



EMPLOYMENT TRIBUNALS

Claimant: Leon Marais

First Respondent: David Mann and Sons Limited

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

Heard at: by CVP (Bury St Edmunds) **On:** 26 October 2023

Before: Employment Judge Boyes (sitting alone)

Appearances

For the Claimant: In person

For the Respondent: Mr Bright, non executive director

RESERVED JUDGMENT

The claim for notice pay against the first Respondent is not well founded and is dismissed.

The claim for notice pay against the second Respondent under section 182 and 184 Employment Rights Act 1996 is not well founded and is dismissed.

REASONS

1. Early conciliation started on 16 February 2022 and ended on 17 February 2022. The claim form was presented on 11 March 2022.
2. The Claimant made complaints of failure to pay notice pay and unlawful deduction from wages resulting from unpaid overtime. The unauthorised deduction from wages complaint already having been dismissed, the sole matter that remains to be determined is the notice pay claim.

The Proceedings/Hearing

3. The case was listed for a final hearing on the 14 December 2022. At that hearing the Claimant's unauthorised deduction from wages claim was heard and dismissed. In view of the issues that arise in this case, I ordered

that the Secretary of State be added as a party to these proceedings given that the notice pay complaint relates to payments out of the National Insurance Fund [rule 34 ETRP].

4. Consideration of the notice pay claim was adjourned pending service of the claim upon, and receipt of any response from, the second Respondent.
5. The claim was served upon the second Respondent on the 26 January 2023. A response was subsequently received from the second Respondent. The second Respondent indicated that she did not intend to attend the hearing but rather would rely wholly upon the written submissions and other documents provided.
6. The Claimant and Mr Bright gave evidence at the reconvened hearing. I heard brief submissions from the Claimant and first Respondent. In reaching my conclusions I have taken in to account all of the evidence before me including the documentary evidence provided by the parties for the hearing which took place on the 14 December 2022.
7. I reserved Judgment.

The Issue

8. The issue for the Tribunal to determine is whether the Claimant is entitled to receive notice pay for the period 3 October 2021 to 1 November 2021.

Findings of Fact

9. My findings of fact are as follows:

Claimant

10. The Claimant was employed by the first Respondent from 9 May 2013 until 2 October 2021. At the point that his employment ended he was employed full time as the Furniture Manager. The Claimant was dismissed by reason of redundancy. The Claimant commenced new employment on 4 October 2021.

Respondent

11. The first Respondent ran a retail outlet at the time of the Claimant's employment. The company entered into a Company Voluntary Arrangement ("CVA") on the 23 November 2020. The Administrator is Eric Walls of KSA Ltd. The first Respondent appeared by instruction of the Administrator.

Chronology of events

12. The Claimant was given notice of termination on 6 September 2021 and continued to work until 2 October 2021. He was paid by the Administrator for that period.
13. Mr Bright wrote to the Claimant and other employees on the 2 October 2021 informing them that it was not clear who would pay their redundancy and notice pay given the CVA status of the company because this depended upon the financial position post sale and so the company may ask The Insolvency Service to make the payments. On 15 October 2021, he informed all employees that redundancy and notice pay would be paid

via The Insolvency Service and provided them with the necessary supporting documentation.

14. The Claimant applied to the second Respondent for notice pay from 3 October 2021 to 1 November 2021. As a result of that application, he received a payment of £16.50 from The Insolvency Service. The breakdown of how that payment was arrived at is contained in a letter from The Insolvency Service dated 9 November 2021. He received £16.50 because pay of £1915.99 from his new employment, which began on 4 October 2021, was deducted from the gross notice pay due of £1,936.61. It is that deduction that the Claimant, in effect, challenges.
15. After the Claimant was notified of The Insolvency Service's decision, there followed communications by email and text between 9 November 2021 to 7 February 2022 between the Claimant and Mr Bright regarding his notice pay [bundle pages 140 to 143]. This culminated in an email from Mr Bright to the Claimant on the 7 February 2022, in which he explained why The Insolvency Service's payment was calculated as it was and stated that the first Respondent did not owe the Claimant any further payment in relation to notice pay.
16. The Claimant asserts that the first Respondent told him that if his notice pay was not fully paid by The Insolvency Service then it would pay any shortfall. In live evidence, the Claimant stated that he was told this on several occasions by Mr Bright. He says that Mr Bright also told other people the same thing. He could not remember when these conversations occurred.
17. In live evidence, Mr Bright stated that the CVA has now concluded. Following the sale of property by the first Respondent, all sums have now been paid out that the first Respondent.
18. Mr Bright's evidence was that the first Respondent was not notified of any shortfall in notice pay until the employees were notified of the by The Insolvency Service. He then notified the Claimant, and other employees who were likewise affected, that he would investigate with KSA (the insolvency practitioners). In terms of the assertion by the Claimant that the Claimant was told that any shortfall would be met, he believes that there is some confusion. At no time did he say that the first Respondent would pick up the shortfall. He notified all staff that the sums owed including notice pay would be paid by The Insolvency Service or Manns. At that point they did not know if The Insolvency Service would pay the sums concerned because, at the time, they were closing down the store and did not know what could be paid.
19. Having considered all of the evidence before me in the round, including the documentary evidence and oral evidence of the Claimant and Mr Bright, I find that in the earlier stages of the redundancy process, the Claimant and the other employees was informed by Mr Bright that it was not clear who would pay the redundancy and notice pay but it would be paid by either the first Respondent or second Respondent. It seems to me that this is where confusion may have arisen, the impression having been formed by the Claimant that his notice pay would be paid in full whoever was ultimately

responsible for paying it. The position was not clarified until the 15 October 2021. The situation was undoubtedly worrying and confusing for the Claimant. However, there is no evidence before me to suggest that the Claimant was ever told by the first Respondent that if The Insolvency Service did not pay the gross notice pay of £1,936.61, that the first Respondent would top up any shortfall. There was no agreement that the first Respondent would do so.

Terms and conditions of employment and Staff Handbook

20. The Claimant's written statement of particulars of employment signed by the Claimant on the 2 January 2017 states, at section 10, that the amount of notice of termination to which he is entitled is detailed in the staff handbook.
21. The staff handbook deals with notice pay at section 2.x. It confirms that employees are entitled to one week's notice for every complete year of service up to a maximum of 12 weeks for 12 years' service. It also states that:

The Company may, in its absolute discretion, pay your salary entitlement in lieu of all or any part of the unexpired period of notice (subject to deduction at source of income tax and applicable national insurance contributions). [...] You have no right to receive a payment in lieu of notice instead of working your notice period unless the Company exercises its discretion to pay you in lieu under this clause.

The Relevant Law

22. The relevant sections of the Employment Rights Act 1996 as follows:
182 Employee's rights on insolvency of employer.
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 section 186, 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. [...]*
184. Debts to which Part applies.
 - (1) This Part applies to the following debts—*
 - [...] (b) any amount which the employer is liable to pay the employee for the period of notice required by section 86(1) or (2) or for any failure of the employer to give the period of notice required by section 86(1), [...]*
23. In *Westwood v Secretary of State for Employment* [1984] IRLR 209, [1985] ICR 209, the House of Lords decided that, when assessing an employer's liability for breach of contract, the failure to give the statutory minimum period of notice was to be treated as giving rise to a liability in damages, which was subject to the duty to mitigate. The same principles have been

applied in *The Secretary of State for Employment v Cooper* [1987] ICR 766 and *Secretary of State for Employment v Stewart* [1996] IRLR 334.

24. In *Cerberus Software Ltd v Rowley* 2001 ICR 376, CA, the Court of Appeal decided that it is only when an employee is entitled to pay in lieu that the damages are liquidated. If the contractual term gives the employer a discretion whether or not to make a payment in lieu of notice they are not liquidated damages.

My Conclusions

25. The Claimant was dismissed without being given the minimum statutory notice. The Claimant was entitled to 8 weeks' notice based upon 8 years' service. The second Respondent accepts that the Claimant's notice ran from 7 September 2021 to 1 November 2021 and that, as the Claimant was paid all wages to 2 October 2021 that a Compensatory Notice Payment could be considered for the period 3 October 2021 to 1 November 2021.
26. The Claimant's terms and Conditions of employment, when read together with the staff handbook, expressly provides for payment in lieu of notice. However, it is plain from the wording at section 2.x of the staff handbook that such a payment was entirely at the discretion of the first Respondent. Consequently, any claim for damages arising from the failure to give notice are unliquidated and subject to the rules relating to mitigation. As such, applying the relevant caselaw as referred to above, the Second Respondent was entitled to deduct what the Claimant's earned during the remainder of the notice period from his new employment.
27. This means that the second Respondent was entitled to deduct the Claimant's earnings of £1915.99 from his new employment from the gross notice entitlement of £1,936.61, the net compensation payable for loss of notice therefore being £16.50.
28. In relation to the First Respondent, taking in to account my findings above at paragraph 19, on the evidence before me, I conclude that there was no agreement that the first Respondent would top up any shortfall in payment of notice pay from The Insolvency Service. Further, and in any event, once The Insolvency Service took responsibility for termination payments owed to the Claimant, the first Respondent's liability in that respect ceased.
29. In the circumstances, the claims against both the first Respondent and the second Respondent are not well founded and are dismissed.

Employment Judge S.L.L. Boyes

Date: 23 January 2024

**Reserved Judgment and Reasons sent to the parties on:
24 January 2024**

For the Tribunal Office

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