



EMPLOYMENT TRIBUNALS

Claimant: Mr T P McEvilly (1)

Mr M Quinn (2)

Mr A Lucass (3)

Respondent: McLaughlin Contractors Limited (1)

McLaughlin Contractors (2)

HELD AT: Manchester (by CVP)

ON: 19 October 2023

BEFORE: Employment Judge Johnson

REPRESENTATION:

Claimant: Mr D Morris (solicitor for first claimant)

Second claimant did not attend, (nor was he represented)

Mr C Ocloo (solicitor for third claimant)

Respondent:

The first respondent company was not represented, (nor was an officer of the company in attendance).

Note: Mr S Hoyle (consultant from Croner), confirmed that he had been instructed by the wife of the former director Mr McLaughlin (deceased), but this was in her private capacity as his wife and not as the company secretary. Mr Hoyle attended as an observer.

The legal representatives for the estate of Mr Robert Alexander McLaughlin (deceased), did not attend.

Note: an executor Mr Christopher Burton attended and observed the hearing but did not seek to represent the estate during the hearing.

JUDGMENT

The judgment of the Tribunal is that:

- (1) In relation to the first claimant, the following complaints are well founded and succeed:
 - (a) The first claimant is entitled to a redundancy payment, which is payable by the first respondent, and which amounts to £10,191.
 - (b) The first claimant must be paid the gross sum of £5,688 by the first respondent in respect of notice pay for the breach of contract complaint.
 - (c) This means that the **total** sum payable by the first respondent to the first claimant in respect of his successful complaints is **£15,879 (Fifteen thousand, eight hundred and seventy-nine pounds)**.
- (2) The second claimant failed to attend the hearing and has failed to pursue his claim. Accordingly, his claim is dismissed.
- (3) In relation to the third claimant, the complaint seeking a redundancy payment from the first respondent is successful and they must pay the third claimant the sum of **£16,166 (Sixteen thousand, one hundred and sixty-six pounds)**.
- (4) The first and third claimants' applications to amend their claims to include complaints of a failure by the first respondent to provide written statements of terms and conditions and a failure to provide written pay statements contrary to section 11(1) and (2) Employment Rights Act 1996 respectively, are dismissed upon withdrawal by both claimants.
- (5) The claims brought against the second respondent are dismissed following confirmation by the first and third claimants (and with the second claimant not attending), that they were not their employer at the material time.

REASONS

Introduction

1. These proceedings arose from 3 claim forms presented by the three claimants following periods of early conciliation:
 - (a) Mr T P McEvelly – case no:2409767/2022 & presented 7 December 2022.
 - (b) Mr M Quinn – case no:2409768/2022 & presented 7 December 2022.
 - (c) Mr A Lucass – case no:2402105/2023 & presented 27 January 2023.

The three claimants were employed by the first respondent company and were dismissed on 22 July 2022 following the death of the sole director Mr

Robert Alexander McLaughlin and the company ceasing to operate as a business.

2. The first respondent company remains registered with Companies House and as yet, they have not been informed of the death of Mr McLaughlin, who remains registered as the sole director. His wife Susan McLaughlin is recorded as the company secretary and has some shares in the business. However, upon Mr McLaughlin's death she has understandably not sought to continue operating the business.
3. Mr McLaughlin's estate is in the process of a complicated probate process, and it has taken time to identify and resolve outstanding assets and liabilities in order that the residue of the estate can be finalised and distributed. This means that the first respondent company remains dormant, and it is understood that a likely eventual outcome is for this business to become insolvent and to wound up. Consequently, the payments ordered to be paid by the first respondent company to the first and third claimants, may have to be recovered via the government's Redundancy Payments Service.
4. Although the claims have included reference to the unincorporated business of McLaughlin Contractors, of which Mr McLaughlin was understood to be the sole principal, the first and third claimants' representatives confirmed that they did not wish to proceed against the second respondent as they believed their employment was with the first respondent company.
5. The second claimant despite presenting a claim form at the same time as the first claimant has not instructed a representative and has not attended either the preliminary hearing case management (PHCM) before Judge Horne on 14 June 2023 nor this final hearing. No correspondence has been presented by him during the proceedings and he clearly has failed to pursue his claim. It was therefore reasonable to dismiss his claim and it was not in the interests of justice to put the respondents (and potentially the other claimants), to further prejudice by delaying the resolution of the final hearing while further efforts are made to request his participation in this case. After all, he is a claimant, and it is his duty to advance his claim in accordance with the timetable set by the Tribunal.
6. The first respondent had presented responses resisting the complaints brought by the first and second claimants but failed to do so within the permitted time limit in relation to the third claimant. Judge Horne refused an application made by the first respondent's representative at the PHCM for an extension of time in order that their proposed response regarding the third claimant's claim could be accepted. No judgment was entered, but clearly the extent to which the first respondent could resist the third claimant's claim was limited. However, this became unimportant once Mr Hoyle confirmed that he could only observe the hearing today as he was not representing the first respondent and no officer for the company was in attendance.

Issues

7. The parties discussed the issues with Judge Horne at the PHCM on 14 June 2023 and it was noted that in addition to the complaints of an unpaid redundancy payment, the first claimant was permitted to amend his complaint to include an additional complaint of breach of contract.
8. There appeared to be no dispute that the claimants were employees of the first respondent company, that they all worked continuously for periods in excess of 2 years and that their employment ended on 22 July 2022, with no suitable alternative vacancies being offered to them so as to avoid termination.
9. The real issue to determine was the question of whether the Mr McLaughlin agreed with the claimants before the date of termination that they would accept alternative employment with the contractor (known as *Fargo*), with whom the first respondent was a sub contractor at a building project in Liverpool. This argument was based upon the premise that the claimants agreed to resign and accordingly the termination of their employment in July 2022 was by mutual agreement, rather than the first respondent ceasing to trade following Mr McLaughlin's death in July 2022.
10. These issues were identified by Judge Horne from paragraph (38) to (43) of his Note of PHCM dated 14 June 2023.

Evidence used

11. The first and third claimants gave oral evidence and relied upon witness statements provided before the final hearing. No evidence was heard from the second claimant or any respondent witnesses.
12. The first respondent was ordered by Judge Horne to prepare a final hearing bundle following disclosure of documents by the parties but had failed to do so before the hearing began and instead the first and third claimants produced small bundles dealing with their discrete claims in these proceedings.
13. The Tribunal was provided with copies of the proceedings in relation to these claims, schedules of loss and supporting documents, primarily dealing with evidence of pay. Although P45 and P60 forms were provided, there were no payslips nor statements of particulars. Initially, consideration was given by the Tribunal concerning an application to amend the claims to include complaints relating to the failure by the first respondent to provide these employment documents under section 11 Employment Rights Act 1996 (ERA), as they were likely to be well founded. However, it became clear that no reference to these failures were included within the original claim forms. Moreover, the claim forms had been presented more than 3 months following the termination of employment (redundancy payment time limit being 6 months – section 164 ERA), with no convincing evidence that it was not reasonably practicable for the claimants to present these complaints within the usual period provided under section 11 ERA. Both the first and third

claimants' representatives therefore agreed to withdraw applications to include these complaints.

14. The first and third claimants gave credible and reliable evidence and in the absence of any evidence to the contrary from the respondents, I accepted their evidence relating to the issues in question.

Findings of fact

15. The first respondent was a limited company and where at the material time, Mr Robert Alexander McLaughlin (deceased) was the sole director and majority shareholder. His wife Susan McLaughlin was the company secretary and minority shareholder and did not play an active role in the business.
16. The first claimant was employed by the first respondent as a ground worker/labourer from 7 March 2007 until his employment was terminated on 22 July 2022.
17. The third claimant was employed by the first respondent as a ground worker/labourer from 16 October 2000 until his employment was terminated on 22 July 2022.
18. Neither claimant received a written statement of particulars from the first respondent during their employment, nor did they receive any or proper written pay statements during their employment. Bank statements and P60/P45 documentation confirmed that at the material time, the first claimant received gross pay of £474 and net pay of £400 each week and the third claimant received gross pay of £548 and net pay of £450 each week.
19. Mr McLaughlin sadly was diagnosed with terminal cancer in 2021 and in early 2022 he had a conversation with the second respondent Mr Quinn about wanting to sort matters out before he passed away and was seeking to reach an agreement with the contractor company 'Fargo' which the first respondent was a sub-contractor. The purpose of this agreement would be to secure alternative employment for the three claimant employees as the first respondent would be unable to continue trading once Mr McLaughlin died.
20. While I accepted that Mr McLaughlin was well intentioned and wanted to provide some security for his employees and indeed had this discussion with the second claimant, I am unable to accept that he spoke with the other claimants, that they only heard about the proposal as hearsay from the second claimant and ultimately, no arrangements were made for alternative employment before Mr McLaughlin died.
21. Mr McLaughlin passed away on 19 July 2022 and his wife informed the claimants that they should finish their work on Friday 22 July 2022, when they would be dismissed as the first respondent company would cease to operate and work contracts. No suitable alternative vacancies were offered within the first respondent company.

22. The first claimant was able to find alternative work on the same site as before but through an employment agency called 'GPW Design Services Limited', which for the avoidance of doubt was not connected with the business 'Fargo' identified by Mr McLaughlin to Mr Quinn. The third claimant was given an elderly van used by the first respondent company on an ex gratia basis and it was understood that this was to assist him with a new business venture as a self employed painter and decorator.
23. Accordingly, I find on balance that the first and third claimants were dismissed because the first respondent ceased to trade and there was no need for their continuing employment. In effect, they were made redundant. I also accept that no redundancy pay was made, no notice pay was given and that the claimants were simply paid for the work which they did up until the date of termination of 22 July 2022.
24. Since this date, the first respondent has remained active, but dormant and the company has not made any redundancy or other payments to the claimants.

Law

Redundancy payments

25. Section 139 of the Employment Rights Act 1996 provides, amongst other things, that an employee who is dismissed shall be taken to be dismissed by reason of redundancy if the dismissal is wholly or mainly attributable to the fact that the requirements of the business for employees to carry out work of a particular kind have ceased or diminished.
26. Under section 155 of the Employment Rights Act 1996, an employee does not have any right to a redundancy payment unless he has been continuously employed for a period of not less than two years ending with the relevant date. Section 145 provides that the relevant date:
- a. In relation to an employee whose contract of employment is terminated by notice, whether given by his employer or by the employee, means the date on which notice expires.
 - b. In relation to an employee whose contract is terminated without notice means the date on which termination takes effect
 - c. In relation to an employee who is employed under a limited-term contract which terminates by virtue of a limiting event without being renewed under the same contract means the date on which termination takes effect
27. Where the contract is terminated by the employer and the notice required by section 86 to be given by the employer would, if duly given, on the material date, expire on a date later than the relevant date (as defined above) then for the purposes of determining the employee's entitlement to a redundancy payment under section 155 and the calculation of the amount of the redundancy payment to which the employee is entitled, the later date is the relevant date. The material date is the date when notice of termination was given by the

employer or where no notice was given, the date on which the contract was terminated by the employer.

28. Under section 163 of the Employment Rights Act 1996, for the purposes of a reference to an Employment Tribunal for a determination as to an employee's right to a redundancy payment or the amount of a redundancy payment, an employee dismissed by his employer shall, unless the contrary is proved, be presumed to have been dismissed by reason of redundancy.
29. Section 162 of the Employment Rights Act 1996 provides that the amount of a redundancy payment shall be calculated by:
- a. Determining the period, ending with the relevant date, during which the employee has been continuously employed;
 - b. Reckoning backwards from the end of that period the number of years of employment falling within that period; and
 - c. Allowing the appropriate amount for each of those years of employment
30. The appropriate amount means:
- a. One and a half weeks' pay for a year of employment in which the employee was not below the age of forty-one,
 - b. One week's pay for a year of employment in which he was not below the age of twenty-two, and
 - c. Half a week's pay for each year of employment not falling within the above subparagraphs
31. Where twenty years of employment have been reckoned, no account shall be taken of any year of employment earlier than those twenty years.
32. Section 141 of the Employment Rights Act 1996 provides that an employee is not entitled to a redundancy payment if he unreasonably refuses an offer to renew his contract of employment or to re-engage him under a new contract of employment, with the renewal or re-engagement to take place either immediately or, or after an interval of not more than four weeks after, the end of his employment.

Wrongful dismissal

33. The Employment Tribunals Extension of Jurisdiction Order 1994 provides that proceedings for breach of contract may be brought before a Tribunal in respect of a claim for damages or any other sum (other than a claim for personal injuries and other excluded claims) where the claim arises or is outstanding on the termination of the employee's employment.
34. A claim for notice pay is a claim for breach of contract; Delaney v Staples 1992 ICR 483 HL.

Discussion

35. Both the first and third claimants were employees of the first respondent at the material time and had worked continuously for this company for periods well in excess of two years. They had both presented their claims within the requisite time limits (allowing for early conciliation), of 6 months from the date of termination on 22 July 2022.
36. Despite allegations that they both effectively resigned to secure alternative employment following the death of Mr McLaughlin on 19 July 2022, I did not accept that this was the case and they clearly were both dismissed by reason of a decision by Mrs McLaughlin that the company would cease trading from 22 July 2022.
37. The claimants continued with their work until this date and their employment was terminated. Their employment ended because the need for their continued employment by the first respondent ceased. This was a clear redundancy situation and there was no evidence that suitable alternative vacancies were on offer.
38. Both the first and the third claimants did their best to find alternative employment but this was in no way connected with the first respondent business and their redundancy complaints must succeed.
39. The first claimant had worked continuously for the first respondent at the effective date of termination on 22 July 2022 for a period of 15 years and taking account of his age (55 when dismissed), the correct multiplier to calculate his redundancy payment is 21.5 weeks. The third claimant had 21 completed years of service, producing a multiplier of 29.5 weeks based upon his age, (60 when dismissed). Their gross pay will be applied to these multipliers to calculate the redundancy payments due.
40. Neither claimant was paid their notice pay, but only the first claimant brought such a complaint and he is entitled to the capped figure of 12 weeks, even though his continuous employment was for a greater period. His gross pay will be applied to this multiplier.

Conclusion

41. Accordingly, the first claimant's complaints are well founded and succeed with a redundancy payment, payable by the first respondent, and amounting to £10,191 and the gross sum of £5,688 also being payable by the first respondent in respect of notice pay for the breach of contract complaint. Consequently, the total sum payable by the first respondent to the first claimant in respect of his successful complaints is £15,879.
- (6) The second claimant failed to attend the hearing and has failed to pursue his claim and his claim must be dismissed.
- (7) The third claimant's complaint seeking a redundancy payment from the first respondent is successful and they are entitled to the sum of £16,166.

Employment Judge Johnson

Date 19 October 2023

JUDGMENT SENT TO THE PARTIES ON

24 October 2023

FOR THE TRIBUNAL OFFICE



NOTICE

THE EMPLOYMENT TRIBUNALS (INTEREST) ORDER 1990 ARTICLE 12

Case numbers: **2409767/2022, 2409768/2022, 2402105/2023**

Name of cases: **Mr T P McEvilly** v **1. McLaughlin**
Mr M Quinn **Contractors Limited**
Mr A Lucass **2. McLaughlin**
Contractors

Interest is payable when an Employment Tribunal makes an award or determination requiring one party to proceedings to pay a sum of money to another party, apart from sums representing costs or expenses.

No interest is payable if the sum is paid in full within 14 days after the date the Tribunal sent the written record of the decision to the parties. The date the Tribunal sent the written record of the decision to the parties is called **the relevant decision day**.

Interest starts to accrue from the day immediately after the relevant decision day. That is called **the calculation day**.

The rate of interest payable is the rate specified in section 17 of the Judgments Act 1838 on the relevant decision day. This is known as **the stipulated rate of interest**.

The Secretary of the Tribunal is required to give you notice of **the relevant decision day**, **the calculation day**, and **the stipulated rate of interest** in your case. They are as follows:

the relevant decision day in this case is: 24 October 2023

the calculation day in this case is: 25 October 2023

the stipulated rate of interest is: **8% per annum**.

For the Employment Tribunal Office