EMPLOYMENT TRIBUNALS

Claimant: Mr N Johnstone

Respondent: 1. Springhead Fine Ales Limited (now dissolved)
2. Secretary of State for Business, Energy and Industrial Strategy

Heard at: Considered on the papers

On: 9 April 2021

Before: Employment Judge Flint

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JUDGMENT

1. The claims against the second respondent for unpaid wages and holiday pay are not well founded and are dismissed.

REASONS

Introduction

1. The Tribunal was required to determine what amount, if any, was payable to the claimant by the second respondent by virtue of section 168 of the Employment Rights Act 1996.

Claims and Issues

2. The claimant made his claim for arrears of wages and unpaid holiday pay against the first respondent.
3. Upon the Tribunal hearing from the claimant that he had been refused payment from the Redundancy Payments Service for the sums claimed, the Tribunal used its own initiative to add the second respondent as a party on 27/3/2020.
4. The Tribunal gave default judgment under Rule 21 of the Tribunal's Rules against the first respondent on 28/4/2020 and ordered the first respondent to pay the claimant £782 for unpaid wages and £400 holiday pay.
5. The first respondent was dissolved on 22/9/2020.

6. The claimant seeks an order against the second respondent for £782 unpaid wages and £400 holiday pay.
7. The second respondent accepts that the claimant is owed the sums sought but denies any liability for those sums under section 168 of the Employment Rights Act 1996 (ERA 1996).

Documents considered

8. I have considered correspondence and documentation from the claimant, first respondent and second respondent. There is no bundle of evidence in this case and all parties are content for the Tribunal to base its decision on that correspondence and documentation.

Facts

9. The first respondent was a private limited company. The claimant started employment as a Brewery Assistant on 12/8/2015. The first respondent entered into a Creditors Voluntary Arrangement (CVA) on 5/2/2016.
10. On 23/4/18, HMRC, the major creditor of the first respondent sent a request to FRP Advisory (Supervisor of the CVA) requesting the CVA be failed to due to breach by the first respondent. The creditors were circulated with a proposal to wind up the first respondent. The petition was, however, delayed in order to provide the first respondent with the requisite 30 days to rectify the breach.
11. FRP issued a certificate of non-compliance on 12/6/2018. It did not, however, present a petition for winding up because it believed HMRC had already done so (with a court hearing of 4 July 2018 fixed) This decision was made to save costs. FRP was also aware that on 31/5/2018, a qualified floating charge holder had issued a Notice to Appoint an Administrator.
12. The first respondent entered Administration on 14/6/2018. The claimant's employment ended on 26/6/2018 with the reason for dismissal being redundancy. The claimant's arrears of wages and holiday pay relate to sums payable between 1/1/2018 to 15/6/2018.

The Law

13. Under section 182 ERA 1996 the second respondent is required to pay employees out of the National Insurance Fund for unpaid wages / holiday pay due on the date of insolvency. Section 183 defines what is meant by "insolvency". It includes "an employer, if a company.. if a voluntary arrangement proposed in the case of a company for the purposes of Part I of the Insolvency Act 1986 has been approved under that part of that Act."

Arguments

14. The claimant has not put forward any legal argument, but presumably adopts the argument of the first respondent, as submitted in correspondence by Mr Andrew Fender, Administrator. That argument is that a company can become insolvent on different dates with respect to different creditors. He argues in this case that the relevant date of insolvency was 14/6/2018, this being the date that he was appointed as Administrator by a floating charge holder. Mr Fender states that he was not appointed by the CVA Supervisor and that as far as he was aware, the CVA Supervisor did not take any action regarding the CVA breach.

15. Mr Fender goes on to distinguish the case cited by the second respondent: ***Secretary of State for BIS v McDonagh and Others 2013 UKEAT/0287/12/LA*** insofar as in that case the EAT was dealing with respondent companies that had transitioned from CVA to winding up petition by the CVA supervisor. This did not happen here: where the CVA was ended on 12/6/2018 and, Mr Fender argues, a second insolvency event occurred in the appointment of a Receiver by the floating charge holder (as opposed to the CVA supervisor, FRP Advisory) on 14/6/2018.
16. The second respondent relies on the McDonagh case as authority that there can only be one insolvency event. It maintains that the insolvency event here was the CVA of 5/2/2016 and that the claimant is not entitled to a payment out of the National Insurance Fund for any unpaid wages or holiday pay accrued thereafter.

Conclusions

17. ***Secretary of State for BIS v McDonagh and Others 2013 UKEAT/0287/12/LA*** is very clear authority that there can only be one insolvency event and not multiple:

    34. The domestic statute in my view permits of only one occasion during what might be called an insolvency situation on which an employer may become insolvent. I reject the submission that it may be possible for what might be called "serial insolvency" to occur; that is where an employer enters into a CVA (it is then by statute insolvent, section 183(3)(c)) and without having relieved itself of the insolvency then enters liquidation later. The state of liquidation is not, in my view, upon a proper reading of that statute unaffected by European considerations, a different and separate insolvency. It would have been, had there been no CVA, but if the issue is when the company became insolvent (which is the relevant issue for present purposes) then it permits only of one answer: it became insolvent in such a chain of events when the CVA was approved. – Mr Justice Langstaff

18. This is further elaborated upon:

    35. As Mr Purnell points out in his skeleton argument there are a number of reasons for reaching this conclusion. First the appropriate date under section 185 is defined by reference to the date upon which the employer became insolvent; this is past tense; the language does not permit the option of alternatives. Secondly, it is incoherent to suggest that a company which is insolvent by statute becomes insolvent again or in addition or in any additional way when wound up. The underlying state of insolvency has not changed. Mr Purnell submits, and I accept, that the use of the present perfect tense in section 183 is indicative. It expresses a past event, albeit with continuing consequences. That past event is a single event.

    36. It makes no sense, in my view, to interpret each occasion upon which an employer might become insolvent, provided for by section 183(3), as being a separate occasion, each of which would constitute its own appropriate date. That would mean that an employee of a company subject to a CVA would on that occasion be able to claim any arrears of pay and holiday pay then due. If the company then subsequently became insolvent under one of the other definitions provided for by section 183(3), he would upon this approach be able to claim again. This makes no sense in the context of a minimum guarantee provided to an employee in the event of the insolvency of his employer.

19. I am satisfied that ***Secretary of State for BIS v McDonagh and Others*** directly applies in this case and that the date of insolvency was 5/2/2016. Whilst I do note factual discrepancies between the cases, these do not diminish the applicability of Mr Justice Longstaff's judgment to this case.

20. One such discrepancy is that the first respondent's CVA was terminated on 12/6/2018 but it did not enter Administration until 14/6/2018. This in

itself, however, does not mean the first respondent ceased to be insolvent for two days. Nor does it mean that the date of insolvency for the claimant was 14/6/2018. On the contrary, the first respondent continued to be in an insolvent state and three potential parties were intending to issue a petition to wind up the company: the CVA Supervisor, HMRC and another creditor.

21. Nor does the fact that the Administrator was appointed by the floating charge holder rather than the CVA Supervisor impact on the insolvency date.

22. As a consequence, I find that the second respondent is not obliged to make payment to the claimant for unpaid wages or holiday pay because these debts accrued in 2018, considerable time after the insolvency date of 5/2/2016.

23. As Mr Justice Longstaff commented in ***Secretary of State for BIS v McDonagh and Others***, the consequences of this may seem harsh and unfair to claimants, but Parliament had taken a deliberate decision to treat arrears of pay and holiday pay differently from other debts arising on insolvency.

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Employment Judge Flint

Date: 09 April 2021

JUDGMENT & REASONS SENT TO THE PARTIES ON

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FOR THE TRIBUNAL OFFICE