



## EMPLOYMENT TRIBUNALS

Claimant

Respondent

**Mr Thomas O'Donnell**

v

**Easysoft Ltd**

**Heard at: Leeds**

**On: 03 March 2021**

**Before: Employment Judge T R Smith**

**Appearance:**

**For the Claimant: In person**

**For the Respondent: Mr Anderson (Compliance Officer)**

Note: This has been a remote hearing. The parties did not object to the case being heard remotely. The form of remote hearing was V-video. It was not practicable to hold a face-to-face hearing because of the Covid19 pandemic.

### **JUDGMENT**

The Tribunal declares the Claimant's complaint of an unlawful deduction from wages is well founded and the Respondent is ordered to pay the Claimant the sum of £1714.73 forthwith

### **Written reasons provided pursuant to Rule 62 (3) of the Employment Tribunals Constitution and Rules of Procedure) Regulations 2013**

#### **Background**

1. Oral judgement was given in this case on 03 March 2021.
2. A request for written reasons has been made by the Respondent on 12 March 2021.
3. The written reasons set out below are supplied pursuant to that request.

## **Evidence**

4. The Tribunal had before it bundles from both the Claimant and the Respondent. The Claimant's bundle was paginated by means of various sections, A1 to D4 (f). Any reference in the judgement to page is a reference to the Claimant's bundle unless otherwise indicated.
5. The Tribunal heard evidence from the Claimant and from Mr Anderson, compliance officer with the Respondent. Mr Anderson's role also included human resources.
6. The Tribunal considered all the evidence placed before it, even if it is not made specific reference to it.

## **The Issues**

7. At the heart of this dispute was a simple question, namely whether the Respondent was entitled to a salary of £54,000 or £55,000 per annum from 01 February 2019 until the termination of the Claimant's employment on 23 October 2020.
8. As a subsidiary question, if the Claimant succeeded, should any award be gross or net.

## **Findings of Fact.**

9. On or about 01 February 2019 a meeting took place between the Claimant and Mr Stephen Hill. As the Tribunal understood the position, Mr Hill is the principal shareholder of the Respondent and its chief executive officer.
10. The purpose of the meeting was to determine whether the Claimant's probationary period should be extended, and if so, whether there should be an adjustment to his salary package. Prior to the meeting the Claimant had a contractual remuneration of £45,000 per annum.
11. No notes were kept of the meeting but there was an e-mail from the Claimant to Mr Anderson, soon after the meeting, setting out the Claimant's understanding of the position in respect of salary.

12. The email dated 05 March 2019 was responding to Mr Anderson's request for confirmation of the Claimant salary following his meeting with Mr Hill. The Claimant stated "*I am of the understanding it is £55,000 and some sort of potential bonus to be discussed at a later date*". Thus, the Claimant believed his base salary was £55,000. The Tribunal considered it relevant that this e-mail was written over a year before the parties were to part company.
13. Mr Hill did not give evidence as to what he said was agreed in terms of salary.
14. As part of Mr Hill's responsibilities, he also oversaw payroll.
15. The Claimant thereafter received a salary increase but it transpired the increase was to £54,000 per annum and not £55,000 per annum.
16. The Claimant then received, on 12 June 2019 (C1) (a) letter from Mr Anderson confirming that his salary had increased to £45000 to £55,000 effective from 01 February 2019. The letter was copied to Mr Hill.
17. The letter was unsolicited.
18. The Tribunal did not accept that if the salary agreed was, as claimed by the Respondent, £54,000, that Mr Hill would not have then raised with Mr Anderson or the Claimant the apparent error in his letter.
19. The employment between the Claimant and Respondent appeared to proceed well until approximately September 2020 when the Claimant raised a grievance as regards the alteration to his line management. It is not necessary to make any findings in respect of that disagreement other than to record the grievance was not resolved to what the Claimant considered his satisfaction and he started to look for alternative employment. He resigned his employment by means of an e-mail dated 23 September 2020. He thereafter worked his notice, coupled with utilising some accrued holiday.
20. The Claimant did not notice the error in respect of his pay until he was about to leave the Respondents employment. This came about because he decided to print off his payslips as he might need them in his new employment. It was on 07 October 2020 that he became aware of the alleged shortfall and raise the matter with Mr Hill. It was only at this stage that the Claimant was told his salary was £54,000 per annum and that any reference to £55,000 was an administrative error. It is proper to record the Respondent supplied electronic payslips rather than hard copy payslips to the Claimant and the Tribunal accepted the Claimant's explanation that he did not look at them but simply checked his online banking

and saw that his salary had been significantly increased following the meeting in February 2019. Those payslips were apparently calculated on a monthly basis on an annual salary of £54,000 per annum.

21. It is also proper to record that an error had occurred in respect of the Claimant's pension contributions, unconnected with his salary which the Respondent accepted and blamed on book keeping software they had used. The pension issue was not pursued before the Tribunal but it has a potential evidential relevance, as will become clear.
22. When the Claimant resigned, correspondence took place between Mr Anderson and the Claimant as to his holiday pay. The holiday pay was based on a salary of £55,000, (see the email 7 October 2020 , C2(b)) not £54,000.
23. Mr Anderson wrote to the Claimant by email dated 09 October 2020 and specifically stated that Mr Hill had checked all holiday pay calculations and had done so in the Claimant's case. Here was a further opportunity, if the salary in February 2019 was really £54,000 for Mr Hill to seek to address the apparent anomaly. He did not. He approved the holiday pay figures based on an annual salary of £55,000pa even though on the Respondent's case this was the wrong figure.
24. The difference between £55000 and £54000 per annum, on a gross monthly basis is £83.33. If the Claimant was right that there was an underpayment from 01 February 2019 and he was entitled to 20 months x £83.33 = £ 1666.60. In addition he was entitled to the sum of £48.13 representing his working days in the month of October 2020. Therefore, mathematically the difference between the parties was £1714.73.

### **The Law and Discussion**

25. Section 13 of the Employment Rights Act 1996 sets out the limited circumstances in which an employer may make a deduction from an employee's wages. It is not suggested by the Respondent that section 13(1) (a) or (b) were satisfied.
26. Section 13 (3) states "*where the total amount of wages paid on any occasion by an employer to a worker employed by him is less than the total amount of wages properly payable by him to the worker on that occasion... the amount of the*

*deficiency shall be treated for the purposes of this part as a deduction made by the employer from the workers wages on that occasion”.*

27. Thus a non-payment or short payment may amount to a deduction.
28. Section 13 (4) makes it clear that subsection 3 does not apply “*so far as the deficiency is attributable to an error of any description on the part of the employer affecting the computation by him of the gross amount of wages properly payable by him to the worker on that occasion”.*
29. The key question is therefore what was properly payable to the Claimant.
30. In order to answer this question the Tribunal has to make a determination as to what was the contractual agreement between the parties.
31. Was it agreed that the Claimant received a salary of £55,000 per annum from 01 February 2019 or a salary of £54,000 from the same date?
32. The Tribunal is entitled to construe the contractual agreement, see the Court of Appeal’s decision in **Agarwal -v- Cardiff University [2018] EWCA Civ 2084**.
33. The Tribunal is satisfied that on the balance of probabilities the Claimant has established that a contractual agreement was reached that his pay was £55,000 per annum from 01 February 2019.
34. It has reached this conclusion for the following principal reasons.
35. Firstly there was the Claimant’s relatively contemporaneous email setting out his understanding of the meeting with Mr Hill.
36. Secondly there was the unprompted letter from Mr Anderson to the Claimant stating that his salary was £55,000 per annum copied to Mr Hill who did not dispute that letter at the time or at any time till the Claimant had handed in his letter of resignation.
37. Thirdly when the Claimant came to leave his holiday pay was based on £55,000 per annum and Mr Anderson confirmed the figures had been checked by Mr Hill.
38. Fourthly Mr Hill was not called to give evidence as to what he said took place at the meeting in February when the Claimant salary was adjusted upwards.
39. Fifthly the Tribunal found the Claimant to be an honest and straightforward witness and had no reason to doubt his account. Whilst the Tribunal was troubled by the fact that there were apparently electronic payslips calculated on an annual salary of £54,000 per annum the Claimant did not access the payslips until he was about to leave. He simply checked his on-line banking account and assumed the monthly figure added to his account was correct. It should be remembered

there was a problem in any event in respect of the pension deductions. The payslips are a factor, and a powerful factor that favour the Respondent. However even having taken that factor into account the Tribunal concluded, on balance, the Claimant's evidence carries greater weight and therefore found that was the sum properly payable to him was £55,000 per annum.

40. Given the Claimant was not paid on a salary of £55,000 he is entitled to a declaration in respect of the non-payment/deduction which is the Tribunal has already indicated amounted to £1714.73.
41. This figure was not disputed mathematically by the Respondents. The only challenge to the figure was whether it should be paid net or gross.
42. The Tribunal is satisfied that the payment should be made gross applying section 62 of the Income Tax Earnings and Pensions Act 2003.
43. For completeness no time point was raised by the Respondent and none arose as there were a series of deductions and therefore time ran from the last payment see section 23 (e) Employment Rights Act 1996.

**Employment Judge T R Smith**

Dated: 24 March 2021

Sent to the parties on:

Dated: 24 March 2021

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