



# EMPLOYMENT TRIBUNALS

**Claimant:** Mr. Graham Collins

**Respondent:** SES Engineering Services Ltd

**Heard at:** Leeds Employment Tribunal

**On:** 11 November 2020

**Before:** Employment Judge Armstrong

## Representation

Claimant: In person

Respondent: Not present (written representations submitted under rule 42)

# RESERVED JUDGMENT

1. The respondent shall pay to the claimant £411.45 in respect of redundancy payment.
2. The respondent shall pay to the claimant £571.80 in respect of holiday pay.

# REASONS

## Introduction

1. The claimant commenced employment with the respondent on 12 March 2012. He worked as a planning engineer, initially full time and then for two days per week from 2017. He was paid £2,124 gross per month. The claimant was dismissed by reason of redundancy on 3 July 2020. He was not required to work his contractual notice period of 8 weeks and the respondent made a payment in lieu of notice.
2. Following the termination of his employment, the respondent made the following payments to the claimant:
  - 2.1. A redundancy payment of £4,773.12. This was calculated on the basis of 12 weeks x £397.76;
  - 2.2. £1,609.48 in lieu of accrued but untaken annual leave of 8.5 days, calculated on the basis of 8.5 days x £198.88;

- 2.3. £4,375.26 as a payment in lieu of contractual notice. This was calculated on the basis of 8 weeks x £397.76, plus additional sums representing cash in lieu of access to contractual benefits, as follows:
  - 2.3.1. Flex Fund (£250 per annum, with NI deducted): £33.15
  - 2.3.2. Company Car Lease / Allowance Payment: £692.31
  - 2.3.3. Car Compensation Payment: £109.57
  - 2.3.4. Private Healthcare: £68.15
  - 2.3.5. Pension (Employer contribution 10%, with NI deducted): £274.30
  - 2.3.6. Life Assurance: £10.21
  - 2.3.7. Permanent Health Insurance: £5.42
3. The parties agree the number of days holiday pay outstanding and the number of weeks which should be used to calculate the claimant's redundancy pay.
4. The claimant claims that the respondent used the incorrect figure for a week's pay when calculating his redundancy pay and holiday pay. The claimant claims a further £1,682.77 in respect of redundancy pay, on the basis that the correct figure for a week's pay is £546.90, which would be capped at £538. The claimant claims a further £633.88 in respect of holiday, on the basis that the correct figure for a day's pay is £75.57.
5. The respondent contests the claim. The respondent's position is that the correct figure for a week's pay is £397.76, representing the claimant's basic salary. The respondent's position is that the claimant is not entitled to cash equivalent value in respect of benefits in the calculation of a week's pay for accrued annual leave or redundancy pay.
6. The claimant appeared before me in person. He gave some brief sworn evidence regarding the payments set out above.
7. The respondent did not attend the hearing. I considered the representations submitted by the respondent's representative, Greenwoods GRM LLP, in accordance with Rule 42 of the Employment Tribunals Rules of Procedure 2013.
8. I considered the documents in the 82-page bundle of documents provided by the parties.
9. The hearing took place by video (Cloud Video Platform), due to COVID-19 restrictions. The Claimant was able to participate fully in the hearing. After some initial difficulties with the audio connection, the claimant telephoned in to the hearing so that he could be heard clearly, whilst remaining in the video hearing for visual participation. The claimant confirmed that he was able to see and hear the tribunal clearly.

**Issues for the tribunal to decide**

10. The issue for the tribunal to decide is what figure for a week's pay should be used in calculating:
  - 10.1. The claimant's statutory redundancy payment;
  - 10.2. The payment made in respect of 8.5 days' accrued but untaken annual leave.

11. In relation to each payment, whether the figure for a week's pay should include payment in respect of:
  - 11.1. Flex Fund
  - 11.2. Company Car Lease / Allowance
  - 11.3. Car Compensation payment
  - 11.4. Private healthcare
  - 11.5. Pension
  - 11.6. Life Assurance
  - 11.7. Permanent Health insurance

### Findings of fact

12. The Respondent did not contest the figures included in the claimant's claim form, save that it said private health care cover was not paid as a cash equivalent value.
13. I heard further brief evidence from the claimant in respect of each of the payments as follows:
14. He was unsure what the 'flex fund' was, but it was a payment which he received with his pay in lieu of notice. He believed that it was one of a number of offers which could be obtained from the company, and that it was a benefit to him, which the respondent provided.
15. On commencement of employment, the claimant was offered a company car or an allowance. He chose to take an allowance. This is set out at page **B3** of the bundle, in an appendix to the Claimant's offer letter, as follows:

*'Choosing the Company Car option:-*

*A car will be allocated to you if available from the fleet otherwise after your first 3 months of employment you will be able to select a car from the HSBC scheme.*

*This car is provided to enable you to carry out your duties more effectively and is allocated to the job, not you as an individual. Upon termination of employment, the car will be returned to the Company by the last day actually worked.*

*However, you may choose the alternative of a Grade 4 car allowance which is currently £5,160 per annum. To qualify for the full allowance, your vehicle must be six years old or less and must be insured for business purposes.'*

16. The claimant's evidence is that because his duties required him to work locally and remotely on various sites, he was required to have a car. He had an obligation to either purchase or lease a car, and to service, maintain, tax and insure the vehicle. He took out a new loan in September 2019 and is still subject to that financial commitment. After the claimant had been employed for five years, the car policy changed slightly. It was split into two parts – the car allowance and the car compensation payment. The two figures amount to roughly the same figure as previously. These sums did not appear as a separate payment on his monthly pay statements. I accept this evidence.

17. The private health care scheme was funded by the respondent, the claimant did not pay towards it and no figure was deducted from his monthly pay. The same situation applied to the life assurance and permanent health insurance schemes.
18. The respondent made a 10% contribution towards the claimant's pension each month.

### **Relevant law and conclusions – redundancy payment**

19. The claimant is entitled to a redundancy payment because he was dismissed by reason of redundancy (s.135 Employment Rights Act 1996 ('ERA 1996')). By virtue of s.162 ERA 1996, that payment shall be calculated on the basis of a week and half's pay for each year the claimant was employed over the age of 41. The parties are agreed that the claimant is entitled to 12 weeks of statutory redundancy pay.
20. It is agreed that the claimant had normal working hours and his remuneration did not vary according to the amount of work done. A week's pay is therefore to be calculated under section 221(2) ERA 1996 which provides: '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 through his normal working hours in a week.'
21. In *S and U Stores Ltd v Wilkes* [1974] ICR 645, the National Industrial Relations Court considered the question of how to calculate remuneration for the purposes of redundancy payments. Sir John Donaldson held as follows:
  22. *'In our judgment the test for determining the "average weekly rate of remuneration" is as follows. (1) Any sum which is paid as a wage or salary without qualification is part of the employee's remuneration. (2) The value of any benefit in kind (e.g. free accommodation) or paid in cash by someone other than the employer... is to be disregarded as not forming part of the remuneration. (3) Any sum which is agreed to be paid by way of reimbursement or on account of expenditure incurred by the employee has to be examined to see whether in broad terms the whole or any part of the sum represents a profit or surplus in the hands of the employee. To the extent that it does represent such a profit or surplus it is part of the employee's remuneration. This is not a matter which calls for an involved accountancy exercise. It is for the tribunal of fact to form a broad common sense view of the realities of the situation as revealed by the evidence assessed in the light of their expert knowledge and experience.'*
23. In that case, the court held that a car allowance which was paid weekly to the claimant did not form part of his remuneration because it was a genuine estimate of the expenses incurred.
24. In *University of Sunderland v Droussou* UKEAT/341/16 the Employment Appeal Tribunal held that pension contributions paid by the employer constitute remuneration for the purposes of calculating a week's pay

because the statute does not require payment to be made to the employee, and pension contributions are as much a reward for work as salary.

25. The respondent's representative has not addressed the cases of *S and U Stores Ltd v Wilkes* and *University of Sunderland v Droussou* in their written representations. However, as they are established cases and the principles are clear, I have decided that it would be disproportionate to revert to the respondent and seek further submissions.
26. The issue for the tribunal is which, if any, of the figures outlined above is remuneration which is payable by the employer under the contract of employment.
27. I am satisfied that the claimant's private healthcare, life assurance and permanent health insurance were benefits in kind, and therefore not remuneration for the purposes of s.221 ERA 1996.
28. Although it is not clear from the evidence what the 'flex fund' is, I find on the balance of probabilities that it was some sort of benefit in kind provided by the respondent, and therefore not remuneration for the purposes of s.221 ERA 1996.
29. I find that the car allowance and car compensation payment are both reimbursement for expenses. I must therefore consider whether they amount to a profit or surplus in the claimant's hands or a genuine estimate of the expense incurred. I find that it is a genuine estimate of expense incurred. The claimant was offered a choice of a company car or a car allowance, the implication being that the two were broadly equivalent options. On the balance of probabilities, the sum provided by way of the car allowance and car compensation scheme must therefore be a genuine estimate of the expense of obtaining, maintaining and insuring a car. Therefore I find that this sum is not remuneration for the purposes of s.221 ERA 1996.
30. I find that the pension contribution paid by the respondent does amount to remuneration, for the reasons set out in the case of *Droussou*. The respondent paid £274.30 in respect of the pension contribution for eight week's notice. I therefore find that the weekly figure is £34.29. The claimant is therefore entitled to a further £411.45 redundancy payment (12 x £34.29).

### **Relevant law and conclusions – holiday pay**

31. The claimant was entitled to four weeks' basic annual leave in each year under Regulation 13 of the Working Time Regulations 1998 ('WTR 1998'), and a further 1.6 weeks' additional annual leave in each year under regulation 13A WTR 1998. He was entitled to be paid for that leave 'at the rate of a week's pay in respect of each week of leave', to be calculated in the same way as a week's pay under sections 221 to 224 of the ERA 1996 (reg.16 WTR 1998). The claimant is entitled to a payment in lieu of leave accrued but untaken where his employment terminated during the course of his leave year (reg. 14 WTR 1998). The claimant and respondent agree that the claimant is entitled to pay in lieu of 8.5 days' annual leave.

32. The WTR 1998 are intended to implement the Working Time Directive. It is established law that the statutory method of calculating a week's pay under the ERA 1996 does not fully implement the Working Time Directive and therefore the WTR 1998 should be construed purposively to give effect to the Working Time Directive in respect of the four weeks' basic annual leave. Therefore, all elements of a worker's normal remuneration must be taken into account when calculating holiday pay for the basic four weeks' leave (*British Airways plc v Williams and ors* 2012 ICR 847, ECJ; *Bear Scotland Ltd v Fulton and anor*; 2015 ICR 221, EAT, *British Gas Trading Ltd v Lock and anor* 2017 ICR 1, CA). The ERA 1996 applies directly in relation to the additional 1.6 weeks' leave.
33. The Respondent's written representations do not explicitly address the question of whether the agreed 8.5 days are basic or additional leave. However, as their submissions rely on the cases of *Williams v British Airways* and *Bear Scotland v Fulton*, I conclude that they accept that the European approach applies, and therefore that the leave is basic leave. Even if they do not make such an admission, I find it to be the correct approach.
34. In *British Airways plc v Williams and ors* 2012 ICR 847, ECJ, at paragraphs 20-26, the court held:
- 34.1. The purpose of the requirement of payment for leave is to put the worker, during such leave, in a position which is, as regards remuneration, comparable to periods of work;
- 34.2. Remuneration paid in respect of annual leave must, in principle, be determined in such a way as to correspond to the normal remuneration received by the worker;
- 34.3. However, where the remuneration received by the worker is composed of several components, the determination of that normal remuneration and, consequently, of the amount to which that worker is entitled during his annual leave requires a specific analysis;
- 34.4. Domestic law cannot affect the worker's right to enjoy, during his period of rest and relaxation, *economic conditions which are comparable to those relating to the exercise of his employment* (my emphasis);
- 34.5. Any aspect which is linked intrinsically to the performance of the tasks which the worker is required to carry out under his contract of employment and in respect of which a monetary amount is provided which is included in the calculation of the worker's total remuneration, must necessarily be taken into account for the purposes of the amount to which the worker is entitled during his annual leave;
- 34.6. By contrast, the components of the worker's total remuneration which are intended exclusively to cover occasional or ancillary costs *arising at the time of performance* of the tasks which the worker is required to carry out under his contract of employment need not be taken into account in the calculation of the payment to be made during annual leave (my emphasis).
- 34.7. The court therefore has to assess the intrinsic link between the various components which make up the total remuneration of the worker and the performance of the tasks which he is required to carry out under his contract of employment.

35. Applying those principles:

36. I find that the car lease / allowance and car compensation payments do form part of a week's pay for the purposes of the WTR 1998. Applying a purposive construction to the legislation, in order for the remuneration for holiday to correspond to the claimant's normal salary, the car allowance must be included. Furthermore, the purchase, maintenance and insurance of a vehicle is not an 'occasional or ancillary cost arising at the time of performance' but rather an ongoing expense which would continue during periods of leave.

37. The respondent paid the claimant £692.31 in respect of the car lease / allowance payment and £109.57 in respect of the car compensation payment for his 8 weeks' pay in lieu of notice. Taking both payments together, this gives a weekly figure of £100.24 (£801.88 divided by 8), and a daily figure of £50.12 (£100.24 divided by 2). The claimant is therefore entitled to a further £426.02 in respect of these two sums (£50.12 times 8.5).

38. For the reasons set out above at paragraph 30, I find that the pension contribution paid by the respondent should be included within the calculation of a week's pay for the purposes of the WTR 1998. The daily figure is £17.15 (£34.29 divided by 2). The claimant is therefore entitled to a further £145.78 in this respect (£17.15 times 8.5).

39. For the reasons set out above at paragraphs 27 and 28, I find that the Flex fund, private healthcare, life assurance and permanent health insurance are benefits in kind which are not part of his normal remuneration linked to the tasks performed by the claimant. Therefore they should not be included in the calculation of a week's pay for the purposes of the claimant's holiday pay.

40. Therefore, the claimant is entitled to the following payments from the respondent:

40.1. A further £571.80 in respect of holiday pay;

40.2. A further £411.45 in respect of statutory redundancy pay.

Employment Judge **Kate Armstrong**

16 November 2020