

**IN THE MATTER OF THE EMPLOYMENT ACT 2000**

**AND IN THE MATTER OF A DISPUTE BEFORE THE EMPLOYMENT AND LABOUR RELATIONS TRIBUNAL**

Claimant

and

**HORIZON COMMUNICATIONS LIMITED (In Receivership)**

Respondent

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**JUDGMENT**

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1. For the reasons set out in more detail below, the Tribunal awards the Claimant judgment in default of the Respondent submitting its Answer to the Claimant's claim. Judgment is awarded in the amount of \$65,635.

**Background**

2. This matter involves a labour dispute that was referred to the Employment and Labour Relations Tribunal ("the Tribunal") under a notice of referral ("the Referral") dated June 9, 2023. The Claimant is one of eleven employees of the Respondent seeking to recover unpaid wages and other compensation from the Respondent. The Respondent is operating under a private receivership and has functionally ceased operations, though it has not yet been wound-up.

**Procedural Background**

3. The Tribunal, using the powers conferred by section 44C(1)(b), chose to consolidate the claims of the Respondent's eleven employees for procedural purposes. The employees, however, were neither jointly represented before the Tribunal nor did they seek to pursue their claims collectively as a group.
4. With the assistance of the Tribunal Administrator, the Tribunal set a preliminary hearing for Monday, July 31, 2023. The aim of the preliminary hearing was to provide the Tribunal with an opportunity to set directions that would pave the way for a final hearing of each employee's unpaid compensation claim.
5. Notice of the preliminary hearing was given to each claimant. Efforts were made by the Tribunal Administrator to notify the Respondent of the hearing through Mr. Gilbert Darrell, the founder, Chief Executive Officer, and Managing Officer of the Respondent, including by email. The Tribunal understands that the Tribunal Administrator has been told by Mr. Darrell that he is no longer employed by the Respondent. Mr. Darrell directed inquiries relating to the Respondent to Ms. Katie Norris, an Assistant Manager at the financial advisory firm, Teneo.

6. Notwithstanding what the Tribunal understands to have been Mr Darrell's representation to the Tribunal Administrator, that he is no longer an employee of the Respondent, and based on our inquiries of the Joint Receivers, we have seen nothing to convince us that Mr Darrell has ceased being a director of the company. Accordingly, we find that notice of the preliminary hearing to Mr Darrell was sufficient of the purpose of satisfying notice on the Respondent.
7. Notice of the hearing was also given by the Tribunal Administrator to Ms. Norris. There then followed an email exchange with Ms. Norris about whether she or the joint receivers should attend the preliminary hearing.
8. Having taken notice that Teneo's Mr. Charles Thresh and Mr. Mike Morrison were the Respondent's Joint Receivers, the Tribunal decided that it was necessary to hear from them during the preliminary hearing for purposes of learning more about the present legal status of the Respondent and about the status of the Receivership generally, given this information would likely support the efficient resolution of the pending disputes.
9. On July 27, 2023 a summons was issued to the Joint Receivers, under the hand of the Tribunal Chair, requiring their attendance at the preliminary hearing for purposes of assisting the Tribunal with its inquiries into the following four areas:
  - i. The present status of Horizon Communications Limited,
  - ii. The identity of the person(s) responsible for managing the affairs of Horizon Communications Limited,
  - iii. The status of the receivership, and
  - iv. The plan and timeline for rehabilitation, sale, or liquidation of Horizon Communications Limited.
10. A record of the attendees at the preliminary hearing is included in Schedule I of this judgment.
11. As noted in Schedule I, Mr. Thresh attended the hearing together with counsel, Mr. Ben Adamson of Conyers. Together, they advised the Tribunal of the following:
  - i. The Respondent is presently in Receivership. It has been in Receivership since the appointment of the Joint Receivers on January 5, 2023. The Respondent's offices are now closed. The Joint Receivers were appointed by a secured lender under the terms of a debt instrument and were given authority by that instrument to take full control of assets subject to a charge. On November 9, 2022, a Notice of Crystallization was sent to the Respondent, advising that the floating charge had become enforceable, thereby becoming a fixed charge. All assets of the company were subject to the fixed charge and fell within the control of the Joint Receivers.

- ii. The Receivership had no effect on the company's Board, which remains intact. That being said, the Joint Receivers acknowledged that given they controlled all assets of the Respondent, the Respondent's management had a limited ability to carry out its functions. The Joint Receivers believe the Respondent's Board has written to Mr. Darrel, who remains a director, reminding him of his duties as a director and employee of the company.
  - iii. The Receivership is ongoing, and the Joint Receivers intend to remain in place until all assets are realized. That being said, the company ceased trading on June 26, 2023, and all employees were terminated on or shortly after this date. A number of former employees had been retained by the Joint Receivers on a contractual basis to assist them with the winding down the affairs of the business and the realization of assets, a process that (at the time of the hearing) was ongoing though nearing completion.
  - iv. The Joint Receivers anticipated the sale of the company's assets to be concluded within "the next couple of weeks" and once that was done, they intended to take the administrative steps necessary to conclude the Receivership and ultimately to apply for their release as Receivers. A winding-up petition was also being contemplated.
12. From the information provided by the Joint Receivers, and based on the experience of the Tribunal Administrator, it appears to the Tribunal that the Respondent has no functional day-to-day management, even though the Receivership has not altered the duties of its officers or board.
13. No winding-up order has been sought or made in relation to the Respondent, and there is no impediment to the claimants seeking to pursue their claims against the Respondent while it is in Receivership.
14. The Tribunal asked Mr. Thresh for clarity in relation to the statement made about certain employees being retained by the Joint Receivers after commencement of the Receivership.
15. From the response given by Mr. Thresh, the Tribunal understands that the Respondent's employees were terminated in stages following the commencement of the Receivership. Mr. Thresh said that once the Joint Receivers were in place, they wrote to the Respondent's employees outlining their intention (at least initially) to preserve critical mass within the business for a period with a view to selling it as a going concern. Mr. Thresh said that some employees were initially laid off in January 2023 and did not return. Others were laid off from that date on "*a part-time basis*".
16. Mr. Thresh indicated that for those employees who continued to work for the Respondent after the Receivership commenced, their compensation was met by the Joint Receivers. Mr. Thresh said that where former employees were asked to return to the business on a contractual basis after being laid off in January, their compensation was also met by the Joint Receivers.

17. With effect from June 26, 2023, all remaining employees were made redundant.

#### **Limitations on the powers of the Tribunal**

18. Two matters were raised by former employees of the Respondent, which highlighted the limited power of the Tribunal to assist in the actual recovery of money for the employees.
19. Firstly, [redacted] queried whether - given the further explanation provided by Mr. Thresh about the Joint Receivers meeting the wages of certain employees following commencement of the Receivership - the Joint Receivers should be joined as additional respondents to the extant disputes.
20. While we are sympathetic to the claimants' desire to identify a solvent source of compensation against whom they may possess a viable claim for unpaid wages, the Tribunal's case management powers are limited. Although the Employment Act gives us power to set directions for the expeditious and just hearing and determination of labour disputes, we have not been expressly granted authority similar to that available under Order 15, rule 6 of the Rules of the Supreme Court, which allows that court to order the joinder of a party to an action on its own motion.
21. The Tribunal is only empowered to hear disputes upon a referral from an inspector. Accordingly, any complaint by a claimant that they are owed unpaid wages or other compensation by the Joint Receivers must first be made to an inspector in accordance with section 36 of the Employment Act, and then only following their investigation can the inspector refer that complaint to the Tribunal for adjudication.
22. Accordingly, no position is taken by the Tribunal on the question of whether the Joint Receivers have adopted or otherwise affirmed the contracts of any of the Respondent's employees, or whether the Joint Receivers separately entered into new employment terms which now give rise to valid claims for unpaid compensation.
23. Next, [redacted] queried whether it was correct for Mr. Adamson to suggest that the Respondent had no money when it possessed assets, such as trucks. The Tribunal understood [redacted] to be expressing concern about whether the Respondent's assets would be available to satisfy the claims of the employee group given her belief that section 33 of the Employment Act gave priority to the claims of the Respondent's employees for accrued and untaken vacation, accrued and unpaid wages, and severance.
24. While sympathetic to the request, we are unable to effectively address the concerns raised. The Tribunal is obliged to recognize that its jurisdiction is limited to hearing and determining complaints and disputes referred under the Employment and Labour Code. That jurisdiction does not extend to reviewing how the Receivership has been conducted or whether an improper preference has been given to another in the disposal of the Respondent's assets. Also, and as indicated above, to date no winding-up application has been made to the Supreme Court in respect of the Respondent.

25. Where the Tribunal finds in favor of the Respondent's employees, they are entitled to seek recovery of the sums owed by the Respondent from the Supreme Court as a civil debt. The Supreme Court would have the power in a winding up to review the conduct of the Receivership, including whether the manner in which the Respondent's assets have been disposed of contravenes the section 33 rights of the claimants.

#### **Briefing of the labour dispute**

26. Based on the representations of the employees in attendance during the preliminary hearing, and in view of the additional information provided by the Joint Receivers, the Tribunal directed the employees to each submit a Claim Form in a prescribed format that would set out the basis for their claims against the Respondent within 7 days of the hearing date. Given the number of claimants, the Tribunal believed it would be more efficient if the template was utilized to allow the claimants to present their claims in a uniform format.
27. Given our observation that that the Respondent has no functional management, and the indication of Mr. Darrell that he would not be involved in these proceedings on behalf of the Respondent, the Tribunal initially proposed a direction whereby each claimant would deliver a copy of the Claim Form to the company's last known place of business, located at 41 Cedar Avenue, Hamilton; however, Mr. Adamson and Mr. Thresh proposed an alternative solution whereby the claimants would deliver their Claim Forms to the offices of Teneo, and the Joint Receivers would take steps to notify the company's officers. This proposal was preferred by the Tribunal because there was a better chance of providing actual notice of the proceedings to the company than by simply leaving the Claim Form at the last known business address of the Respondent. Accordingly, the Tribunal directed that delivery of the Claim Form to Teneo would satisfy the requirement to provide the Respondent with notice of each claim.
28. The Respondent was directed to submit an Answer to each Claim Form received within 7 days of delivery of the Claim Form to Teneo, admitting or denying the matters set out in the Claim Form.

#### **The Claimant's Claim**

29. The Claimant submitted his Claim Form on July 31, 2023 and delivered a copy to the offices of Teneo in accordance with the Tribunal's directions.
30. In his Claim Form, the Claimant avers that as a result of his termination he is entitled to receive the following:
- a. \$37,500 for unpaid wages,
  - b. \$15,635 for accrued and unused vacation, and
  - c. \$12,500 representing 4 weeks' severance.
31. The Respondent has not submitted an Answer to the Claim Form.

32. The Claimant has now requested that the Tribunal award judgment against the Respondent in default of submitting its Answer.

**Disposition of the Labour Dispute**

33. The Tribunal is satisfied that steps were taken to notify the Respondent of the preliminary hearing.

34. The Tribunal is also satisfied that steps were taken by the Claimant to notify the Respondent of his claim for unpaid wages.

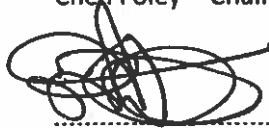
35. In default of submitting its Answer to the Claimant's claim, judgment is awarded against the Respondent in the amount of \$65,635.

36. The Claimant may seek to enforce this judgment in the Supreme Court as a civil debt in accordance with section 44C(2) of the Employment Act 2000.



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Chen Foley – Chair



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Peter Aldrich



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Judith Hall Bean