



# EMPLOYMENT TRIBUNALS

**Claimant:** Miss A Bow

**Respondent:** 1. Secretary of State for Business, Energy and Industrial Strategy  
2. Rug Rescue Limited (In Creditors Voluntary Liquidation)

**Heard at:** by CVP from the Bristol Tribunal      **On: 24 May 2024**

**Before:** Employment Judge Woodhead

## Appearances

For the Claimant: Representing herself

For the Respondent 1: Not in attendance

For the Respondent 2: Not in attendance

## JUDGMENT

1. The complaint in respect of an underpayment of redundancy pay is not well founded and is dismissed.
2. The complaint in respect of an underpayment of holiday pay is not well-founded and is dismissed.
3. The Claimant accepts that she has been paid the correct amount in respect of arrears of pay and this complaint is therefore dismissed.
4. The complaint in respect of an underpayment of notice pay is not well founded and is dismissed.

## DELAY IN ISSUING THIS JUDGMENT

5. I apologise to the parties for the delay in issuing this decision. This arose because there was insufficient time for me make a decision in the two hour trial window.

## THE ISSUES

6. Claims can be brought in respect of insolvent employers for redundancy pay (Section 166/170 Pt 9 Employment Rights Act 1996 (“**ERA**”)) and/or other debts (Section 182/188 – Pt 12 ERA).
7. Section 18(1) Employment Tribunal’s Act 1996 does not include claims under Pt9 or 12 as relevant proceedings requiring ACAS conciliation.
8. The Claimant’s employment ended by reason of redundancy on 29 July 2022. She presented her claim to the Tribunal on 13 March 2023.
9. The Claimant brings claims against the First Respondent (R1) for:
  - 9.1 Redundancy pay
  - 9.2 Notice pay
  - 9.3 Holiday pay
  - 9.4 Arrears of pay
10. R1 originally disputed that the Claimant was an employee of R2. However, it later conceded that she was an employee.
11. R1, having accepted that the Claimant was an employee, filed an amended response on 27 October 2023 as follows:

*In the previous ET3 response submitted on 14 September 2023, the SOS conceded the issue of employee status, and agreed that the claimant was an employee of Rug Rescue Ltd, with payments being subject to quantification.*

*As detailed in the claimant’s e-mail to the Tribunal of 17 October 2023, the Redundancy Payments Service (“the RPS”) has subsequently made payments to the claimant, however the claimant disagrees with the wage rate used in the assessment of the payments and has asked that the case is listed for hearing on the issue of quantum only.*

*The SOS has no objection to the request, and agrees that the claimant will need to rely on the Tribunal to consider the issue of the relevant rate of pay.*

*The RPS considered the evidence provided by the claimant, including P60s which showed income of £8628 for the tax year ending 05 April 2020, £4107.47 to 05 April 2021 and £6200 to 05 April 2022. The RPS has therefore used the wage rate of £119.23 per week, based on the income declared to HMRC for the latest tax year 2021/22.*

*In her director’s questionnaire submitted to the RPS, the claimant included a statement advising that she made the decision to reduce payments herself, with the intention that the reduced payments would be*

*“made up from increased revenue in the future”, which “did not happen”.*

*Additionally, the claimant confirmed in her questionnaire that she was the sole director, was not subject to any control or guidance, and there was nobody within the company who could take disciplinary action against her, or to whom she could raise grievances.*

*The claimant also confirmed that wages owed were not recorded in the company accounts “as this was not felt necessary”.*

*Based on the low rate of pay for at least the previous 3 tax years, the RPS could not verify the temporary nature of any arrangement that may have existed regarding a reduction in pay, or the validity of that arrangement, the claimant having made the decision herself as sole director to reduce payments. The RPS would also have been unable to verify the amount owed in respect of any such arrangement, as any payments that may have been owed were not recorded in the company accounts and would have been “discussed between the Director and the company accountant at the appropriate time”*

*Having considered all the information detailed above, the SOS submits that the RPS, with a duty to protect payments from the National Insurance Fund, was correct to use the wage rate indicated by the final P60, and the claimant must rely on the Tribunal to consider whether the relevant wage rate was higher than £119.23.*

*The SOS has attached the following documents for ease of reference:*

- 1) The claimant’s P60 documents (redacted)*
- 2) The claimant’s statement regarding the pay reduction*

*The SOS does not propose to be represented in person at any future hearing of this case, but respectfully requests that the Tribunal acknowledges this ET3 as written submissions in respect of any hearing, pursuant to Rule 42 of the Employment Tribunals Rules of Procedure (“the Tribunal Rules”). The SOS intends no disrespect to the Tribunal or any other party, however due to the nature of the case, the SOS has no further useful information to provide, and written submissions are deemed appropriate.*

*This response is copied to the claimant for reference, in accordance with the Tribunal Rules,*

12. R1 paid the Claimant £4,715.80 on 20 September 2023 in respect of redundancy pay, arrears of pay, holiday pay and compensation for loss of notice based on weekly pay of £119.23.
13. The Claimant claims that such payment should in fact have been paid based on the higher weekly rate of pay of £380 (based on a 40 hour week at the National Minimum Wage of £9.50) within six weeks of her claim to R1, namely by 18 October 2022.

## THE HEARING

14. This claim was listed for a hearing of 2 hours.
15. For the hearing I was provided with the following documents:
  - 15.1 The Claimant's claim form.
  - 15.2 A witness statement for the Claimant of four pages attaching **Exhibit 1** on the fifth page (being a document which the Claimant said had been signed by her late father which read:

*8 May 2020*

*I Michael Bow confirm that it has been agreed that Annette Bow come off of furlough and return to work on reduced wages, the level of such wages to be agreed further to the preceding month's income.*

*Annette Bow is to keep a detailed record of her hours worked and provide these to Michael Bow when requested.*

*Once Rug Rescue Ltd's income has increased and at a time to be agreed between Michael Bow and Annette Bow, all wages owed to Annette Bow will be repaid by Rug Rescue Ltd.*

*M B Bow*

- 15.3 A one and a half page chronology of events prepared by the Claimant;
- 15.4 The Claimant's two page schedule of compensation claimed (which she confirmed accorded with the details in her witness statement);
- 15.5 A witness statement of one page from Ms C Cox (who was not in attendance at the hearing);
- 15.6 A witness statement of one page from a Ms K A Hansford (who was not in attendance at the hearing).
- 15.7 An email from R1 of 9 May 2024 attaching the following which it said should serve as written submissions for the hearing on behalf of R1:
  - 15.7.1 its ET3 of 27 October 2023;
  - 15.7.2 R1's response to the Claimant's claim for interest (as referenced above).
16. The Claimant confirmed that there was nothing else that I should refer to.
17. The Claimant affirmed her evidence and the truthfulness of her witness statement.

## RESPECTIVE POSITION OF THE PARTIES

### *Claimant's case*

18. The Claimant's position, as set out in her witness statement, can be summarised as follows:
  - 18.1 Her contract of employment with the R2 terminated by way of notice dated 4 July 2022.
  - 18.2 She made an online claim for redundancy and associated payments to the Insolvency Service on 6 September 2022.
  - 18.3 She was in fact working a 40 hour week from the end of 2021;
  - 18.4 She based her calculations on a 40 hour week at the National Minimum Wage of £9.50 per hour giving weekly pay of £380 a week (40 x £9.50).
  - 18.5 She was a Director and employee of Rug Rescue Ltd ('RRL') from February 2011 to August 2022.
  - 18.6 Her father was the sole shareholder in the company until his death in December 2020 and his Will provided for all of his assets to be transferred to the Claimant's mother.
  - 18.7 Once it became clear that R2 would have to go into liquidation, it was agreed that the shares in R2 would be transferred to the Claimant in order that she could deal with all administrative matters.
  - 18.8 She was unable to access her employment contract as it was produced on 'Law Depot' (an online service for legal documents). However, she maintained that the terms of the employment contract were that she was employed on a part-time basis of 20 hours a week over a 5 day week with her duties including but not limited to, running the warehouse, carrying out the washing and drying of rugs, carrying out repairs to rugs, invoicing, cleaning, marketing, accounts, Director duties and any other work necessary for the smooth running of R2. She said that the employment contract provided for contractual holiday pay of 4 weeks a year and that there was a clause in the employment contract requiring an increase in her working hours as and when the work demanded it.
  - 18.9 The Claimant's case was that trade was hit by the pandemic and it was considered that trade would likely return to pre-pandemic levels if R2 found a way to continue to trade with substantially reduced outgoings. After a meeting with the Claimant's father in April 2020 the Claimant decided that the best course of action was to continue to work the required hours but take a fixed payment from the company each month and that R2 would pay wages owed to her once trade had returned to pre pandemic levels. She said she discussed this with her father and he agreed that that is how they would proceed and that this would be a temporary measure and that once trade had increased to pre pandemic levels, R2 would make payment to the Claimant of any wages owed. In this regard the Claimant referred to

Exhibit 1.

- 18.10 The agreement between herself and her father was not that she receive payment at a reduced hourly rate, but that she receive a temporary fixed amount each month which bore no relation to the number of hours worked and that she keep a detailed note of her hours worked so that once trade had returned to pre pandemic levels, R2 would pay her the monies owed for actual hours worked.
- 18.11 She had always been paid at the rate of the national minimum wage and so it followed that the postponed payment would be calculated at £9.50 per hour.
- 18.12 She said that as feed stores/tack shops gradually re-commenced taking in rugs, the hours she was required to work increased. She said that this was pursuant to a clause in her employment contract requiring her to undertake what work and hours were necessary for the job.
- 18.13 She said that she and her father were reluctant to bring staff members off of furlough and back into work as the income was just not there to pay them. She said she kept weekly time sheets of the hours she worked which were transferred to an Excel spreadsheet but that she does not have access to that information as it was stored on the company computer which is no longer in her control.
- 18.14 She said that by the end of 2021, the hours that she was required to work had increased to regular full-time hours of 40 hours per week as a result of the resignation of two key members of staff (being a part-time seamstress who resigned in March 2021 and a full-time warehouse worker who resigned in November 2021).
- 18.15 The Claimant said that the company income was still very low and she and her father decided only to replace the part-time seamstress. She said that she continued with the role of the full-time warehouse worker, alongside the other roles she had.
19. She said that had R2's fortunes reverted to pre pandemic levels she would have been paid, pursuant to the agreement entered into between her and her father, for those hours worked, to which postponed payment applied.
20. With reference to her responses contained in the Directors' Questionnaire sent to her by R1, she said that she noticed it late and completed it in haste without a thought for the need for legal advice on the answers in order not to prejudice her right to such payments. She said that as a result, her answers were brief and from the standpoint of the position she was in at the time she completed the questionnaire, namely as shareholder and Director making all the decisions alone.
21. Through response to questions under oath the Claimant further explained her position as follows:
- 21.1 She calculated her entitlement to a week's pay at 40 hours per week at

£9.50 per hour i.e. £380 per week gross

- 21.2 **Statutory Redundancy** - She said that R1 agreed that she was entitled to a statutory redundancy payment based on the multiplier of 1.5 weeks pay for each of her 11 years of service (16.5 weeks' pay). R1 had paid her a statutory redundancy payment of £1,967.30 (119.23 x 16.5 weeks). She claimed a further payment of **£4,302.70** ((16.5 x £380 = £6,270.00 – the £1,967.30 paid by R1).
- 21.3 **Arrears of pay** – she said that she had no claim for arrears of pay as she had sought 8 weeks of arrears from R1 for the period 4.6.22 to 29.7.22 and this had in fact been paid by R1 at the rate of £380 per week (£3,040). She could not explain why R1 had paid this at the higher rate of a weeks' pay that she sought.
- 21.4 **Holiday pay** – she said that R1 had accepted her claim for 10.15 days of holiday pay and had paid her £242.48 in that respect. This was presumably calculated as follows: 10.15 days/5 day working week = 2.03 weeks. 2.03 x £119.23 = £242. She claimed that she was owed **£529.36** on the basis of the following calculation: ((10.15 x (380/5) = £771.40)– £242.48). However, this in fact gives the slightly lower figure of £528.92.
- 21.5 **Notice pay** – she said that she should have been paid **£1,038.56** in respect of notice (being £4,180 (11 x 380) less £2,388.51 (in respect of earnings during what would have been her notional notice period that offset her losses), £433,73 received in universal credit and £319.20 paid to her by R1 for notice). It remains unclear to me why R1 paid the Claimant £319.20.
- 21.6 In total the Claimant therefore said she claimed £5,870.18 gross (£4,302.70+ £528.92 (the corrected figure) + £1,038.56).
- 21.7 **Interest** – The Claimant originally said she claimed at the rate of 8% on the following basis:
- 21.7.1 For the period before she received payment from R1 (18 October 2022 to 20 September 2023 - 344 days at £2.51 a day (8% on £11,439.16). Total: £863.44;
- 21.7.2 For the period from 21 September 2023 to date of payment calculated at £1.29 a day (8% on £5,870.62). Calculating to the date of hearing on 24 May 2024, from 21 September 2023 to 24 May (246 days at £1.29 a day). Total: £317.34.
- 21.7.3 At the hearing she said she in fact only claimed interest at the median Bank of England interest rate between October 2022 and August 2023 which she calculated at 4.12%.
- 21.7.4 As regards R1's submissions on the question of interest the Claimant said this was misconceived because she was not claiming interest on a judgment debt. She was claiming for losses as a result of the payments not having been made when they were due.

- 21.8 The fixed amount she had been paid under the agreement she said she had with R2/her father was that it in fact changed monthly and she herself made the decision about how much R2 could afford to pay her. She said that sometimes the fixed amount was £100 sometimes £700 and it varied in between those amounts.
- 21.9 She agree with the P60 figures quoted by R1 (£8,628 for the tax year ending 05 April 2020, £4,107.47 for the tax year to 05 April 2021, £6,200 for the tax year to 05 April 2022).
- 21.10 The shortfall in her pay was a debt of R2 but R2 did not have a close relationship with the accountant (who just did the end of year accounts and payroll) and she let her father know how many hours she was due.
- 21.11 She did not have access to the computer where she said the excel spreadsheet of the hours she had worked was stored because when the liquidator took over R2 that computer went to the liquidator along with her written records. However, she had not tried to contact the liquidator for access to those written or computer records.
- 21.12 She had not sought arrears of pay for any period prior to 4 June 2022 because that was the last time she had been paid by R2 and she thought that was the earliest she could claim from and she had not looked into it.

22. Ms Cox, in her witness statement, said:

*I started working for Rug Rescue Ltd on 1 September 2015 and worked for the company for 7 years until termination of my employment contract by way of notice of redundancy 4 July 2022.*

*I was employed as a part-time warehouse worker throughout my period of employment with Rug Rescue Ltd. Over the 7 years of my employment, I worked directly under the supervision of Annette Bow.*

*As a result of the Covid-19 pandemic, I was placed on furlough from April 2020 and I believe this continued until at least July/August 2020, when I returned to work.*

*Prior to the covid- 19 pandemic, it was commonplace for Annette Bow to leave the warehouse in the early afternoon, having worked the morning shift. Following my return to work in July/August 2020, it was clear that Annette was working more and more hours. I cannot confirm the actual number of hours Annette worked but it appeared to me that she was in the warehouse continually and was certainly working what I would consider to be full-time hours from at least some time in 2021 up until my redundancy.*

23. Ms Hansford, in her witness statement, said:

*I started working for Rug Rescue Ltd on 23 March 2021 as a part-time machinist and worked for the company for 16 months until termination of my employment contract by way of notice of redundancy 4 July 2022.*



*My hours of work varied according to the work that came in on any particular week and there were times when I worked almost full-time hours.*

*For the entire period that I worked for Rug Rescue Ltd, it was clear to me that Annette worked what I would consider to be full-time hours and that this continued up until the date of my redundancy.*

### **R1's position**

24. R1's position is summarised in the Issues section above. As regards the Claimant's claim for interest R1 said in correspondence of 9 May 2024:

*Further to the ET3 previously submitted on 27 October 2023, the claimant has submitted in her emails on 8 May 2024 a schedule of compensation which includes interest to be paid.*

*The Secretary of State conceded liability on 14 September 2023 and made payments on 19 September 2023.*

*The Secretary of State has acted as promptly as she has been able to. SOS has no liability to pay the interest claimed as a judgment was not awarded against SOS as per the Employment Tribunals (Interest) Order 1990 where it provides that sums of money payable as a result of a judgment of an Employment Tribunal (excluding sums representing costs or expenses), shall carry interest where the full amount is not paid within 14 days after the day that the document containing the tribunal's written judgment is recorded as having been sent to parties.*

*The Secretary of State wishes to advise the Tribunal that they do not propose to be represented in person at any future hearing of this case. They respectfully requests that the Tribunal accepts this ET3 and the ET3 submitted on 27 October 2023 as the Secretary of State's written submissions in respect of any hearing, pursuant to Rule 42 of the Employment Tribunals Rules of Procedure which states; "The Tribunal shall consider any written representations from a party, including a party who does not propose to attend the hearing, if they are delivered to the Tribunal and to all other parties not less than 7 days before the hearing." The Secretary of State intends no disrespect to the Tribunal, however due to the nature of the case, they have no further useful information to provide, and written submissions are deemed appropriate.*

*This response is copied to the claimant for reference, in accordance with the Tribunal Rules,*

### **THE LAW**

25. Section 162 (Amount of a redundancy payment) of the Employment Rights Act 1996 ("the ERA") provides (1) The amount of a redundancy payment shall be calculated by—(a) determining the period, ending with the relevant date, during which the employee has been continuously employed, (b) reckoning backwards from the end of that period the number of years of employment falling within that

period, and (c) allowing the appropriate amount for each of those years of employment. (2) In subsection (1)(c) “the appropriate amount” means—(a) one and a half weeks' pay for a year of employment in which the employee was not below the age of forty-one, (b) one week's pay for a year of employment (not within paragraph (a)) in which he was not below the age of twenty-two, and (c) half a week's pay for each year of employment not within paragraph (a) or (b).

26. Section 164 of the ERA provides for claims for redundancy payments. Section 166 of the ERA sets out circumstances which applications can be made by an employee to the Secretary of State for payment of sums for which the employer is liable. Section 167 of the ERA includes provisions for the making of a payment by the Secretary of State to an employee from the National Insurance Fund pursuant to an application under Section 166. Section 168 of the ERA includes provision for the amount of a payment by the Secretary of State to an employee under Section 167 of the ERA. Section 170 of the ERA provides for a reference to be made to an employment tribunal for determining questions of liability under Section 166 or the amount payable under Section 168.
27. Section 182 of the ERA includes provisions for the Secretary of State to make a payment to an employee from the National Insurance Fund for debts owed by an insolvent employer.
28. Section 184 of the ERA sets out the employer debts to which Part XII (Insolvency of Employers) of the ERA applies. It provides that Part XII applies to (a) any arrears of pay in respect of one or more (but not more than eight) weeks, (b) any amount 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 of the employer to give the period of notice required by section 86(1), (c) any holiday pay— (i) in respect of a period or periods of holiday not exceeding six weeks in all, and (ii) to which the employee became entitled during the twelve months ending with the appropriate date [...]. Section 185 ERA defines the term “the appropriate date”. Section 186 ERA applies to the amounts payable under section 182.
29. Section 188 ERA provides that: (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.
30. Chapter II of the ERA sets out provisions in respect of the calculation of a weeks' pay. Section 221 ERA provides: (1) This section and sections 222 and 223 apply where there are normal working hours for the employee when employed

under the contract of employment in force on the calculation date. (2) Subject to section 222, if the employee's remuneration for employment in normal working hours (whether by the hour or week or other period) does not vary with the amount of work done in the period, the amount of a week's pay is the amount which is payable by the employer under the contract of employment in force on the calculation date if the employee works throughout his normal working hours in a week. (3) Subject to section 222, if the employee's remuneration for employment in normal working hours (whether by the hour or week or other period) does vary with the amount of work done in the period, the amount of a week's pay is the amount of remuneration for the number of normal working hours in a week calculated at the average hourly rate of remuneration payable by the employer to the employee in respect of the period of twelve weeks ending—(a) where the calculation date is the last day of a week, with that week, and (b) otherwise, with the last complete week before the calculation date. (4) In this section references to remuneration varying with the amount of work done includes remuneration which may include any commission or similar payment which varies in amount.

31. Section 223 of the ERA provides that (1) for the purposes of sections 221 and 222, in arriving at the average hourly rate of remuneration, only -- (a) the hours when the employee was working, and (b) the remuneration payable for, or apportionable to, those hours, shall be brought in. [...].

## FINDINGS OF FACT, ANALYSIS AND CONCLUSIONS

32. If what the Claimant says is correct and R1 has in fact paid the Claimant for arrears of pay for the period between 4.6.22 and 29.7.22 at the rate of £380 per week (totalling £3,040) rather than at the rate of £119.23 then this must have been an error on the part of R1. In any event the Claimant made clear at the hearing that she does not pursue a claim for arrears of pay.
33. Given the limited documentation that appears to have been available to it, I find that R1 has used the correct calculation of a week's pay for the purposes of the Claimant's claims for a redundancy payment, notice pay and holiday pay when it divided the Claimant's declared pay (£6,200) on her P60 for the tax year to 5 April 2022 by 52. This was broadly consistent with the Claimant's pay in the previous two years (£8,628 year to 5 April 2020 and £4,107.47 year to 5 April 2021).
34. I have taken into account the Claimant's evidence (including but not limited to **Exhibit 1**) but I was not persuaded, on the balance of probabilities, that the Claimant had in fact worked more hours at the rate of the NMW or that any such hours were owed to her by R2:
  - 34.1 The Claimant was the sole director of, decision maker at R2. Latterly she was the sole shareholder.
  - 34.2 Had additional hours worked been owed to her they would have been recorded as a debt in R2's accounts but they were not.
  - 34.3 The Claimant was not able to produce the weekly time sheets she said she had kept or the Excel spreadsheet she said those hand written records were

transferred to and she had not sought to obtain them from R2's computer or from the liquidator.

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**Employment Judge Woodhead**

Date 20.08.24

Sent to the parties on:

04.09.24

Jade Lobb

For the Tribunals Office

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<https://www.judiciary.uk/guidance-and-resources/employment-rules-and-legislation-practice-directions/>