



# 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 by Mr Steve Dodson in respect of his claim for arrears of pay, is dismissed on withdrawal.
- The application for reconsideration by Mr Frank Homewood is granted and on reconsideration the judgment of the 28 April 2021 case number 2601572/2020 is revoked to the extent it relates to Mr Homewood's application pursuant to section 170 of the Employment Rights Act 1996 (ERA) as to the amount of the sum payable to him in accordance with section 166 and 168 ERA in respect of a redundancy payment.
- In determining the amount of the sum payable under section 166 and 168 of the Employment Rights Act 1996, in accordance with 170, the decision of the Tribunal pursuant to case number 2600265/2019, 2600444/2019 & Others is that **Mr Frank Homewood** is entitled to a further payment of **£1,463.08** payable by the Third Respondent.

## 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; this claim was brought under case number 2600265/2019, 2600444/2019 & others.

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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.

### **The Claims**

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 complain they had been incorrectly calculated.
5. The claimants who sought to challenge the protective awards were; Mr Steven Dodson: 2600309/2019, Mr Frank Homewood: 2600296/2019 (**Claimant**) and Mr Tomas Gegelevicius:2600302/2019 (together referred to as the **Claimants**).
6. A hearing took place on 28 April 2021.
7. Additionally, at the hearing, the Claimants' representative, Ms Toner, made submissions that Mr Homewood was also claiming that he had not received his full redundancy payment and Mr Steve Dodson claimed unpaid arrears of pay which had been deducted from his protective award.

### **The Evidence**

8. 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.

### **Time Limits**

9. 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 take us then to 25 April 2019. The claim form (ET1) (page 56 of the bundle) alleging a failure to pay, was issued on 18 May 2020.
10. Ms Toner had not come prepared to deal with the issue of time limits and it was agreed that the Claimants' would submit the further information required in respect of the liability issues identified at the hearing, in respect of some of the Claimants and for any submissions or documents, to be presented in writing on the time limitation issue, within 7 days from the hearing on 28 April 2021.
11. Ms Toner confirmed that she was content for the remaining issues on liability and limitation, to be dealt with on the papers.
12. I decided that we would deal with the evidence available at the hearing on the 28 April 2021 in relation to the claims for underpayment however, any decision would be reserved pending receipt of the further documentation from Ms Toner .

13. I made the following findings of fact in respect of Mr Homewood and the underpayment of redundancy pay (incorrectly named in Ms Toner's submissions and ultimately in the judgment at paragraph 61 as Mr Homeward).

**Findings of Fact**

**Mr Frank Homewood**

**Redundancy Payment**

14. This claim was dealt with at paragraph 11 of Ms Toner's written submissions. It was asserted that Mr Homeward worked for 30 years; he was 57 as at 29 October 2018 (the date of redundancy) and was entitled to 28 weeks' redundancy payment of £10,668.84 and not the sum of £9,205.56 which was paid, an underpayment of **£1,463.08**.
15. There was nothing in the claim form to confirm what is being sought. Ms Toner stated that there was a letter from the Redundancy Payments Office confirming the redundancy payment and she asked to be able to send that in with the rest of the further documents and I agreed to permit her to do so.
16. There was no witness statement from Mr Homewood to confirm his gross weekly wage.

**Further Information**

17. Ms Toner submitted on the 3 May 2021 further information copied into the Respondent.
18. This further information included a witness statement from Mr Homewood which was unsigned and undated. There was no explanation in the covering email about why the statement was not signed or dated. The statement referred to his wages being £381.03 (p.88) at the time of his dismissal. His date of birth is confirmed as 3 April 1961 and at the date of dismissal he was therefore 57 and believes his entitlement to redundancy pay should have been 28 weeks or £10,668.64 rather than the £9,205.56 which he received, an underpayment of **£1,463.08**.
19. The letter which Ms Toner had agreed to provide from the Redundancy Payments Office was not included and there was no explanation for its omission.

**Jurisdiction**

20. The statement did not address jurisdiction and the claim was struck out on the grounds that it had been brought out of time by judgment dated 5 July 2021.

**The Application – reconsideration**

21. The Claimants made a timeous application for reconsideration of the judgment dated 5 July 2021 and sent to the parties on 9 July 2021.

**Frank Homewood – underpayment of redundancy pay**

22. This judgment, relates only to the claim by Mr Homewood for underpayment of redundancy pay (**Claimant**). The application for reconsideration in respect of the alleged underpayment of protective awards, is dealt with in a separate judgment as it was presented as a separate claim (2601572/2020).

**The Application**

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23. The application invites the Tribunal to make a ruling on the claim by Mr Homewood for underpayment of redundancy based on the witness and documentary evidence from the hearing on 28 April 2021 on the grounds that the claim originally submitted to the Tribunal on 27 January 2019 bearing the claim number 2600265/2019, included claims for redundancy pay and that the hearing on 29 November 2019 did not deal with these claims (pages 5 and 6) .
24. Page 5 and 6 is an Order from Regional Employment Judge Swann dated 14 November 2019 which provides that the hearing on 29 November 2019 will be to determine the protected award only, as that is the only one that the Administrator's had given permission to proceed with.
25. The original claim form stated that; "*Many of the claimants have claimed and been paid their entitlements from the Redundancy Payments Office ( RPO) under section 186 of the Employment Rights Act 1996 however some of the claimant's dispute the amounts they have received and wish to challenge these amounts against the SOS.*"
26. It is submitted therefore that the claim by Mr Homewood was in fact not a fresh claim (ie not part of the claim submitted on 18 May 2020), rather it is an existing claim not yet dealt with by the Tribunal and that the claim by the Claimant is therefore not brought out of time and should be considered under the multiple claim with claim number 2600265/2019, 2600444/2019 and others.
27. It is submitted that consent is not required for these claims which are enforced against the Third Respondent only.
28. Attached with the application for reconsideration is a copy of a signed witness statement from Mr Homewood dated 30 April 2021 confirming that his gross weekly wages were £381.03 which would appear to be confirmed by the wages slip produced at the last hearing.

### Rules of Procedure

29. 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.
30. The test is whether it is necessary in the interests of justice to reconsider the Judgment (rule 70). Broadly, it is not in the interests of justice to allow a party to reopen matters heard and decided, unless there are special circumstances, such as a procedural mishap depriving a party of a chance to put their case or where new evidence comes to light that could not reasonably have been brought to the original hearing and which could have a material bearing on the outcome.
31. The Tribunal on receiving the application considered that it was in the interests of justice to reconsider the judgment as appeared that there has been a procedural mishap or a misunderstanding with respect to which claim form the complaint of Mr Homewood was being brought pursuant to.
32. The Third Respondent was invited to provide its comments on the application.

### Respondent's representations

33. The Third Respondent's written representations to the application for reconsideration dated 30 September 2021, does not dispute that the claim forms part of the original claim (2600265/2019) but provides in respect of the claim by the Claimant;

*“ Frank Homewood believes that his Redundancy Payment should be based on a higher wage rate. The appointed Insolvency Practitioner ( “the IP”) confirmed, in accordance with Section 187 (1) of the Employment Rights Act 1996. Mr Homewood’s weekly wage as being £328.77 and his redundancy payment was based on this rate accordingly. A redacted copy of his payment advice letter is attached for reference. The RPS has previously advised the Claimant’s representative that as they have paid in accordance with the rate confirmed by the IP, they will be unable to consider any further payment at this time. The Claimant is put to proof of any further entitlement will need to rely on the Tribunal to consider any evidence he may have to confirm a higher wage rate, as the RPS will be unable to make any further payment unless a Tribunal award confirms that a higher wage rate is applicable.”*

34. The Third Respondent included within its submissions, a copy of the letter from the Redundancy Payment Officer dated 1 December 2018 confirming the weekly wage rate on which the entitlement had been calculated, namely £328.77 per week and the calculation of a redundancy payment of 28 weeks @ £328.77 equating to £9,205 ( less payments owed leaving a payment due to the Claimant of £1,434.38).
35. Both parties were in agreement that the application should be considered on the papers and I have done so.

#### **Withdrawal of claim by Mr Dodson**

36. In response to the representations from the Third Respondent dated 17 September 2021, the Claimants' representative wrote that the claims remained as covered in the submissions provided to the Tribunal with the exception of Mr Dodson, who was withdrawing his claim for arrears of pay. That withdrawal has been dealt with under claim number 2600265/2019 & Others which was the claim pursuant to which the application on behalf of Mr Dodson was pursued, it being argued that the claim was in time because the original claim for a protective award also included a claim for arrears of pay.

#### **The Legal Principles - reconsideration**

37. Rule 70 provides that 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.
38. The tribunal should also be guided by the common law principles of natural justice and fairness
39. In ***Outasight 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’.

40. In ***Newcastle upon Tyne City Council v Marsden 2010 ICR 743, EAT***. The judge observed that the overriding objective meant that the interests of justice ground for granting review did not have to be construed restrictively, as earlier case law had suggested. The judge regarded such case law as having been superseded by the introduction of the overriding objective.

**Legal principles – redundancy payment**

41. It is not in dispute that the Claimant is entitled to a payment of redundancy pay. Statutory redundancy payments are calculated on the basis of gross pay, with no deductions for income tax and national insurance: section 309 (1) Income Tax (Earnings and Pensions) Act 2003 (ITEPA).
42. The rules governing a week’s pay are set out in Chapter II of Part XIV of the Employment Rights Act 1996.
43. If the employee is claiming a statutory redundancy payment, then the amount to be paid from the National Insurance Fund (NIF) is a redundancy payment computed in the usual way, less anything that has actually been paid by the employer — S.168(1)(a) Employment Rights Act 1996 (ERA).
44. An employment tribunal may be called upon to determine the correct amount that should be paid to an employee out of the NIF : *Elwick v Insolvency Service and ors ET Case No.3202558/18*.
45. The relevant statutory provisions are as follows;

**168.— Amount of payments.**

(1) *The sum payable to an employee by the Secretary of State under section 167—*

*(a) where the employer’s payment to which the employee’s application under section 166 relates is a redundancy payment or a part of a redundancy payment, is a sum equal to the amount of the redundancy payment or part,*

*(aa) where the employer’s payment to which the employee’s application under section 166 relates is a payment which his employer is liable to make to him under an agreement having effect by virtue of section 203(2)(e) or (f), is a sum equal to the amount of the employer’s payment or of any redundancy payment which the employer would have been liable to pay to the employee but for the agreement, whichever is less, and*

*(b) where the employer’s payment to which the employee’s application under section 166 relates is a payment which the employer is liable to make under an agreement in respect of which an order is in force under section 157, is a sum equal to the amount of the employer’s payment or of the relevant redundancy payment, whichever is less.*

(2) *The reference in subsection (1)(b) to the amount of the relevant redundancy payment is to the amount of the redundancy payment which the employer would have been liable to pay to the employee on the assumptions specified in subsection (3).*

(3) *The assumptions referred to in subsection (2) are that—*

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- (a) the order in force in respect of the agreement had not been made,*
- (b) the circumstances in which the employer's payment is payable had been such that the employer was liable to pay a redundancy payment to the employee in those circumstances,*
- (c) the relevant date, in relation to any such redundancy payment, had been the date on which the termination of the employee's contract of employment is treated as having taken effect for the purposes of the agreement, and*
- (d) in so far as the provisions of the agreement relating to the circumstances in which the continuity of an employee's period of employment is to be treated as broken, and the weeks which are to count in computing a period of employment, are inconsistent with the provisions of Chapter I of Part XIV, the provisions of the agreement were substituted for those provisions"*

**166.— Applications for payments.**

*(1) Where an employee claims that his employer is liable to pay to him an employer's payment and either—*

- (a) that the employee has taken all reasonable steps, other than legal proceedings, to recover the payment from the employer and the employer has refused or failed to pay it, or has paid part of it and has refused or failed to pay the balance, or*
- (b) that the employer is insolvent and the whole or part of the payment remains unpaid, the employee may apply to the Secretary of State for a payment under this section.*

*(2) In this Part "employer's payment" , in relation to an employee, means—*

- (a) a redundancy payment which his employer is liable to pay to him under this Part,*
- (aa) a payment which his employer is liable to make to him under an agreement to refrain from instituting or continuing proceedings for a contravention or alleged contravention of section 135 which has effect by virtue of section 203(2)(e) or (f), or*
- (b) a payment which his employer is, under an agreement in respect of which an order is in force under section 157, liable to make to him on the termination of his contract of employment.*

*(3) In relation to any case where (in accordance with any provision of this Part) an employment tribunal determines that an employer is liable to pay part (but not the whole) of a redundancy payment the reference in subsection (2)(a) to a redundancy payment is to the part of the redundancy payment.*

*(4) In subsection (1)(a) "legal proceedings" —*

- (a) does not include any proceedings before an [employment tribunal]<sup>3</sup> , but*
- (b) includes any proceedings to enforce a decision or award of an [employment tribunal]<sup>3</sup>.*

46. Where an employee claims a redundancy payment from BEIS, any question about the amount of the payment due, must be referred to an Employment Tribunal pursuant to section 170 Employment Rights Act 1996;

**170.— References to employment tribunals**

*(1) Where on an application made to the Secretary of State for a payment under section 166 it is claimed that an employer is liable to pay an employer's payment, there shall be referred to an employment tribunal —*

*(a) any question as to the liability of the employer to pay the employer's payment, and*

*(b) any question as to the amount of the sum payable in accordance with section 168.*

*(2) For the purposes of any reference under this section an employee who has been dismissed by his employer shall, unless the contrary is proved, be presumed to have been so dismissed by reason of redundancy.*

*Where an employee claims a redundancy payment or an equivalent payment from BEIS, then any question about the employer's liability to pay, or about the amount of the payment due, must be referred to an employment tribunal (ERA 1996 s 170)*

**Conclusion**

47. It is unfortunate that at the hearing on the 28 April 2021, the Claimant's representative had not explained to the Tribunal that the claim for underpayment of redundancy pay on behalf of Mr Homewood, was being brought pursuant to the original claim and not as part of the subsequent claim number 2601572/2020. There was no mention of the time limits not being applicable until the application for reconsideration was applied for.
48. It would appear however, that the claim for underpayment was mentioned in the original claim and Employment Judge Britton following, the order of Regional Employment Judge Swann, dealt only with the claims for a protective-awards.
49. In the circumstances, I determine that it is necessary in the interests of justice to exercise the Tribunal's broad discretion and reconsider my judgment because of the procedural mishap/misunderstanding with respect to which claim form the claim was being brought pursuant to under.
50. The letter from the Redundancy Payment Officer dated 1 December 2018, confirms that the redundancy payment was based on the Claimant being 57 years of age at the time of redundancy with 30 years' service.
51. There is no documentation from the Third Respondent to support that the Claimant had been recorded as earning £328.77 **gross** rather than net weekly wage. The letter from the Redundancy Payments Officer to the Claimant states; "*Your weekly wage rate has been confirmed as £328.77 per week*". The Claimant has provided a signed witness statement and payslip evidencing that his **gross pay** was £381.03.
52. The Tribunal is therefore satisfied, on a balance of probabilities, that the statement and payslip from the Claimant is correct and that pursuant to section 166 (1), 168 and 170 of the Employment Rights Act 1996, the outstanding amount which should be paid to the Claimant is the sum of **£1,463.08** .



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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