



EMPLOYMENT TRIBUNALS

Claimant: Mr J Sisson

Respondent: Secretary of State
for Business Energy and Industrial Strategy

Heard at: Nottingham **On:** 22 November 2017

Before: Employment Judge Clark (sitting alone)

Representation

Claimant: In person

Respondent: Did not attend but submitted written representations

JUDGMENT

1. The claims fail and are dismissed.

REASONS

1. For decades, the Claimant had been an employee of his erstwhile employer, A F Reprographics Limited. On 30 June 2016 it ceased trading. On 1 July 2016 the directors wrote to all employees including the claimant indicating that they were of the view that the company was now insolvent and therefore they had a duty to cease trading. That letter set out the various payments the claimant was due which included, in very approximate figures, £1400 in respect of annual leave and £900 in pension contributions from both employer and employee which had not been paid into the claimant's pension scheme.

2. The employer did not, at that stage, commence any formal action in respect of its insolvent status. I do not understand an insolvency practitioner was appointed. No creditors pressed the issue and no court orders were made.

3. The claimant sought various payments from the Insolvency Service which refused to pay as the company was, at that time, not insolvent within the meaning of the relevant statutory provisions engaging any duty on the Secretary of State to step in and pay them. With the help of his union, UNITE, objections were lodged at Companies House blocking the attempts to dissolve the employer as a legal entity and, on 18 October 2017, it was eventually made subject to a winding-up order.

4. The claimant again pursued his payments against the Secretary of State.
5. A number of claims were satisfied including a payment relating to a basic award following a judgment of unfair dismissal obtained in early 2017. The statutory rules relating to those claims are different to what are now before me, hence the payments were eventually made. The claims for holiday pay and loss of unpaid pension contributions remained outstanding.
6. Although there was, by then, a winding up order engaging the duty on the Secretary of State, it was then some 15 months or so since he had accrued his right to holiday pay. Further, the claimant has no authority from his pension provider to act in respect of enforcing any rights to unpaid contributions. As a result, his claims were rejected.
7. His claim against that decision comes before me.

The Holiday Pay Claim

8. It goes without saying that the responsibility for paying holiday pay lies, of course, with an employee's employer. Parliament has decided that in very prescribed circumstances, the Secretary of State will accept responsibility for payments where the employer becomes insolvent. Part XII of the Employment Rights Act 1996 governs those circumstances. Key concepts within that part are:-

- a. That the secretary of state is obliged to pay only up to a maximum of 6 weeks holiday pay entitlement and only where the employee's entitlement to it arose within the 12 months immediately before the date of insolvency.
- b. By s.186(3) of the 1996 Act, the date of the insolvency is not based on an accounting principle such as that which governs the directors' legal duties (i.e. the date when the company has no prospect of meeting its liabilities or can't pay its debts when they fall due). Instead, it is set by reference to the date on which insolvency is formally acknowledged by the various procedures under the Insolvency Act 1986, for example, a winding-up order by a Court.

9. Consequently, in order to engage liability on the Secretary of State for any payment for holiday pay, the claimant must show that he became entitled to holiday pay in the 12 months before 18 October 2017, and not 1 July 2016. In this case he accepts he cannot.

10. There is no scope for me to apply a different date and no recognition in these statutory provisions of the unfairness that may arise where no action is taken by any other creditors or directors and the ex-employee is left to bring about the winding up order himself, as was the case here. That took the claimant and his advisers over 15 months. Although he did what he needed to do to engage the Secretary of State's obligation, the time it took to do so meant he had lost the right to this payment.

The Unpaid Pension Contributions Claim

11. The jurisdiction to bring this claim before this tribunal is set out in part VII of the Pension Schemes Act 1993. In terms of pension contributions unpaid by an insolvent employer, it provides a broadly similar safety net to the provisions referred to already in the Employment Rights Act 1996.

12. However, this claim faces a more fundamental obstacle. The 1993 Act makes clear it is an application which can only be made to the Secretary of State, and subsequently to this tribunal, by a by “*a person competent to act on behalf of an occupational pension scheme*”. Unless there is some explicit pre-authorisation given to an employee, or they also happen to hold some additional status under the scheme, such as a trustee for example, their status merely as a member of the pension scheme is insufficient to bring them within the statutory definition **(Campbell v Secretary of State for Trade and Industry [2003] All ER (D) 110 (Mar).**

13. The claimant accepts he is not such a person and that the rules prevent me from dealing with his claim.

14. Beyond that, I am not satisfied there is a certificate from a relevant officer under s.125 of the 1993 Act. Moreover, the 1993 Act limits the contributions that the Secretary of State takes responsibility for, in part at least, to those arising within 12 months immediately before the insolvency. The date of insolvency under the 1993 Act carries essentially the same definition as under the 1996 Act and as no contributions were due to be paid during that 12 month period, it appears the claim would have failed in any event.

15. For those reasons I must dismiss both claims. I do so with sympathy for Mr Sisson who has done all he can to engage all his statutory rights but finds himself without a remedy.

Employment Judge Clark

Date 22 November 2018

JUDGMENT SENT TO THE PARTIES ON

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FOR THE TRIBUNAL OFFICE