

THE INDUSTRIAL TRIBUNALS

CASE REFS: 17435/18
17958/18

CLAIMANTS: 1. Muriel Maguire
2. Lynda Jamison

RESPONDENT: Department for the Economy

JUDGMENT

The unanimous judgment of the tribunal is:

- (1) A declaration that the respondent ought to make payments to the claimants in respect of arrears of pay pursuant to Article 227 of the Employment Rights (Northern Ireland) Order 1996.
- (2) The amounts payable are as follows:

Muriel Maguire	£194.55
Lynda Jamison	£169.19

CONSTITUTION OF TRIBUNAL

Employment Judge: Employment Judge Orr

Members: Mr R McKnight
Mr I Foster

APPEARANCES:

The claimants appeared and were self-representing.

The Department was represented by Mr Rafferty, Barrister-at-Law, instructed by the Departmental Solicitor's Office.

BACKGROUND

1. The claimants were employed by BOTL Wine and Spirit Merchants Limited until their contracts of employment terminated on 5 July 2018 unfortunately due to the insolvency of the company. Ms Maguire had been employed from 27 October 2014 and Ms Jamison had been employed from 31 October 2016.

2. There is no dispute that BOTL Wine and Spirit Merchants Limited was formally insolvent from 5 July 2018.
3. The claimants each lodged claims with the Redundancy and Insolvency Payments Service on 3 August 2018 for payments from the National Insurance Fund.
4. Both claimants received payments from the Redundancy Payments Service in respect of notice pay, holiday pay and arrears of pay/wages. Ms Maguire also received a redundancy payment.
5. In addition, the claimants each claimed for payment of an annual bonus, which they asserted was due to them under their respective contracts of employment. The claims for bonus payments were rejected by the Redundancy and Insolvency Payments Service by letter dated 30 October 2018.
6. The claimants presented claims to the Office of the Industrial Tribunals and Fair Employment Tribunal in November 2018 against the respondent for payment of “arrears of pay” in respect of their bonuses. Ms Maguire claimed £2,000.00 and Ms Jamison claimed £1,600.00 by way of an annual bonus.

ISSUES

7. At the commencement of the hearing Mr Rafferty contended, for the first time, that a ‘bonus’ is not ‘arrears of pay’ as defined by **Part XVI of the *Employment Rights (Northern Ireland) Order 1996***. This had not been raised in the respondent’s responses to the claims or at any Case Management Discussion/Preliminary Hearing in these proceedings.
8. It was clear to the tribunal that the claimants (as self-litigants) were entirely taken by surprise by this, as was the tribunal. Therefore the hearing proceeded by way of evidence on the first day and was relisted for a second day to enable the claimants sufficient time to fully consider the respondent’s legal submissions in relation to their contention and to ensure, as far as possible, that the claimants had the opportunity to consider the respondent’s argument and the legal authorities being relied upon by it.
9. The legal and factual issues were identified at the hearing and agreed by the respondent’s representative and both claimants as follows:
 - (i) Are the claimants contractually entitled to a bonus payment under their respective contracts of employment on the appropriate date?
 - (ii) Does a “bonus” payment come within the definition of “arrears of pay” as a “debt” within the meaning of Articles 227 and 229 of the Employment Rights (Northern Ireland) Order 1996?
 - (iii) Is the eight weeks pay limit, as provided for in Article 229(1)(a) applicable to the claimants’ claims of arrears of pay?

EVIDENCE

10. The tribunal heard evidence from each of the claimants on their own behalf and on behalf of each other. Ms Aisling Moody, Staff Officer in the Redundancy Payments Service gave evidence on behalf of the respondent. The tribunal was provided with an agreed trial bundle in respect of each claimant.

RELEVANT LAW

11. The Employment Rights (Northern Ireland) Order 1996 provides, so far as relevant to these proceedings, as follows:

“Employee's rights on insolvency of employer

227. *If, on an application made to the Department in writing by an employee, the Department 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 Department shall, subject to Article 231, pay the employee out of the Northern Ireland National Insurance Fund the amount to which, in the opinion of the Department, the employee is entitled in respect of the debt.*

Debts to which Part applies

229.—(1) *This Part applies to the following debts—*

- (a) *any arrears of pay in respect of one or more (but not more than eight) weeks,*
- (b) *any amount which the employer is liable to pay the employee for the period of notice required by Article 118(1) or (2) or for any failure of the employer to give the period of notice required by Article 118(1),*
- (c) *any holiday pay—*
 - (i) *in respect of a period or periods of holiday not exceeding six weeks in all, and*
 - (ii) *to which the employee became entitled during the twelve months ending with the appropriate date,*
- (d) *any basic award of compensation for unfair dismissal or so much of an award under a designated dismissal procedures agreement as does not exceed any basic award of compensation for unfair dismissal to which the employee would be entitled but for the agreement], and*

- (e) *any reasonable sum by way of reimbursement of the whole or part of any fee or premium paid by an apprentice or articled clerk.*
- (2) *For the purposes of paragraph (1)(a) the following amounts shall be treated as arrears of pay—*
- (a) *a guarantee payment,*
 - (b) *any payment for time off under Part VII;*
 - (c) *remuneration on suspension on medical grounds under Article 96 and remuneration on suspension on maternity grounds under Article 100, and*
 - (d) *remuneration under a protective award made under Article 217.*
- (3) *In paragraph (1)(c) “holiday pay”, in relation to an employee, means—*
- (a) *pay in respect of a holiday actually taken by the employee, or*
 - (b) *any accrued holiday pay which, under the employee's contract of employment, would in the ordinary course have become payable to him in respect of the period of a holiday if his employment with the employer had continued until he became entitled to a holiday.*

The appropriate date

230. *In this Part “the appropriate date”*

- (a) *In relation to arrears of pay (not being remuneration under a protected award made under Article 217) and to holiday pay, means the date on which the employer became insolvent,*

...

Limit of amount payable under Article 227

231.—(1) *The total amount payable to an employee in respect of any debt to which this Part applies, where the amount of the debt is referable to a period of time, shall not exceed –*

- (a) *[£530] in respect of any one week, or*
- (b) *in respect of a shorter period, an amount bearing the same proportion to [£530] as that shorter period bears to a week.*

[The limit on a week's pay as per the Employment Rights (Increase of limits) Order applicable from 6 April 2018 was £530.]

Complaints to industrial tribunals

233.—(1) *A person who has applied for a payment under Article 227 may present a complaint to an industrial tribunal—*

(a) that the Department has failed to make any such payment, or

(b) that any such payment made by the Department is less than the amount which should have been paid.

(2) *An industrial tribunal shall not consider a complaint under paragraph (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 Department 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 industrial tribunal finds that the Department ought to make a payment under Article 227, the tribunal shall—*

(a) make a declaration to that effect, and

(b) declare the amount of any such payment which it finds the Department ought to make.

EU Law

12. Mr Rafferty, on behalf of the respondent, helpfully referred the tribunal to the relevant extracts from the applicable European Directive – **“EU Directive 2008/94/EC on the protection of employees in the event of the insolvency of their employer”**.

“Recital (3) *It is necessary to provide for the protection of employees in the event of the insolvency of their employer and to ensure a minimum degree of protection, in particular in order to guarantee payment of their outstanding claims, while taking into account of the need for balanced economic and social development in the Community. To this end, the Member States should establish a body which guarantees payment of the outstanding claims of the employees concerned.*

...

(7) *Member States may set limitations on the responsibility guarantee institutions. Those limitations must be compatible with the social objective of the Directive and may take into account the different levels of claims”.*

13. Article 2(2) of the 2008 Directive provides as follows:

“This Directive is without prejudice to National Law as regards the definition of the terms ‘employee’, ‘employer’, ‘pay’, ‘right conferring immediate entitlement’ and ‘right conferring prospective’ entitlement”.

14. Mr Rafferty, also referred the tribunal to the decisions of ***Checa Honrado C-57/17*** (28 June 2018), ***Eschenbrenner C-496/15*** (2 March 2018) and ***Viscano C-69/08*** (16 July 2009). These European authorities are clear that it is a matter for the Member States to define which forms of compensation fall within the scope of the directive and what is meant by the term ‘pay’.

15. The EAT in ***Graysons Restaurants Ltd The Jones and Others [2017] UKEAT 0277/16*** held that equal pay arrears can be ‘arrears of pay’ within Section 184(1) of the Employment Rights Act 1996 and is therefore a debt under Section 182 of the Employment Rights Act. (The Northern Ireland equivalents are Article 229 and 227 of the Employment Rights (Northern Ireland) Order 1996 respectively).

16. The EAT observed that “*arrears of pay*” is not defined in the legislation nor is the word “*pay*”. Mr Justice Simler DBE stated:

“28. I accept that Article 2(2) of the Insolvency Directive leaves the definition of ‘pay’ to national law. Further ‘pay’ for the purposes of ‘arrears of pay’ in Section 184 may be narrower than ‘pay’ under Article 157 (formerly Article 141) of the Treaty of the European Union which is defined to include a wide variety of rewards for work, including pension (which is deferred pay), and rewards by way of non-monetary benefits or consideration in kind, that might be regarded as falling outside the category of “arrears of pay”. However, I do not consider that this answers the question in this case. Although Section 184 sets limits on the categories of debt within scope, ‘pay’ has not been defined for the purposes of Part XII. In the context of the category of “arrears of pay” it must be remuneration for work that has been performed by the individual for the employer. (Tribunal emphasis).

29. Neither Benson nor Connor concerned equal pay arrears and those cases are not authority for the proposition that equal pay arrears cannot be arrears of pay within Section 184(1)(a). That does not entail treating the five categories of debt in Section 184(1) as non-exhaustive. They are exhaustive and it is only if equal pay arrears can be “arrears of pay” that they can be said to fall within the scope of the protection and Part XII. It is therefore necessary to consider the nature of these claims to determine this question.

30. The equal pay arrears claims in this case are claims in respect of periods that pre-date the insolvency. They relate to work performed by the claimants that was, as a matter of fact, rated as equivalent to work done by their male comparators, but for which they received less pay than their male comparators received for the equivalent work. The claims are not quantified but at some point the Claimants will be in a position to identify what the precise pay shortfall is by reference to each particular comparator relied on.

31. That is different from Benson where the payments sought to be claimed as within scope were not remuneration for work actually done, and moreover,

statutory guarantee payments are listed in Section 184(2) to be treated as arrears of pay, whereas contractual guarantee payments are not. It is also different from the compensatory award in issue in Connor which on any analysis is not arrears of pay for work actually done, but reflects future loss earnings. The remuneration in issue in this appeal is for work actually done by the claimants but not paid. For the reasons developed below there is a presumption that an equality clause operated in their contracts that can only be rebutted if material factor defences are established by the employer.

32. Further, unlike in Benson and Connor there is no express provision in Section 184(1)(b) to (e) or (2) that militates against an equal pay arrears claim in respect of remuneration for work performed falling within “arrears of pay”.

33. I can see no conceptual or qualitative distinction between arrears of pay claimed in consequence of a failure to pay sums contractually due under express or implied terms of a contract for work done, and sums claimed as due for work done under an equality clause implied by statute. There is no principled reason for the Secretary of State’s assumption that ‘equal pay’ is somehow different from pay. Nor has any policy justification for this distinction been identified.”

17. The Employment Appeal Tribunal stated further at paragraph 52:-

“52. The statutory obligation of the Secretary of State under s.182 is to pay to the employee the amount which, in the opinion of the Secretary of State, the employee is “entitled in respect of that debt” if the Secretary of State is satisfied that, on the relevant date, the employee “is entitled to be paid the whole or part of any [qualifying] debt”. Qualifying debts include “arrears of pay” owed by the insolvent employer at the relevant date. So the obligation of the Secretary of State is to pay the employee the amount “which the employee is entitled to be paid in respect of that debt”. Entitled must mean legally entitled so the critical question is whether there is a debt in respect of which the employee was legally entitled to be paid by his employer on the relevant date. The answer to that question in the case of arrears of pay under a contract of employment is found by determining the legal position as between the employee and employer in accordance with the relevant principles of contract law. If the contractual entitlement is disputed it must be capable of being enforced (in other words not time-barred)”.

18. The EAT in ***Benson and Others v Secretary of State for Trade and Industry [2003] ICR1082*** held as follows:-

“... Section 184(1) of the Employment Rights Act 1996 was intended to define and limit the debts owed by an insolvent employer to its employee which were the subject matter of express protection and payment by the Secretary of State; but paragraphs (b) to (e) of Section 184(i) were not intended to be declaratory or explanatory of “arrears of pay” in paragraphs (a), but contained items which were not arrears of pay and would not have been debts for the purpose of Section 182 but for their express inclusion in those paragraphs; that, accordingly, “arrears of pay” did not mean sums

payable under the contract, and the employees' contractual payment in respect of a period of lay off was not recoverable under Section 184(1)(a) as arrears of pay; and that the employees were entitled only to a guarantee payment under Section 28, which was expressly included by Section 184(2)(a) as a debt recoverable from the Secretary of State".

19. In **Benson** the specific issue was whether contractual guaranteed payments in respect of a period of lay-off were arrears of pay. The employees had a collectively agreed hourly rate after the first four hours of 'lay off' in any week. The employees claimed for this contractual guaranteed payment after their employer became insolvent. Their claims were refused by the Secretary of State because a guaranteed payment was specifically provided for in Section 184 of the Employment Rights Act 1996. (Northern Ireland equivalent Article 229(2)(a)). The EAT determined that the contractual provision in respect of a period of 'lay off' was not recoverable as 'arrears of pay' under Section 184(1)(a) as there exists a specific entitlement to a guaranteed payment for 'lay off' under Section 184(2)(a) as expressly included in the legislation.

RELEVANT FINDINGS OF FACT

20. The written terms of the claimants' contracts of employment stated as follows:

(Ms Maguire)

"5. Remuneration

5.1 Your salary is at the rate of £25,000 per annum based on a 37.5 hour week, pro rata 30 hour £20,000 and thereafter as itemised on your payslip. A performance related bonus of £2,500 is available which will be based on mutually agreed targets. This payment will be made at the end of the 12 month period commencing 1 August. Payment is made in monthly instalments in arrears by either bank transfer or by cheque. Payment is made on the last working day of the month".

(Ms Jamison)

"5. Remuneration

5.1 Your salary is at the rate of £20,000 per year proportionately over working 30 hour week and thereafter as itemised on your payslip. Payment is made in monthly instalments in arrears by bank transfer; payment is made on the last day of the month. An incentive bonus of 10% is also payable annually based upon performance and mutually agreed targets set at the beginning of the term".

21. The tribunal unanimously finds as a fact that each claimant had a contractual right to an annual bonus payment that was unrelated to targets or performance. The cogent and unequivocal evidence of both claimants, which the tribunal accepts and which was not rebutted by any evidence from the respondent, was that each year, each claimant received a payment in July, equivalent to ten percent of their salary. The tribunal accepts that no targets were ever set or agreed; there were no discussions between the claimants and their employer at any time relating to

performance; no reviews or 'one to ones' took place and no tasks or targets were ever set that either claimant was required to meet or work towards. The tribunal finds that the annual payment was part of the annual remuneration package as per the clear and consistent evidence of both claimants. No evidence was called by the respondent to the contrary. Whilst the express terms of their respective contracts of employment state otherwise, the tribunal is satisfied from the claimants' evidence that these terms were not applied and this is not what occurred in practice. The tribunal also took into account that the annual payments were pro-rated in the same way as salary when the claimants altered their working hours from five days to four days, this clearly supports the claimants' case that the annual payment was not, in practice, linked to specific tasks or performance and was treated as part of their remuneration package as a whole. The tribunal finds, as a fact that as at the date of the insolvency – namely 5 July 2018 - the claimants had a contractual entitlement to be paid their annual bonus payment – this was the clear and unchallenged evidence of the claimants.

22. There was no dispute that the Redundancy Payments Service rejected each of the claimants' claims for bonus payment by letter dated 3 October 2018 citing the following:-

“Your claim includes an application for a ‘bonus’ payment and that you are entitled to a bonus payment per year payable on 31 July 2018. In order for the Department to accept a bonus payment is in fact payable depends on a number of factors, namely:

- They are contractual and included in the employees contract of employment and that the contract of employment clearly states that the employer is liable for additional payments.*
- Whether or not it is conditional and can be withheld by the employer for e.g failure to meet sales targets etc.*
- Bonuses that can be withheld by the employer for reasons such as decrease in business etc are not payable.*

We have carried out further investigations:

- The purported ‘contract’ fails to state under what conditions a ‘bonus’ payment was payable and whether or not it was conditional.*

The Department find that your claim for the payment of a ‘bonus’ payment is both unsubstantiated and unverified therefore the Department are not satisfied that you are in fact entitled to arrears of pay in respect of a ‘bonus’ payment from the National Insurance Fund and that our decision notified to you by letter dated ‘date’ stands.”

23. The respondent's ET3 response forms are, for all practical purposes, identical in respect of each claimant. The response form of Ms Jamison is set out below:

“The Department received an RP1 application for statutory redundancy and insolvency payments from Mrs Jamison formerly an employee of Bot Wine and Spirits merchants on 03 August 2018.

Her claim included an application for a 'bonus' payment and stated that she was entitled to a bonus payment of 10% of her gross salary. In order for the Department to accept a bonus payment is in fact payable is dependent on a number of factors, namely:-

- *They are contractual and included in the employee's contract of employment and that the contract of employment clearly states that the employer is liable for additional payments.*
- *Whether or not it is conditional and can be withheld by the employer for e.g. failure to make sales targets etc.*
- *Bonuses that can be withheld by the employer for reasons such as decrease in business etc and are not payable.*

The Department undertook checks and further investigations into her entitlement and have found that the purported 'contract' fails to state under what conditions a 'bonus' payment was payable and whether or not it was conditional.

The Department found that the claim for the payment of a 'bonus' payment is both unsubstantiated and unverified therefore the Department is not satisfied that the claimant is entitled to arrears of pay in respect of a 'bonus' payment from the National Insurance Fund and that our decision was notified to Mrs Jamison by letter dated 30/10/2018" (sic).

24. There was no dispute that the Redundancy Payments Service did consider bonus payments as 'arrears of pay' on the caveat they met certain criteria – as set out at paragraph 7 of Ms Moody's witness statement:-

"The Department has taken the view that bonus payments can be considered as arrears of pay, but they must fall under a certain criteria which is:-

- (a) *Is the bonus payment contractual?*
- (b) *Is the bonus payment performance related? If so, has evidence been provided that targets/objectives were met?*
- (c) *Is it stipulated/indicated in the written contract that a bonus payment could be withheld at any time? If so, this would not be a liability for the Department?*
- (d) *What period of time does the bonus payment cover? If this bonus is being claimed over a period that the Department has already made payment in relation to arrears of pay up to eight weeks, a partial payment may be considered".*

25. The tribunal accepts that Mr McSorley, a fellow employee of the claimants received the sum of £3,000.00 from the Redundancy Payments Service in respect of his full contractual entitlement to his annual bonus. There was no dispute that this

occurred and the respondent's evidence was that this had been an error and that efforts would be made to rectify this (no documentation to this effect this was adduced in evidence). Ms Moody informed the tribunal that Mr McSorley was not entitled to this bonus payment and moreover the payment ought to have been limited to eight weeks' pay as per Article 229(1)(a).

26. After considering all the documentation and email correspondence provided, together with Ms Moody's undisputed evidence, the tribunal finds that the bonus payments were not paid to the claimants because the respondent determined they were performance related and on this basis could be withheld.

CONCLUSION

(i) *Are the claimants contractually entitled to a bonus payment under their respective contracts of employment on the appropriate date?*

27. As per the findings of fact set out above, the tribunal concludes that the claimants have discharged the onus of establishing a contractual right to an annual bonus payment. There was no evidence adduced by the respondent to rebut the clear and consistent evidence of both claimants that bonuses were paid on an annual basis without reference to targets and/or performance.

28. As per the findings of fact set out above, the tribunal accepts that the respondent paid a full annual bonus entitlement to a fellow employee, however the contractual entitlement of a fellow employee is not determinative of whether the claimants have a contractual right to a payment under their respective contracts of employment.

29. Mr Rafferty accepted on behalf of the respondent that if the tribunal determined the bonus payments to be contractual and a debt falling within the definition of "arrears of pay" as at the date of the insolvency –then the claimants were entitled to payment as per the provisions contained in Article 227. As per the findings of fact the tribunal determines that on the appropriate date, the claimants were entitled to their annual bonus payment on the appropriate date.

(ii) *Does a "bonus" payment come within the definition of "arrears of pay" as a "debt" within the meaning of Articles 227 and 229 of the Employment Rights (Northern Ireland) Order 1996?*

30. The tribunal determines, based on the findings of fact set out above that the claimant's bonus payments are capable of falling within the definition of "arrears of pay" as a debt pursuant to Article 229(1)(a) for the following reasons:-

- (1) The claimants had a contractual right to the payments pursuant to their contracts of employment as per the findings of fact set out above.
- (2) Based on the findings of fact set out above and in considering the legal authorities, it is the tribunal's determination that these bonus payments were '*remuneration for work that has been performed by the individual for the employer*' (see **Graysons Restaurant Limited v Jones and Others [2019] EWCA Civ 725**) and therefore a qualifying debt to which they were legally

entitled to be paid.

- (3) There is no express provision in the legislation excluding bonus payments from the definition of arrears of pay; furthermore, the legislation does not define “pay”. Whilst the tribunal accepts that not all contractual payments under the contract of employment come within the definition of ‘arrears of pay’, the tribunal is satisfied that on the facts as found, the claimants’ bonuses were payment for work undertaken to which the claimants were legally entitled.
 - (4) The tribunal accepts Mr Rafferty’s submission that the provisions of the Employment Rights (Northern Ireland) Order 1996 which define “wages” and “a week’s pay” are not helpful in determining the issue in this case. Article 59 on “Meaning of “wages” etc.” expressly states that it applies to Part IV of the Order only and Article 23 provides for a maximum amount of a week’s pay to specific awards which does not include Part XIV “Insolvency of Employers”. In any event Article 231 set the relevant limit on the amount payable under Article 227.
 - (5) The legislation clearly imposes limits on the debts that are recoverable on the insolvency of an employer, specifically the number of weeks is limited to eight as per Article 229 (1)(a)) and (contrary to the respondent’s submission) the amount payable is limited to the amount of a week’s pay pursuant to Article 231(1)(a) and (b). Those limits apply to the claimants’ claims.
- (iii) *Is the eight week pay limit provided for in Article 229(1)(a) applicable to the claimants’ claims of arrears of pay?*

31. The claimants at hearing, quite properly, did not dispute that ‘arrears of pay’ is limited to eight weeks under the above mentioned legislation. As per the tribunal’s determination above, the eight week limit provided for in Article 229(1)(a) is applicable to the claimants’ claims.

32. At hearing the claimants agreed with Ms Moody’s calculation of the amount of bonus due as set out in her witness statement. This included the relevant statutory deductions and the eight week ‘arrears of pay’ limit. The claimants had already received one week of ‘arrears of pay’ and therefore the annual bonus was pro-rated for the remaining seven week entitlement, as helpfully, provided in Ms Moody’s witness statement. The only difference relates to Ms Maguire, whose annual salary was £20,000 by reason of reducing her hours to a four day week, therefore her annual bonus was £2,000 which pro-rated for seven weeks and with statutory deductions is calculated at £194.55.

33. The tribunal makes a declaration that the claimants are entitled to be paid arrears of pay as a debt, limited to eight weeks pursuant to Article 227 and Article 229(1)(a) of the Employment Rights (Northern Ireland) Order 1996 in the following amounts:-

Mrs Jamison -	£160.19
Mrs Maguire -	£194.55

34. This is a relevant decision for the purposes of the Industrial Tribunals (Interest) Order (Northern Ireland) 1990.

Employment Judge:

Dates and place of hearing: 21 October 2020 and 26 November 2020, Belfast.

This judgment was entered in the register and issued to the parties on: