



EMPLOYMENT TRIBUNALS

Claimant: Mr V Karpavicius

Respondent: (1) Secretary of State for Business, Energy & Industrial Strategy
(2) Prime Aquariums Ltd (in liquidation)

Heard at: Reading (by CVP) **On:** 6 April 2023

Before: Employment Judge Shastri-Hurst

Representation

Claimant: in person

Respondent: Mr P Soni (lay representative)

JUDGMENT having been handed down to the parties on 6 April 2023 at the final hearing, 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:

JUDGMENT

1. The claimant's claim under s166 of the Employment Rights Act 1996, for a statutory redundancy payment, is well-founded and upheld;
2. The respondent is ordered to pay the sum of £1,322.15 as the statutory redundancy payment.
3. The claimant's claim under s182 of the Employment Rights Act 1996, for other payments, is struck out as being out of time, and the Tribunal does not have jurisdiction to deal with it.

REASONS

Introduction

1. The second respondent ("Prime Aquariums") was a company incorporated on 20 January 2016 as a private limited company that dealt with sales via mail

order and via the internet, supplying and delivering goods relating to aquariums.

2. The claimant was the sole director and shareholder of Prime Aquariums. He says he was also an employee, however this is disputed by both respondents.
3. Prime Aquariums went into company voluntary liquidation on 6 December 2022. The claimant claims that, as a result, his employment was made redundant, meaning that he is due various payments, which he now seeks to claim from the respondents.
4. ACAS early conciliation started on 8 April 2022 and concluded on 11 April 2022. By claim form of 30 June 2022, the claimant brought claims under s166 and s182 of the Employment Rights Act 1996 (“ERA”), for a redundancy payment and other payments respectively.
5. The first respondent (“the SOS”) defended these claims on the basis that the claimant was never an employee of Prime Aquariums.
6. Prime Aquariums has not entered a response to the claim, and has taken no part in it.
7. At the final hearing, the claimant represented himself, and the SOS was represented by Mr Soni. I am grateful to them both for the manner in which they conducted themselves during the hearing.
8. In order to assist me in reaching my judgment, I had in front of me a bundle of 200 pages, and a witness statement from the claimant. I heard evidence from the claimant, who was cross-examined by Mr Soni. I also heard submissions from both parties, and had the benefit of a bundle of relevant cases from Mr Soni.
9. At the beginning of the hearing, it was identified that there was an issue regarding the time within which the claim was presented to the Tribunal. It was the SOS’s case that the claims were out of time, and therefore the Tribunal did not have jurisdiction to deal with them.
10. There was a dispute of fact about when the claimant was made redundant (assuming for the moment that the claimant was an employee of Prime Aquariums). The claimant said it was 25 November 2021, however that date changed during the hearing to 16 November 2021, as that was the date of the last activity on Prime Aquarium’s bank account. The SOS on the other hand argued that the claimant must have been made redundant by 11 August 2021, as it was on this date that he instructed Redundancy Claims UK (“RCUK”) to deal with payments arising from that redundancy – [39].
11. Given this dispute in fact regarding the effective date of termination, and therefore the date from which the clock would start to run in relation to the claim under s166 ERA, I decided to hear the evidence in the case and deal with both the time limit point and the substantive claim together, as opposed to dealing with time limits as a separate preliminary issue.

Issues

12. The issues were agreed at the beginning of the hearing as being as follows:

Time limits

- 12.1. Was the claim under s166 ERA presented to the Tribunal within the requisite time limit under s170 and s164?
- 12.2. Was the claim under s182 ERA presented to the Tribunal within the requisite time limit under 188?
- 12.3. These questions require the Tribunal to determine when the claimant was made redundant (assuming for current purposes that he was an employee). The claimant says 16 November 2021, the respondent says 11 August 2021.

Ss166/170 ERA claim

- 12.4. If this claim is in time, was the claimant an employee of Prime Aquariums at the time of the redundancy? This is the only basis on which the SOS defends this claim.
- 12.5. If so, and the claimant is due a redundancy payment, what was his gross weekly pay?

Ss182/188 ERA claim

- 12.6. If this claim is in time, was the claimant an employee of Prime Aquariums at the time of the redundancy? This is the only basis on which the SOS defends this claim.
- 12.7. If so, and the claimant is due notice pay, holiday pay and arrears of pay, what amount is the claimant due under each head of loss?

Law

Time limits – s166 ERA

13. There is no express time limit for a claim brought under s166 ERA, as is made clear by s170 ERA which deals with references to the Tribunal. However, claims under s166 are claims against the state, to guarantee liabilities owed by an employer. It follows that the SOS can only provide such a guarantee if the employer would in fact be liable, which would happen only if a claim is made within the time limits provided by s164 ERA, set out below:

- (1) 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 s111.
- (2) An employee is not deprived of his right to a redundancy payment by subsection (1) if, during the period of six months immediately following the period mentioned in that subsection, the employee –
- a. Makes a claim for the payment by notice in writing given to the employer,
 - b. Refers to an employment tribunal a question as to his right to, or the amount of, the payment, or
 - c. Presents a complaint relating to his dismissal under s111,

And it appears to the Tribunal to be just and equitable that the employee should receive a redundancy payment.

- (3) In determining under subsection (2) whether it is just and equitable that an employee should receive a redundancy payment an employment tribunal shall have regard to –
- a. The reason shown by the employee for his failure to take any such step as is referred to in subsection (2) within the period mentioned in subsection (1), and
 - b. All the other relevant circumstances.

14. For the purposes of s164(1)(b), the meaning of employer will mean any body against whom the claimant is entitled by statute to claim his redundancy pay. Here, under s166, the claimant is entitled to claim against the SOS; therefore, making a claim to the SOS will be sufficient to stop time running under s164. The claim to the redundancy payments service was made on 1 March 2022.

15. If the date of redundancy was 16 November 2021, then the primary time limit for presenting a claim would be 15 May 2022. In this scenario, the claim form would have been presented in time.

16. If the date of redundancy was 11 August 2021, then the primary time limit for presenting a claim would be 10 February 2022. Given that the date on which a claim was made to the SOS was 1 March 2022, this claim would be outside the primary time limit.

17. It would then be necessary to consider the provision under s164(2), which sets out a two-stage test:

- 17.1. Was a claim (to either the employer or Tribunal) made within 6 months of the primary time limit (here 10 August 2022); and, if so,
- 17.2. Is it just and equitable that the claimant should receive any redundancy pay due?

18. In determining the question of whether it would be just and equitable for the claimant to receive any redundancy pay due, the Tribunal needs to have regard to the factors set out above in s164(3).

Time limits – s182 ERA

19. S188 ERA sets out the time limit for presenting a claim under s182 ERA, as follows:

(1) A person who has applied for a payment under s182 may present a complaint to an employment tribunal –

- a. That the Secretary of State has failed to make such payment, or
- b. That any such payment made by him is less than the amount which should have been paid.

(2) 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.

20. As set out in s188, the time limit for bringing a claim under s182 is three months from the date on which the decision of the SOS on the application was communicated to the claimant. Here, that date is 21 March 2022. This means the primary time limit for the claimant to present his claim under s182 was 20 June 2022. This was then extended by 3 days to reflect the period of time within the ACAS early conciliation period. The ultimate deadline for presenting his claim was therefore 23 June 2022.

21. The claim form was in fact presented on 30 June 2022, and was therefore 7 days late, and as such out of time.

22. The issue therefore becomes whether it was not reasonably practicable for the claimant to have presented his claim by 23 June 2022, and, if not, whether it was presented to the Tribunal within a reasonable period after 23 June 2022. The burden of proof lies with the claimant.

23. In terms of “not reasonably practicable”, the first question must be why the primary time limit was missed. Then I must ask whether, notwithstanding those reasons, was the timely presentation of the claim still reasonably practicable.

24. The meaning of “reasonably practicable” has been held to mean “reasonably feasible”– Palmer & Saunders v Southend-on-Sea Borough Council [1984] 1 All ER 945. What is “reasonably feasible” has been held to sit somewhere between the two extremes of what is reasonable, and what is physically possible.

25. Of relevance in this case is the reliance upon advice from third parties. The case of Dedman v British Building and Engineering Appliances Ltd [1974] All ER 520 established “the Dedman Principle”, that a claimant who puts his case in the hands of a solicitor cannot plead ignorance if the solicitor gets it wrong. In other words, a claimant will not be able to argue that it was not reasonably practicable to present his claim on time on the grounds that he received wrong advice.

26. There are different categories of “adviser”; some fall within the Dedman principle, some do not. For example, trade union representatives count as “advisers” for these purposes, and they are generally deemed to know the

relevant time limits and the importance of those time limits. It follows, and has been found by the EAT in Times Newspapers Ltd v O'Regan [1977] IRLR 101, that the trade union's fault was attributable to the claimant and so it was reasonably practicable for her to have brought claim in time, even though the failure to do so was because the trade union representative had got the time limits wrong.

27. The question for advisers who are non-legal is whether a claimant was reasonable in relying on their advice. If the answer is "yes", then that claimant and adviser will be subject to the Dedman Principle. If the answer is "no", they will not.

28. If an adviser makes an error, the question will then be whether that error was, in itself, reasonable. If the mistake was reasonable, the Dedman principle will not apply – Wall's Meat Co Ltd v Khan [1978] IRLR 499.

Applications for redundancy payments – s166 ERA

29. S166 provides as follows:

(1) Where an employee claims that his employer is liable to pay to him an employer's payment and either –

- a. That the employer 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.

(2) In this part "employer's payment", in relation to an employee, means –

- a. A redundancy payment which his employer is liable to pay to him under this Part..."

Employee's rights on insolvency of employer – s182 ERA

30. S182 provides as follows:

If, on an application made to him in writing by an employee, the Secretary of State is satisfied that –

- a. the employee's employer has become insolvent;
- b. the employee's employment has been terminated; and,
- c. on the appropriate date the employee was entitled to be paid the whole or part of any debt to which this Part applies

The Secretary of State shall, subject to s186, pay the employee out of the National Insurance Fund the amount to which, in the opinion of the Secretary of State, the employee is entitled in respect of the debt.

Employee status

31. For a claimant to be successful under s166 and s182 ERA, they must be an employee.

32. It is possible for a shareholder and director to be an employee as well, even when the claimant is 100% shareholder, meaning that they have complete control of the company. In fact, this is an irrelevance.
33. The case of Secretary of State for Business, Enterprise and Regulatory Reform v Neufeld and Howe [2009] EWCA Civ 289 set out helpful guidance in cases in which a director/shareholder is alleged to also be an employee. The question is one of fact for the Tribunal to determine, with regard to two issues:
- 33.1. Was the putative contract genuine, or a sham; and,
 - 33.2. If the contract is genuine, is it a contract of employment? This requires proving more than just appointment as director. Relevant factors include:
 - 33.2.1. How the claimant was paid - a salary points to employee status, director's fees point away from it.
 - 33.2.2. How the claimant had been acting – simply acting in the role of director, or acting as an employee.
34. In the case of Neufeld, the Employment Appeal Tribunal found that the Tribunal had erred in finding that the claimant was not an employee, and erred in taking into account the irrelevant facts that he had given personal guarantees, had lent money to it, and was a controlling shareholder.
35. Another useful case is that of Secretary of State for Business, Innovation and Skills v Knight [2014] IRLR 605, in which the Employment Appeal Tribunal upheld the Tribunal's decision that the claimant was an employee. This was despite the fact that she was managing director and sole shareholder, and, during the last two years, had waived her salary to allow others to be paid. The issue was the claimant's employment status at the point when the redundancy payment fell due. The question was whether, by the time of redundancy, the claimant's employment contract had been varied or discharged as a result of her waiving her salary. The Tribunal (upheld by the EAT) found that on the facts, there was no variation or discharge, but that there was simply a choice by the claimant not to take her salary.

Findings of fact

36. Prime Aquariums was incorporated on 20 January 2016 by the claimant, who was the sole shareholder and director of the company. The company consulted on aquarium sales, also undertaking building projects on-site, selling made to order products, to be built and delivered by suppliers. From the point of order to the date of delivery would be around 2-3 months.
37. For several years, Prime Aquariums was running well. The claimant was a "one man band", and referred to himself as Operations Manager, but had no written contract of employment. When the company was set up, there was an oral agreement with the company that he "take care of the whole thing". He agreed to be paid £11,500 per annum.
38. The claimant undertook the following tasks:

- 38.1. Communications with clients, using all different media; email, telephone, social media and eBay;

- 38.2. Managing the company's reviews on several platforms;
 - 38.3. Dealing with the company's finances and accounts;
 - 38.4. Taking and posting photos and videos of aquarium projects to social media platforms;
 - 38.5. Managing company expenses.
39. In terms of his hours, the hours of Prime Aquariums were 0900-1700hrs, however the claimant would work when the work needed to be done. Although the claimant did go on holiday, he just took the work with him and answered calls and emails as usual.
40. The claimant received payslips that were produced by a third party company, engaged by Prime Aquariums to take care of salary, tax, VAT and so on – [109-111]. The claimant did not always get the money that was recorded on these payslips, and did not receive a regular monthly salary.
41. The claimant received P60s each year: I have had sight of the P60s for 2019, 2020 and 2021 – [106-108].
42. In his role as director, the claimant made director's loans to the company periodically. He would also on occasion receive some dividends.
43. When the Covid-19 pandemic hit in March 2020, Prime Aquariums' suppliers were not able to fulfil the requirements for orders received by the company. This meant that delays were caused, leading to cancellations, refunds and poor reviews from customers.
44. On 11 August 2021, the claimant sent a letter of authority to RCUK, giving them authority to deal with matters relating to his redundancy claim and other statutory entitlements - [39]. It was around August that the company took its final orders, which would take 2-3 months to complete.
45. The last bank transactions for Prime Aquariums took place on 16 November 2021 - [112]. The claimant was still required to work up to that date, in order to ensure that the last orders taken were all completed.
46. Prime Aquariums entered into company voluntary liquidation on 8 December 2021.
47. On 1 March 2022, the claimant submitted his claim to the SOS for redundancy and insolvency payments - [40]. On 21 March 2022, the claimant received a letter from the Redundancy Payments Service rejecting his claim on the basis that he was not an employee of Prime Aquariums - [54].
48. ACAS early conciliation started on 8 April 2022 and concluded on 11 April 2022. RCUK presented the claim form on behalf of the claimant on 30 June 2022.

Conclusions

Time point – s164 ERA

49. If the claimant was made redundant on 16 November 2021, then his claim under s166 is in time.

50. If the claimant was made redundant on 11 August 2021, then his claim is outside the primary time limit. However, he did make his claim to the Redundancy Payments Service within 6 months of that initial time limit. The question then becomes whether it would be just and equitable for the claimant to receive his redundancy payment, if one is in fact due to him.
51. I consider that, if the claimant was an employee, then it would only be just for him to be able to receive his redundancy payment. To be deprived of a legitimate payment on the basis that RCUK, the claimant's advisers, did not enter the claim form on time, would be unfair. The "just and equitable" test is a much broader one than the "not reasonably practicable" test, and I consider it would not be just and equitable to keep the claimant from a payment to which (if the claim succeeds) he is lawfully entitled.
52. If necessary, I therefore extend time under s164(2) so that the claim under s166 is in time, even if the earlier redundancy date is correct.

Time point – s188 ERA

53. It is not clear to me what the reason was for missing the primary deadline of 23 June 2022. The claimant relied upon the guidance of RCUK, who are no longer representing him.
54. RCUK know on 21 March 2022 that SOS had rejected the claimant's application, and so knew that they would need to go to the Tribunal if they wanted to pursue the claim for the claimant.
55. RCUK approached ACAS and completed the early conciliation process in plenty of time (8 – 11 April 2022). Then there appears to have been a delay of over 2 months before the ET1 was submitted by RCUK. I have no evidence as to what was happening in that time period. The claimant was unable to shed any light on the reason it took over 11 weeks from the end of the ACAS early conciliation period to present the ET1.
56. The question is then whether the claimant and RCUK are subject to the Dedman Principle. As set out above, the question for advisers who are non-legal is "was the claimant reasonable in relying on their advice?". RCUK holds itself out specifically for the purpose of assisting people who are seeking redundancy payments from their employer. Therefore, the claimant was reasonable in relying on RCUK's advice, and deferring to them as experts in how to deal with this type of claim.
57. I turn then to consider whether the error by RCUK in presenting the claim form late was in itself reasonable. Again, the burden lies with the claimant, and again I have no evidence regarding the reason for the delay. This type of case is RCUK's bread and butter; they should have been aware of the time limits, and made sure that the ET1 was presented in time. As such, I find that RCUK's error in delaying the presentation of the ET1 was not reasonable.
58. It follows then that the Dedman Principle applies in this case, meaning that the claimant is bound by RCUK's actions in presenting the claim form late. I find

that the claimant has not discharged the burden of proof to demonstrate that it was not reasonably practicable to present the claim form in time.

59. I therefore find that the s182 claim is out of time, and the Tribunal does not have jurisdiction to deal with it.

Employee status

60. The claimant had no written contract of employment, and there is no suggestion that any purported employment contract is a sham. In any event, I note that sham cases are a rarity, and they tend to be based on a written contract designed deliberately to mask the sham. I find that there is no sham in this case.

61. Therefore, I must move on to consider all relevant factors, including how the claimant was paid and how the claimant had been acting.

62. Although I accept that the claimant did not always take his salary, he did receive payslips, and the company had engaged a third party specifically to deal with issues such as those payslips. The mechanics of paying the claimant appear therefore to point towards him being an employee.

63. In terms of what he actually did whilst working, the claimant did everything required to make the company operate. He was not just performing director's responsibilities, but was doing all tasks, from updating social media, to handling client orders, to controlling the finances. I find that the claimant acted in accordance with his contract, that he was to do all tasks and "take care of the whole thing" as he said he was contracted to do in evidence.

64. Looking at the bank statements, and taking into account the claimant's evidence that the last orders would have been completed in November 2021, I accept that he was working up to the closure of the company's bank account on 16 November 2021. It may have been that the volume of work reduced, however there was still work to be done, and the claimant was still the person doing that work.

65. In line with Knight, I have to consider the claimant's employee status at the time that the redundancy payment fell due. In light of my finding that the claimant worked until 16 November 2021, that is the date on which I must consider his status, particularly in relation to the claimant's waiver of his salary.

66. I again refer back to the case of Knight, and find that, in this case, there was no variation of the claimant's contract, and no discharge of it. The claimant simply chose not to be paid his salary in order to put that money back into the company. This is not sufficient in and of itself to mean that the claimant's contract was varied or discharged at the point when he was made redundant.

67. The fact that the claimant was the sole shareholder and so had 100% control of the company is irrelevant, as is the fact that he made director's loans and took dividends as a director.

68. I therefore conclude that the claimant was an employee of Prime Aquariums, at the time of the redundancy, on 16 November 2021. In light of that finding, the claim under s166 is in fact within the primary time limit in any event.

69. The claimant's claim for his statutory redundancy pay is therefore well-founded and succeeds.

70. It was agreed between the parties that the correct gross weekly pay for the claimant was £240.39, using the P60 on [108].

71. Given the claimant's age at the commencement of his employment and at the date of termination, the correct calculation for his statutory redundancy pay is as follows:

$$[(4 \times 1) + (1 \times 1.5)] \times 240.39 = \text{£}1,322.15.$$

72. The claimant is awarded the amount of £1,322.15 as his statutory redundancy pay.

Employment Judge **Shastri-Hurst**

Date 13.4.2023

REASONS SENT TO THE PARTIES ON

14.5.2023

GDJ

FOR THE TRIBUNAL OFFICE