



EMPLOYMENT TRIBUNALS

Claimant: Mr J Armstrong

Respondent: Jolie Lingerie Limited (In Liquidation)

Heard at: Nottingham **On:** Friday 15 March 2019

Before: Employment Judge Clark (sitting alone)

Representatives

Claimant: In Person and supported by Mr J Armstrong (Father)

Respondent: Did Not Attend and was not Represented

RESERVED JUDGMENT

1. The claim for unauthorised deduction from wages succeeds. The Respondent will pay to the Claimant the sum of £857.60.
2. The claim for accrued and untaken annual leave as at the date of termination succeeds. The Respondent will pay to the Claimant the sum of £1,964.26.
3. The claim for breach of contract in respect of notice payment succeeds. The Respondent will pay to the Claimant the sum of £1,227.66.
4. The claim for a redundancy payment fails and is dismissed.

REASONS

1. From 1 January 2009 the Claimant was employed within the Respondent's business as an IT Manager. His employment ended on 1 April 2017 by reason of redundancy. It seems on that date the directors of the company made all members of staff redundant save for themselves. The company continued trading for a short time there afterwards before insolvency practitioners were appointed and the respondent entered a creditors voluntary liquidation. There were two directors, they are Mr Jim and Mrs Bridget Armstrong. They are the Claimant's mother and father. Their directorship ceased on 23 March 2018. The Respondent remains in existence as a legal entity in the sense that it has not been dissolved although the insolvency practitioners have had control of the company since 16 March 2018.
2. At the time of his dismissal the Claimant was earning £175.38 gross per week. He was subject to written terms and conditions but those terms did not alter the

statutory minimum entitlement so far as notice was concerned and made no separate contractual provision so far as redundancy was concerned. In terms of holiday, the Claimant was entitled to 20 days' leave to be taken at mutually convenient times plus a further 8 days' leave to be taken in respect of the public and bank holidays. I find as a fact that in the 2 years prior to the date of termination, the circumstances within this employer's business was such that none of the staff had been able to take paid annual leave. Because I find that restriction on the ability to take such leave was imposed by the employer, the statutory entitlement so far as it relates to the Working Time directive rolls over from one year to the next. I also find that the contractual terms of employment entitled employees to carry over unused leave from one year to the next.

3. Around the time of the redundancy, the Claimant's health was deteriorating. From around February or March of 2017 he had begun to suffer with psychosis which led to a hospital admission on 17 May 2017. The terms of that admission were compulsory under the powers provided by the Mental Health Act 1983. He remained detained until 11 July before being subject to further admissions in December 2017 for a period of around two months and again in June 2018 for approximately one month. Throughout that time, he was not consistently engaging with his medical advisers and was not taking the anti-psychotic medication that had been prescribed. He did not start taking the anti-psychotic medication until around June or July 2018 after which he began to notice an improvement in his health which, by September/October time, had reached the point where he could engage with other issues in his life. One such issue was the fallout from the demise of his parents' business and his own rights under his employment in that business.
4. On 26 October 2018 he presented claims to this Employment Tribunal for a redundancy payment, notice pay, arrears of pay and holiday pay.
5. He had during the intervening period been living with his parents when not otherwise admitted to hospital and had the support of his father, as he does before me today except that focus of the family's support and advice was on his wellbeing and ill health and not on any remaining claims he might have against the company or indeed the Secretary of State in respect of any debts owed to him. I am satisfied that in both his capacity as a Director (until 23 March 2018) and also as the Claimant's father, Mr Armstrong Sr advised and encouraged Mr Armstrong Jr just as he did for all of his ex-staff to ensure that they made such claims as they felt they were entitled to. It is not likely that advice was in anyway headed by the claimant at the time. During the most acute episodes of the Claimant's ill health I accept that he would simply stand facing a wall and not listen to any advice from his father or others. It is not until 2018 when things start to improve that discussions could take place between the two in a meaningful and constructive manner. During that time there had been no written request for any of the payments made to the employer or indeed to the insolvency practitioner nor has any claim been presented prior to the claim before me today. The insolvency practitioners have undertaken some analysis of the rights of the individual employees made redundant and I have a table before me prepared by them. However, they did so to satisfy their own reasons and purposes for doing so. They certainly do not act as agents for the employees in raising any claims for payments against the insolvent employer.
6. The Claimant is clearly a vulnerable Claimant and his father has supported him well in the hearing today. I confess I felt some unease upon learning that Mr Armstrong Sr's capacity was previously that of Director of the Respondent. In

view of the surrounding circumstances and the need for the Claimant to be supported in this hearing I came to the conclusion that no issues of conflict prevented me exploring matters in the way that I did. The ill health suffered by Mr Armstrong Jr clearly had significant and acute phases and he remains under the ongoing care of community based Mental Health Services. I did explore with Mr Armstrong the effect that his mental ill health may or may not have had on his capacity to undertake the necessary process of lodging a claim or indeed even asserting his right to a redundancy payment. The particular psychosis he experienced related to an exchange he had with a group of individuals which seemed to have had a profound effect on his thought process and beliefs. He had previously been an atheist. As a result of the acquaintance with these other individuals began to hear voices which he believed to be the voice of God. That voice was a voice he obeyed above any other individuals. It was obstructive in other aspects of life including formal processes such as completing his Personal Independence Payment application form, he approached life in a black and white manner, following the voice, ignoring matters that he may have felt were not honest and true paths to follow. I explored this to determine whether there were matters in his medical history or indeed present before me from which a determination of capacity could be reached and I reserved the decision on the Claimant's claims in order to give some further consideration to any affect that incapacity may have had on the relevant time limits involved in the claims before me. In particular I wanted to consider the effect of Section 28 of the Limitation Act 1980 and whether the principles underpinning that statutory provision, which ordinarily are in applicable to this jurisdiction, nonetheless have some bearing on the approach that could be taken to the relevant time limits for the claims brought.

Discussion and Conclusion

7. I approached matters firstly by splitting the claims into two groups. One group is the claim for redundancy payment which has its own particular time limit provision set out in Section 164 of the Employment Rights Act 1996. The other group contains the remaining claims for notice, holiday and arrears, all of which are claims which apply the not reasonably practicable formula to the primary 3 month time limit. In other words, those claims must be brought within 3 months of the relevant date (whether that is the effective date of termination or the date on which payment was otherwise properly due) but may be extended where it was not reasonably practicable for the claim to be brought within that period of time and where it was subsequently brought in a further reasonable period of time.
8. There is no question that the period between the EDT on 1 April 2017 and 26 October 2018 is substantially outside the primary time limit such that unless that discretion is engaged, the claims are out of time.
9. I start with the second group of claims and begin with first the limb of the test, that is whether it was or was not reasonably practicable for the claims to be presented within the 3 month period. I am satisfied that it was not reasonably practicable for the Claimant to present his claims. I am satisfied that he was labouring under a significant and acute period of ill health to a degree where it was frankly not possible for him to give consideration to matters such as presenting claims before an Employment Tribunal and to the extent that he was being supported by his family the reasonable focus of their attention notwithstanding their role otherwise in the employer's business was to his wellbeing and recovery. I suspect that during this period the claimant's capacity

to litigate would have fluctuated and may even have been lacking all together but for the reasons I give below I do not reach that conclusion here nor do I need to for this test.

10. The question then turns to the second limb which is whether the period within which the claim was presented was nevertheless a further reasonable period of time. At first blush I was concerned that there had been a period of delay which took matters outside of the further reasonable period. However, I was persuaded by the effects of the medication on the Claimant which did not take effect until sometime around September/October 2018 and even then were measured very much on a day by day assessment. It seems to me that it was not reasonable for him to turn his mind to his employment rights until around then. That time frame between then and a claim being presented on 26 October is in my view a reasonable further period of time. For those reasons I accept there is jurisdiction to consider the claims of holiday pay, arrears of pay and breach of contract in respect of notice pay.
11. At the time of his dismissal the Claimant had not been paid for some time along with the other employees of the employer's business. I accept the analysis prepared by the insolvency practitioner that the arrears of pay owing was £3,301.62. That is the value of the judgment so far as the claim is brought against the Respondent. It may well be the case that the practical effect of this judgment is pyrrhic as the obligation of the Secretary of State on the insolvency of a company for arrears of pay is limited to 8 weeks in any event and it seems to be the case that the bulk of that has already been paid albeit for some reason at a lower weekly rate.
12. Turning to the annual leave entitlement I am satisfied that the Claimant has not been paid for the entirety of his entitlement for the leave year 16/17 and 15/16 in the sum of £1,964.26.
13. In terms of his notice pay the Claimant was entitled to a period of 7 weeks' notice which he did not receive. The gross figure for notice pay is 7 times £175.38 resulting in a total figure of £1,227.66.
14. I turn then to the remaining claim of redundancy payment. The value of the claim is settled, it being a matter of applying a formula. The Claimant with his age and length of service as at the effective date of termination was entitled to a payment of 6 times his normal week's pay subject to the statutory cap which is not engaged in this case. His entitlement would be £1052.28. The fundamental question in this case is whether he has lost the right to a redundancy payment by virtue of the passage of time between his affective date of termination and his claim being otherwise asserted. It will be immediately apparent that the analysis of the law in this area is overshadowed with the very severe and sad circumstances of the Claimant's ill health and admission to hospital at various times during the intervening 18 months and the answer to whether he is entitled to that sum of redundancy payment will depend on the extent to which any aspect of those surrounding circumstances can be advanced to overcome the statutory time limits otherwise engaged.
15. There are two limbs to the statutory entitlement to a redundancy payment set out in Section 164 of the Employment Rights Act 1996. The first under subsection 1 provides:

"An employee does not have any right to a redundancy payment unless,

before the end of the period of 6 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."

16. This provision operates in a slightly different way to the usual time limit provisions. Employees are given a period of 6 months from the relevant date to assert their claim by one of those 4 methods, in this case the effective date of termination on 1 April 2017. Where such an assertion is made, any subsequent claim to a Tribunal that the payment has not be made can in fact be made at any time thereafter. To that extent it is a provision without a time limit. However, it is not all generous to the claimant as unless one of those 4 conditions is engaged during the period of 6 months from 1 April 2017, the Claimant will not retain a right to a redundancy payment without recourse to the second limb of the test. Before dealing with that, it is the case that none of those 4 conditions were engaged in this case. There certainly was no payment agreed and paid. There was no claim to a Tribunal, no claim for unfair dismissal. There was no written claim presented to the employer neither directly nor indirectly. I did explore at some length the circumstances of that possibility having happened somewhere in the factual background and the highest that can be said is that at some point during the relevant 6 month period it is likely that Mr Armstrong Sr verbally encouraged the Claimant to make such claim as he was entitled to. That does not satisfy the statutory provision.

17. It follows the Claimant will have lost his right to a redundancy payment unless he can rely on the second limb of the test set out at subsection 2 of Section 164. It provides:

"An employee is not deprived of his right to a redundancy payment by subsection 1 if during the period of 6 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."

18. In the circumstances of this case, I would have little difficulty in engaging the just and equitable concept required to rely on the second limb. The issue is whether any of those three further conditions are satisfied. I have concluded

that sadly they are not.

19. The question then is whether there is any other route available to the Claimant to require me to read into that section, or interpret it, in a way which takes account of the mental ill-health he was suffering during the relevant period. I have taken some time to reflect on this and give consideration to the principles that underpin the concept enshrined in Section 28 of the Limitation Act 1980 which disapplies the running of statutory time limits where a Claimant is under a legal disability. Lack of capacity to litigate is such a disability.
20. The time limits set out in Section 164 has been held to be jurisdictional and not procedural (**Secretary of State for Employment v Atkins Auto Laundries Limited** [1972] ICR 76). Beyond that, that section is not simply expressed as a period of time within which such a claim for a payment shall be brought but it is expressed in terms which expressly state the employee is not entitled to a redundancy payment unless... I am satisfied that means it has been held to go to the right to the payment itself as opposed as to merely a remedy to enforce it.
21. The extent to which it may be permissible for me to make reference to the Limitation Act 1980 appears to be limited to circumstances where the employment right in question conveys no time limit (**Greenwich Health Authority against Skinner and Ward** [1989] IRLR 238) or where equitable principles are engaged effectively as a means of stopping the other side relying on the passage of time by virtue of their own fraud (**Grimes and Sutton London Borough Council** [1973] ICR 240). However, I am not satisfied these principles can serve to entitle me to displace a later explicit statutory provision setting down a short time limit that itself contains various formulations of extension provisions. In the final analysis, and as much as I may have been pleased to find it, I have come to the conclusion that the principle enshrined within Section 28 of the Limitation Act 1980 does not provide me with a route to extending the time limit so as to engage my jurisdiction. No only am I not satisfied that there is a route available in law, I am not satisfied on reflection that I have the evidence that the claimant was under a legal disability and, if he was, at what points in the chronology that was so. That may seem harsh when considered against my non-medical view of the severity of the mental ill health the claimant was suffering under but it is a clear principal of the common law and now the Mental Capacity Act 2005 that capacity is presumed until the contrary is established. As a lay person, I can see many points in the evidential background to this case from which I might assume that the Claimant lacked capacity to present a claim and that they continued or recurred a substantial period of time after 1 April 2017. My presumption is not enough and there is insufficient evidence to that affect. The Claimant was discharged at periods and subject to community care at periods and had other networks within his family and beyond from which he might have been supported in making decisions. Unless there was evidence to displace the statutory presumption of capacity then it is not for me to make that assessment in a lay context.
22. For those reasons, I am afraid to say the effect of Section 164 is that the Claimant has not demonstrated that any of the conditions asserting or preserving the right to a redundancy payment were complied with and, as such, the right to a redundancy payment which undoubtedly previously existed was thereby lost. For those reasons the claim for a redundancy payment is dismissed.

Employment Judge Clark

Date 27 March 2019

JUDGMENT SENT TO THE PARTIES ON

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FOR THE TRIBUNAL OFFICE