



EMPLOYMENT TRIBUNALS

Claimant

S Emberson

v

Respondent

Orion Corporate Solutions
Limited (in voluntary liquidation)

Heard at: Bury St Edmunds ET (by CVP) **On** 26 March 2024

Before: Employment Judge Anderson

Appearances

For the claimant: N Emberson (lay representative)

For the respondent: Did not attend

JUDGMENT

1. The claimant is entitled to a redundancy payment of £5267.00 from the respondent, having been dismissed by way of redundancy on 31 May 2022.
2. The claimant has complied with s164(2)(b) Employment Rights Act 1996 and it is just and equitable that she should receive a redundancy payment.
3. The claimant's claim for a declaration that holiday and notice pay are owed under s188 Employment Rights Act 1996 is dismissed as the claim is out of time and it was reasonably practicable for it to have been filed within time.

REASONS

1. At the outset of the hearing I explained to Mr Emberson and the claimant that I would be considering only the claim of the claimant today (claim no. 3307515/23). While Mr Emberson had been referred to as a claimant on the Notice of Hearing dated 22 December 2023, the relevant claim number (3307489/2023) had not been included in the notification that was sent to the to the insolvency practitioner. Additionally it was clear that the two claims were not identical in fact, as had been suggested, as Mr Emberson's application to the Redundancy Payment Service (RPS) had been rejected on the grounds of his employment status whereas in this claim, the claimant's application to RPS was rejected for being out of time.

2. The respondent company was placed into voluntary liquidation on 22 November 2022. It ceased trading on 31 May 2022. The insolvency practitioners, Larkin Gowan (LG) advised the respondent's director (Mr Emberson) on 17 November 2022 that the claimant should have been notified she was redundant as of 31 May 2022. It provided a draft letter for the respondent to send to the claimant advising her of her redundancy from that date. This was sent to the claimant on 18 November 2022.
3. On 22 November 2022 the claimant made an application to the RPS for a redundancy payment, holiday pay and notice pay.
4. On 9 March 2023 the RPS advised that the application for a redundancy payment was out of time as the claimant had failed to comply with s164(1) Employment Rights Act 1996. A payment was made for holiday pay though less than claimed by the claimant. No reference was made to the notice pay claim.
5. On 26 April 2023 LG advised the claimant to make an application to the tribunal. Early conciliation commenced on 25 May 2023 and ended on 30 May 2023. The claim was filed on 23 June 2023.
6. Mr Emberson, director of the respondent and the claimant, company secretary of the respondent, attended the hearing. Mr Emberson had dealt with all correspondence and applications to the RPS and the tribunal on behalf of the claimant and gave evidence on oath.

Redundancy Payment

7. Mr Emberson said that LG had been consulted about the liquidation of the respondent in June 2022 and should have advised him at that time that it was necessary to issue a redundancy notice. He had issued a notice in November 2021, but the company had not gone into liquidation at that time and had continued to trade, so the redundancy did not take effect. He said that he was unable to make an application (for the claimant) to the RPS until the liquidation took effect.
8. The law
Employment Rights Act 1996

163.— References to employment tribunals.

(1) Any question arising under this Part as to—

(a) the right of an employee to a redundancy payment, or

(b) the amount of a redundancy payment,

shall be referred to and determined by an employment tribunal.

(2) For the purposes of any such reference, an employee who has been dismissed by his employer shall, unless the contrary is proved, be presumed to have been so dismissed by reason of redundancy.

...

164.— Claims for redundancy payment.

- (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 section 111.
- (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 section 111,
- 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.
- ...
- (5) Section 207B (extension of time limits to facilitate conciliation before institution of proceedings) applies for the purposes of subsections (1)(c) and (2).

Decision

9. This claim was filed in the tribunal on 23 June 2023. Allowing for an extension of time under the early conciliation provisions it was filed within twelve months of the claimant's effective date of termination, thus in accordance with s164(2)(c). I have considered whether it is just and equitable that the claimant receives a redundancy payment and have taken into account s164(3). The claimant was company secretary of the respondent and Mr Emberson was the director. The claimant is married to Mr Emberson. He was dealing with the redundancy and liquidation process and believed that he had taken the necessary steps to ensure that the claimant was entitled to a redundancy payment, having issued a redundancy notice in November 2021 following a redundancy procedure. He was unaware that a further notice was needed until he was so advised by LG in November 2022 and took immediate action to address the matter and make an application on the claimant's behalf to the RPS. Thereafter, when it was rejected by the RPS, he made a claim, within

the second six month period to the tribunal. In the circumstances, I find that it is just and equitable that the claimant receives a redundancy payment.

Holiday pay and payment in lieu of notice.

10. Mr Emberson made a claim to the RPS on the claimant's behalf on 22 November 2022. This included claims for redundancy, holiday and notice pay. Redundancy is considered above. No payment for notice was awarded and no reasons were given for this decision. Only part of the holiday pay claim was paid. Following advice from LG on 23 May 2023 a claim was issued on the claimant's behalf by Mr Emberson in the tribunal seeking a declaration of a right to a redundancy payment and holiday and notice pay on 23 June 2023. As noted above this followed a period of early conciliation from 25 May 2023 to 30 May 2023.
11. Mr Emberson said that he was not sure why the claim had not then been filed until 23 June 2023. He said that he thought he had acted promptly in respect of all aspects of the liquidation and pay claims. He said that often he and the claimant have a holiday around the end of May, he may have had work commitments and he explained that the claimant had been ill during the first three quarters of 2023. When I asked him what the deadline was that he was working to in respect of filing the claim he said he did not know there was a deadline and he believed he had been responsive throughout the process.
12. The Law
Employment Rights Act 1996

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.

188.— Complaints to employment tribunals.

(1) A person who has applied for a payment under section 182 may present a complaint to an employment tribunal —

- (a) that the Secretary of State has failed to make any 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.
- (3) Where an employment tribunal finds that the Secretary of State ought to make a payment under section 182, the tribunal shall—
 - (a) make a declaration to that effect, and
 - (b) declare the amount of any such payment which it finds the Secretary of State ought to make.

Decision

13. The Secretary of State's decision was sent to the claimant on 9 March 2023 and the last date for filing a claim in the tribunal was, accordingly, 8 June 2023. Claims under s182 Employment Rights Act 1996 are exempt from the early conciliation provisions and therefore time is not extended for the filing of a claim, even where conciliation takes place. I have considered whether it was reasonably practicable for the claim to be filed in time and I find that it was. Mr Emberson was dealing at that time with RPS claims for both himself and Mrs Emberson. He was in contact with LG and clearly pursuing all options to ensure that the claimant was able to recover monies to which she believed she was entitled. I accept that he was not aware of relevant deadlines but there is no reason that I can see why he could not have made himself aware of such information by way of research. LG were insolvency practitioners and not lawyers instructed by him on this matter. He was conducting the claims himself. I do not find that holidays, work commitments, or the claimant's illness (though I accept that was a matter of significant worry and concern to the claimant and Mr Emberson) were such that it was not reasonably practicable to file in time, where the evidence is that Mr Emberson was spending a significant amount of time on these matters.
14. As it was reasonably practicable for the claim to have been filed in time, I do not extend time for filing under s188(2)(b) and the claim for a declaration on holiday pay and notice pay is dismissed.

Employment Judge Anderson

Date: 1 April 2024

Sent to the parties on: 24/4/2024

N Gotecha

For the Tribunal Office