



EMPLOYMENT TRIBUNALS

Claimant: Mr P Smith

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

Heard at: Leeds by CVP

On: 23 May 2022

Before: Employment Judge Maidment

Representation

Claimant: In person

Respondent: Ms M Rose, employed by the respondent

Upon applications made in writing by both claimant and respondent to reconsider the Judgment dated 22 February 2022 under Rule 71 of the Employment Tribunals Rules of Procedure 2013

JUDGMENT

The Judgment is varied as follows:

1. The respondent's response is not struck out.
2. The respondent is ordered to pay to the claimant the gross sum of £4200 in respect of unpaid wages relating to his contract of employment with Drink Me Dry Limited (in liquidation) as Project Manager. Such sum has in fact already been paid to the claimant by the respondent.
3. The respondent is ordered to pay to the claimant the gross sum of £4200 in respect of unpaid wages relating to his contract of employment with Drink Me Dry Limited (in liquidation) as General Manager.
4. The claimant's complaint seeking payment in respect of accrued but untaken holiday entitlement as at the termination of employment fails and is dismissed.

The claimant's application for costs is refused.

REASONS

The respondent has shown cause as to why its response to the claimant's complaint in respect of accrued but untaken holiday entitlement ought not to be struck out. The respondent's response did refer to limitations on the claimant's ability to recover debts owed by an employee in an insolvency situation as set out in Section 184 of the Employment Rights Act 1986. Section 182 of that Act gives a right to employees to claim the debts owed to them by their former employer from the Secretary of State. The debts to which that right of recovery extends are set out at Section 184 and Section 184(1)(c)(ii) provides for the payment of holiday pay to which the employee became entitled during the period of 12 months ending with the "appropriate date". Section 185(a) provides that the appropriate date means the date on which the employer became insolvent. In this case, the employer went into liquidation on 18 December 2020. The claimant's employment terminated more than 12 months prior to that date and therefore any holiday entitlement accrued up until the point of termination of employment related to a period before the period of 12 months ending with the appropriate date. The claimant's complaint in respect of holiday pay must therefore fail.

The claimant has been awarded a sum in respect of his arrears of wages based on a cap being applicable on the amount which could be awarded against the respondent without account being taken of the fact that the claimant was employed by the respondent pursuant to 2 separate contracts of employment. The tribunal in a previous judgment in fact made an award against the claimant's employer, Drink Me Dry Limited in respect of unpaid wages in his position as Project Manager and in addition in his position as General Manager. The claimant had separate contracts of employment in respect of each position. This was not understood by the respondent from the judgment issued against the claimant's employer in circumstances where it now accepts that, if there were two separate contracts of employment in respect of which the claimant was owed wages in excess of the statutory cap, then the claimant ought to receive payment for those wages at the statutory cap in respect of each separate employment.

The claimant's application for costs against the respondent is refused. This was an application jointly made by all of the claimants in these proceedings and where claims have at all stages been consolidated and heard together with common and overlapping issues. Costs in Employment Tribunals are the exception and not the rule but can be awarded (and shall be considered) where a party has acted vexatiously, abusively, obstructively or otherwise unreasonably in the way the proceedings have been conducted or where a response had no reasonable prospect of success (see Rule 76).

The tribunal considers that the respondent has at times raised arguments which have failed and has failed to advance all of its relevant defences at the earliest opportunity it could have done so. However, the respondent was ultimately correct

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in challenging certainly the holiday pay complaint. The respondent was throughout in a position where it was not receiving accurate information from Drink Me Dry Limited (in liquidation). The respondent was told by the company's insolvency practitioner that there was no evidence that the claimants were employees of the company. Drink Me Dry Limited did not conduct its affairs and employment relationships in a transparent manner, certainly in terms of record-keeping and there were suggestions received by the respondent of fraud on the part of at least one of the claimants. Whilst the tribunal has found that the claimants were all employees, the circumstances, certainly of Mr Smith's employment, were unusual. The respondent has a duty to properly administer public funds. It reasonably needed to satisfy itself that payments were due to the claimants, even in the circumstances of the tribunal's judgment against Drink Me Dry Limited in favour of the claimants. The respondent has not behaved in a manner which should cause the tribunal to exercise its discretion to award costs.

Employment Judge Maidment

Date 23 May 2022