EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: S/4104603/2017

Held in Glasgow on 18 January 2017

Employment Judge: Mr C Lucas (Sitting alone)

Miss Linzi Cannon	**Claimant** **Present but** **Not Represented**
Mr James Alexander Smith **(Trading as "Stuart Gallone & Son")**	**Respondent** **Present but** **Not Represented**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The Judgment of the Employment Tribunal is in eleven parts namely:-

(1) The Claimant was employed by the Respondent – (a sole trader who traded as "*Stuart Gallone & Son*") – throughout the period which began on 23 October 2015 and ended on 30 June 2017.

(2) Having given written notice on 28 June 2017 that "*I'm leaving my position with Stuart Gallone & Son on 30 June 2017*" the Claimant voluntarily terminated her employment with the Respondents on 30 June 2017.

(3) The Claimant did not continue to accrue entitlement to paid holiday after 30 June 2017.

(4) Calculation of the sum which, as at the effective date of termination of her employment, the Claimant was entitled to receive in lieu of accrued but

untaken holiday is predicated on the end date of that period – (the period during which holiday entitlement was being accrued) - being 30 June 2017 and not any later date.

(5) On the effective date of termination of the claimant's employment, when the Claimant, as a worker – [in terms of Section 230(3)(b) of, and for the purposes of Section 13 of, the Employment Rights Act 1996] – who had carried out work for the Respondent during the period which had begun on 23 October 2015 and had ended on 30 June 2017, was entitled to receive payment in lieu of accrued but untaken holiday, the Respondent made an unauthorised deduction of £369.23 from the holiday pay properly payable by him to her on that occasion and in so doing breached the provisions of Section 13 of the Employment Rights Act 1996.

(6) As at the date of the Final Hearing of the Claimant's claim no part of the monies previously deducted by the Respondent from wages due by him to the Claimant in respect of payment in lieu of accrued but untaken holiday had been paid to the Claimant.

(7) The Respondent is ordered to pay to the Claimant the sum of £369.23 as compensation, such compensation representing the payment in lieu of the paid holiday which had accrued but had not been taken prior to termination of the Claimant's employment on 30 June 2017.

(8) As the Claimant's employer throughout the period which had begun on 23 October 2015 and had ended on 30 June 2017 the Respondent had failed to provide the claimant with a statement of initial employment particulars and in failing to do so had breached the provisions of Section 1 of the Employment Rights Act 1996.

(9) The Respondent is ordered to pay to the Claimant the sum of £1,230.77 in respect of his failure to provide the Claimant with a statement of initial employment particulars as he was required to do by Section 1 of the

Employment Rights Act 1996 – [such ordered payment being in addition to the £369.23 ordered to be paid at *"(7)"* above].

(10) The Claimant's claim that she was owed notice pay by the Respondent has been withdrawn by the Claimant and is dismissed.

(11) The reference in the Claimant's claim to being discriminated against by the Respondent was a reference included in the ET1 in error and for the avoidance of doubt that claim as referred to in the ET1 is dismissed.

REASONS

Background

1. In a claim form ET1 presented to the Tribunal office on 18 September 2017 – (hereinafter, "*the ET1*") – the Claimant named "*James Smith*" as being her employer and the person she was claiming against. The ET1 disclosed the address of James Smith as being 65 Crawford Drive, Old Drumchapel, Glasgow.

2. The Claimant alleged in the ET1 that her employment had begun on 23 October 2015 and had ended on 14 July 2017.

3. The Claimant claimed in the ET1 that she was owed notice pay and holiday pay.

4. At Section 8.2 of the ET1 the Claimant narrated that *"I resigned from my position on 28 June 2017*", that "*I had a holiday booked for 2 weeks from 3 July 2017*", that "*the company holiday year started on 1 January and my holiday entitlement was 31 days including public holidays*" and that "*up until my date of leaving the company, I had taken 2 holiday days plus 6 bank holidays so I would have been entitled to 31 days divided by 52 weeks x 27 weeks to the date of my departure = 16 days – 8 taken leaving 8 to be paid*."

5. At Section 9.2 of the ET1 the Claimant alleged that she was owed £492.31 as holiday pay.

6. There was an indication in the ET1 that the Claimant was claiming that she had been discriminated against by the Respondent.

7. In a Form ET3 response received by the Tribunal on 13 October 2017 the Individual, Company or Organisation who or which had employed the Claimant was identified as being "*Stuart Gallone & Son*" with an address at 65 Crawford Drive, Glasgow. "*James Smith*" was identified as being the contact for that organisation.

8. Notwithstanding what was set out in that response form – (hereinafter, "*the ET3*") – the Respondent, Mr James Alexander Smith, now accepts that when employing the Claimant he acted as a sole trader who traded as "*Stuart Gallone & Son*" and that it was he who had been the Claimant's employer throughout a period which had begun on 23 October 2015 and had ended on 30 June 2017 and the ET3 and its content are deemed by the Tribunal to have been submitted by or on behalf of the Respondent.

9. At Section 4 of the ET3 the Respondent denied that the dates of employment given by the Claimant in the ET1 were correct. He confirmed that her employment had begun on 23 October 2015 but he contended that it had ended on 30 June 2017, his explanation being that "*Ms Cannon handed her notice on 28 June 2017 and left on 30 June 2017"*.

10. The Claimant had alleged in the ET1 that her gross monthly pay, i.e. pay before any PAYE tax or employee National Insurance deductions, was £1,333.00. The Respondent confirmed in the ET3 that those earnings details as given by the Claimant in the ET1 were correct.

11. The Respondent made it clear in the ET3 that he intended to defend the Claimant's claim and at Section 6.1 of the ET3 he set out, at length, what the effect of the Claimant leaving her employment with the Respondent on only

two days' notice being given by her to him had been. He stated that "*my firm was required to employ a temporary accountant to complete work started by her*" which "*was most disruptive and costly to my firm…"*

12. After some adjustment to ensure a date suitable to both parties, the Tribunal Office eventually scheduled a Final Hearing of the Claimant's claim to take place at Glasgow on 18 January 2018. The Final Hearing began as scheduled and was completed that day.

13. Neither party was represented at the Final Hearing on 18 January and although each of the Claimant and the Respondent gave evidence on her/his own behalf neither party called any other witness to give evidence to the Tribunal.

14. At commencement of the Final Hearing of her claim the Claimant confirmed that the ET1 reference to discrimination was an error on her part and that she was not and had never intended to claim that she had been discriminated against by the Respondent. The Claimant also confirmed that she was not pursuing her claim, as made in the ET1, that she was owed notice pay. She made it clear to the Respondent and to the Tribunal that her only continuing claim was that she was owed payment in lieu of accrued but untaken entitlement to paid holiday.

Findings in Fact

15. The Tribunal found the following facts, all relevant to the Claimant's claim, to be admitted or proved:-

16. Throughout the period which had begun on 23 October 2015 and had ended on 30 June 2017 the Claimant had been employed by the Respondent, initially as an Accountancy Assistant and latterly as a Trainee Accountant. She worked at the business premise at 16 Fitzroy Place, Glasgow from which, as a sole trader, the Respondent traded as "*Stuart Gallone & Son*".

17. Prior to 28 June 2017 the Respondent had entered into discussions with a third party with the intention of selling his accountancy practice to that third party but those negotiations had fallen throughout, a fact which led the Claimant to look for alternative employment.

18. Prior to 28 June 2017 the Claimant had reached agreement with a prospective employer to begin work with that prospective employer on or about 17 July 2017.

19. Prior to 28 June 2017 the Claimant had booked a holiday away from home. That holiday was scheduled to begin on 3 July 2017. The Respondent was aware that she intended to take two working weeks of her annual entitlement to paid holiday during that 3 to 15 July - (both dates inclusive) – period.

20. Early in the working day of 28 June 2017 the Claimant handed the Respondent a letter, itself dated 28 June, which was signed by her and the substantive wording of which was:-

> "*Please accept this letter as formal notification that I am leaving my position with Stuart Gallone & Son on the 30th June 2017.*
>
> *Thank you for the opportunities you have provided me during my time with the company."*

That letter – (hereinafter, "*the Resignation Letter*") – made no reference to the effective date of termination of the Claimant's employment being any date after 30 June 2017; to the contrary, it was unequivocal in stating that she was "*leaving my position*" with the Respondent "*on the 30th June 2017*".

21. The effective date of termination of the Claimant's employment with the Respondent was 30 June 2017.

22. The Claimant failed to give the Respondent the minimum notice of termination of employment envisaged by Section 86(2) of the Employment Rights Act 1996 as applying in a circumstance where there is no contractual requirement

to give any longer period of notice but he accepted the fore-shortened period of notice from the Claimant and facilitated the termination of her employment on the date intimated by her in the Resignation Letter, i.e. 30 June 2017.

23. At no time during the course of her employment with the Respondent had the Claimant been provided with a contract of employment or statement of terms and conditions of employment setting out, amongst other things, the period of notice to be given by her to terminate her employment or what her entitlement to paid holiday in any given holiday year was.

24. The Claimant had asked the Respondent for such a statement of terms and conditions of employment but had been told by him that she "*didn't need one*" because "*he wouldn't sack me*".

25. The Respondent accepts not just that he failed to provide the Claimant with such a statement of terms and conditions of employment but also that he deliberately declined to give her one even when she asked for it, his explanation to the Tribunal being, "*basically, we never really had the time to look at that side of our business.*"

26. In the absence of any written terms and conditions of employment setting out the period of paid holiday to which she was entitled the Claimant was unsure what her entitlement to paid holiday in any holiday year was but the Tribunal was satisfied from the evidence that it heard from her and from the Respondent that she was entitled to the statutory minimum number of days paid holiday which, for an employee like the Claimant who worked a five day week, was 28 days' paid holiday. The Respondent was insistent that she was not entitled to any more than that and in the absence of written terms and conditions the Claimant found herself unable to prove anything to the contrary and was prepared to concede that her entitlement was to 5.6 weeks', i.e. 28 days', paid holiday in the holiday year.

27. The holiday year applicable to the Claimant's employment with the Respondent was the year beginning on 1 January and ending on 31 December.

28. The Claimant accepted that during the course of the holiday year which ended on 31 December 2017 she had taken 28 days' paid holiday and that her claim for payment in lieu of accrued but untaken holiday relates only to the holiday year which began on 1 January 2017.

29. The Tribunal has found as fact that during the course of a holiday year the Claimant was entitled to a total of 28 days' paid holiday.

30. During the period which had begun on 1 January 2017 and had ended on 30 June 2017 the Claimant had taken 8 days' paid holiday. Included within that 8 days' period there had been 6 local or statutory holidays. The other 2 days – (in fact 2 x ½ day plus 1 full day) – were days which the Claimant had selected and taken as paid holiday.

31. The effective date of termination of the Claimant's employment having been 30 June 2017, the entitlement to paid holiday which had accrued to the Claimant during that 1 January 2017 to 30 June 2017 period was one half of her annual entitlement to paid holiday, i.e. 14 days, of which, during the course of her employment, the Claimant had taken and been paid for 8 days.

32. As at the effective date of termination of the Claimant's employment, 30 June 2017, the balance of her accrued – (but not taken) – holiday entitlement was 6 days, not the 8 days argued by her in the ET1.

33. Based on her annual salary of £16,000 per annum and the fact that she worked a 5 day week the gross amount due to the Claimant in lieu of the accrued but untaken holiday to which she was entitled as at 30 June 2017 was £369.23.

34. The Respondent does not deny that as at 30 June 2017 the Claimant had accrued but had not taken 6 days of the 14 days' paid holiday to which she was entitled in respect of the period of the holiday year worked by her – (i.e. 1 January to 30 June) - but when giving evidence has candidly sought to

justify his deliberate decision not to pay her in lieu of those accrued 6 days' untaken holiday by referring to his argument that the Claimant had failed to provide him with "proper" notice and that as a consequence he was faced with having to employ temporary staff to cover the period when he would otherwise have expected her to be at work.

35. That attempt at justification does not detract from the fact that the Respondent had made a deduction from wages properly payable to the Claimant. He admits that he made the deduction and that he did so deliberately.

36. The Claimant had never signified in writing any agreement or consent to the making of any deduction from her wages and no such deduction was required or authorised to be made by the Respondent by virtue of any statutory provision or any relevant provision of the Claimant's contract.

37. No part of the £369.23 due to the Claimant in lieu of accrued but untaken holiday has been paid to her since she left the Respondent's employment on 30 June 2017, this despite attempts made by the Claimant directly to the Respondent and via ACAS to obtain payment of that outstanding payment in lieu of accrued but untaken holiday.

38. The Tribunal has been provided with no information which enables it to calculate what the net sum due to the Claimant – (i.e. net of deduction of PAYE tax and employee National Insurance contributions) - in respect of accrued but untaken holiday entitlement is. But the Tribunal records that it is agreed between the parties that any sum awarded to the Claimant under this head of claim as being payable by the Respondent to the Claimant, although based within this Judgment on gross-salary-equivalence, is subject to PAYE tax deduction at source.

The Issues

39. The Issues identified by the Tribunal as being relevant to the determination of the Claimant's claim were:-

- What the effective date of termination of the Claimant's employment with the Respondent had been.

- What the sum due by the Respondent to the Claimant as at the effective date of termination of her employment as payment in lieu of accrued but untaken holiday entitlement was.

- Whether the Respondent had made a deduction from the Claimant's wages and, if so, whether such deduction was a deduction required or authorised to be made by virtue of a statutory provision or a relevant provision of the Claimant's contract or one to which the Claimant had previously, in writing, signified her agreement or consent.

- What the sum was outstanding and still due to the Claimant by the Respondent as at the date of presentation of the ET1 had been.

- What the sum outstanding and still due to the Claimant as at the date of the Final Hearing of the Claimant's claim is.

The Relevant Law

- The Employment Rights Act 1996, particularly Sections 1, 13, 27 and 86(2).

- The Working Time Regulations 1998, particularly Regulation 14(2) and (3).

- The Employment Act 2002, particularly Section 38.

Discussion

40. The monetary award sought by the Claimant as outstanding holiday pay is relatively low but the legal basis of her claim and, generally, determination of

the issues involved requires the Tribunal to consider not only the underlying law but also, (firstly), whether – (as she alleges is the case) – the Claimant's employment with the Respondent ended on 14 July 2017 or on any earlier date, (secondly), the arithmetical calculation of what sum was due to the Claimant as at the effective date of termination, or became payable to her because of the termination of her employment, and (thirdly), what sums have been paid to the Claimant since the effective date of termination and/or since the date of presentation of the ET1.

41. Credibility is not an issue which has been significant to the Tribunal's determination of the Claimant's claims.

42. There is clearly a difference of opinion between the parties as to what the effective date of termination of the Claimant's employment had been. But other than that there is very little dispute between the parties about what the Claimant was, in principle, entitled to receive by way of payment in lieu of accrued but untaken holiday entitlement and there is no dispute about the fact that the Claimant had not been paid that sum at any stage either prior to presentation of the ET1 or prior to the Final Hearing of her claim.

43. In terms of Section 13 of the Employment Rights Act 1996 – (hereinafter, "*ERA 1996*") - an employer is not permitted to make a deduction from wages of a worker employed by him unless the deduction is required or authorised to be made by virtue of a statutory provision or a relevant provision of the worker's contract or is a deduction to which the worker has previously signified her or his agreement in writing.

44. Section 27 of the ERA 1996 defines *"Wages*" as including holiday pay whether payable under the employee's contract or otherwise.

45. In this case the Claimant had no contract; the Respondent had refused to give her one. By definition, therefore, any deduction could not have been authorised by a relevant provision of her contract. The deduction was neither required by statute nor authorised by statute. The Claimant had never, in

writing – (or otherwise) - , signified her consent to the making of the deduction. It was an unauthorised deduction deliberately made the Respondent in complete breach of the provisions of Section 13 of ERA 1996.

46. The fact that the Respondent felt aggrieved at not having been given the statutory minimum notice by the Claimant, let alone the very much longer period of notice – (one month) - which he insisted was "customary" within the accountancy profession, neither justified nor excused the Respondent's deliberate decision to make an unauthorised deduction from the Claimant's wages.

47. Put simply, the effective date of termination of the Claimant's employment was the date upon which the contract between her and the Claimant came to an end.

48. The Claimant gave the Respondent notice on 28 June 2017 that her employment would end on 30 June 2017.

49. The terms of the Resignation Letter were unequivocal and unambiguous and whatever the Claimant may have intended that wording to infer the Resignation Letter can only be interpreted as meaning – (and was understood by the Respondent to mean) – that the Claimant's employment was to end on 30 June 2017 and not any later date.

50. The Tribunal was satisfied that the particular phraseology used by the Claimant in the Resignation Letter would have been understood by any reasonable employer to have meant what it said.

51. The Tribunal was satisfied, too, that although the Respondent might well have felt aggrieved by being given, at most, nearly 3 days' notice of termination of his employee's employment he accepted that short notice and facilitated the termination of her employment on her preferred termination date, 30 June 2017.

52. The Tribunal has found that the effective date of termination of the Claimant's employment was 30 June 2017 and not any later date.

53. The Tribunal has considered what payment was due to the Claimant as payment in lieu of accrued but untaken holiday entitlement.

54. The Claimant had taken a total of 8 days' paid holiday during the period which had begun on 1 January 2017 and had ended on 30 June 2017.

55. Assuming a 30 June 2017 effective date of termination, the Claimant had accrued but had not taken some of the paid holiday to which she was entitled in which case, in terms of Regulation 14(2) and (3) of the Working Time Regulations 1998, she was entitled to receive payment in lieu of that accrued but untaken holiday entitlement.

56. The Tribunal was satisfied that as at the effective date of termination, 30 June 2017, the Claimant was still entitled to accrued but untaken paid holiday, an entitlement conferred on her by the Working Time Regulations 1998, and that it is appropriate to assess compensation due to the Claimant as including a payment in lieu of that accrued entitlement to paid holiday.

57. The Tribunal was satisfied that as at the date of termination of her employment, and still as at the date of presentation of the ET1 to the Tribunal, and still as at the date of the Final hearing of the Claimant's claim, the gross amount outstanding and due to be paid by the Respondent to the Claimant in respect of payment in lieu of accrued but untaken holiday was £369.23.

58. The Tribunal was satisfied from the evidence that it heard, including the admissions made by the Respondent, that at no time during the course of the Claimant's employment with him had the Respondent sought to comply with Section 1 of the Employment Rights Act 1996 by providing the Claimant with a written statement of particulars of employment. To the contrary, he had deliberately chosen not to provide the Claimant with a written statement of particulars of her employment with him.

59. By failing to provide the Claimant with a written statement of particulars of employment the Respondent had breached Section 1 of ERA 1996.

60. Section 38 of the Employment Act 2002 requires Tribunals to award compensation to an employee where, amongst other possibilities, a successful claim in respect of unauthorised deductions has been made and the employer was in breach of its duty to provide full and accurate written particulars under Section 1 of the ERA 1996.

61. This is a case where not only was the Claimant not provided with full and accurate written particulars as required by Section 1 of ERA 1996 but a case where she asked for and was refused those particulars and in respect of which the Respondent has candidly admitted that he knew he had not provided such particulars. His only explanation to the Tribunal was, "*basically, we never really had the time to look at that side of our business*".

62. That being the case, the Tribunal considers that the Respondent's refusal to provide the Claimant with full and accurate written particulars of her employment- (as required by Section 1 of the ERA 1996) – amounted to a deliberate and flagrant breach by him of that Section 1 of that Act and, as it has discretion to do, has determined that it is just and equitable to award not the 2 weeks' pay that is the minimum envisaged by Section 38 of the Employment Act 2002 but the "*higher amount*" of 4 weeks' pay envisaged by that section of that Act as permissible and as being within an Employment Tribunal's discretion to award.

63. Bearing in mind the Claimant's salary of £16,000 per annum that award under Section 38 of the Employment Act 2002 of 4 weeks' pay equates to £1,230.77.

64. The Respondent is ordered to pay that sum, £1,230.77, to the Claimant in addition to the £369.23 already ordered to be paid to her as payment in lieu of accrued but untaken holiday.

65. **The total awarded to the Claimant, i.e. the total ordered by the Tribunal to be paid to the Claimant is £1,600.**

Employment Judge: C Lucas
Date of Judgment: 05 February 2018
Entered in register: 09 February 2018
and copied to parties