



## EMPLOYMENT TRIBUNALS (SCOTLAND)

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**Case No: 4101629/2019**

**Preliminary Hearing Held at Dundee on 3 May 2019**

**Employment Judge I McFatridge**

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**Mr D Luchoomun**

**Claimant  
In person**

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**Perth & Kinross Council**

**Respondents  
Represented by:  
Ms M McLaren  
Solicitor**

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### NOTE

The hearing in this case took place on 3 May 2019. At the end of it I adjourned  
30 for a short time and then issued an oral judgment to the effect that the claim was  
dismissed on the grounds that the Tribunal had no jurisdiction to hear it since it  
had been lodged out of time. The claimant requested written reasons and these  
are now provided below. These include and expand upon the reasons which I  
gave at the hearing.

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### REASONS

1. The claimant submitted a claim to the Tribunal in which he claimed that he  
40 had suffered an unlawful deduction of wages. It was his position that his  
employers had underpaid him by £602.21 in his salary which he received at

E.T. Z4 (WR)

the end of November 2017. The early conciliation certificate lodged by the claimant indicated that he had commenced early conciliation on 27 December 2018 and the certificate had been issued by ACAS on 27 January 2019. The claimant's ET1 was received on 4 February 2019.

5 The respondents submitted a response in which they denied the claims. Essentially their position was that the claimant had been paid correctly in terms of his contract of employment and there had been no unlawful deduction of wages. They set out the background which was to the effect that the claimant had worked for Aberdeenshire Council and had then

10 moved to a job with Perth & Kinross Council during term time. Although teachers' pay is negotiated nationally it would appear that there are differences in the way that Aberdeenshire Council and Perth & Kinross-shire Council calculate pay of an employee who leaves or commences midway through a term. They speculated that this may be the reason why

15 the claimant considered that he had been underpaid. If he had then this was not due to any fault on the part of Perth and Kinross Council. The respondents requested a preliminary hearing on whether or not the claim was time barred. They also requested that the preliminary hearing deal with their request for a Deposit Order in terms of Rule 39 on the basis that the

20 claim had little or no reasonable prospect of success.

2. At the hearing the claimant gave evidence on his own behalf. Both parties then made submissions. On the basis of the claimant's evidence and the documents provided by the parties I made the following findings in fact

25 relevant to the issue of time bar.

### **Findings in Fact**

3. The claimant is a teacher of Physics. He worked as a Physics Teacher at Portlethen Academy and resigned from his employment there with effect

30 from 12 November 2017. He started work for the respondents the following day as a teacher of Physics at Perth. Scottish teachers' salaries are fixed nationally and the claimant's salary both with Aberdeenshire Council and with Perth & Kinross Council was £35,763 per annum. On 8 November 2017 the claimant was provided with a statement of employment particulars confirming this (R2.4). This confirms at section 2 that

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5 “Your salary will be in accordance with the provisions contained in the scheme of salaries and conditions of service of teachers as agreed by the Scottish Joint Negotiating Committee for teaching staff in school education.”

- 10 4. On 26 November 2017 the respondents wrote to the claimant. The letter was lodged (R2.5). They confirmed that an adjustment of salary would be required in order to ensure the claimant had accrued sufficient leave entitlement to cover the year. Information was enclosed detailing how the adjustment had been calculated to reflect his date of commencement of employment with Perth and Kinross Council. It goes on to state

15 “As previously advised, if you have left a teaching post with another employer you should have received a balance of leave adjustment on departure. Perth & Kinross has no obligation for any previous calculations undertaken. However if you believe your adjustments to be incorrect you should contact your trade union.

20 Further information is available by visiting [www.snct.org.uk](http://www.snct.org.uk)”

- 25 5. The claimant received his first month’s salary from the respondents on 27 or 28 November 2017. The pay slip was not lodged but the claimant’s position is that he received £255.35 net. The claimant also received at around this time a payment from Aberdeenshire Council. Again no pay slips were lodged but it was the claimant’s position which, for the purposes of this hearing, I accept, that he expected to receive £2299.82 the total salary he received from both Councils was £1697.61 which meant that as he saw it there was a shortfall of £602.21.

- 30 6. He discussed matter with his immediate colleagues who advised they could not understand it. The claimant then contacted the respondents’ payroll department and contacted his union. On 5 December 2017 Leighanne Byrne of the respondents’ payroll department e-mailed the claimant setting out the claimant’s position. For the sake of completeness it is probably as well to quote this e-mail in full:
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“Good Morning Dharmadeo

Thank you for your email below. With reference to your salary query, I write to clarify the basic pay calculation Perth & Kinross Council has adopted since teacher’s terms and conditions were revised in August 2011. The principle of the basic pay calculation we carry out also complies with the National Pay Specification for Teachers Leave & Pay documents, which will be written into the handbook next August. There was an intention for it to be included in August this year due to inconsistencies of calculation methods between the 32 Scottish Councils but unfortunately was delayed.

As per the SNCT handbook, the salary year runs from the 1st of August to 31st of July. The leave year runs from the 1st of September to 31 August. In order to align salary payments to reflect the working year (195 days) and accrued leave due (40 days), Perth and Kinross Council carry out an academic session calculation (ie 14.08.17 – 12.08.18)

The daily rate of pay for teachers is 1/235th of the annual salary rate (Part 2 Section 1, Para 1.8 of the SNCT handbook). For each day worked in the school session all teachers accrue paid leave on a 0.20513 basis.

The annual leave entitlement for a full time teacher is 40 days – public holidays are included in this entitlement. Any days which fall outwith the working year and allocated school holidays, excluding Saturday and Sunday’s are regarded as school closure days (non payment days).

As agreed at local level our school holidays in this session are:-

Vacation	Numbers of Days Annual Leave	Dates
October	5	09.10.18 – 13.10.17
Christmas	10	25.12.17 – 05.01.18
Easter	11	30.03.18 – 13.04.18
Summer	14	29.06.18 – 11.07.18 06.08.18 – 10.08.18
Total	40	

School Closure days in this session are:-

Vacation	Numbers of Days Annual Leave	Dates
October	5	16.10.17 – 20.10.17
February	2	15.02.18 – 16.02.18
May	1	07.05.18
Summer	17	12.07.18 – 03.08.18
Total	25	

5 By applying the above terms and conditions your salary for session 2017/2018 equates to £25676.04.

There are 140 working days from your start date to the end of the current academic session.

#### **Breakdown of Basic Salary**

140 Days/235 Days x £35763 = £21305.62

10 **Breakdown of Accrued Leave Payment**

140 Days x 0.20513 = 28.7182 Days

28.7182 Days/235 Days x £35763 = £4370.42

#### **Total Payment Due for Current Academic Session**

15 £21305.62 + £4370.42 = £25676.04 (this figure was detailed in the basic pay calculation sheet previously sent to you)

The SNCT handbook stipulates an employee should be paid their annual salary in equal instalments where possible. To allow you to be paid 1/12th of your salary for future months, your first payment requires to be reduced.

20 You have not accrued sufficient leave with Perth & Kinross Council to be paid throughout the summer, therefore your salary is adjusted in the first month and 1/12ths paid thereafter rather than paying the number of days worked in the first month and having to reduce your salary in the summer months. There is reference to this in your Statement of Employment Particulars Point 4 Annual Leave

25 'Where a teacher is newly appointed to the Council or a new post within the Council after the leave year has commenced and

insufficient leave has been accrued in that leave year an adjustment to salary will be made.'

I have included a link below to the National Specification document which confirms how a new start and leaver basic pay calculation is carried out. You will note however that this is not mandatory until next year as indicated in my first paragraph (refer to 2<sup>nd</sup> link)

[links provided]

I appreciate your frustration and upset at this outcome. I wish to reiterate however that you have not experienced a pay cut from Perth & Kinross Council. We can only pay you for the working days and accrued leave you are due. Unfortunately your terms and conditions of employment as a teacher are not based on the number of calendar days in the month therefore the calculation you have quoted below ie  $18/30 \times \text{£}2980.25$  cannot be achieved.

Unfortunately, I am not in a position to comment on the basis of payment made by your previous employer. May I suggest you contact them directly to request a salary breakdown?

For reference, I have provided a breakdown of a leaver calculation had an employee left Perth & Kinross on 12.11.17 to evidence that a full year salary is achieved by applying the said calculations.

**First Attachment** – You will note the leaver calculation I have provided indicates a gross payment due of £2636.39 (terminating on 12.11.17)

**Second Attachment** – The new starter calculation you were provided indicated a gross payment due of £343.91 (commencing on 13.11.17)

By adding these figures together this equates to a normal 1/12th

We provide a copy of the basic pay calculation to all new starts to highlight the impact of commencing after the start of an academic session. This was requested by the Scottish Negotiating Committee for Teachers due to the level of queries received when an employee moves from one local authority to another. Should Aberdeen confirm that no further monies are due from them, we of course do not want you to suffer financial detriment. We cannot pay you any more than the payment you are entitled to, however, we could raise an emergency manual payment for the approximate net difference which

would then be recoverable from your salary over the remainder months of this academic session.

If you wish to take up this offer, we would require you to sign a deduction mandate before the additional monies could be released into your bank account.

I hope this information assists with your query and I apologise for the upset you have experienced.”

7. The claimant contacted his union again. They contacted the respondents and were provided with a copy of this letter. At some point in December they advised the claimant that they could not take the matter any further. They advised that the union had been involved in negotiating and agreeing these arrangements nationally. The claimant asked if they were in a position to provide him with free legal advice and they said that they did not provide free legal advice.
8. The claimant thereafter did nothing until he returned to work after the summer holidays in late August/early September 2018. It was the claimant's position in evidence that he was waiting until the new SNCT Handbook was produced since he hoped that this might provide some assistance to individuals in his position.
9. In or about September 2018 the claimant went on to the CAB website seeking advice about the issue. He followed a link from that website to a website called Advice Scotland. This website has an online chat facility and the claimant chatted online with an adviser. As a result of that he contacted ACAS. He contacted ACAS in early September 2018. He did not seek to start early conciliation at that point. At around this time ACAS advised him that a Tribunal claim had to be submitted within the three month limit. The claimant then carried out some further online research and believed that in certain circumstances it was possible for the three month time limit to be extended. He spoke to the case worker at ACAS again and she agreed that he could start early conciliation. Early conciliation started on 27 December and concluded on 27 January. The claimant submitted his ET1 online himself. He was not assisted by anyone in completing it.

10. The claimant was not ill or in any way incapacitated during the three months after the end of November 2017. One of the reasons he did not wish to go to a Tribunal at that stage was that he was still employed by the respondents and did not wish to raise proceedings. He believed that as a private citizen he should be able to rely on those in power to sort matters out so that what he saw as an injustice should be rectified.

### **Matters Arising from the Evidence**

11. It was clear to me that the claimant has a powerful feeling of injustice which to some extent drove his evidence. He feels that he has been put in a situation where he has lost money through no fault of his own. I accepted his evidence regarding the timeline of events. I considered that his evidence regarding his motivations for not doing anything for a period of around eight months between late December and August to be unreliable. The claimant's position in evidence in chief was that from his communications with the payroll department in December he had formed the view that the GPCS would be addressing the matter in their new handbook issued in August 2018. His position was that it was only when he saw that the new handbook had been issued and his position was not addressed that he decided he should try and take matters further. I do not see how any-one could take that from the terms of the letter which was sent to him.

### **Discussion and Decision – Time Bar**

12. This case relates to a single deduction from wages which occurred when the claimant received his pay for the month of November 2017 from the respondents. The claimant was unclear as to the date he received his pay but indicated it would have been two or three days prior to 30 November. At the latest it would therefore have been 28 November.
13. The time limit for making a claim in relation to an unlawful deduction of wages is contained in section 23 of the Employment Rights Act 1996. The claimant required to make his claim on or before 27 February 2017 in order



to meet the initial three month time limit. This could potentially have been extended had the claimant applied for early conciliation prior to 27 February 2017 but the claimant did not do this. Instead the claimant did not start early conciliation until 27 December, some 10 months later and his claim was not lodged until 4 February almost a year after the initial time limit had expired.

14. Section 23 goes on to state

“Where the employment tribunal are satisfied that it was not reasonably practicable for a complaint under this section to be presented before the end of the relevant period of three months the Tribunal may consider the complaint if it is presented within such further period as the Tribunal considers reasonable.”

15. The test under section 23 is similar to the test for extending the time limit for claims of unfair dismissal under section 111. There is a substantial body of case law where the higher courts have provided guidance to Tribunals on this test. The case of ***Palmer & Saunders v Southend-on-Sea Borough Council [1984] IRLR 119 CA*** indicates that the meaning of the words reasonably practicable lies somewhere between reasonable on the one hand and reasonably physically capable of being done on the other. The best approach is to read practicable as the equivalent of feasible and to ask was it reasonably feasible to present the complaint to the Employment Tribunal within the relevant three months? Having considered the claimant’s explanation it appeared to me that there was really nothing which prevented the claimant from presenting his complaint to the Tribunal within the relevant three months. The claimant’s position in evidence was that there were really two reasons he did not explore the matter further before August 2018. The first of these was his natural reluctance at wishing to raise proceedings against his employers. The second was that he believed in some way that publication of a new edition of the SNCT Handbook in August 2018 would assist his cause.

16. It was entirely unclear to me from the claimant’s evidence just exactly how he believed the second reason to be the case. He accepted he had

received the e-mail from the respondents' payroll department at the beginning of December which clearly set out their position. He also accepted that this e-mail had been copied to his trade union adviser and that his trade union adviser had told him there was nothing further the union could do.

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17. To paraphrase the letter from payroll what it says is that when an employee changes authorities mid-way through a term both the authority he is leaving and the authority he is joining require to carry out a calculation so as to ensure that the correct payments are made. They explain in some detail how Perth & Kinross Council carry out this calculation and state that it is in accordance with a "national specification document" which they provide a link to. They say that difficulties do arise because currently some local authorities do things differently but express the view that the matter will be resolved in August 2018 once the method of calculation contained in the National Specification document, which Perth & Kinross have been applying since 2011, is incorporated into the NJCT Handbook. They even helpfully provide a calculation showing how much they believe Aberdeenshire Council should have paid the claimant had they applied the method of calculation which is contained within the national specification document.

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18. There is nothing in this letter which could possibly give anyone the impression that once the new handbook was produced they would have their situation addressed and any pay anomalies retrospectively repaid. It would have been absolutely clear to the claimant that he would not be paid any further sum for November by Perth & Kinross Council. If he disputed this then he would require to go to Tribunal. It is clear that he is an intelligent man and possessed the wherewithal to look online, obtain advice and submit a claim form which is of course what he eventually did the following February.

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19. The respondents' representative helpfully referred to the case of ***Machine Tool Industrial Research v Simpson [1988] ICR 558*** as authority for the proposition that if a claimant is relying on a change of facts then this can only be relevant if for the claimant not to be aware of the factual basis on

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which to bring a claim at the outset of the period and then be aware of such facts at a later stage. In this case the first point is that the change in the claimant's perception of the facts was insufficient in that he was aware in December that he had not been paid, furthermore even if I were to accept that he had genuinely some belief that problems were going to be addressed by the publication of a new version of the handbook in August such a belief was entirely unreasonable and unjustified.

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20. It is clear from the evidence that it was eminently feasible for the claimant to raise his claim within the initial three month period and his application for an extension of time falls at this hurdle.

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21. Given that I have found it was reasonably practicable for the claimant to have submitted his claim within the initial period of three months I strictly speaking do not require to consider whether or not he lodged the claim within a reasonable time thereafter. For the sake of completeness however I should say that even if, contrary to the evidence, I had come to the view that it was not reasonably practicable for the claimant to lodge his claim within the initial three months I would have no hesitation in finding that he did not lodge it within a reasonable time thereafter. The claimant has no real explanation for the period of time which elapsed between September when he visited the CAB website and spoke to Advice Scotland and ACAS and 27 December when he began early conciliation. This delay by itself would be unreasonable.

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22. Given that the claim is time barred the Tribunal has no jurisdiction to hear the claim and that is the end of it. I should say however that as I indicated to the claimant at the hearing even if I had found that the Tribunal had jurisdiction to hear the claim I would have had no hesitation in ordering a Deposit Order under section 39 in this case. It is clear to me that the claim has little reasonable prospect of success. I do appreciate that the claimant is the victim of what appears to be an injustice. He has worked for the whole scholastic year where he is supposed to receive a certain salary. Because of the fact that he moved from one local authority to another during term time he has not been paid the full salary which he anticipated. It is clear

that this is due to the unfortunate circumstance whereby at least in 2017  
Aberdeenshire Council calculated vacation pay due to him as a leaver on a  
different basis from the way that Perth & Kinross Council calculated it on  
the basis of him as a new start. I can quite see why he is aggrieved. That  
5 having been said the Tribunal only has jurisdiction to deal with the case in  
front of it. The claim which he has raised is a claim that Perth & Kinross  
Council made an unlawful deduction from his wages. Their position which  
the claimant has not controverted in any way is that they calculated how  
much he was due as a new start on the basis of the SNJT approved  
10 scheme. They had been operating this since 2011. It is their position that  
this is the proper way of making the calculation and that the problem which  
has arisen in the claimant's case is due to the fact that his previous  
employer calculates things differently. It is not clear to me whether the  
claimant would or would not have any remedy against Aberdeenshire  
15 Council but what is absolutely clear to me is that given the terms of his  
contract of employment and given what appeared to be the terms of the  
SNJT guidance in the national specification document he does not have any  
claim against Perth & Kinross Council. Their position is that they have paid  
him in terms of their contractual obligation and at the end of the day the  
20 claimant has not provided any sensible argument as to why this is not the  
case. He says they ought to have calculated his pay on a different basis  
but they state in the letter why his calculation is untenable and as I say the  
claimant has not produced anything to controvert this. In those  
circumstances it is my view that the claim would have had little reasonable  
25 prospect of success even if I had found that the Tribunal had jurisdiction to  
hear the claim.

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35 **Employment Judge:**  
**Date of Judgment:**  
**Date sent to parties:**

**Ian McFatridge**  
**12 June 2019**  
**12 June 2019**