EMPLOYMENT TRIBUNALS

Claimant: **Mr D R Gibson**

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

Heard at: **Sheffield** **On: 8 August 2017**

Before: **Employment Judge Little**

Representation:

Claimant: **Mr N Sharples, Regional Legal Officer for the GMB**

Respondent: **Written representations only**

JUDGMENT

1 The claimant is given permission to amend his claim so that the type of debt (from an insolvent employer non-payment of which is complained about) is revised from holiday pay to arrears of wages.

2 It is declared that the respondent ought to make a payment under Employment Rights Act 1996 section 182 in respect of unpaid wages for the last period of the claimant's employment which is the sum of £453.60.

REASONS

1 The claimant presented his claim to the Tribunal on 12 June 2017. He had previously brought a claim against his insolvent former employer – Burgin European (Transport) Limited and in those proceedings had obtained on 10 February 2017 a default judgment whereby amongst other things the employer was required to pay to the claimant unpaid wages in the amount of £453.60.

2 Within the current proceedings the claimant when presenting his claim had complained that the Secretary of State had failed to make a payment in respect of holiday pay out of the National Insurance Fund. The Secretary of State presented an ET3 in very general (if not vague) terms on 3 July 2017. It was not until 27 July 2017 that by a letter of that date the Secretary of State set out the details of its grounds of resistance. Essentially the grounds were that the Secretary of State had made the appropriate payment to the claimant out of the Fund in respect of holiday pay albeit that it had made that payment in two instalments. One in respect of the payment for accrued untaken holiday pay and the other for holiday taken but not paid.

3 On receipt of that information the claimant realised his own mistake and that the payment that he had not actually received from the Secretary of State was in respect of arrears of wages.

4 The claimant has given evidence before me by reference to a witness statement and he has answered some questions from me. The claimant with his union representative had also prepared a bundle of documents for today.

5 The respondent when writing to the Tribunal on 7 August 2017 explained that the Secretary of State did not propose to be represented in person at the hearing and that instead the representations in the 7 August letter with its enclosures were the written representations the Secretary of State sought to rely on. I have therefore considered that material together with the notice of appearance and the detailed grounds of resistance referred to above. Whilst the respondent did not object to the hearing proceeding today it did object to the claimant's application for amendment. That was primarily on the basis it was not admitted "*that the claimant has brought his complaint in respect of applications made under section 182 of the 1996 Act for arrears of pay within the time limitations of section 188(1) and (2) of that Act*."

6 **The amendment application**

I accept Mr Sharples' argument that it is not necessary to consider the question of time limits because the amendment does not seek to introduce a new cause of action. Mr Sharples went on to describe the exercise as one of relabeling. I do not agree that it is precisely a relabeling exercise but I do agree that it is not a new cause of action either. The relevant cause of action under section 188 of the Employment Rights Act 1996 is that the Secretary of State has failed to make a payment under section 182 of the Act. Section 182 provides that the Secretary of State will pay an employee out of the National Insurance Fund certain debts owed to that employee by his former but now insolvent employer. The type of debts are set out in section 184. In those circumstances I find that the cause of action is in respect of a non-payment of any of those debts. The fact that initially the claimant thought that one debt had not been paid but now realises it is another type of debt does not alter the cause of action itself which remains that I have described above. In those circumstances and having regard to the guidance given in **Selkent Bus Company Limited v Moore [1996] ICR 836**. It is not necessary for me to take into account time limits. However I do need to take into account the question of delay and to consider why the application was not made sooner than it was. In an ideal world, an employee who is a trade union member would provide all relevant documentation to his union so that before launching a claim in the Employment Tribunal it was clear precisely what the claim concerned. No doubt in this case the union asked the claimant to provide all relevant documentation but it seems he may not have done so and that, he told me, was due to confusion and a lay person in respect of the correspondence he was receiving from the Insolvency Service and so mistook one of the instalments in respect of holiday pay for payment of wages. It is also significant in my judgment that the respondent did not provide a full explanation of its case until the detailed grounds of resistance set out in the Insolvency Service's letter of 27 July 2017. Once

in receipt of that information the claimant and his union took prompt action in making the amendment application within a matter of days.

I also need to consider the question of relative prejudice. If the amendment is not allowed there will be significant prejudice to the claimant. He will be denied the payment to which I am satisfied that he was due from his insolvent employer and so will now receive from the Fund (see below). Apart from the fact that the respondent now has to defend a complaint about a different type of debt I see no particular prejudice to the respondent. The Secretary of State has put forward the defence to the amended claim if it should be allowed in their letter of 7 August to which I have referred.

7 Accordingly I have allowed the claimant to amend his claim.

8 **The merits**

The claimant has confirmed that the debt he is now seeking payment of is in respect of the last period of his employment. He resigned from his employment in a letter dated 20 September 2016 and a copy of that is at page 31 in the bundle. In that letter he gives his employer 7 days notice – albeit that the claimant was unable to work in that period because of ill health. It follows in those circumstances that the effective date of termination of employment was 27 September 2016. The Secretary of State had appeared to accept that insofar as the claimant's payment of compensation for loss of notice is concerned. When the Insolvency Service wrote to the claimant about that on 31 March 2017 they described his notice period as running from 22 September 2016 to 29 September 2016 (a copy of that letter is at pages 78-79 in the bundle). However in the respondent's letter of 7 August 2017 they state:-

> "It is clear that the claimant's employment ended on 22 September 2016 and there is no amount owing for any unpaid wages."

In making that statement the respondent was relying upon a form RP14a – Employee Information from Insolvency Practitioner and this is exhibit 2 to the letter. In that statutory form the unnamed Insolvency Practitioner gives the claimant's employment end date as 22 September 2016. Having regard to the claimant's resignation letter to which I have referred and the consequences of it that in my judgment is incorrect.

9 In any event, the claimant's rather confusing reference to non-payment of wages for week 25 and for 10 hours work on the following Monday can now, by reference to his payslips within the bundle, be identified as a non-payment for the week ending 23 September 2016 and for the following Monday, 26 September 2016. It is to be noted therefore that there is some overlap between the notice period commencing on 20 September by reference to the resignation letter (although from 22 September as per the decision letter at pages 78-79). I am also however mindful that the claimant had already obtained a default judgment against his former employer where the arrears of wages are found to be £453.60 – which is what the claimant now seeks within these proceedings.

10 In his evidence before me the claimant accepts that in the bundle (page 51) is what purports to be a payslip for week 25 which refers to gross pay of £340.20 and net pay of £290.55. However the claimant says that in the first place those figures are incorrect having regard to the hours which he actually worked and says that in any event he did not receive any payment

as described in that payslip or at all for the relevant week. In this regard he has taken me to his bank statements which appear at pages 52-56 in the bundle. Whilst those show payments from the employer for earlier periods in September 2016, there are no receipts for the figures shown on the week 25 payslip or any other receipt which could tally. Accordingly on the basis of the claimant's unchallenged evidence which is supported by documentary evidence I find (as did the Judge who gave the default judgment) that the claimant was owed the sum of £453.60 in respect of his last period of employment (that is the period he last worked as opposed to the notice period). Further it is clear that that is a debt within the description in section 184 (arrears of pay) and so it is a payment which the Secretary of State ought to make payment of under section 182.

Employment Judge Little

Date: 11 August 2017