



**EMPLOYMENT TRIBUNALS (SCOTLAND)**

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**Case Nos: S/4100635/2019 & S/4103315/2019**

**Held in Edinburgh on 4 April 2019**

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**Employment Judge: Ms Amanda Jones (sitting alone)**

15 Michael Elliot

Claimant  
Unrepresented

D.E. Fencing Limited  
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Respondent  
Represented by David Elliot Director

**JUDGMENT OF THE EMPLOYMENT TRIBUNAL**

25 1. The respondent breached the contract of employment of the claimant by failing to pay him a week's lying time and accrued holiday pay on termination of his employment and the respondent is ordered to pay to the claimant the sum of £437.76 net.

30 2. The claimant breached his contract of employment by failing to provide the required contractual notice of one week to the respondent. However, the respondent did not suffer any losses as a result of the claimant's breach.

**REASONS**

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**INTRODUCTION  
E.T. Z4 (WR)**

1. The claimant brought a claim alleging that he was not paid a week's lying time when he left the employment of the respondent. He also alleged that he had not been paid in lieu of outstanding holiday entitlement.

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2. The respondent lodged a counter claim alleging that the claimant had acted in breach of contract by failing to resign with proper notice. The respondent sought damages for the losses it said had been suffered as a failure of the claimant's breach. The respondent's position was that it had withheld the week's lying time to which it accepted that the claimant was entitled in order to offset this against the losses suffered. The respondent denied that the claimant was entitled to any payment in lieu of holidays.

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### ISSUES TO BE DETERMINED

3. The Tribunal was therefore required to determine the following issues:

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- Did the claimant breach his contract of employment by failing to give the required notice of termination of his employment to the respondent?

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- If the claimant was in breach of contract, did the respondent suffer damages as a result of his breach of contract, and

- Was the claimant entitled to receive accrued holiday pay at the date of termination of his employment?

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### FINDINGS IN FACT

4. Having heard evidence from the claimant and Mr Elliot on behalf of the respondent, the Tribunal made the following findings in fact:

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5. The claimant was employed as a ground worker by the respondent from June 2017 until 15 November 2018 and worked on a contract between the respondent and the local Council.

6. The claimant worked with one other employee of the respondent at that contract.
- 5 7. The claimant took this role on a short-term basis until another employee passed his driving test.
8. The duties of the claimant and his colleague were directed by a council employee who was also the father of the claimant's colleague.
- 10 9. The claimant was paid £9 per hour and was paid £360 gross and £288 net per week.
- 15 10. The claimant had worked a week's lying time at the commencement of his employment and the respondent accepted that it had not paid the claimant this amount on termination of his employment.
- 20 11. Although a statement of terms and conditions was sent to the claimant, he did not sign or return that statement. The statement required that an employee give a week's notice of termination of employment for each year of service.
- 25 12. The statement made reference to holiday entitlement - "Holiday pay is subject to one years full service with the company this is in accordance with the Employment Act 1972. Holidays are 2 weeks in the summer, 2 weeks Christmas and New Year. These holidays will not be paid if the employee has left the company."
- 30 13. The claimant did not regularly receive pay slips but his wages were paid into his bank account on a weekly basis.
14. The claimant had been employed for 17 months at the date of his dismissal.
15. The respondent calculated annual leave entitlement on a calendar basis.

16. The claimant took and was paid for 22 days leave during the last calendar year of his employment.

5 17. On the basis of the date of his termination of employment, he was entitled to 24.6 days leave in 2018.

10 18. The claimant advised his colleague on 12 November 2018 that he would be finishing up work at the end of that week as the colleague had now passed his driving test. On Friday 16 November, the claimant gave his colleague the keys to the works vehicle and did not attend work further thereafter.

15 19. When the claimant contacted the respondent to find out why he had not been paid his lying time on termination of his employment, he was advised that this was because he had not given proper notice to the respondent.

20 20. A replacement was found for the claimant in the week after the termination of his employment.

### **OBSERVATIONS ON THE EVIDENCE**

25 21. The Tribunal heard from the claimant and, on behalf of the respondent, Mr David Elliot. It was clear that there was a significant degree of bad feeling between both men. It was therefore difficult for the Tribunal to determine the exact details of what had taken place.

30 22. The main dispute between the parties was whether in advising the claimant's colleague that he was leaving at the end of the week, proper notice had been served by the claimant. It was the claimant's position that his colleague was in effect the foreman as the only other employee of the respondent on site. The respondent's position was that the Council employee (who was the father of their employee) was the foreman on site and that the claimant ought to have advised either Mr David Elliot or Mr Steve Elliot (who was the claimant's nephew) that he was giving notice of termination of his employment.

23. There was also a dispute regarding when a replacement for the claimant was recruited. The claimant said that he was aware it was a few days after he had left, whereas the respondent said that was simply hearsay, and that it was later. However, the respondent also indicated that he was not involved in recruiting staff.

## SUBMISSIONS

24. The parties made brief submissions summarising their positions.

## DISCUSSION AND DECISION

25. It was a matter of agreement between the parties that the claimant had not been paid the net sum of £288 representing the pay for his first week of work which had been withheld by the respondent. This amounts to a breach of contract by the respondent.

26. The Tribunal concluded that the claimant had not given proper notice to the respondent of the termination of his employment. While giving notice orally can be an effective intimation of notice, the Tribunal concluded from the evidence that the claimant had simply indicated to his colleague that he was finishing up at the end of the week. The Tribunal concluded that there was no actual intention to give notice of the termination of his employment to his employer. The claimant's actions were therefore in breach of his contract of employment.

27. However, the Tribunal was not satisfied that the respondent had suffered any losses as a result of the claimant's breach of contract. Although the respondent sought to argue that it had lost money, no documentary evidence of those losses was provided. Mr David Elliot in his evidence suggested that the company lost a week's employment amounting to £720 during the week when the claimant would have been working his notice. However, no evidence of invoices or other documentation demonstrating such losses was

produced. Further, it was clear that the sum claimed included the wages which would have otherwise been paid to an employee. There was no evidence to suggest that the work which required to be done would not be carried out at another time. In addition, the respondent sought to recover a further week's losses of £720 on the basis that it was said that it took a further week to find a replacement for the claimant.

28. The Tribunal accepted the evidence of the claimant that a replacement was found a few days after the termination of his employment. The claimant named the individual and said that he had been informed of this by his former colleague. While the respondent is correct to characterise such evidence as hearsay, the Tribunal preferred the evidence of the claimant in this respect to that of the respondent. The respondent's evidence was contradictory in that Mr David Elliot indicated that he was not involved in recruitment or personnel matters but also knew when the replacement was recruited.

29. In any event, the Tribunal concluded that the respondent could only have incurred losses over the period during which the claimant would have worked his notice, which was a week. As the Tribunal was not satisfied that the respondent did in fact incur losses during this period as a result of the claimant's breach of contract, no damages are awarded to the respondent in respect of the claimant's breach of contract.

30. Turning to the issue of holiday pay, the Tribunal accepted the respondent's evidence as to the days on which the claimant had taken holidays and accepted that he was paid on those days. However, the Tribunal concluded that the claimant was entitled to a further 2.6 day's pay in respect of accrued leave which had not been taken.

31. Although the letter of terms and conditions which was provided to the claimant seemed to suggest that no holiday pay would be paid to the claimant if he left the company, the Tribunal was satisfied that the claimant was entitled to be paid in respect of accrued but untaken holiday pay.

32. Therefore, the claimant is entitled to be paid a total sum of £437.76 by the respondent calculated as follows.

A week's lying time £288 net

2.6 day's holiday pay £149.76 net (being £288/5 x2.6)

5 Employment Judge: Amanda Jones  
Date of Judgement: 25 April 2019  
Entered in register: 01 May 2019  
And copied to parties