



# EMPLOYMENT TRIBUNALS

BETWEEN

**Claimant**

Mr M Benjamin

**Respondents**

AND The Insolvency Service (1)  
Fat Toni's (Stroud) Limited (CVL) (2)  
Fat Toni's Franchise Management Limited (3)

## JUDGMENT OF THE EMPLOYMENT TRIBUNAL

HELD AT Southampton (by video) ON

9 February 2024

EMPLOYMENT JUDGE GRAY

**Appearances**

For the Claimant:	In person
For the First Respondent:	Did not attend (written submissions made)
For the Second Respondent:	Did not attend and was not represented
For the Third Respondent:	Mr Orsi (Director)

### JUDGMENT WITH WRITTEN REASONS

The judgment of the Tribunal is the Claimant's complaints for arrears of wages and holiday pay succeed against the Second Respondent which is ordered to pay the Claimant £3,775 gross for arrears of wages (302 hours x £12.50) and £3,322 gross for accrued but untaken holiday (22 days at £151 per day).

The complaints against the First and Third Respondents fail and are dismissed.

**REASONS**

1. By a claim form submitted on the 30 August 2023 the Claimant made a claim for holiday pay and arrears of pay.
2. The claim was served on three Respondents.
3. The ACAS certificates for all three Respondents are dated 24 August 2023 to 29 August 2023.
4. It means things complained about on or after the 25 May 2023 are in time for the purposes of Tribunal jurisdiction.
5. The Claimant says he was employed as an Operations Manager by the Second Respondent from the 1 November 2018 to the 26 July 2023.
6. In the details of claim (question 8.2) he states:

“I was made redundant on the 26/7/2023 by Fat Toni’s Stroud Ltd (CN10039615)

The above company were already in a CVA and none of the staff were informed of this by either the company or the Insolvency Practitioners dealing with the case and the options available - if I know that it would then become an issue if the company was made insolvent I would have found a new job.

I have received the redundancy payment and notice payment from The Insolvency Service but not received any owed pay or holiday pay.

In total I am owed 47 days, £7097 approximately before deductions.

I have contacted ACAS and the Insolvency Practitioners dealing with the liquidation and both do not understand why payment is being withheld.

It is apparently The Insolvency Service that is stopping payments of outstanding wages and holiday payments.

All I am asking is for what I have worked and the holiday entitlement is paid.

I do not want to have to take the government to court to get my money, but I am very much willing to do so as it is just not correct and fair.”

7. The Insolvency Service in its response resists the Claimant’s claim on the following basis (which also forms its written submissions at this hearing):

**“Part 1: Details of Claimant’s Claim**

1.The claimant Michael Benjamin is pursuing payment from the National Insurance Fund under the provisions of sections 166 and/or 182 of the Employment Rights Act 1996 (“the 1996 Act”), namely arrears of pay and holiday pay.

2. Section 166 of the 1996 Act allows the Secretary of State to make certain payments from the National Insurance Fund, subject to sections 167 & 168 of that Act

3. Section 182 of the 1996 Act allows the Secretary of State to make certain payments from the National Insurance Fund, subject to sections 184, 185 & 186 of that Act.

**Part 2: Summary**

4. It is admitted that Fat Toni's (Stroud) Limited entered a Creditors Voluntary Arrangement (CVA) on 19 September 2019. It then subsequently entered Creditors Voluntary Liquidation (CVL) on 4 August 2023.

5. For the purposes of satisfying section 182(c) of the 1996 Act, which provides for payment of certain debts that are owed to former employees of businesses that have become formally insolvent and section 185(a), the appropriate date for calculating the Secretary of State’s liability for payment of holiday pay and arrears of pay is the date that the company became insolvent as defined in section 183 of the Act. Section 183 provides details of the legal definition of insolvency for the purposes of the Act. The CVA falls under section 183(3)(c).

**Part 3: Facts**

6.Fat Toni's (Stroud) Limited entered a CVA on19 September 2019 and on 4 August 2023, entered Creditors Voluntary Liquidation (CVL).

7.The claimant has made a claim for holiday pay and arrears of pay under section 184 of the Act for periods after his employer first became insolvent. The details are as follows:

Michael Benjamin:

Arrears of pay from 01 December 2022 to 20 January 2023 £543.20

Holiday pay for 10.08 days for leave year 01 February 2023 to 31 January 2024

8. The claimant was dismissed on 05 August 2023, which was after the company entered into a formal state of insolvency namely a CVA on 19 September 2019. The payments claimed were for a period after the date of the CVA and therefore the claims for these payments were rejected.

9. Documents filed at Companies House on 17 August 2023 show that the CVA had ended and that the company was in the process of entering Creditors Voluntary Liquidation (CVL) which occurred on 4 August 2023.

10. The Employment Appeals Tribunal cases *SoS for BIS v 1) M V McDonagh & Others and 2) Briman DBS Ltd (UKEAT/0312/12/LA)* and *J Pengelly v 1) SoS for BIS & 2) Woolston Golf and Country Club UKEAT/0287/12/LA*, found that the first insolvency date is the relevant date for the purposes of the 1996 Act. The relevant insolvency date in this case, is therefore 19 September 2019.

11. No payment can therefore be considered for holiday pay or arrears of pay accrued after the relevant insolvency date.”

8. The Third Respondent submitted a response to say that it did not employ the Claimant at the relevant time.
9. The liquidators on behalf of the Second Respondent confirmed ... “Further to your correspondence, I can confirm that we will not be defending the claim, neither will we be attending the hearing.”.
10. By correspondence dated 30 January 2024 to the parties, Employment Judge Livesey directed ... “Given the stances of Respondent 1 and Respondent 3 on the claim, does the Claimant seek to contest its liability beyond that set out in the SofS’s Response? Does he seek to suggest that R3 is liable despite its response? If neither are disputed, the Tribunal can issue a judgment against his ex-employer for the sums claimed in the hope that he can obtain a dividend in lieu of the sums owed. Otherwise, the matter will proceed to hearing, as listed.”.
11. The Claimant replied on the 3 February 2024 ... “Firstly I would ask Judge Livesey to explain to myself and the other employees that are in the same position, why are they Insolvency Service being allowed to break the law in regards to the minimum wage law and the modern day slavery law being broken and not facing any legal challenge against it. ... As Fat Toni’s Stroud Ltd have entered into Insolvency none of the owed wages, holiday pay, pensions payments have been paid, if they cannot pay the outstanding wages then this should be paid by the Insolvency Service? Or are they above the law? Or doesn’t the law apply to them? I am seeking clarity on this or do I need to take it to a more senior authority for clarification?”.

12. All these matters were raised with the attending parties at the start of this hearing.
13. The Judge explained that in such claims as this, it is for the claimant to show that the arrears of pay and holiday pay claimed were unpaid at the 'appropriate date', which for the purposes of claiming such amounts means the date on which the employer became insolvent (section 185(a) Employment Rights Act).
14. Where an employer first enters into a creditors' voluntary arrangement (CVA) and is later wound up, the 'appropriate date' is the date of the CVA. This is confirmed in the Employment Appeals Tribunal (EAT) decision of **Secretary of State for Business, Innovation and Skills v McDonagh and ors 2013 ICR 1177, EAT**. In that case the EAT rejected the argument that where a CVA is followed by another insolvency event, there is more than one 'appropriate date'. It is noted in that authority that it does have the harsh result that employees who had built up arrears of pay and holiday pay between the CVA and the winding-up could not claim them from the National Insurance Fund when their employment was terminated on winding-up. The result was particularly harsh for employees who had, unknowingly, joined the company after the CVA had been concluded. However, the EAT considered that the legislation's meaning was clear.
15. The Claimant did not disagree with the facts asserted, nor the assessment of the law, and acknowledged that the only Judgment that could be made in these circumstances was against the Second Respondent. Although a frustrating outcome for him, he confirmed he did intend to raise this anomaly with his MP.
16. The Claimant confirmed by affirmation the amount of wages and holiday pay he claimed, which were the amounts as set out in his claim form. Accepting what the Claimant says, his complaints for arrears of wages and holiday pay succeed against the Second Respondent which is ordered to pay the Claimant £3,775 gross for arrears of wages (302 hours x £12.50) and £3,322 gross for accrued but untaken holiday (22 days at £151 per day).
17. The complaints against the First and Third Respondents fail and are dismissed.
18. The Claimant requested written reasons for this Judgment which are also provided as set out above.

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Employment Judge Gray  
Dated 9 February 2024

Judgment sent to Parties on 20 February 2024

For the Employment Tribunal

**Recording and Transcription**

Please note that if a Tribunal hearing has been recorded you may request a transcript of the recording, for which a charge may be payable. If a transcript is produced it will not include any oral judgment or reasons given at the hearing. The transcript will not be checked, approved or verified by a judge. There is more information in the joint Presidential Practice Direction on the Recording and Transcription of Hearings, and accompanying Guidance, which can be found here:

<https://www.judiciary.uk/guidance-and-resources/employment-rules-and-legislation-practice-directions/>