of pay, up to 8 weeks (s. 184 (1)(a));
- Any amount which the employer is liable to pay the employee for the period of notice required by section 86 (1) or (2) or for any failure of the employer to give the period of notice required by section 86 (1) (s. 184 (1)(b));
- Any holiday pay (s. 184 (1)(c)).

5.5 The terms 'arrears of pay' and 'holiday pay' are not more specifically defined with reference to, for example, Part II of the Act or the Working Time Regulations. The provision in relation to notice pay, however, is specifically tied to the provisions relating to the statutory minimum periods of notice set out in s. 86.

5.6 The Secretary of State's liability under s. 182 has been held not to have exceeded that of the insolvent employer. Where an employer would have been entitled to set off sums owed by the employee against the debt owed to him, the Secretary of State was equally entitled to make the deduction (*Secretary of State for Employment-v-Wilson* [1997] ICR 408). The same applied in situations of mitigation or where benefits had been received (*Westwood-v-Employment Secretary* [1985] ICR 209).

5.7 Section 188 enabled a claimant in Mr Goddard's position to apply to the tribunal in the event that a payment under s. 182 was thought to have been less than the amount which should have been paid (s. 188 (1)(b)).

6. Conclusions; the primary claim under s. 188 ERA

6.1 Much of the factual matrix in this case was not in dispute. The matter which was in dispute was focused upon the narrow point regarding the deduction of Class 1 National Insurance contributions from the payments made by the RPS in purported compliance with ss. 182 and 184.

6.2 There were number of matters which, in the Judge's view, had to be determined;

(i) How were the payments under s. 184 ordinarily to have been calculated?

(ii) Did the words '*in the opinion of the Secretary of State*' within s. 182 provide the RPS with some form of discretion as to how to apply the statutory provisions?

(iii) Was there any other guidance, directive or regulation which specified the approach which was to have been taken into account and, if so, what was its legal effect?

6.3 On the first point, it was not helpful that s. 184 failed to indicate that the calculations in respect of wages, holiday and notice pay were to have been undertaken in accordance with Part II of the Act and the Working Time Regulations. Nevertheless, how else were they to have been calculated? It would have been extraordinary if the legislation had anticipated different approaches to the calculations without stipulating what they ought to have been.

6.4 Further, it was clear from *Wilson* and *Westwood* (supra) that the courts had tried to align the Secretary of State's liability with the position had there not been an insolvency. What would the employer's liability have been? What would the 'debt' then have been? In this case, it was agreed that the Claimant would not have been required to give credit for Class I National Insurance contributions from the payments for wages, holiday and notice pay, given his age. If the Secretary of State was to have benefitted from the *Wilson* principle, so too should he have been shouldered with the duty to make payments of no less than the employee's entitlement from a solvent employer. Mr Soni accepted that the Respondent effectively stood in the employer's shoes in such a situation.

6.5 Accordingly, on a simple application of the Act, the Judge considered that the Secretary of State's liability was equivalent to that of the employer. If the employer would not be entitled to deduct Class I National Insurance contributions, neither should the Secretary of State have been.

6.6 But did the words '*in the opinion of the Secretary of State*' within s. 182 provide the RPS with some form of discretion as to how to apply the statutory provisions? That point did not appear to have been argued and/or considered by the courts in the past. It was not part of the Respondent's response to suggest that it had retained some residual discretion and Mr Soni did not seek to run such an argument at the hearing. The word 'opinion' in context was understood to refer to questions such as the existence of the employer's 'insolvency' and/or an applicant's employment status and/or the extent of the debt. On that last point, the Respondent here did not suggest that it was of the 'opinion' that Class I National Insurance contributions could have been deducted by the employer had it not been insolvent.

6.7 Thirdly, was there any other guidance, directive or regulation which specified the approach which had been taken and, if so, what was its legal effect?

6.8 At the hearing on 19 June 2020, the Respondent was ordered to produce "*all documentary material related to its pleaded defence that it is obliged to deduct National Insurance from all sums paid out*" (paragraph 7 of the Case

Management Summary of 19 June 2020). In response to that Order (or otherwise), no documentation was produced which set out the nature of any such 'obligation'.

6.9 The Respondent's case was that the RPS did not have access to individual tax codes and, by default, it deducted basic rate tax and national insurance contributions from all payments made. The RPS then sent records of the payments made and any associated deductions to HMRC which updated the tax accounts of the receiving employee. Mr Soni accepted that that might occur "*in some circumstances where a claimant may not be liable to pay income tax and national insurance*". He suggested that, "*where appropriate, claimants ... should approach HMRC directly for information about claiming a refund*" (his email of 9 September 2020 [36-7]). If HMRC failed to refund a claimant, it was suggested that he could then raise a complaint to a tax tribunal (Mrs Smallman's email of 10 December 2019 [64]).

6.10 That mechanism may work very well in practice and may serve to rectify the practical problem of the RPS not having all of the necessary information that it might need to make the correct calculation. But the fact that Mr Soni accepted that deductions might have been made in circumstances where a claimant might not have had the liability, in the judge's view, implicitly accepted that payments might not always have been made in accordance with s. 184.

6.11 The Tribunal had to apply the law. As a practical solution in this case, the Claimant might have submitted proof of his age (a passport or driving licence) which ought then to have satisfied the RPS of the nature of the correct liability. He had, of course, supplied his age as part of his original application [132]. The Respondent asserted that an applicant's pensionable age dependent upon his/her age and sex. Although that was right, the Respondent still had the capability to understand an applicant's liability for National Insurance on the basis of the information supplied.

6.12 Finally, and for the sake of completeness, this was not the same situation as occurred in *Morris-v-Secretary of State for Employment* [1985] ICR 522 and *Titchener-v-Secretary of State for Trade and Industry* [2002] ICR 225. The question there was *when* the statutory cap within s. 186 had to be applied; before or after tax and National Insurance deductions. Here, the question was whether the deduction ought to have been made at all.

7. Conclusions; other elements

7.1 The Claimant's witness statement contained a number of additional complaints and/or heads of loss which had to be dealt with [4];

(i) Age discrimination, including a claim for damages associated with personal injury losses (paragraph 2);

The Claimant had not brought a complaint of discrimination on the grounds of age (see part 8.1 of the Claim Form [15]), nor did he identify such a claim before Employment Judge Cadney on 19 June 2020 at the Case Management Preliminary Hearing.

He did apply to amend his claim on 12 March 2020, which was refused on 21 April, as was the subsequent application for reconsideration. The application was renewed on 16 July 2020 but was again rejected by Employment Judge Cadney on 26 August 2020, both on its merits and because it was not appropriate or permissible for the Claimant to have renewed an application which had already been rejected and not appealed.

I asked the Claimant if he was renewing the application at the hearing. He did not do so. The complaint would have been significantly out of time, as both Judges Roper and Cadney pointed out, but what they did not also say was that the Tribunal would not have had jurisdiction to determine the claim since the Claimant was not pursuing the Respondent as his former employer. It is more likely that the situation would have been covered by the goods and services provisions of the Equality Act, if it was covered at all.

In the absence of a complaint of discrimination, there was no separate power for the Tribunal to award damages for personal injuries as part of an award under s. 184;

(ii) Aggravated damages (paragraph 3);

A claim or 'debt' of aggravated damages was not a matter which was capable of having been pursued under s. 184. Such a claim may have been brought in discrimination claims where a complainant was able to establish injury to feelings having been caused by "*exceptional or contumelious conduct or motive*";

(iii) Exemplary/punitive damages (paragraph 4);

Again, such a claim was not listed as a possibility within s.184, but that may not have been fatal. In *Kuddus-v-Chief Constable of Leicestershire Constabulary* [2001] UKHL 29, the House of Lords indicated that the availability of such damages depended upon the nature of the tortious behaviour rather than whether or not the cause of action relied upon was recognised prior to the decision of *Rookes-v-Barnard* in 1964. The two categories of case identified in *Rookes* in which such damages might have been possible were, firstly, where there was oppressive, arbitrary or unconstitutional action by servants of the Government or, secondly, where the tortfeasor's conduct was calculated to make a profit, although the Claimant did not rely upon that second limb here.

Even if such a claim was capable of having been pursued as an adjunct to a claim under s. 184, it could not have been said that the Respondent's conduct fell into either of the two categories identified in *Rookes.* As was said in *Ministry of Defence-v-Fletcher* [2010] IRLR 25, in order to attract an award of exemplary damages, the conduct must have been conscious and contumelious. The EAT emphasised that such damages were punitive.

In this case, the worst that might have been said of the Respondent was that it had been a little dogmatic in its responses to the Claimant.

Nevertheless, it had followed a process which appeared to have been in place for some time and which is still followed. It did not do so maliciously or vindictively. An award of exemplary damages was not appropriate.

(iv) '*A Directive from the Tribunal to RPO that they should always take ages into account when making their calculations*';

The Claimant was unable to identify any power which the Tribunal had to make such a 'Directive'. The power to make recommendations to an employer in respect of a complaint of discrimination did not apply.

8. Preparation time order

8.1 At the conclusion of the hearing, the Claimant applied for a preparation time order under rules 76 and 79 of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013. He argued that the Respondent's stance in the litigation had been unreasonable. He alleged that correspondence ought to have been responded to differently. He argued that he had pointed out what the Respondent had done wrong at an early stage, but it had not altered its approach [129-130]. He alleged that some of its internal correspondence demonstrated that he was being fobbed off [69].

8.2 The Respondent's conduct in defending the proceedings was not unreasonable under rule 76. It had defended a position which it took, and continues to take, in the case of all such payments. Critically, although not in accordance with the strict duty which it had under s. 182, a practical solution had been found; for an applicant in the Claimant's position to seek repayment through HMRC. The Claimant had made no such application in this case. Had he done so, the litigation may have been avoided. Asking HMRC to correct what was an incorrect payment made by the RPS did not mean that the RPS had complied with s. 182 because *it* had the liability to make the correct payment, but it appeared to have worked in the vast majority of cases. The Judge had certainly not seen a similar case litigated. It was, perhaps, the Claimant who had been a little too dogmatic in his approach.

8.3 Even if unreasonable conduct was capable of having been demonstrated, it was not appropriate to make such an order in the circumstances.

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Employment Judge Livesey

3 November 2020

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Date

JUDGMENT & REASONS SENT TO THE PARTIES ON

.....9 November 2020.....

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FOR THE TRIBUNAL OFFICE