



EMPLOYMENT TRIBUNALS

Claimants: Miss J Adams and others
Respondent: Secretary of State for Business, Innovation and Skills
Heard at: Midlands East (CVP) **On:** 28 April 2021
Before: Employment Judge Rachel Broughton (Sitting alone)

Representatives

Claimant: Ms Toner – solicitor
Respondent: No Attendance

Covid-19 statement:

This was a remote hearing. The parties did not object to the case being heard remotely. The form of remote hearing was V – video. It was not practicable to hold a face-to-face hearing because of the Covid-19 pandemic.

RESERVED JUDGMENT

The judgment of the Tribunal is that:

- The claims of **Mr Steven Dodson, Mr Frank Homewood and Mr Tomas Gegelevicius** that the Respondent has made an underpayment of a protective award (and in the case of Mr Homewood, additionally an underpayment of a redundancy payment), pursuant to section 192 TULR(C)A, are struck out on the basis that the claims were not presented within the period provided by section 192 (2) of TULR(C)A.

REASONS

Background

1. On 18 January 2020, Employment Judge Britton gave judgment, following a hearing on 29 November 2019, that the First Respondent to that claim; FFP Realisations 2018 Limited In Administration), pay all hourly paid employees otherwise known as Process Operatives and as covered by the recognition agreement between the First Respondent and the GMB, remuneration for a protected period of 90 days beginning on 29 October 2018.

2. The findings of Employment Judge Britton were that it was not in dispute by the administrators for the First Respondent, that on 29 October 2018 most of the workforce, that is over 100 employees, were there and then made redundant as the business had gone into administration. There was no consultation period including with the GMB. A small number of the workforce (25 employees approximately) were retained by the administrators to assist with the winding down process and their employment ended on 18 January 2019. Employment Judge Britton found that there was a failure to comply with the consultation provisions. He held that; *“I therefore find that it is just and equitable to make a protective award of 90 days pay for all Claimants who have presented claims before me or are covered by the GMB recognition agreement as per the presentation of the claims by the GMB.”*
3. An award was therefore made pursuant to S.189(2) on the 29 November 2019.
4. The judgement was issued in writing on 18 January 2020 (with the oral decision given at the hearing on 29 November 2019). There was a correction to the judgment on 18 May 2020.

The Claims

5. This hearing is concerned with the claims of 3 of the claimants to the group action. The individual claimants and case numbers are; Mr Steven Dodson: 2600309/2019, Mr Frank Homewood: 2600296/2019 and Mr Tomas Gegelevicius:2600302/2019 (**Claimants**).
6. Claims were issued on behalf of other claimants however Ms Toner confirmed at the hearing on 28 April 2021, that a number of them have now received their entitlements and are not pursuing claims; Janice Bradley, Keith Bradley, Areta – Kristina Katiliute and Lize Vingre. Ms Toner also confirmed that she has no instructions to pursue a claim on behalf of Andrew Davison. Those claims will be dismissed on withdrawal within 7 days from the date of this judgment. If there is an objection to dismissing those claims, those objections must be sent to the Tribunal within 7 days from receipt of this judgement.
7. The Claimants issued claims in respect of non-payment of a protective award pursuant to section 192 of the Trade Union and Labour Relations (Consolidation) Act 1992, however, since the claims were issued, payments have been made by the Secretary of State, however the Claimants' are not content with the payments received and complaint they have been incorrectly calculated.

The Legal Principles

8. The relevant statutory provision is section 192 of the Trade Union and Labour Relations (Consolidation) Act 1992 (TULR(C)A) which provides as follows;

(1)An employee may present a complaint to an employment tribunal on the ground that he is an employee of a description to which a protective award relates and that his employer has failed, wholly or in part, to pay him remuneration under the award.

(2) An employment tribunal shall not entertain a complaint under this section unless it is presented to the tribunal—

(a) before the end of the period of three months beginning with the day (or, if the complaint relates to more than one day, the last of the days) in respect of which the complaint is made of failure to pay remuneration, or

(b) where the tribunal is satisfied that it was not reasonably practicable for the complaint to be presented within the period of three months, within such further period as it may consider reasonable.

(2A) Section 292A (extension of time limits to facilitate conciliation before institution of proceedings) applies for the purposes of subsection (2)(a).

9. In **Howlett Marine Services Ltd v Bowlam and ors 2001 ICR 595, EAT**, the EAT confirmed that, where nothing has been paid for any part of the protected period, the three-month limitation runs from the last day of that period i.e. the protected period. It does not run from the date the protective **award** is made. The EAT acknowledged that it is essential that, at the date when the S.192 complaint is presented to an employment tribunal, there has been a failure to pay. There cannot be a failure to pay without there being a legal obligation to pay and there is no legal obligation to pay until a protective award has been made under S.189(2).
10. The EAT recognised that this meant that there could be circumstances in which the end of the three-month limitation period running from the last day of the protected period could pre-date the date that the protective award is actually made, meaning that any enforcement complaint would already be out of time. The test of reasonable practicability under S.192(2)(b) is applicable to the period of three months that ends with the S.192(2)(a) expiry dates however, where the whole of the S.192(2)(a) period has expired before the protective award is made, the question of reasonable practicability is at no stage the test. Instead, the tribunal is only required to decide whether the delay during the further period was or was not reasonable.

General case law on not reasonably practicable extension

11. **Wall's Meat Co Ltd v Khan 1979 ICR 52, CA**: Lord Justice Shaw '*The test is empirical and involves no legal concept. Practical common sense is the keynote and legalistic footnotes may have no better result than to introduce a lawyer's complications into what should be a layman's pristine province. These considerations prompt me to express the emphatic view that the proper forum to decide such questions is the [employment] tribunal, and that their decision should prevail unless it is plainly perverse or oppressive*'
12. The onus of proving that presentation in time was not reasonably practicable rests on the claimant : **Porter v Bandridge Ltd 1978 ICR 943, CA**.
13. **Palmer and anor v Southend-on-Sea Borough Council 1984 ICR 372, CA**, the Court of Appeal concluded that reasonably practicable does not mean reasonable, which would be too favourable to employees, and does not mean physically possible, which would be too favourable to employers, but means something like

'reasonably feasible'.

The Evidence

14. The Claimants' had produced a bundle for the hearing on 28 April 2021 which numbered 116 pages and Ms Toner had prepared written submissions. Ms Toner also made oral submissions at the hearing.
15. Prior to the hearing, I checked Companies House and noted that the First Respondent FFP Realisations 2018 Ltd to the original claim (the employer) was dissolved in February 2021. Ms Toner explained that the judgment in respect of the underpayments, is in these circumstances and where judgement for payment of a protective award has already been made in this matter, sought only against the Secretary of State (**Respondent**). The claims are no longer pursued as against the previous First and Second Respondent.
16. I shall deal with the submissions and discussions before the Tribunal generally, before turning to the findings in each of the individual's cases.

Time Limits

17. I calculated the end of the protected period to be **26 January 2019**; that is the end of the 90-day period as determined by Employment Judge Britton in his judgment. The protected period beginning on 29 October 2018.
18. The time limitation under section 192(2)(a) is 3 months from the end of the protected period, which would take us then to **25 April 2019**.
19. The claim form (ET1) (page 56 of the bundle) alleging a failure to pay, was issued on **18 May 2020**.
20. The claim therefore has been brought technically more than a year outside the primary time limit.
21. The Secretary of State made a determination of the amounts due and wrote out to the Claimants in **June 2020**.
22. Ms Toner made submissions at the 28 April 2021 hearing, that as judgment was given orally by Employment Judge Britton on **29 November 2019** and the Secretary of State takes 6 weeks to make payment, she believes that the correct time limit limits **starts** from the end of that date, which would be **mid-January 2020**.
23. The ACAS conciliation certificate (which was not in the bundle) confirms that conciliation started on **23 April 2020** and finished on **7 May 2020** and thus the claims Ms Toner maintains were within the primary time limit when issued on **18 May 2020**.
24. On referring Ms Toner to the IDS Employment Law Handbook commentary on section 192 and the above case authority of *Howlett Marine Services Ltd v Bowlam and ors 2001 ICR 595, EAT*, Ms Toner agreed that the 3 month time limit is actually 3 months from the end of the protected period and that the claims were therefore outside the primary time limit.

25. Ms Toner had not come prepared to deal with the issue of time limits, having understood that the claims were brought in time. In inviting Ms Toner to address the Tribunal on the application of section 192 (2) TULR(C)A which deals with the jurisdiction of the Tribunal, Ms Toner explained that there had been "*lots of problems trying to get payment*" from the Secretary of State and because of the Covid pandemic, "*this has caused a lot of problems and a lot of delay*".
26. Unfortunately, however, Ms Toner had not included within the bundle any of the documents relating to her correspondence with the Secretary of State and could not recall and therefore was not in a position to confirm, the dates that she had written and chased payment and what responses she had received nor did she elaborate on what the 'problems' were.
27. It was agreed that the Claimants' would submit the further information required in respect of the liability issues (addressed below in respect of each individual claimant) and for any submissions or documents, to be presented in writing on the time limitation issue, within 7 days from the hearing on 28 April 2021.
28. Ms Toner confirmed that she was content for the remaining issues on liability and limitation, to be dealt with on the papers.
29. I decided that we would deal with the evidence available at the hearing on the 28 April 2021 in relation to the claims for underpayment however, any decision would be reserved pending receipt of the further documentation from Ms Toner.

Findings of Fact

Steven Dodson

Protective Award

30. Dealing first with Mr Steven Dodson; Ms Toner made submissions that the Secretary of State had deducted a payment from the protective award paid to him because Mr Dodson had been paid a separate sum for arrears of pay however Mr Dodson disputes that he received such a sum. The sum in contention is **£275.96**.
31. I asked what evidence was submitted showing that the deduction claimed had been made and the arrears of pay had not been received however, Ms Toner confirmed that there was no evidence contained in the bundle.
32. There was no witness statement from Mr Dodson either and there was no written confirmation of any deduction, all I had before me were submissions from Ms Toner.
33. Ms Toner asked to be allowed to produce evidence in support of the claim within the next 7 days, along with documents in support of an application for an extension of time to bring the claimant pursuant to section 192 (2). I allowed her to do so and agreed to reserve the decision pending that further information.

Further Information

34. On the 3 May 2021, within the 7 days as ordered, Ms Toner sent across to the Tribunal copying in the respondent, a witness statement signed and dated 3 May 2021 from Mr Dodson.

35. Mr Dodson referred in this statement to being employed from 13 December 2013 until his summary termination on 29 October 2019 and that at the time of his dismissal his gross wage was £305.37 per week. Further, he alleges that from the sum awarded of £2442.96, a sum of **£275.96** had been deducted for what was said to be, a payment he had received by way of arrears of pay that he had not claimed and had not been paid.
36. Also provided was a copy of the letter from The Insolvency Service dated **16 June 2020** confirming that from the payment of £2,442.96 a payment of £275.96 had indeed been deducted to take into account a payment already received.
37. No defence to the claim has been received from the Respondent.
38. However, the Tribunal is not in a position to determine liability if it has no jurisdiction to deal with the claim.
39. The witness statement did not explain or comment in any way on the reasons why the claim was not presented until 18 May 2020.

Jurisdiction - Time Limit

40. The Tribunal must be satisfied that it was not reasonably practicable for the claim to be presented in time and if it is so satisfied, determine what further period it considers reasonable.
41. Ms Toner did not file any further submissions or documents and the Tribunal has therefore made its determination on the evidence available to it.
42. In the circumstances, as the primary limitation period expired on 25 April 2019, this predated the judgment delivered orally on **29 November 2019**. It was not reasonably practicable I find to present the claims therefore within the primary time limit ie before the award had been made.
43. The claim was presented on 18 May 2020, 6 months later.
44. I have no further evidence or submissions before me to explain however why, after judgment was given on 29 November 2019 it took a period of 6 months, twice the normal limitation period, to file the claim for non-payment of the award.
45. In the absence of any clear explanation for the time it took, other than a general submission by Ms Toner that she had chased for payment and there were 'problems' due to Covid in the intervening period, I consider that a reasonable period in which to have brought the claim, after the award was made, would have been within a further 3 months.
46. Taking Ms Toner's submissions at the hearing on 28 April 2021; if the limitation period under section 192 (2) was, as she (incorrectly), understood it to be, a period of 6 weeks from the 29 November 2019 would have expired on 10 January 2020. A further 3 months from that date would have expired on 9 April 2020. Therefore, even had Ms Toner been operating on this understanding, the ACAS conciliation process was still not commenced until after this date, i.e. on the 23 April 2021, outside the time limit as she submits she understood it to be and which she initially argued before me, meant the claims were brought within time. On the Claimants

own case as put therefore, the claims were issued outside what Ms Toner understood the time limit to be.

47. Ms Toner's own oral submissions were that the Secretary of State in her experience, takes 6 weeks to make payment and she had understood that the time limit made provision for that period for payment. If payment had not been made within that 6 weeks, Ms Toner would then according to her own evidence, been aware that there was a delay in payment and it would I find, have been reasonable for the Claimants to have then been advised that it may be necessary to take and start to prepare to take, enforcement proceedings.
48. I consider that a reasonable period for submitting the claim, would have been within 3 months from the date of the judgment granting the award on 29 November 2019. That would have given the Claimants' the benefit of the same period as the primary limitation period and given a reasonable period after the 6 week period when Ms Toner advises payment is normally paid, to prepare and submit the claims .That further period would have expired on **28 February 2020**.
49. The Acas conciliation was not started until **23 April 2020** and the claim issued on 18 May 2020. With no evidence or further submissions on the reasons for the delay and what further period it is submitted would have been reasonable, the Tribunal find that the claim was presented out of time.

Tomas Gegelivicus

Protective Award

50. The claim by Mr Gegelivicus is that he was paid a protective award based on a weekly rate of **£270** (i.e. a gross sum equating to 8 weeks' pay of £2160) but earned **£308.88**. This is set out in a letter from The Insolvency Service dated 19 June 2020 (p.86).
51. Ms Toner took me to his contract of employment at page 85 in the bundle which appears to confirm that he was paid £7.29 per hour and worked 39 hours per week, which equates to £308.88 gross per week.
52. At page 144/145 of the bundle, is a letter from the Administrators stating that their records confirm that his actual weekly earnings were £308.88, which equates the it is submitted to a gross underpayment of **£311.04**.
53. There is a letter in the bundle (p.86) from the Insolvency Service dated 19 June 2020 confirming the calculation of the protective award.

Further Information

54. The Tribunal was sent further information on 3 May 2021 including a signed and dated witness statement from Mr Gegelevicius confirming that he was employed from 13 December 2013 until his summary dismissal on 29 October 2019 and confirming the above information about his pay.
55. It appears on the evidence that Mr Gegelivicus actual weekly earnings were £308.88 and that is the rate at which the Secretary of State should have calculated his protective award however, the Tribunal is not in a position to determine liability before determining that it has jurisdiction to deal with the claim.

56. The statement did not explain or comment in any way on the reason why the claim was not presented until 18 May 2020.

Jurisdiction

57. The witness statement did not explain or comment in any way on the reason why the claim was not presented until 18 May 2020.

58. No further evidence from the Mr Gegelivicus or his representative, was presented regarding the issue of jurisdiction.

59. The issues that apply are the same as apply in the case of Mr Dodson above. In the absence of any evidence or further submissions, the same findings are made regarding time limit in that I find that a reasonable period for submitting the claim, would have been within 3 months from the date of the judgment granting the award on 29 November 2019, namely by **28 February 2020**.

60. The claim is therefore struck out on the ground that the Tribunal does not have the jurisdiction to deal with the claim because it had been brought out of time.

Mr Frank Homeward

Protective Award

61. Ms Toner made submissions that Mr Homeward was paid at a rate of **£329.77** per week; his pay slip is included in the bundle at page 88 and confirms his weekly gross pay of **£381.03**, which includes basic pay plus first aid waiting.

62. There was no witness statement provided from the Claimant, only the payslip and letter from the Insolvency Service dated 16 June 2020 (p.89).

63. It is alleged that his protective award was calculated incorrectly, and he suffered an underpayment of **£418.08** which appears to be the case on the documents submitted.

Redundancy Payment

64. In terms of his payment for a redundancy payment, this is dealt with at paragraph 11 of Ms Toner's written submissions. It is asserted that Mr Homeward worked for 30 years; he was 57 as at 29 October 2018 (the date of redundancy) and was entitled to 28 weeks' redundancy payment of £10,668.84 and not the sum of £9,205.56 which was paid.

65. There is nothing in the claim form to confirm what is being sought. Ms Toner stated that there a letter from the Redundancy Payments Office confirming the redundancy payment and she asked to be able to send that in with the rest of the further documents and I agreed to permit her to do so.

Further Information

66. Ms Toner submitted on the 3 May 2021 further information copied into the Respondent.

67. This further information included a witness statement from Mr Homeward which was unsigned and undated. There was explanation in the covering email about why the statement was not signed or dated. The statement refers to his wages being £381.03 (p.88) at the time of his dismissal, that the protective award was paid at a rate of £328.77 per week leaving a shortfall of **£418.08**. His date of birth is confirmed as 3 April 1961 and at the date of dismissal he was therefore 57 and believes his entitlement to redundancy pay should have been 28 weeks or £10,668.64 rather than the £9,205.56 which he received, an underpayment of **£1,463.08**.
68. The letter which Ms Toner had agreed to provide from the Redundancy Payments Office was not included and there was no explanation for its omission.
69. The Tribunal is not in a position to determine liability however before it has determined that has no jurisdiction to deal with the claim.

Jurisdiction

70. The statement did not explain or comment in any way on the reason why the claim was not presented until 18 May 202.
71. The same issues and considerations apply to this claim as with the above claims of Mr Dodson and Mr Gegalivicus and therefore in the absence of any further evidence or submissions to persuade the Tribunal that a reasonable period would be more than a further 3 months from the date of the award ie **28 February 2020**, the claim is therefore struck to on the grounds that it had been brought out of time.

Employment Judge Rachel Broughton

Date: 5 July 2021

JUDGMENT SENT TO THE PARTIES ON

9 July 2021

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FOR THE TRIBUNAL OFFICE

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