



# EMPLOYMENT TRIBUNALS

**Claimant:** Miss L Johnson

**Respondent:** Secretary of State for Business, Energy and Industrial Strategy, Redundancy Payment Service

## JUDGMENT

Employment Tribunals Rules of Procedure 2013 – Rule 21

1. On a reference by the Claimant under section 170 Employment Rights Act 1996 ('ERA') the judgment of the Tribunal is that:
  - a. The Leven, Hotel Restaurant & Spa Ltd (LHRS) was liable to pay to the Claimant a statutory redundancy payment (that matter having already been determined in a judgment promulgated on 23 November 2020) and
  - b. The amount payable by the Secretary of State to the Claimant, in accordance with section 168(1) ERA, is £2,943.

## REASONS

1. In **2020**, the Claimant presented a Claim Form to the Tribunal in which she claimed, among other things, a statutory redundancy payment against The Leven Hotel Restaurant & Spa Ltd ('LHRS').
2. The proceedings were served on LHRS in the normal way, but no response was returned.
3. The file was reviewed by Employment Judge Garnon. He decided to hold a telephone hearing in **September 2020** in order to understand more about the Claimant's claim and the claims of others which had been brought against LHRS and other named respondents. Having obtained further information, Judge Garnon subsequently decided that he had sufficient information available to him in order to make, under Rule 21 of the ET Rules of Procedure, a determination on the Claimant's claims for a redundancy payment, for notice and for outstanding accrued holiday pay. He issued a judgment on **23 November 2020** ordering LHRS to pay to the Claimant:

- a. A redundancy payment of £2,943;
  - b. Damages for breach of contract (notice pay) in the sum of £1,962;
  - c. Compensation for outstanding untaken annual leave in the sum of £610
4. That judgment, therefore, determined the liability of LHRS to pay the above sums. The Claimant was not paid the redundancy payment – I am unsure whether she was paid the notice pay or holiday pay but in any event they are not the subject of this reference. LHRS was wound up and dissolved on **26 February 2022**.
5. On **01 February 2022** (which I shall refer to as ‘the reference’), the Claimant presented a second Claim Form to the Tribunal. She did so pursuant to **section 170** of the ERA which provides as follows:
- (1) *Where on an application made to the Secretary of State for a payment under section 166 it is claimed that an employer is liable to pay and employer’s payment, there shall be referred to an employment tribunal –*
    - (a) *Any question as to the liability of the employer to pay the employer’s payment, and*
    - (b) *Any question as to the amount of the sum payable in accordance with section 168.*
  - (2) *For the purposes of any reference under this section an employee who has been dismissed by his employer shall, unless the contrary is proved, be presumed to have been so dismissed by reason of redundancy.*
6. The reference to a payment under **section 166** is to a payment from the Secretary of State for a payment under that section, referred to as an “employer’s payment”, which includes a redundancy payment which his employer is liable to pay him under this Part (section 166(2)(a)).
7. Where an employee has applied to the Secretary of State under section 166, and where the Secretary of State is satisfied that the requirements specified in section 167(2) are met then he “*shall pay to the employee out of the National Insurance Fund a sum calculated in accordance with section 168 but reduced by so much (if any) of the employer’s payment as has already been paid*”.
8. The relevant part of **section 167(2)** provides that:
- (3) *The requirements referred to in subsection (1) are –*
    - (a) *That the employee is entitled to the employer’s payment, and*

*(b) That one of the conditions specified in paragraphs (a) and (b) of subsection (1) of **section 166** is satisfied,*

9. Thus, once the Secretary of State receives an application under **section 166** for the payment of a redundancy payment, he must pay it if he is satisfied that the employee is entitled to the redundancy payment and that the employee has taken all reasonable steps, other than legal proceedings, to recover the payment from the employer and the employer has refused or failed to pay it, OR that the employer is insolvent and the whole or part of the payment remains unpaid.
10. If satisfied of those matters, **section 168** then governs the amount payable by the Secretary of State under **section 167**. In the case of a redundancy payment, it is the sum equal to the amount of the redundancy payment.
11. In the Claimant's reference to the Tribunal she says that on **10 December 2020**, she applied to the Secretary of State (under section 166) for payment of the redundancy payment of **£2,943**. At the time she made the application she attached a copy of Judge Garnon's judgment of **23 November 2020** that LHRS was liable to pay that redundancy payment to her. On **06 December 2021**, the Secretary of State notified her that her application for payment was rejected on the basis that the Secretary of State did not accept that, at the date of termination of her employment, the Claimant had been continuously employed by LHRS for a period of 2 years. Thus, she referred the question of the amount payable by the Secretary of State to this Tribunal.
12. The Claim Form (the reference) was served on the Secretary of State by letter dated **14 February 2022**. The date for the Secretary of State to respond to the claim was **14 March 2022**. No response was sent by that date. The Secretary of State sent a response on **15 March 2022**. However, it was not accompanied by an application to extend time. In such circumstances, by virtue of Rule 18 of the ET Rules of Procedure the Response must be – and was – rejected. The Claimant's reference was then referred to me under Rule 21 of the ET Rules.
13. Under Rule 21, where on the expiry of the time limit in rule 16 no response has been presented and no application for a reconsideration is outstanding, an employment Judge shall decide whether on the available material, a determination can properly be made of the claim or part of it. If there is, the judge shall issue a judgment, otherwise a hearing must be fixed before a judge alone.
14. I was satisfied that I had sufficient information to enable me to issue this judgment.
15. The judgment of Judge Garnon, dated **23 November 2020** determined the liability of LHRS to pay to the Claimant a redundancy payment of **£2,943**. Having read the reasons, it is clear that Judge Garnon gave particular consideration to the issue of continuity of employment, referring expressly, to regulation 4 of the Transfer of Undertaking (Protection of Employment) Regulations. He concluded that the Claimant had 9 complete years of employment and calculated the amount of the redundancy in accordance with the statutory formula. That judgment was never the subject of any application for reconsideration or appeal.

16. By the time she applied to the Secretary of State under **section 166**:

- a. the Claimant had taken all reasonable steps to recover the payment – those steps being the presentation of a Claim Form against LHRS (the reference to ‘legal proceedings’ in **section 166(1)(a)** does not include any proceedings before an employment tribunal’ – **section 166(4)(a)**) and had received a judgment in her favour, and
- b. LHRS has failed to pay the redundancy payment.

17. Furthermore, although it is strictly unnecessary (because of the applicability of **section 166(1)(a)**) I would add that LHRH is insolvent – a winding up order having been made on **13 April 2021** – albeit after the date of the application to the Secretary of State under **section 166**.

18. Having considered the relevant statutory framework and the factual background as set out above, I have no hesitation in concluding as follows:

- a. Insofar as the reference may be taken as raising a question as to the liability of the employer to pay to the Claimant a redundancy payment, I have no doubt whatsoever that the employer (LHRS) is so liable. That inevitably follows from the judgment of Judge Garnon which cannot be disturbed. An experienced Tribunal judge understands the need for any claimant to show that they have been continuously employed for at least 2 years. It follows from the judgment itself that Judge Garnon was satisfied of this and – lest there was any doubt – he expressly dealt with the matter in his reasons. It is not for the Secretary of State or anyone else – including me - simply to choose to ignore the effect of that judgment.
- b. The Claimant had taken all reasonable steps to recover the redundancy payment from LHRS.
- c. LHRS failed to pay the redundancy payment.
- d. Insofar as the reference may be taken as raising a question as to the amount of the sum payable under **section 168**, I am satisfied – again from the judgment of Judge Garnon – that the amount of the redundancy payment payable by the Secretary of State is **£2,943**.

19. In light of the above, the hearing currently listed for **20 April 2022** is cancelled.

Employment Judge **Sweeney**

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Date: 6 April 2022