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# EMPLOYMENT TRIBUNALS

**Claimant:** Mr D Elwick

**Respondent:** 1) The Insolvency Service. Secretary of State for Business  
Innovation & Skills  
2) Firmco in Liquidation

**Heard at:** East London Hearing Centre

**On:** Thursday 20 June 2019

**Before:** Employment Judge Jones

## Representation

**Claimant:** In Person

**1<sup>st</sup> Respondent:** Written Representations

**2<sup>nd</sup> Respondent:** Written Representations

# JUDGMENT

The judgment of the Tribunal is that: -

- 1 The Claimant's redundancy payments should have been calculated on the basis of a gross salary of £26,000 per annum.
- 2 Under section 188 of the Employment Rights Act 1996, the 1<sup>st</sup> Respondent is ordered to pay the Claimant the outstanding balance of £8,095.76 redundancy pay and of £2590.68 notice pay.
- 3 The 1<sup>st</sup> Respondent is to pay the Claimant the total sum of £10686.44.

# REASONS

2 This is a matter that came before Employment Judge Ross on the 3 May 2019 at a preliminary hearing. The Claimant was the only person who attended.

3 The Claimant gave sworn evidence today. The Tribunal also saw a bundle of documents from the Claimant which consisted of the following: - his P60 for the tax year April 2017 to April 2018, minutes of a director's strategy meeting dated 21 June 2017, an undated letter written on Firmco headed paper by the finance director, Ray Wallace; and copies of the Claimant's email correspondence Begbies Traynor and with the 1<sup>st</sup> Respondent, the Insolvency Service about his redundancy payment.

4 The Tribunal had ET3 Response forms and Grounds of Resistance from all the Respondents. The 3<sup>rd</sup> Respondent was dismissed from these proceedings at the last hearing.

## The Issues

5 The Claimant's case today is that the 1<sup>st</sup> Respondent paid him incorrect sums as his redundancy and notice pay and that they should be ordered to pay him the correct amounts. The Claimant contends that his redundancy and notice pay should have been calculated on the basis of an annual salary of £26,000, which would mean that he was entitled to have his payments calculated on the basis of £508 gross weekly pay (the statutory maximum), whereas he had been paid on the basis of an annual salary of £12,000 or £230.14 per week pay. He calculates that he is entitled to a further £8,336 in redundancy payments and a further £2,667 in notice pay making a total of £11003.00.

6 The issues to be determined at this hearing were set out by EJ Ross in May as follows: -

### 7 *Redundancy Payment*

7.1 What redundancy payment was the Claimant entitled to? The issue between the parties was whether the Claimant's gross weekly pay at the time of his dismissal should have been calculated from the basis of an annual salary of £26,000 or £12,000.

### 8 *Notice Pay*

8.1 How much notice pay was the Claimant entitled to? This will turn on the finding of fact identified at the first issue.

9 From the evidence, the Tribunal make the following findings of fact: -

## Findings of Fact

10 The Claimant was employed by the 2<sup>nd</sup> Respondent, a construction company, from 25 August 1994 until his dismissal by redundancy which took effect on or around 27 June

2019. The Claimant had been employed as the Managing Director of the 2<sup>nd</sup> Respondent. At the time of his dismissal he was employed as semi-retired Director.

11 The Claimant was not able to be precise about the date of termination of his employment because he has never received written notice of dismissal from the 2<sup>nd</sup> Respondent. By a claim form presented on 21 December 2018, the Claimant brought a complaint of age discrimination and a claim for the balance of redundancy payment and notice pay that he contended that he is entitled to. The Claimant withdrew his complaint of age discrimination at the hearing on 3 May and it was dismissed by EJR today, 20 June 2019.

12 Begbies Traynor, presented a Response on behalf of the 2<sup>nd</sup> Respondent. Begbies Traynor are insolvency practitioners. From that Response and from the documents provided by the Claimant, the Tribunal finds that Ian Goodhew, an Insolvency Manager for Begbies Traynor wrote to the Claimant on 25 October to inform him that the company's records confirmed that the Claimant's salary was £12,000 per annum and that the records showed that the Claimant also had a car allowance and fuel allowance but as they did not form part of his salary for the purposes of redundancy pay and arrears of wages, the Claimant's weekly salary was calculated at a weekly rate of £230 per week. The redundancy payment paid by the 1<sup>st</sup> Respondent was based on that calculation.

13 The 2<sup>nd</sup> Respondent referred to the undated letter from Mr Wallace the company's Finance Director which confirmed that the Claimant's 'all inclusive' salary package was £26,000 paid to him at a rate of £2,166 per month from January 2018. Mr Goodhew was unable to locate a copy of this letter in the company records in his possession and was concerned that the Finance Director was in possession of company headed paper which following the liquidation, he was not permitted to use. Mr Goodhew referred to the company wage records which apparently indicated that the Claimant was paid a salary of £12,000 per annum with a car and fuel allowance totalling £14,000. Mr Goodhew refused to revise the submission made to the 1<sup>st</sup> Respondent.

14 The 1<sup>st</sup> Respondent's defence to this claim is therefore that the Claimant has been paid all the redundancy and other payments that he is entitled to. In its Response its defence is that the Claimant's salary at the time of the redundancy was £12,000 per annum and that it gleaned that information from the company's records.

15 Since the hearing on the 3 May 2019, the minutes of which clearly stated what the issues for this hearing were, the 2<sup>nd</sup> Respondent has not sent in any evidence to show where that information was gleaned from.

16 The Claimant produced the letter from Ray Wallace, the 2<sup>nd</sup> Respondent's former Finance Director today. The letter is undated but is headed '*Re Mr D Elwick....Retirement agreement for 2018*'. The letter states that the 2<sup>nd</sup> Respondent's board of directors agreed at the strategy meeting on 21 June 2017 that the Claimant would commence his semi-retirement from Firmco in January 2018. The board further agreed that the role of managing director of the company would be handed over to Mr Feargal McEaney in the summer 2017 and it was expected that they would work jointly together to the end of the year when the Claimant's retirement would commence. The board further agreed that the Claimant would remain an employee of Firmco for the year of 2018 with an 'all inclusive' salary package of £26,000 which would be paid to him from January 2018 in a sum

monthly rate of circa £2,166 per month. The letter stated that the agreement was reached by the full board so that the Claimant could continue as an employee, attend monthly board meetings and assist the business wherever possible during his retirement year and for as long as was necessary.

17 Begbies Traynor refused to accept the contents of this letter because it was written on the 2<sup>nd</sup> Respondent's headed paper which the Finance Director should no longer be using following the company liquidation. The Tribunal finds from the Claimant's evidence today and the absence of any other evidence from the Respondents that it is likely that the contents of the letter is correct.

18 The Tribunal also finds from the Claimant's evidence that from January 2018 he was not operating a company car and his salary was not meant to include any car or fuel allowance. From January 2018 he was no longer employed as the managing director and no longer undertook travel on company business following the beginning of his retirement.

19 In his case management summary of 3 May 2019, EJ Ross directed that all issues would be addressed by the Tribunal at today's hearing. The Tribunal ordered the Claimant to prepare a bundle of documents and to send the index to the bundle to the Respondents so that they were aware of the evidence to be considered by the Tribunal today. The Respondents were also aware of the issues for today's hearing as those were clearly set out in the case management summary as set out above.

20 On Tuesday 18 June 2019 the 1<sup>st</sup> Respondent wrote to the Tribunal to indicate that it was not going to appear at the today's hearing. Mr Soni stated that the 1<sup>st</sup> Respondent would rely on the ET3 submitted on 30 April 2019. The 1<sup>st</sup> Respondent also submitted that the Tribunal should take note of the ET3 and Grounds of Resistance submitted by Begbies Traynor on behalf of Firmco regarding the Claimant's remuneration.

21 The ET3 submitted on behalf of the 1<sup>st</sup> Respondent confirmed that Firmco was insolvent within the meaning of sections 166 and 183 of the Employment Rights Act 1996 (ERA), having gone into creditors liquidation on 2 August 2018. The 1<sup>st</sup> Respondent confirmed that the Claimant has already received payments under the National Insurance Fund under the provisions of Sections 166, 167 and 168 of the ERA. He has been paid redundancy pay, arrears of pay and had a payment of notice worked and not paid by the employer. The payments were as follows: £6,904.24 as redundancy pay; £317.71 and arrears of pay and £2,209.32 as outstanding notice pay.

22 The 1<sup>st</sup> Respondent's case is that it has been told by the Insolvency Practitioner (IP), Begbies Traynor, that the Claimant's gross weekly pay for 2 days a week was £230.14 per week. That information was provided by the IP on a form provided by the 1<sup>st</sup> Respondent. The IP needs to agree the debt in order for the 1<sup>st</sup> Respondent to make recoveries against the insolvent estate on behalf of the National Insurance Fund. Based on information that it received from the IP, the 1<sup>st</sup> Respondent disputed that the Claimant was entitled to receive any further payment under the provisions of section 166, 167 and 182 of the ERA.

23 The Claimant wrote to the 1<sup>st</sup> Respondent to enquire on what documents they had based their decision to calculate his redundancy payment on a basis of a salary of £12,000. No documents were provided to him. Following the promulgation of the preliminary hearing case management summary and orders from the Tribunal hearing on 3 May 2019, the Tribunal has not received any documentation from the 2<sup>nd</sup> Respondent which could show on what basis it has decided to calculate the Claimants redundancy payments on the basis of a salary of £12,000. Although the letters to the 1<sup>st</sup> Respondent referred to 'company documents' that showed that the Claimant was paid £12,000, neither the Claimant nor the Tribunal has seen those documents or told what they were. The Redundancy Payments Service and Begbies Traynor have not sent any further documents to the Employment Tribunal even though, from the minutes of the hearing before Employment Judge Ross, it would have been clear that this was an issue that needed to be determined at today's hearing.

24 The Claimant has not been provided with a P45 form from Begbies Traynor on the 2<sup>nd</sup> Respondent's behalf. An undated email from Begbies Traynor, a copy of which was in the Tribunal bundle but which the Claimant believed was dated 26 June 2019, informed the Claimant that P45's has not yet been issued to the 2<sup>nd</sup> Respondent's former staff as Begbies Traynor had been unable to access the relevant information on the company's server. That would indicate that the company documents are not complete or that they are inaccessible to the IP.

25 The Claimant's letter to the 2<sup>nd</sup> Respondent by email on 23 October 2018 confirmed that he had sent payslips to the 2<sup>nd</sup> Respondent for February, March and April 2018 which showed that he had been paid a monthly wage of £2166.67.

26 The Claimant's weekly wage would therefore have been  $£2,166.67 \times 12 \div 52 = £500$  per week. That was confirmed in the P60 document which the Claimant included in his bundle of documents which showed in the tax year 2017/2018 the Claimant earned a total of £37,600.63. His case was that he was paid £36,000pa to December 2017 and £26,000pa from January 2018.

27 There were no documents in the bundle or on the Tribunal file from either Respondent, showing on what basis the Claimant had been recorded as earning £12,000 as his salary.

28 The Tribunal had a copy of the minutes of the directors' strategy meeting held at the Holiday Inn, Brentwood on 21 June 2017 at which the Claimant was present along with 4 other directors. One director was absent.

29 At that directors' meeting it was decided that it would be a good idea if FM who the Tribunal understands to be Feargal McEneaney, took over as Managing Director. The note records that it was decided that this would happen on 1 September 2017. The Claimant had been Managing Director for 20 years up until that time.

30 The plan was that the Claimant would work four days a week from June until Christmas 2017, retire from the post as Managing Director at the end of 2017 and then continue to be employed 2018 in a sort of consultant type role for which he would be paid £26,000 per annum on the basis of working two days a week until December 2018. The 2<sup>nd</sup> Respondent was also going to continue to pay his pension and private medical

insurance. The Claimant's membership of BUPA scheme and his pension were all paid until May 2018. The company ceased trading in June 2018 and was insolvent from August 2018.

31 The 2<sup>nd</sup> Respondent wanted to keep his considerable practical knowledge accessible to the business and it was noted that this could be put to good use in assisting with problem-solving on the projects and sites. The Claimant confirmed in his evidence that the new managing director, was to take over after the 21 June, strategy meeting. He actually took over in August 2017. The Claimant was paid £37,600 in the year 2017, as shown in the P60 that the Claimant produced to the Tribunal. From January 2018 he was paid £26,000 for working two days a week. This was an arrangement that was good for the Claimant and good for the business as it still retained his expertise, knowledge of clients and the work and collections. This arrangement was to end in December 2018.

32 The Claimant's evidence was that his wage had been considerably higher in earlier years when he was a full time Managing Director during which time he took car and fuel allowances which were paid as separate additions to his wage. The Claimant's evidence was that the 2<sup>nd</sup> Respondent decided about approximately 8 years ago to give all employees a car allowance so that they could purchase or lease a car that they then used as part of their employment. The Claimant did have a car allowance at that time. All employees had to visit construction sites around London and various other projects. However, following the Claimant's retirement in January 2018, he no longer required or had a company car, he did not visit sites and did not need or require a fuel allowance from the 2<sup>nd</sup> Respondent. His evidence was that the full payment made to him of £26,000 represented his wages only. There was no element within that payment which represented a car and/or fuel allowance.

33 The 2<sup>nd</sup> Respondent ceased trading in or around May 2018. The Claimant believes there were between 23 and 25 members of staff working at the 2<sup>nd</sup> Respondent's at the time it ceased trading and went into liquidation. The Claimant has been told that the 2<sup>nd</sup> Respondent's Finance Director, Mr Wallace had offered to issue P45's for all the staff before handing over the company documents to Begbies Traynor but his offer was refused. The Claimant believes that previous members of staff are still being subjected to emergency Tax as no P45's have been issued to them. As the Claimant and his colleagues never received termination letter or their P45's, his date of termination of employment set out in his claim form was the date that the Claimant along with the other employees were told by the liquidators that the business was going to be folding. That was on 27 June 2018.

## **The Law**

34 Sections 166, 167 and 168 of the Employment Rights Act 1996 (ERA) set out a scheme whereby if an employee claims that his employer is liable to pay him a redundancy payment, wages etc. the employer is insolvent and the debt passes to the Secretary of State then the payment will be made. Section 182 of the ERA states that if, on an application made to him in writing by an employee, the Secretary of State is satisfied that the employee's employer has become insolvent and the employee's employment has been terminated and on the appropriate date, the employee was entitled to be paid the whole or part of any debt to which this part applies; the Secretary of State shall, subject to Section 186, pay the employee out of the National Insurance Fund the

amount to which, in the opinion of the Secretary of State, the employee is entitled in respect of the debt.

35 Section 184 outlines the debts to which the part applies. This part, applies to the following debts

35.1 Any arrears of pay in respect of 1 or more (but not more than 8) weeks

35.2 Any amount in which the employer is liable to pay the employee for the period of notice required by Section 86(1) or (2) or for any failure for the employer to give the period of notice required by Section 86(1)

35.3 Any holiday pay in respect of a period or period of holiday not exceeding 6 weeks in all and to which the employee became entitled during the 12 months ending with the appropriate date.

35.4 Any basic award of compensation for unfair dismissal (or so much of an award under the 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)

36 Section 185 states that the appropriate date in relation to arrears of pay and holiday pay means the date on which the employer became insolvent, and in relation to a basic award of compensation for unfair dismissal and to remuneration on the protected award so made, means whichever is the latest of the date on which the employer became insolvent, or the date of determination of the employee's employment, and the date on which the award was made.

37 Section 186 confirms that 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 £525 in respect of only one week or in respect of a shorter period, an amount bearing the same proportion to £525 as that shorter period bears to a week.

***Applying Law to Facts:***

38 It is this Tribunal's judgment that the Claimant was employed as the Managing Director of the 2<sup>nd</sup> Respondent until he began a period of semi-retirement in the summer of 2017. He handed over the position of Managing Director to Feargal McEneaney, the new managing director from August 2017. He worked four days a week until December 2017 and began working two days per week from January 2018. His salary became £26,000 per annum from January 2018.

39 The letter from the Finance Director referred to an 'all inclusive' salary. The Tribunal considered whether this was a reference to there being other elements in his pay package as well as pay for work done, such as fuel or car allowances. There was no indication in his letter that this was what was being referred to. It was this Tribunal's judgment that even if Mr Wallace used a letterheaded piece of paper when he should not have done so, it is likely that he did so to assist the Claimant but not to deceive the Tribunal or to the Respondent. His intention to assist the Claimant did not make the

contents of the letter unreliable. Mr Goodhew of Begbies Traynor did not comment on the authenticity of the document. The Tribunal accepts the authenticity of this document.

40 Mr Wallace used the term 'all inclusive' in the letter. The Tribunal considered whether this was a reference to a total wage made up of salary, plus fuel and car allowances or whether it was just the salary. It is likely that as the Respondent was used to referring to directors' salaries as inclusive of fuel and car allowance, this was something that Mr Wallace did automatically. The other directors did receive a total payment made up of wages and allowances. The Claimant had an arrangement with the Respondent that was unique to him. Also, there was no reference to fuel and car allowances in the letter or in the minutes of the directors meeting in June when the whole retirement plan had been agreed.

41 There is no evidence of any element of the Claimant's wage from January 2018 containing fuel or car allowances. The Claimant was adamant in the hearing that he was not claiming those items and was not required to have a car for the better performance of his duties at that time. He was not visiting sites and was not using his car as part of his job as he had been doing previously as Managing Director.

42 It is therefore this Tribunal's judgment that the Claimant is entitled to payments under sections 166, 167, 168 and 182 of the ERA calculated on a wage of £26,000.

43 The Claimant is entitled to the following payment calculated as follows: -

43.1 His date of termination of employment was 27 June 2018. He began his employment on 25 August 1994. He has therefore been employed with the Respondent for 23 years.

43.2 The Claimant was 64 at the time of his termination of his employment and was earning £500 per month. The Tribunal arrived at that figure thus - £2166 per month x 12 months divided by 52 weeks equal £500 per week ( $£2166 \times 12 / 52 = £500.00$ ).

43.3 The Claimant was 41 at the time of his employment in 1994. The Claimant is therefore entitled to 30 weeks wages at the rate of £500 per week which gives a total redundancy payment of £15,000.

43.4 The Claimant's notice pay is also calculated at the rate of £500 per week and he is entitled to 9.6 weeks at the rate of £500pw = £4,800. The 2<sup>nd</sup> Respondent had previously calculated the notice pay on the basis of 9.6 years as  $£230.14 \times 9.6 = £2209.32$ .

43.5 The Claimant has already been paid redundancy pay of £6,904.24 and notice pay of £2,209.32 making a total of £9,113.52.

43.6  $£15,000 - £6,904.24 = £8,095.76$

43.7  $£4,800 - £2,209.32 = £2590.68$



43.8 The Claimant is owed  $\pounds 2,590.68 + \pounds 8,095.76 = \pounds 10,686.44$ .

44 The 1<sup>st</sup> Respondent is ordered to pay the Claimant the total sum of  $\pounds 10,686.44$ .

Employment Judge Jones

25 July 2019