



EMPLOYMENT TRIBUNALS

BETWEEN

Claimant

Mrs Michelle McCarthy

Respondents

AND Secretary of State for Business Enterprise
And Industrial Strategy (1)
Francis Clark LLP (2)

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

HELD REMOTELY
BY CVP VIDEO PLATFORM

ON

11 July 2023

EMPLOYMENT JUDGE N J Roper

Representation

For the Claimant:

Mr R McCarthy, Claimant's husband

For the First Respondent:

Written Representations

For the Second Respondent:

Ms T Jones of Counsel

JUDGMENT

The judgment of the tribunal is that the claimant's claims are all dismissed against both respondents on withdrawal by the claimant.

.

RESERVED REASONS

1. This is the judgment following a preliminary hearing to determine whether the claimant's claims should be struck out as against the second respondent on the grounds that they have no reasonable prospect of success. I also considered whether the claimant should be ordered to pay a deposit as a condition of continuing with the claims as against the remaining first respondent because they have little reasonable prospect of success.
2. In this case the claimant Mrs Michelle McCarthy has brought claims seeking payment of the minimum guaranteed payments under the Statutory Insolvency Fund following the liquidation of her employer. The claims are all denied by both respondents.
3. This has been a remote hearing which has been consented to by the parties. The form of remote hearing was by CVP Video Platform. A face-to-face hearing was not held because it was not practicable, and all issues could be determined in a remote hearing. The

documents that I was referred to are in a bundle of 64 pages, the contents of which I have recorded. The order made is described at the end of these reasons.

4. I have considered the grounds of application and the responses submitted by the parties. I have considered the oral and documentary evidence which it is proposed will be adduced at the main hearing. I have also listened to any factual and legal submissions made by and on behalf of the respective parties. I have not heard any oral evidence, and I do not make findings of fact as such, but my conclusions based on my consideration of the above are as follows.
5. This claim concerns the liquidation of Boundary Precision Engineering Limited, a limited company which was formerly known as BPE Aerospace Limited ("the Company"). The claimant commenced employment with the Company on 9 September 1990 and was appointed as its Finance Director on 1 January 2006. On 1 May 2013 the claimant entered a loan agreement with the Company under which she borrowed £69,162 from the Company as an unsecured loan ("the Loan"). The Loan has not been repaid.
6. The second named respondent Francis Clark LLP is a firm of Chartered Accountants and Insolvency Practitioners. The Company engaged the second respondent on 8 August 2022, and the claimant's employment terminated summarily on that date. On 8 September 2022 the Company passed a winding up petition and the second respondent was appointed as Liquidator to wind up the Company in a Creditors Voluntary Liquidation.
7. In the course of this process the claimant signed a statement of affairs on 26 August 2022 in which, inter-alia, she confirmed that the amount outstanding under the Loan from her to the Company was £80,381.51.
8. The Secretary of State for Business Energy and Industrial Strategy is the first named respondent in these proceedings. The first respondent the Secretary of State acts as statutory guarantor for payments made from the National Insurance Fund, and the Secretary of State has a duty to protect the National Insurance Fund. Under sections 166 and 182 of the Employment Rights Act 1996 the Secretary of State (the first respondent) is liable to make certain minimum payments to an employee on the insolvency of that employee's employer. Under section 166 this includes a statutory redundancy payment, and under section 184(1) it includes arrears of pay of up to eight weeks; the minimum statutory period of notice; and accrued holiday pay of up to 6 weeks.
9. It is accepted by the parties that the claimant's previous employer (the Company) was insolvent, and that the Company has not paid the claimant any payments relating to redundancy pay, notice pay, outstanding wages, and accrued but unpaid holiday pay. It is also agreed between the parties that the relevant statutory minimum amounts which would ordinarily fall due to be paid by the second respondent from the National Insurance Fund to the claimant are as follows: (i) statutory redundancy pay £14,275.00; (ii) breach of contract in respect of unpaid notice pay of £6,852.00 gross, which is £5,007.84 net; (iii) arrears of pay (unpaid wages) of £2,509.31 gross, which is £1,833.09 net; and (iv) accrued but unpaid holiday pay £1,447.89 gross which is £1,062.66 net. The net total of these sums is £22,178.59.
10. The Redundancy Payments Service (the "RPS") acts on behalf of the first respondent the Secretary of State in respect of payments to be made from the National Insurance Fund. The RPS has declined to pay the claimant the sum of £22,178.59, because it has offset this amount from the sums which the Claimant owes the Company (that is to say the amount which the claimant has herself certified to be outstanding under the Loan of £80,381.51).
11. Having established the above facts, I now apply the law.
12. The Employment Tribunal Rules of Procedure 2013 are in Schedule 1 of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013 and are referred to in this judgment as "the Rules".
13. Rule 37(1) provides that at any stage of the proceedings, either on its own initiative or on the application of a party, a Tribunal may strike out all or part of a claim or response on the grounds: (a) it is scandalous, or vexatious, or has no reasonable prospect of success; (b) that the manner in which the proceedings have been conducted by or on behalf of the claimant or the respondent (as the case may be) has been scandalous, unreasonable or

- vexatious; (c) for non-compliance with any of these Rules or with an order of the Tribunal; (d) that it has not been actively pursued; (e) that the Tribunal considers that it is no longer possible to have a fair hearing in respect of the claim or response (or the part to be struck out).
14. Rule 39 provides that where at a preliminary hearing (under rule 53) the Tribunal considers that any specific allegation or argument in a claim or response has little reasonable prospect of success, it may make an order requiring a party ("the paying party") to pay a deposit not exceeding £1,000 as a condition of continuing to advance that allegation or argument. Under Rule 39(2) the Tribunal shall make reasonable enquiries into the paying party's ability to pay the deposit and have regard to any such information when deciding the amount of the deposit.
 15. As noted above, under sections 166 and 182 of the Employment Rights Act 1996 the Secretary of State (the first respondent) is liable to make certain minimum payments to an employee on the insolvency of that employee's employer. Under section 166 this includes a statutory redundancy payment, and under section 184(1) it includes arrears of pay of up to eight weeks; the minimum statutory period of notice; and accrued holiday pay of up to 6 weeks.
 16. In addition, the Insolvency Rules 2016 apply. Under Rule 14.25 (which applies to liquidations) there is a mandatory set off of sums due on the one part from a company in liquidation to any creditor, and another part from any sum owed by that creditor to a company in liquidation, where there are mutual dealings. Only the balance (if any) is payable. Where that balance is due from the insolvent entity, the creditor has a right to submit a claim for the balance in the liquidation. This Rule applies in the liquidation of the Company and therefore there is a mandatory set off under Rule 14.25 in respect of the mutual dealings between the Company and the Claimant.
 17. The first respondent is thus required by law under Rule 14.25 to set off payments due from employees to the Company against the sums which the first respondent would otherwise pay out to employees on the insolvency of the Company. The first respondent is required to take account of the sums due from the claimant to the Company when considering whether to make payments from the National Insurance Fund on behalf of the insolvent Company to the claimant.
 18. Two relevant cases are these: Secretary of State for Employment v Wilson and Ors (1) and BCCI (2) [1996] IRLR 330 EAT, and Westwood v Secretary of State for Employment [1985] ICR 209. They both confirm that the liability of the Secretary of State to make payments cannot exceed that which would otherwise be due to be paid by the Insolvent Employer
 19. Decision:
 20. This preliminary hearing was listed to determine whether the claimant's claims as against the second respondent Francis Clark LLP should be dismissed as having no reasonable prospect of success, and/or whether this second respondent should be removed as a respondent to these proceedings.
 21. During the course of this hearing it became clear that the claimant considers that she has a potential claim against the second respondent arising from their conduct in the course of the liquidation of the Company. The claimant was entitled to a contractual notice period of six months. The statutory minimum period of 12 weeks' notice is potentially payable by the first respondent from the National Insurance Fund. The claimant considers that she should have been treated as a preferential creditor for the balance of her six months' notice period over and above this period of 12 weeks. I explained to the claimant that any such claim would need to be brought before the civil courts and that this Tribunal does not have jurisdiction to determine any such claim arising from the Liquidator's decision not to treat the balance the claimant's breach of contract claim against the Company as a preferential claim.
 22. During these discussions the claimant agreed that at no stage was the second respondent ever her employer, and there are therefore no employment related claims against the second respondent which can be pursued before this Tribunal. Similarly, the second respondent Francis Clark LLP is not the statutory guarantor for payments to be made from the National Insurance Fund by the RPS, because that is the role of the first respondent

- the Secretary of State. The claimant agreed to withdraw her claims against the second respondent for these reasons.
23. We then discussed the claimant's remaining claims against the first respondent following the failure by the RPS to pay the guaranteed minimum payments from the National Insurance Fund.
 24. In this case it is agreed by the parties that in the normal course of events the RPS would pay to the claimant the statutory minimum payments from the National Insurance Fund on the insolvency of her employer (the Company) which would have amounted to a net payment of £22,178.59.
 25. It is also clear that the claimant owes the Company the sum of £80,381.51 as the outstanding amount repayable by her to the Company under the Loan. The claimant certified that position to be true in the Company's statement of affairs in the course of its liquidation.
 26. The difficulty for the claimant arises from Rule 14.25 of the Insolvency Rules 2016 which apply on the liquidation of the Company, the principles of which have been confirmed in the relevant case law: see Secretary of State for Employment v Wilson and Ors (1) and BCCI (2), and Westwood v Secretary of State for Employment. The position is straightforward. The liability of the Secretary of State, the first respondent to the claimant's claims in these proceedings, cannot exceed that of the Insolvent Employer (the Company) to the claimant. Put bluntly, in circumstances in which she still owes the Company £80,381.51, the Company is not liable to pay her any sums due to her unless and until they exceed that debt which she owes the Company. That is why the RPS is entitled to refuse to make payments from the National Insurance Fund on behalf of the first respondent because of the first respondent's duty to protect the National Insurance Fund. The sums otherwise due from the National Insurance Fund do not exceed the debt which the claimant owes to the Company, and in these circumstances, she is not entitled to payment of the sums claimed.
 27. For these reasons in my judgment the claimant's claims have little reasonable prospect of success against the first respondent, and I discussed with the claimant and her husband whether I should make a Deposit Order as a condition of the claimant continuing with her claims as against the first respondent. However, following the above discussion and explanation, the claimant also decided to withdraw her claims against the first respondent.
 28. The claimant's claims are therefore all dismissed against both respondents on withdrawal by the claimant.

Employment Judge N J Roper
Dated: 11 July 2023

Judgment sent to Parties on

For the Tribunal Office