



EMPLOYMENT TRIBUNALS

Claimant: Mr John Sissons

First Respondent: Stelco Europa Ltd (In liquidation)

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

Heard at: Nottingham (in public; via CVP) **On:** 22 March 2022

Before: Employment Judge Millns (sitting alone)

Appearances

For the Claimant: Mr Andrew Scott, counsel

For the First Respondent: No appearance

For the Second Respondent: No appearance (written submissions provided)

JUDGMENT having been sent to the parties on 29 March 2022 and written reasons having been requested in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided:

REASONS

Representation

1. The Claimant was represented by Mr Andrew Scott of Counsel. There was no attendance at the hearing on the part of the First Respondent and no response filed. The Judgment against the First Respondent is accordingly entered under

Rule 21 of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013 as a default judgment.

2. The Second Respondent did not attend the hearing. In the Second Respondent's Response and Grounds of Resistance dated 20 December 2021 the Tribunal was informed that the Secretary of State did not propose to be represented in person at any hearing and instead wished to rely on the contents of the ET3 as its written representations.

Hearing arrangements

3. The hearing was a remote public hearing conducted using Cloud Video Platform under Rule 46. The parties agreed for the hearing to be conducted in this way. The parties were able to hear what the Tribunal heard from a technical perspective. Whilst there were some initial connections difficulties on the Tribunal's part, these were resolved and did not interfere with the administration of the hearing. The participants were told that it was an offence to record the proceedings. Live witness evidence was heard from the Claimant, Mr John Sissons.

The issues

4. At the outset, it was agreed with the Claimant's representative, Mr Scott, that the issues that the Tribunal needed to be determined were as follows:
 - 4.1 whether the Claimant was entitled to a statutory redundancy payment and if so in what sum;
 - 4.2 whether the Claimant's claim for unpaid salary from 1 March 2021 until his dismissal on 13 July 2021 succeeds and if so in what amount;
 - 4.3 whether the Claimant is owed accrued but untaken holiday pay for the period 1 January 2020 to 31 December 2020 for a period of 20 days and for the period 1 January 2021 to 13 July 2021 for a period of 13.5 days and if so in what amount;
 - 4.4 whether the Claimant is owed any sum in respect of underpayment of holiday pay for a period of 7 days in 2020 and 1 day in 2021 and if so in what amount;
 - 4.5 whether the Claimant succeeds in a claim of breach of contract in respect of alleged failure by the First Respondent to pay notice pay and if so in what amount;
 - 4.6 whether the Claimant's claim of breach of contract succeeds in respect of an alleged failure by the First Respondent to make pension contributions for the period 1 March 2021 to 13 July 2021 and if so in what amount;

- 4.7 whether the Claimant is entitled to an uplift on his claim for arrears of pay and holiday pay as a result of the First Respondent's failure to follow the ACAS Code of Practice on Disciplinary and Grievance Procedures;
 - 4.8 Further, as the First Respondent is insolvent (having gone into creditors' voluntary liquidation on 9 July 2021), whether the Claimant is entitled to an order that the Second Respondent is liable to satisfy the above employee debts from the National Insurance Fund to the extent possible pursuant to Sections 182 to 188 of the Employment Rights Act 1996, and in respect of the redundancy payment pursuant to Sections 166 to 168 of the Employment Rights Act 1996.
5. The Claimant withdrew his claim under Sections 123 to 125 of the Pension Schemes Act 1993 (which the Claimant pursued only against the Second Respondent). It was accepted by Mr Scott on behalf of the Claimant that the Claimant did not satisfy the provisions of the Act in order to be able to bring such a claim.

The evidence

6. I heard oral evidence from the Claimant and considered his witness statement, which ran to 10 pages and 52 paragraphs. The Claimant provided a bundle of documents running to 135 pages. I heard oral submissions from Mr Scott on behalf of the Claimant.
7. There was no witness evidence from either the First or Second Respondent. The Second Respondent sent notice that it did not intend to be represented at the hearing relying on its ET3 and Grounds of Resistance as its submissions. I have read those documents and have taken them into account.

Findings of Fact

8. I make the following findings of fact on the balance of probabilities.
9. The Claimant was employed by the First Respondent from 1 April 2004 to 13 July 2021 when his employment terminated because he was made redundant.
10. The First Respondent went into Creditors' Voluntary Liquidation on 9 July 2021.
11. From the commencement of his employment, the Claimant was employed by the First Respondent as a General Manager. The Claimant had a separate role as a Company Director for the First Respondent until 14 April 2009 when he resigned. His resignation as a statutory Company Director did not affect his status as an employee and his employment continued thereafter until his redundancy on 13 July 2021.

12. From the commencement of his employment, the Claimant and one of the shareholders of the First Respondent (Bill Aujla) had discussions about the terms of the Claimant's employment, which included his salary. Initially, the agreement was that the Claimant received 25% of profits each year once the Company accounts had been finalised and filed, and this was also subject to a minimum salary payment of £50,000 gross per annum in the first two years. It was also agreed that after the first two years of employment the Claimant would receive a monthly agreed sum based on monthly management accounts, with any further balance being paid once the annual accounts were finalised after the year end on 31 December.
13. Further discussions took place regarding the Claimant's salary on 1 April 2006, when his monthly salary was increased to £4,583.33 and on 1 June 2012, when his monthly salary was increased to £5,250. In or around August 2014, his monthly salary was agreed in the gross sum of £5,833.33 based on an annual gross salary of £70,000 with effect 1 September 2014.
14. The Claimant continued to be paid the monthly sum of £5,833.33 until the end of his employment, except for a period of furlough leave which commenced on 31 March 2020 and, as will be referred to later, except at the point when the First Respondent stopped paying the Claimant's wages.
15. In September 2019, the Claimant met with Bill Aujla when it was agreed that the Claimant would be entitled to his minimum salary amount of £5,833.33 per month. During the same discussion, the main topic was the future and survival of the First Respondent. Mr Aujla stressed on several occasions the dire financial situation of the Delta Group, who were the owners of the First Respondent.
16. Part of the parties' agreement about the Claimant's salary was set out in a document called "Working Arrangement Agreement", a copy of which is in the bundle. That agreement does not state what would happen if the First Respondent Company did not perform well nor what would happen if the Claimant's salary exceeded his pay out based on 25% profit. The agreement did not state if any deduction would or could be made from the Claimant's salary by the First Respondent. It was not stated at any time during any discussions with the Claimant and the shareholders or any of the First Respondent that the Claimant would have to pay back salary to the First Respondent if the Company did not perform well or if the Claimant's salary exceeded 25% of the profits.
17. At no stage during the Claimant's employment was he approached by any shareholders, or anyone else at the First Respondent, with any suggestion that such a deduction from the Claimant's salary would in any circumstances take place or could take place.
18. On 31 March 2020, the Claimant's gross pay was reduced to £2,500 per month as a result of him going on furlough leave via the Coronavirus Job Retention Scheme.
19. Salary was normally paid by the First Respondent to the Claimant on the 25th day of each month. On 25 March 2021, the First Respondent failed to pay the

Claimant's monthly salary of £2,500, although he was sent a payslip for this amount.

20. The Claimant thereafter did not receive any salary payments from the First Respondent in April 2021 or for the months that followed until his dismissal by reason of redundancy in July 2021.

Holiday pay

21. The Claimant was entitled to 28 days' statutory holiday, including public holidays, based on his full-time hours. The Claimant received his usual furlough pay for the periods covering the seven remaining statutory bank holidays in 2020 but not his full pay.
22. The Claimant queried his holiday entitlement with Janet Nichols, the Bookkeeper for the First Respondent. On 19 November 2020 he received an email from Janet Nichols stating that one week's holiday pay would be paid, and the remainder of his holiday entitlement would be carried over to 2021. However, the Claimant did not receive any of the promised payment.
23. On 22 March 2021 the Claimant again chased Janet Nichols by email for his outstanding holiday pay for 2021 but did not receive any response nor any payments.
24. The Claimant did not receive any holiday pay for 2020, other than the bank holiday on 1 January 2020.

Claim and insolvency

25. In early 2021, the Claimant became aware that the First Respondent had gone into Creditors' Voluntary Liquidation. A Liquidator was appointed on or around 9 July 2021. On 13 July 2021 the Claimant received an email from Janet Nichols with an attached letter stating that his employment was being terminated by reason of redundancy and that he may be able to make a claim for payments to the Department for Business Innovation and Skills Redundancy Payment Service (the "RPS").
26. The Claimant did not receive from the First Respondent any arrears of pay, accrued holiday pay, a statutory redundancy payment nor payment in lieu of notice (12 weeks). Employer's pensions payments were also due to the Claimant in respect of a period of non-payment from March to July 2021, which were not paid.
27. On or around 5th July 2021 the Claimant contacted the Liquidator to notify the sums owing from the First Respondent. The Claimant was informed that he could not claim as a creditor in the liquidation as he was in fact a debtor due to alleged overpayment of salary. The Claimant disputed this and provided copies of correspondence between the First Respondent and his solicitor. The

Claimant asked the Liquidator for a breakdown of how the alleged debt was calculated but none was provided.

28. On around 30 July 2021, the Claimant, and his wife (who also worked for the First Respondent and was owed wages) made a claim to the RPS for payments owed with the assistance of the Liquidator's agents. On 11 August 2021 the Liquidator's agent emailed the Claimant to say that the Liquidator had been advised by the First Respondent's director (Bill Aujla) of an alleged debt from the Claimant to the First Respondent in the sum of £28,072.
26. In summary the claim for payments was rejected by the RPS. Whilst the RPS accepted the Claimant's entitlement to redundancy pay in the sum of £13,872 and holiday pay in the net sum of £1,721.29, as well as notice pay on a net basis at £4,704, their response was that the Claimant was not entitled to any payments because of an alleged debt owing from the Claimant to the First Respondent which was stated to exist in the sum of £28,072.
27. In its Response to this claim, the Second Respondent submitted that the Secretary of State has assessed the following payments to the Claimant in respect of his claims:

Claims Made	Amount
	Assessed (Net)
Notice Pay	£4,704.00
Holiday Pay	£1,1721.29
Redundancy Pay	£13,872.00

28. In addition, the Second Respondent stated that the Insolvency Practitioner provided confirmation that the Claimant owed the company £28,072. which was offset against the notice pay, holiday pay and redundancy pay with the effect that no payment was due to the Claimant from the National Insurance Fund. The Second Respondent also submits that the Claimant's claim for arrears of pay was rejected by the RPS as the Insolvency Practitioner confirmed that his wages had already been paid. In the circumstances the Secretary of State has been unable to verify the Claimant's entitlement to further payments to his satisfaction and cannot proceed with paying for the payment
29. The effect of the Second Respondent's position, if accepted, is that there would be no payment due to the Claimant from the National Insurance Fund because the debt owed by the Claimant to the First Respondent exceeded any payments due to him.
30. The Claimant made his claim to the Employment Tribunal on 23 September 2021 following a period of ACAS early conciliation from 10 May 2021 to 8 June 2021. The extent of the claims brought is set out in the list of the issues at paragraph 4, above.

The law

31. Part XII ERA 1996 is the correct starting point. The relevant sections are Section 182, 187 (1), 186, 188, 189, 190. In summary S182 provides for an application to the Secretary of State where an employee's employer has become insolvent, the employment has terminated and on the appropriate date the employee was entitled to be paid whole or part of any debt to which Part XII applied. S187(1) makes provision for the Secretary of State obtaining a statement of debt owed by the company to the employee from the relevant officer in the insolvency. S188 makes provision for an application by the employee to the employment tribunals under S182 in respect of a payment of less than the amount which should have been paid. S189 provides for the Secretary of State to have subrogated rights to prove in the employer's insolvency once a guaranteed payment under Part XII has been made.
32. I was referred to and considered the case of **Secretary of State for Employment v Wilson & Ors [1997] ICR 408** and **Westwood V Secretary of State for Employment [1985] ICR 209**. The conclusions in **Wilson & Ors** are set out below and each has been helpful in coming to my decision:

“(1) The statutory obligation of the Secretary of State under section 122(1) is to pay to the employee the amount to which, in the opinion of the Secretary of State, the employee “is entitled in respect of that debt”. Under section 122(1)(b) the Secretary of State must be satisfied that, on the relevant date, the employee “is entitled in respect of that debt”.

(2) The “debts to which this section applies” are specified debts owed by the insolvent employer to the employee for arrears of pay, notice pay, holiday pay and so on at the relevant date.

(3) The obligation of the Secretary of State is simply not to discharge or pay “that debt” to the employee. It is to pay to the employee the amount “which the employee is entitled to be paid in respect of that debt”. “Entitled means legally entitled and section 122(1)(b) expressly contemplates that the employee may only be entitled to “part of the debt”.

(4) The critical question is therefore to what debt or part of a debt, was the employee legally entitled to be paid by his employer on the relevant date? The answer to that question cannot be found within Part VII of the Act of 1978 or in any other part of the Act. It can only be found by determining the legal position as between the employee and his employer in accordance with relevant general principles of law, such as the law of contract, and if, as section 122 predicates, the employer is insolvent, by application of the relevant provisions of insolvency law.

(5) The provisions of insolvency law include the mandatory, self-executing set-off provisions of rule 4.90 of the Insolvency Rule 1986. That rule has to be applied to determine what, if anything, is owed by BCCI to an employee such as Mrs Wilson. If the sum owed by Mrs Wilson to BCCI is set off against the sum owed to Mrs Wilson by BCCI, she is only legally entitled, on the termination of her employment, to a credit balance (if any) in her favour. If the result of applying the set-off is a nil balance, she is entitled to nothing. What is clear is that Mrs Wilson is not entitled to claim against BCCI what is owed to her without regard to what is owed by her to BCCI. This result is compatible with the provisions of Council Directive (80/987/EEC)(OJ 1980 L283 p23)

in which the scheme is that of a “guarantee” of the employee’s claims against employers in insolvency.

(6) If that were not the correct position, anomalous consequences would follow. For example if the Secretary of State paid an employee in full without regard to set-off, the Secretary of State would be entitled to prove in the liquidation of BCCI for all that he had paid. That would be unfair to other creditors whose proof of debt is subject to set-off. It is clear that rule 4.90 of the Rules of 1986 makes no different or special provision for setoff in the case of employees or in the case of the Secretary of State. On the other hand the application of set-off is not unfair to the employee. If set-off is applied it will, it is true reduce, possibly extinguish, the debt due to the employee from BCCI and consequently the sum paid by the Secretary of State on the default of BCCI. The set-off will however also reduce the amount owed by the employee to BCCI.

(7) This approach is consistent with the general principle stated by Lord Bridge of Harwick in Westwood v Secretary of State for Employment where he said: “The liability of the Secretary of State cannot exceed that of the insolvent employers.” That statement was made in the context of the application of the rules of mitigation of loss, but is authority for the proposition that the Secretary of State is not under a statutory obligation to pay the whole of the sum claimed by the employee. He is only liable to the extent to which the employee is legally entitled to make a claim against his employer under the general law. The Secretary of State is not, in such cases, applying or relying on the law of set off; the application of the law of set off as between the employer and the employee determines the amount which is owed by the employer to the employee. The Secretary of State is only liable to pay that sum.

(8) It is of course important that, in a many cases as possible, the employee should promptly receive the sum to which he is entitled. But delay caused by genuine disputes between the employee and his employer, acting through the liquidators, is not a justification for imposing on the Secretary of State an obligation to pay the full debt, if the words which impose that liability in the statute do not have that effect. For the reasons explained they do not”

Conclusions

33. I must determine what specified debts were owed by the First Respondent to the Claimant at the relevant date. The answer to that question can be found by determining the legal position as between the Claimant and the First Respondent at the relevant date in accordance with relevant general principles. It was accepted by Mr Scott, that the Second Respondent is entitled in principle to offset sums properly owing to an insolvent employer by an employee against any monies owing. In **Wilson & Ors**, it was found that the Secretary of State was entitled to offset some monies owed by the employee to the insolvent company. Mr Scott makes the point, which the Tribunal agrees with, that the facts of **Wilson & Ors** are very different to the facts of the Claimant’s case. Firstly, Mr Scott submits that the Second Respondent is not entitled to make such a deduction because there is no good evidence from the First or Second Respondent of the Claimant owing the First Respondent the sum of £28,072. Secondly, Mr Scott submits that, absent other evidence, the Claimant’s evidence about the amount and terms on which his salary was to be paid should

be accepted by the Tribunal, along with the Claimant's evidence that he was not paid salary, as set out in detail in the Claimant's witness statement.

34. Having considered the evidence of the Claimant and the submissions of Second Respondent, I conclude that there was no contractual arrangement which entitled the First Respondent to claw back or reduce the Claimant's salary in the way that it is asserted. I also find that the Claimant was not overpaid his salary. In the circumstances I find that the Claimant does not owe the First Respondent the sum of £28,072 nor indeed is there any evidence of the Claimant owing the First Respondent any sum by way of overpayment of wages or otherwise. I also find that the Claimant was not paid his salary as claimed and I therefore do not accept the Second Respondent's submissions that arrears of salary have been paid to him. I accept entirely what the Claimant has told me about the contractual arrangements as to his pay, there being a guaranteed minimum payment of annual salary of £70,000 gross at the point of the Claimant's termination of employment in July 2021 and there being no contractual agreement in place for that sum to be reduced in any circumstances.
35. Moving on to consider the issues list, I find that the Claimant is entitled to a statutory redundancy payment in the sum £13,872 recoverable from the Second Respondent pursuant to Sections 166 - 168 of the Employment Rights Act 1996 and payable from the National Insurance Fund.
36. The Claimant is also entitled to an amount for unlawful deduction of wages in the sum of £11,250 because he was not paid wages from 1 March 2021 until his dismissal on 13 July 2021. Based on reduced furlough pay of £2,500 he is owed 19.5 weeks x £576.92 = £11,250. Of the £11,250 the sum of £4,352 should be paid by the Second Respondent pursuant to Sections 182 - 188 of the Employment Rights Act 1996 out of the National Insurance Fund, calculated on the basis of 8 weeks' pay at £544 (being the limit on pay for any one week payable under section 182 ERA); and the balance of £6,898 is ordered to be paid by the First Respondent.
37. The Claimant's claim for unpaid holiday pay succeeds in the total sum of £10,250.01 because he was not paid for accrued but untaken holiday pay for 13.5 days for the period 1 January 2021 – 13 July 2021 and 20 days for the year 1 January – 31 December 2020. Of that sum, the Second Respondent is ordered to pay the sum of £3,264 from the National Insurance Fund, calculated on the basis of 6 weeks' pay at £544. This is a gross figure and may be subject to deduction of tax and national insurance by the RPS. The remaining balance of £6,986.01 is ordered to be paid by the First Respondent to the Claimant. That figure is also a gross sum and the Claimant will be responsible for any payment of tax, unless that is deducted by the First Respondent.
38. The First Respondent is to pay the Claimant the sum of £337.50 in respect of his claim for breach of contract for failing to pay the Claimant's pension contributions for the period 1 March to 13 July 2021 based on monthly contributions at 3% gross salary (4.5 months x £75).
39. Notice pay. This is calculated on a net basis. It was agreed by Mr Scott was that the Claimant earned £3,855.39 net per month, which per week was £889.71.

The Claimant's claim for notice pay succeeds in the total sum of £10,676.52 and that is a net sum for a period of 12 weeks. Of that sum, the Second Respondent is ordered to pay the net sum of £4,704 from the National Insurance Fund, with the balance of £5,972.52 to be paid by the First Respondent.

40. The final matter is the ACAS uplift. Mr Scott accepted that the uplift could only apply in respect of the claims of unlawful deductions and holiday pay claim and also that it should only apply to those payments to be made by the First Respondent because the uplift is not recoverable as against the Second Respondent.
41. Therefore, I order that the uplift is allowed on the sum of £6,986.01 for unpaid holiday pay and £6,898 for the unlawful deductions claim. This produces a total figure of £13,884.01. I order that a 25% uplift on that figure which is £3,471.00.
42. I order the maximum uplift of 25% on the basis that the First Respondent failed to deal with the Claimant's grievance dated 20 April 2021, which related to his outstanding wages and holiday pay. At no stage did the First Respondent acknowledge or respond to the Claimant's complaint in any way, despite the Claimant's Solicitors chasing the matter on more than one occasion.

Employment Judge C Millns
Date: 25 April 2022

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