



# EMPLOYMENT TRIBUNALS

**Claimants:** Adams and others

**First Respondent:** FFP Realisations 2018 Limited (In Administration)

**Second Respondent:** Fogarty (Filled Products) Limited In Administration)

**Third Respondent:** The Secretary of State for Business, Energy and Industrial Strategy

## JUDGMENT ON APPLICATION FOR RECONSIDERATION

- The application for reconsideration of the judgment striking out the claim in respect of Mr Tomas Gegelevicius and Mr Steven Dodson is dismissed on withdrawal.
- The application for reconsideration of the judgment striking out the claim in respect of Mr Frank Homewood is well founded and succeeds and the judgment dated 5 July 2021 is revoked to the extent that it applies to the claim by Mr Homewood against the Third Respondent pursuant to section 188 of the Employment Rights Act 1996.
- Following reconsideration, the judgment of the Tribunal is that Mr Frank Homewood has received from the Third Respondent in respect of the protective award, less than the amount which it should have paid to him and pursuant to his complaint under **section 188 (1)(b) of the Employment Rights Act 1996 (ERA)**, the Tribunal therefore declares pursuant to section **188 (3) ERA**, that the that the amount the **Third Respondent** ought to make is a further payment of **£418.08**.

## REASONS

### Background

1. On 18 January 2020, Employment Judge Britton gave judgment, following a hearing on 29 November 2019, that the First Respondent to that claim; FFP Realisations 2018 Limited (In Administration), pay protective awards pursuant to S.189(2) to the named claimants.
2. The judgement was issued in writing on 18 January 2020 (with the oral decision given at the hearing on 29 November 2019). There was a correction to the judgment on 18 May 2020.

3. A further claim was issued under case number **2601572/2020** on 18 May 2020 in respect of non-payment of protective awards pursuant to section 192 of the Trade Union and Labour Relations (Consolidation) Act 1992 and/or section 188 ERA, in respect of 109 claimants.
4. Since those claims were issued, payments were made by the Secretary of State however a number of the claimants were not content with the payments received and complained they had been incorrectly calculated.
5. The claimants who sought to challenge the protective awards were; Mr Steven Dodson: (original claim 2600309/2019), Mr Frank Homewood: (original claim 2600296/2019) (**claimant**) and Mr Tomas Gegelevicius (original claim 2600302/2019) (**Claimants**).
6. A hearing took place on 28 April 2021.
7. The Claimants' had produced a bundle for the hearing on 28 April 2021 which numbered 116 pages and Ms Toner had prepared written submissions. Ms Toner also made oral submissions at the hearing. The Claimants did not attend.

#### **Hearing – 28 April 2021**

8. At the hearing on 28 April 2021, I calculated the end of the protected period to be 26 January 2019; that is the end of the 90-day period as determined by Employment Judge Britton in his judgment. The protected period beginning on 29 October 2018. The time limitation under section 192(2)(a) is 3 months from the end of the protected period, which would expire on 25 April **2019**. The claim form (ET1) (page 56 of the bundle) alleging a failure to pay, was issued on 18 May **2020**.
9. The complaint had been brought outside the primary time limit. Ms Toner submitted that while she accepted the claims were out of time, there were grounds for extending time principally because of delays in dealing with the claim by the Third Respondent. The full details are set out in the judgment.
10. There was no witness statement from Mr Homewood evidencing the shortfall in the alleged payment. Mr Homewood had not attended to give oral evidence under oath.
11. It was agreed that the Claimants' would submit further information required in respect of the liability issues identified at the hearing and for any further submissions or documents, to be presented in writing on the time limitation issue, within 7 days from the hearing on 28 April 2021.
12. Ms Toner confirmed that she was content for the remaining issues on liability and limitation, to be dealt with on the papers.

#### **Mr Homewood**

13. Ms Toner submitted on 3 May 2021 further information including a witness statement from Mr Homewood however this was unsigned.
14. The statement also did not address the issue of jurisdiction and the claim was struck out. The reasons are set out in full in the judgment.

#### **The Application – reconsideration**

15. The claimant has made a timeous application for reconsideration of the judgment dated 5 July 2021 sent to the parties on 9 July 2021 in respect of the Claimants.
16. The claimant submitted further evidence in support of its application and written submissions. The evidence attached with the application for reconsideration included;
  - A copy of a signed witness statement from Mr Homewood dated 30 April 2021 confirming that his gross weekly wages were £381.03 (which was consistent with the wages slip produced at the last hearing).
  - Evidence relating to telephone conversations and emails between the Claimant's representatives and the Redundancy Payments Service (RPS) and Acas.

### **Rules of Procedure**

17. I considered the application for reconsideration under Rule 72(1) of the 2013 Rules of Procedure which empowers me to refuse the application without convening a reconsideration hearing if I consider there is no reasonable prospect of the original decision being varied or revoked.
18. The test is whether it is necessary in the interests of justice to reconsider the Judgment (rule 70).
19. The Tribunal on receiving the application considered that this was not a case where there were no reasonable prospects of success.
20. The Third Respondent was therefore invited to provide its comments on the application and did so on the 17 September 2021 and those representations have been taken into consideration.
21. Both parties were in agreement that the application should be considered on the papers and I have done so.

### **The Legal Principles**

#### **Reconsideration**

22. Rule 70 a judgment will only be reconsidered where it is 'necessary in the interests of justice to do so'. A tribunal dealing with the question of reconsideration must seek to give effect to the overriding objective to deal with cases 'fairly and justly' — rule 2.
23. The tribunal should also be guided by the common law principles of natural justice and fairness
24. In *Outsight VB Ltd v Brown 2015 ICR D11, EAT*, Her Honour Judge Eady QC accepted that the wording 'necessary in the interests of justice' in rule 70 allows employment tribunals a broad discretion to determine whether reconsideration of a judgment is appropriate in the circumstances. However, this discretion must be exercised judicially, 'which means having regard not only to the interests of the party seeking the review or reconsideration, but also to the interests of the other party to the litigation and to the public interest requirement that there should, so far as possible, be finality of litigation'.

25. The claimant's representative confirmed on the 2 December 2021 that the claim is pursued only against the Secretary of State, although the submissions make reference to section 192 TULR (C)A 1992, it is understood by the Tribunal that this claim is now only pursued against the Third Respondent and thus is a complaint now only brought pursuant to section 188 ERA 1996

26. The relevant statutory provisions are;

**188 Complaints to employment tribunals.**

*(1) A person who has applied for a payment under section 182 may present a complaint to an employment tribunal—*

*(a) that the **Secretary of State** has failed to make any such payment, or*

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

*(2) An employment tribunal shall not consider a complaint under subsection (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 Secretary of State 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 employment tribunal finds that the Secretary of State ought to make a payment under section 182, the tribunal shall—*

*(a) make a declaration to that effect, and*

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

**Findings of fact**

**Time Limits**

27. The Third Respondent was not present at the hearing on 29 November 2019

28. The written judgement (**Judgment**) made at that hearing, making an order for payments of protective awards, is dated 14 January 2020 and was sent to the parties on 18 January 2020.

29. The claim form (ET1) (page 56 of the bundle) alleging a failure to pay, was issued on 18 **May 2020**.

30. It is now clear from the information provided that the Secretary of State made a determination of the amounts due and wrote out to the Claimants in **June 2020** and thus the section 188 ERA was issued in time ie '*before the end of the period of three months beginning with the date on which the decision of the Secretary of State on the application was communicated to the applicant*'.

31. The Tribunal therefore has jurisdiction to determine the section 188 ERA claim against the Secretary of State.

**Liability - findings of fact**

**Mr Frank Homewood**

**Protective Award**

32. Findings of fact were made as to liability at the hearing on the 28 April 2021;
33. Ms Toner made submissions that Mr Homewood was paid at a rate of **£329.77** per week; his pay slip is included in the bundle at page 88 and confirms his weekly gross pay of **£381.03**, which includes basic pay plus first aid waiting.
34. There was no witness statement provided from the claimant, only the payslip and letter from the Insolvency Service dated 16 June 2020 (p.89).
35. It is alleged that his protective award was calculated incorrectly, and he suffered an underpayment of **£418.08** which appears to be the case on the limited documents submitted.

**Further Information**

36. Ms Toner submitted on the 3 May 2021 further information copied into the Respondent.
37. This further information included a witness statement from Mr Homewood which was unsigned and undated. There was explanation in the covering email about why the statement was not signed or dated. The statement refers to his wages being **£381.03** (p.88) at the time of his dismissal, that the protective award was paid at a rate of **£328.77** per week leaving a shortfall of **£418.08**.

**Claimant's submissions**

38. The Claimant apologised for not sending the further liability evidence related to Mr Homewood and made representations in detail about the time limitation points arising on the section 192 claim. I will not set them out as I now understand that the claim is pursued only against the Third Respondent as confirmed by email of the 2 December 2021 and the limitation issues related to the section 192 claim.

**Respondent's representations**

39. The Third Respondent's written representations to the application for reconsideration dated 30 September 2021;

*"Whether it was reasonable to present the claims in time. The Secretary of State is unable to comment on this issue, as the claimants will need to rely on the Tribunal to consider the reasons for any delays and decide whether the claims can be heard.*

..

*As with Mr Homewood, the claimant will need to rely on the Tribunal to consider any evidence he may have to confirm a higher wage rate and the RPS will be unable to consider any further payment unless a Tribunal award confirms a higher wage rate is applicable."*

**Conclusion**

**Reconsideration**

- 40. I take into account that at the hearing in April 2021, the claimant only addressed the section 192 claim however the section 188 was in time and the claim is now only pursued against the Third Respondent. I take into account the explanation for the non-provision of the further liability information provided by the claimant and accept that this was an oversight.
- 41. The Third Respondent does not plead any prejudice or hardship and indeed makes no representations on the issue of whether the application for reconsideration should be permitted generally and leaves it for the Tribunal to make determinations on what sums may remain payable.
- 42. I have taken into consideration the importance of finality of litigation, which is in the interests of both parties but I consider that it is outweighed in this case by the injustice to the claimants to ensure that they receive the correct payment pursuant to the judgment of Employment Judge Britton and the application for reconsideration is granted and the judgment revoked to the extent that it relates to the claim by the Mr Homewood against the Third Respondent

**Liability**

- 43. I find on the evidence, the payslip and witness statement, that Mr Homewood was paid a weekly wage of £381.03. His basic award was paid at 8 weeks @ £328.77. equating to £2,630.16. Whereas his entitlement was to 8 weeks @ £381.03 equating to £3,048.24. A shortfall of **£418.08** and I make a declaration to that effect and that pursuant to section 188 (3) of the Employment Rights Act 1996 the Secretary of State ought to make that payment to Mr Homewood

Employment Judge Broughton  
8 December 2021

Sent to the parties on:  
10 December 2021

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For the Tribunal Office:

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