

EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: S/4105899/15

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Hearing on Remedy
Held at Glasgow on 22 February 2017

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Employment Judge: Mr C Lucas
Members: Mrs M T Nelson
Mr P O'Donnell

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Ms Fiona McLauchlan

Claimant
Represented by:
Mr E J H Mowat –
(Solicitor)

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Simpsinns Limited

First Respondent
Represented by:
Mr M Howson –
(Consultant)

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Mrs Karen Simpson
and Mr Malcolm George Simpson
(t/a “The Old Loans Inn”)

Second Respondent
Represented by:
Mr M Howson -
(Consultant)

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**JUDGMENT OF THE EMPLOYMENT TRIBUNAL
ON THE ISSUE OF REMEDY**

Having previously reserved the question of Remedy to be dealt with at a separate
Hearing on Remedy, The Employment Tribunal, -

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Firstly: DECLARES that with effect from and including 21 October 2016 it
is the right of the Claimant – (a person employed by the Second
Respondent as a Head Chef) - to be paid at the rate of £10.71 per hour for
each hour worked by her and, as a corollary, that it is incumbent on the
E.T. Z4 (WR)

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Second Respondent to ensure and procure that with effect from and including 21 October 2016 the Claimant is paid by it, as her employer, at the rate of £10.71 per hour for each hour worked by her for it.

5 **Secondly: DECLARES** that with effect from and including 21 October 2016 it is the right of the Claimant – (a person employed by the Second Respondent as a Head Chef) - to receive the benefit of employer pension contributions into the auto-enrolment pension scheme as required by UK Pension Legislation at a level which reflects the rate of pay – (and therefore
10 aggregate earnings) - which, in terms of “**Firstly**” above, the Claimant is entitled to receive with effect from and including 21 October 2016 and, as a corollary, that it is incumbent on the Second Respondent to ensure and procure that with effect from and including 21 October 2016 the Claimant receives the benefit of employer pension contributions into the auto-
15 enrolment pension scheme as required by UK Pension Legislation at a level which reflects the rate of pay – (and therefore aggregate earnings) - which, in terms of “**Firstly**” above, the Claimant is entitled to receive with effect from and including 21 October 2016.

20 **Thirdly: DECLARES** that, subject to appropriate deduction of PAYE tax, it is the right of the Claimant to be paid arrears of pay by the Second Respondent, such arrears of pay accrued during the period 1 November 2010 to 20 October 2016 – (both dates inclusive) - amounting, in aggregate, to £30,902.32 and, as a corollary, that, subject to appropriate deduction of
25 PAYE tax, it is the obligation of the Second Respondent to pay such arrears of pay to the Claimant.

30 **Fourthly: DECLARES** that it is the right of the Claimant to be paid damages as compensation for non-payment by the Second Respondent of automatic enrolment pension scheme employer contributions during the period which began on 1 October 2014 and continued up to and including 20 October 2016, such shortfall of employer pension contributions amounting to £76.49, and, as a corollary, that it is the obligation of the

Second Respondent to pay such damages, £76.49, to the Claimant as compensation for non-payment by it of automatic enrolment pension scheme employer contributions during the period which began on 1 October 2014 and continued up to and including 20 October 2016.

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Fifthly: ORDERS the Second Respondent to pay to the Claimant, net of PAYE tax, the £30,902.32 arrears of pay referred to at “**Thirdly**” above **AND** - (on the basis that such arrears of pay should be paid by the Second Respondent to the Claimant net of such sum as is identified by HM Revenue & Customs as being the appropriate deduction to be made as PAYE tax from such arrears of pay) – **REQUIRES** the Second Respondent to take all steps open to it in order to procure and ensure that the appropriate deduction to be made as PAYE tax from such arrears of pay is established by a date which will enable it, the Second Respondent, to make payment of such sum of £30,902.32, net only of PAYE tax, to the Claimant before 6 April 2017.

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Sixthly: ORDERS the Second Respondent to pay damages of £76.49 to the Claimant as compensation for the shortfall of employer auto-enrolment pension contributions referred to at “**Fourthly**” above.

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Seventhly: ORDERS the Second Respondent to pay to the Claimant interest amounting to £7,828.87 on the arrears of pay and on the damages referred to at, respectively, “**Thirdly**” and “**Fourthly**” above.

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Eighthly: ORDERS the Second Respondent to pay to the Claimant the sum of £1,025 as reimbursement of her – (net-of-retrospective-remission) - contribution towards the Employment Tribunal lodging fee and Hearing fee.

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And

Ninthly: ORDERS the Second Respondent to pay the net arrears of pay referred to at “**Fifthly**” above, the damages referred to at “**Sixthly**” above,

the interest referred to at “**Seventhly**” above and the sum of £1,025 referred to at “**Eighthly**” above to the Claimant before 6 April 2017.

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REASONS

Background

- 10 1. In an ET1 presented to the Tribunal Office on 5 March 2015 the Claimant claimed that she had been discriminated against by her employer on the ground of sex, her claim being based on Section 65(1)(a) of the Equality Act 2010 – (hereinafter, “the Equality Act”). It was contended that since being promoted to the post of Head Chef at The Old Loans Inn in or around
15 November 2010 the Claimant’s salary had been lower than other Head Chefs identified by her as being, allegedly, valid comparators in terms of Section 79 of the Equality Act. And it was argued that because the Claimant had been paid a lower salary than those comparators and had received lower contributions into her pension scheme than those comparators had
20 done her employer had breached the sex equality clause discussed within Section 66 of the Equality Act.
2. A Hearing on Liability was held at Glasgow on 5, 6, 7, 8 and 9 September 2016 and 20 October 2016 and a Judgment in respect of Liability was
25 issued on 15 November 2016 and was entered in register and copied to parties on 16 November 2016. That Judgment is hereinafter referred to as “the Judgment on Liability”.
3. The Judgment on Liability determined that in so far as it was made against
30 the Second Respondent the complaint presented to the Employment Tribunal under the “sex equality” provisions of Chapter 3 of the Equality Act 2010 was upheld Such determination was made on the basis that throughout the period from 1 November 2010 and had continued up to and including 20 October 2016 the Claimant’s employer had been the Second

Respondent and that the First Respondent was not and had never been the Claimant`s employer.

4. After the Judgment on Liability had been issued, entered in the register and copied to the parties, the Tribunal Office scheduled a Hearing – (on the previously reserved issue of Remedy) - to take place at Glasgow on 22 and 23 February 2017.
5. The Judgment on Liability had included a recommendation from the Tribunal that the Hearing on Remedy should take place over two consecutive days but it also included encouragement to the parties' respective representative "to enter into direct dialogue with each other with a view to agreeing what are, effectively, arithmetical calculations without the need for further evidence to be led at a Hearing" and with guidance being given that "the Tribunal believes that that would be in full accordance with the Overriding Objective and would also mean that if agreement on those arithmetical calculations can be reached without Tribunal involvement or that it might thereafter be necessary for the Tribunal itself to do will be the procurement of the issuing of an appropriately worded Final Judgment dealing with Remedy and disposal of the case."
6. At commencement of the Hearing on Remedy the representatives acting on behalf of, respectively, the Claimant and the Second Respondent made a joint submission to the Tribunal requesting it, the Tribunal, to issue a Judgment on Remedy in terms which had been agreed between them as the parties' respective representatives. After discussion among the representatives acting for, respectively, the Claimant and the Second Respondent and the Employment Judge the Tribunal determined that it would issue its Judgment in the terms set out within the "Judgment of the Employment Tribunal on the Issue of Remedy" section of this document and advised the representatives acting on behalf of, respectively, the Claimant and the Second Respondent what the substantive terms of that Judgment would be and – (as regards compensation, damages, interest and

reimbursement of Tribunal fees) - what figures would be included within that Judgment.

Findings in Fact

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7. The Findings in Fact relevant to determination of the issue of Remedy and calculation of the figures referred to in the “Judgment of the Employment Tribunal on the Issue of Remedy” section of this document are all as agreed between, on the one hand, the Tribunal, and, on the other hand, the representatives acting on behalf, respectively, the Claimant and the Second Respondent. Based as they are on the evidence that it heard at the Hearing on Liability, but with it being noted that Mr McNelly was an appropriate comparator throughout the period which began in August 2011 and continued only until February 2015, such Findings in Fact are as follows, -

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8. The arrears of pay relevant to the Claimant’s claim and forming the basis for an Order for arrears of pay to be paid to the Claimant are as set out in the “Arrears of Pay” table below, such table being a replica of a schedule supplied by the Claimant’s representative but accepted by the Second Respondent’s representative, i.e. :-

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<u>Arrears of Pay</u>
<u>November 2010 to September 2011</u>
<u>Comparator Terry Maxwell - Salary £25,479.96</u>
Comparator earnings - £2,123.33 per month - £23,356.63
Claimant’s earnings - £17,668.14
Sum owed: <u>£5,688.49</u>
<u>October 2011 to October 2013</u>
<u>Comparator Jason McNelly throughout, Terry Maxwell from December 2011 and Gavin McGill from February 2013 – Salary £27,000</u>
Comparator’s earnings - £2,250 per month - £51,750

Claimant`s earnings - £39,283.38
Sum owed: <u>£12,466.62</u>
<u>November 2013 to August 2014</u>
<u>Comparator Jason McNelly throughout, Gavin McGill to June 2014 and Terry Maxwell to May 2014 – Salary £27,312</u>
Comparator`s earnings - £2,276 per month - £22,760
Claimant`s earnings - £18,166.70
Sum owed: <u>£4,593.30</u>
<u>September 2014 to February 2015</u>
<u>Comparator Jason McNelly throughout and Alan Brown from October 2014 – Salary £27,858</u>
Comparator`s earnings - £2,321.50 per month - £13,929
Claimant`s earnings - £11,149.02
Sum owed: <u>£2,779.98</u>
<u>Maternity leave – March 2015 to November 2015</u>
Comparator Alan Brown – Salary £27,858
Comparator earnings - £482.16 x 6 = £2,892.96
Claimant`s earnings - £384.85 x 6 = £2,309.10
Sum owed: <u>£583.86</u>
<u>December 2015 to January 2016</u>
<u>Comparator Alan Brown and Richard Wilson – Salary £27,858</u>
Comparator earnings - £2,321.50 per month - £4,643
Claimant`s earnings - £3,038.90
Sum owed: <u>£1,604.10</u>

<u>February 2016 to October 2016</u>
Comparator Richard Wilson and Alan Brown – Salary £27,858 Comparator’s rate - £10.71 per hour
Claimant’s rate £8.77 per hour
Claimant worked 1642.25 hours x £8.77 = £14,402.53
Comparator 1642.25 hours x £10.71 - £17,588.50
Sum owed: <u>£3,185.97</u>
<u>Total arrears of pay £30,902.32 together with interest thereon as calculated in terms of the Employment Tribunals (Interest on Awards in Discrimination Cases) Regulations 1996</u>

9. The damages to be paid to the Claimant are as set out in the “Damages in relation to loss of pension contributions” table below, such table being a replica of a schedule supplied by the Claimant’s representative but accepted by the Second Respondent’s representative, i.e. :-

<u>Damages in relation to loss of pension contributions</u>
Auto enrolment pension scheme introduced in October 2014
Since October 2014 Claimant earned £29,082.88 compared to comparator earnings of £36,731.96
Claimant received employer contributions at 1% of £290.83. Employer contributions to comparator - £367.32
Damages sought: <u>£76.49</u>

10. The representatives acting on behalf of, respectively, the Claimant and the Second Respondent agree that – (net of partial-retrospective-remission) - the Claimant’s contribution towards the Employment Tribunal lodging fee of £250 and the Employment Tribunal Hearing fee of £950 – (a total of £1,200)

– was £1,025 and it was those representatives’ joint submission to the Tribunal that the Second Respondent should be ordered to pay the Claimant £1,025 in reimbursement of that net contribution.

5 11. After discussion among them and the Employment Judge the representatives acting on behalf of, respectively, the Claimant and the Second Respondent made a joint submission to the Tribunal which both invited it the Tribunal to make an Order requiring the Second Respondent to pay to the Claimant interest on both the arrears of salary and the shortfall of
10 employer pension contributions – [such interest to be calculated in terms of the Employment Tribunals (Interest on Awards in Discrimination Cases) Regulations 1996] - and – (on the basis that the “mid-point” to be taken into account when making that calculation was 13 December 2013 and therefore that interest is to be paid for a net 1153 days) – identified for the benefit of
15 the Tribunal that the sum to be ordered to be paid as interest had been agreed between the representatives acting on behalf of, respectively, the Claimant and the Second Respondent as being £7,828.87.

12. During the course of the Hearing on Remedy the representative acting on
20 behalf of the Second Respondent explained to the Tribunal that notwithstanding the terms of the Judgment on Liability the Second Respondent had not yet ensured and procured that with effect from – (and including) – 21 October 2016 the Claimant was paid at the same rate as her comparators, a disclosure which led to the representatives acting on behalf
25 of, respectively, the Claimant and the Second Respondent jointly inviting the Tribunal to make a declaration to the effect that with effect from and including 21 October 2016 the Claimant is to be paid at the same hourly rate as her comparators, i.e £10.71 per hour. In this context, the representatives acting on behalf of, respectively, the Claimant and the
30 Second Respondent jointly confirmed that the rate of pay paid to the claimant’s comparators had “flat-lined” at £10.71 per hour and that that rate, £10.71 per hour, was the appropriate rate of pay to be referred to in such declaration.

13. During the course of the Hearing on Remedy the representative acting on behalf of the Second Respondent provided the Claimant's representative and the Tribunal with an assurance that so far as pay due to the Claimant for the period after 20 October 2016 was concerned, the Claimant would "henceforth" – (i.e. with effect from the day after the last day of the Hearing on Remedy) - be paid "at that rate" of £10.71 per hour for each hour worked by her, that in respect of the period beginning on 21 October 2016 and ending on the last day of the Hearing on Remedy she would be paid arrears of salary based on that rate of £10.71 per hour for each hour worked by her and that so far as the other sums ordered to be paid to the Claimant such payments would be paid to the Claimant before 6 April 2017, i.e. before the end of the current tax year.

14. So far as taxation of arrears of pay is concerned, the Claimant's representative accepted that the sum that would actually be paid by the Second Respondent to the Claimant in respect of arrears of pay due to her for the period ended 20 October 2016 would be paid to her net of PAYE tax. An assurance was given to the Claimant's representative and to the Tribunal by the Second Respondent's representative that the Second Respondent would immediately liaise with HMRC to agree what tax should be deducted by it, the Second Respondent, and paid to HMRC and what net-of-PAYE tax figure should be paid by the Second Respondent directly to the Claimant. In this context it was agreed between the representative acting on behalf of the Second Respondent and the Tribunal that although the figures set out on the table/schedule provided by the Claimant's representative to the Tribunal referred to periods of time and not tax years, that was the best information available at present and was sufficient to form the basis of detailed discussion between the Second Respondent and HMRC so far as liability to PAYE tax was concerned. It was determined by the Tribunal that the relevant Order to be made will require the Second Respondent to take all steps open to it in order to procure and ensure that the appropriate deduction to be made, as PAYE tax, from such arrears of

pay is established by a date which will enable it, the Second Respondent, to make payment of the arrears of pay due to the Claimant – (net only of the appropriate PAYE tax) - before 6 April 2017.

- 5 15. It was agreed that the interest to be paid for 1153 days would be paid at the statutory rate of 8% (simple), the appropriate calculation bringing out an interest figure of £7,828.87.

Relevant Law

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16. Legislation:-

- The Equality Act 2010, particularly Sections 132(4) and (5)
- 15 • The Equality Act 2010 (Equal Pay Audits) Regulations 2014
- The Employment Tribunals (Interest on Awards in Discrimination Cases) Regulations 1996

Discussion

17. For the reasons explained earlier in this Judgment, the Hearing which took place on 22 February 2017 was restricted to Remedy and was conducted throughout on the basis of debate among the representatives acting on behalf of, respectively, the Claimant and the Second Respondent, on the one hand, and the Employment Judge - (speaking on behalf of the Tribunal) - on the other. Effectively, the discussion of Remedy is embodied within the "Background" and "Findings in Fact" sections of this Judgment.

18. The Tribunal wishes to add that – [as it is required by the Equality Act 2010 (Equal Pay Audits) Regulations 2014 to do in a case where the Claimant`s claim was submitted on or after 1 October 2010 and the Tribunal has found the Second Respondent, as her employer, guilty of pay discrimination] - it

has considered whether it should order the Second Respondent – (as the Claimant`s employer) - to carry out an equal pay audit– but has determined, firstly, that no action is required to avoid equal pay breaches occurring or continuing, secondly, that the Second Respondent`s breach has given the Tribunal no reason to think that there may be other breaches being perpetrated by it – (the Second Respondent) – and, thirdly, that the disadvantages of an audit would outweigh its benefits, and therefore that it is appropriate for the Tribunal to determine that an exception to the requirement as contained in such Regulations applies and that there is no purpose to be served in the present case in the Tribunal ordering the Second Respondent to carry out an equal pay audit in terms of such Regulations.

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Employment Judge: Mr C Lucas
Date of Judgment: 06 March 2017
Entered in register: 09 March 2017
and copied to parties

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