



EMPLOYMENT TRIBUNALS

Claimant: Mr M Hammond

Respondents: 1. Kaye Johnson Gee LLP Administrators for Tomlaith Limited (in Liquidation)
2. The Secretary of State for Business, Energy and Industrial Strategy

Heard at: Manchester (by CVP)

On: 17 October 2022

Before: Employment Judge Phil Allen

REPRESENTATION:

Claimant: In person

First Respondent: Did not attend and was not represented

Second Respondent: Mr P Soni, Senior Tribunal Officer

JUDGMENT

The judgment of the Tribunal is that:

1. The Employment Tribunal does not have jurisdiction to determine the claimant's claim for a redundancy payment under sections 164 and 166 of the Employment Rights Act 1996. The claim for a redundancy payment against both respondents is dismissed.
2. The Tribunal does have jurisdiction to determine the claimant's claims for arrears of pay, holiday pay and notice pay under section 188 of the Employment Rights Act 1996.

REASONS

Introduction

1. The claimant was a director of Tomlaith Ltd. That company is in liquidation. The claimant has sought to claim certain payments from the first respondent and/or the National Insurance Fund. The second respondent does not agree that the sums claimed are due. The claimant claimed a statutory redundancy payment, arrears of pay, holiday pay and notice pay.

Issues

2. This was a preliminary hearing which was arranged to determine time issues.

Procedure

3. The claimant represented himself. The second respondent was represented by Mr Soni. The first respondent had confirmed that it would not be attending.

4. The hearing was conducted entirely remotely, by CVP video technology.

5. Some documents were provided, albeit a bundle was not collated and paginated. During the hearing a short break was taken to enable the second respondent to provide a document to which he wished to refer.

6. The Tribunal heard evidence from the claimant. He had prepared a witness statement prior to the hearing. He confirmed, under oath, that the content of the statement was true. He was cross examined by the second respondent's representative.

7. Each of the parties was given the opportunity to make oral submissions. After a break, the parties were informed of the Tribunal's Judgment and reasons. As written reasons were requested, these written reasons have been provided at the same time as the Judgment.

The Relevant Facts

8. The relevant facts as they apply are as follows.

9. The claimant's engagement with Tomlaith Ltd was terminated on 31 October 2021. The claimant made no claim for a redundancy payment either to the first respondent or the Tribunal, within six months of that date (or at least no such claim was evidenced to the Tribunal at the preliminary hearing).

10. The claimant placed these issues in the hands of a company, Redundancy Claims UK Limited (RCUK).

11. In January 2022, in emails shown to the Tribunal, the second respondent informed RCUK that where there were two rejection letters from the second respondent for insolvency service claims, then the time for entering a Tribunal claim would run from the second letter.

12. On 30 March 2022 the second respondent generated a letter to RCUK informing the claimant that his application for payments from the Insolvency Service was rejected. The Tribunal was satisfied that that letter was generated. The Tribunal saw no evidence that it was received. The claimant's evidence was that neither he nor RCUK received it. A screenshot from RCUK's systems did not show receipt. The second respondent evidenced that the letter was generated (a document was provided that did so), but he was not able to provide a traditional sent email confirmation, as the second respondent's systems do not enable him to do so.

13. On 10 May 2022 the second respondent sent a second letter which rejected the claimant's application. That was sent to RCUK. The reasons provided in that letter were more detailed than the first, and it notably did not refer back to the 30 March letter.

14. The claimant based his decision, in terms of the time he had to claim to the Tribunal, on 10 May letter being the (first and only) rejection letter.

15. The claimant entered into ACAS early conciliation between 12-14 July 2022 and entered his Tribunal claim on 14 July 2022.

The Law

16. Section 164(1) of the Employment Rights Act 1996 contains the requirements as to time for a claim for a statutory redundancy payment. It says:

An employee does not have any right to a redundancy payment unless, before the end of the period of six months beginning with the relevant date—

- (a) the payment has been agreed and paid,**
- (b) the employee has made a claim for the payment by notice in writing given to the employer,**
- (c) a question as to the employee's right to, or the amount of, the payment has been referred to an employment tribunal, or**
- (d) a complaint relating to his dismissal has been presented by the employee under section 111.**

17. Section 164(2) of the Employment Rights Act 1996 provides for the further period in which a claim can be brought to the Tribunal.

18. Section 166(1) of the Employment Rights Act 1996 says:

Where an employee claims that his employer is liable to pay to him an employer's payment and either—

- (a) 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 has paid part of it and has refused or failed to pay the balance, or**
- (b) that the employer is insolvent and the whole or part of the payment remains unpaid,**

the employee may apply to the Secretary of State for a payment under this section.

19. Section 166(1) does not expressly include a period of time in which a claim must be made, however as it explicitly says that the employer must be liable to pay the redundancy payment claimed, for such a claim to be brought a claim must have been entered against the employer within six months of the termination date (where the other parts of section 164(1) do not apply).

20. Section 188 of the Employment Rights Act 1996 applies to the claimant's other claims from the second respondent (but not the claim for the redundancy payment). Section 188(2) says:

An employment tribunal shall not consider a complaint under subsection (1) unless it is presented—

(a) before the end of the period of three months beginning with the date on which the decision of the Secretary of State on the application was communicated to the applicant, or

(b) within such further period as the tribunal considers reasonable in a case where it is not reasonably practicable for the complaint to be presented before the end of that period of three months.

21. That provision accordingly confirms that the three month period begins when the decision was communicated to the applicant. It also provides for circumstances where it was not reasonably practicable for the complaint to be entered in the time required, provided that the complaint is entered in such further period as the Tribunal considered reasonable.

22. Neither party referred to any case law in their submissions. The second respondent emphasised that any error on the part of RCUK was between the claimant and RCUK. The Tribunal was, of course, aware of the case law about the reasonably practicable test, which means that: the test is to be given a liberal interpretation in favour of the employee; the language means reasonably feasible, it is not just physical impracticality; if a time limit is missed because of mistake or ignorance, the question is whether the mistake or ignorance was reasonable; and, if the employee engages a skilled adviser, any mistake or ignorance on the part of the adviser is attributed to them.

Application of the Law to the Facts

23. The Tribunal found that the claimant did not make his claim for a redundancy payment within the time required by section 164 of the Employment Rights Act 1996. The claimant did not evidence that he had done any of the things required by section 164(1) within the period of six months beginning with the date his engagement terminated. The Tribunal did not have jurisdiction to consider the claimant's claim against the first respondent for a redundancy payment, as the claim had not been entered within the time required.

24. As the Tribunal did not have jurisdiction to consider the claimant's claim against the first respondent for a redundancy payment, the claimant also could not claim a redundancy payment under section 166(1) of the Employment Rights Act 1996 against the second respondent, as the first respondent could not be liable to pay him such a payment as is required by section 166. Accordingly, his claim against

the second respondent for a redundancy payment must fail. The claims for a redundancy payment against both the first respondent and the second respondent are dismissed.

25. For the other payments (notice pay, holiday pay and arrears of pay), section 188 of the Employment Rights Act 1996 applied. The Tribunal accepted the claimant's evidence about the non-receipt of the letter of 30 March (for both him and RCUK). The Tribunal was not doubting that the 30 March letter was generated. However, the second respondent had not provided evidence that it was communicated to the claimant (or his advisers), in the sense that it was received by him/them. Accordingly, the Tribunal found that the first date when the decision was communicated to the claimant was 10 May 2022.

26. The letter of 10 May contained nothing in it which indicated that there had previously been an earlier decision, or which might have brought to the claimant or his representative's attention the fact that there had been an earlier decision.

27. On that basis, as the Tribunal found that the decision of the second respondent was communicated to the claimant on 10 May 2022, the claim for the arrears of pay, holiday pay and notice pay were all entered at the Tribunal in the time required by section 188.

28. The Tribunal also found that, even had it not found that the 30 March letter had not been communicated, it would have found that it would not have been reasonably practicable for the claimant to enter his claim in time and that the claim was entered within such further period as the Tribunal considered reasonable, where:

- a. the second respondent had made a second decision (on slightly different or expanded grounds); and
- b. the second respondent had told the claimant's representatives in an email that time ran from the second decision, as it did in the emails of 10 January.

29. The Tribunal did not think the second respondent actually had the ability to tell an applicant how the Tribunal would apply the law (as it purported to do in 10 January email). Section 188 does not provide for the second respondent to agree an extension of time. However, the Tribunal found, on this occasion and for this claimant, that the combination of the 10 May letter and the email of 10 January would have meant that it was not reasonably practicable for a claim to have been entered within the time required (where reliance was placed upon the second respondent's statement as being the reason for the mistake), and the Tribunal would have accepted that the claim was entered within such further period as the Tribunal considered reasonable.

Date: 17 October 2022

JUDGMENT AND REASONS SENT TO THE PARTIES ON
24 October 2022

FOR THE TRIBUNAL OFFICE

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