



EMPLOYMENT TRIBUNALS (SCOTLAND)

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Case No: 4107730/2019

Final Hearing Held in Dundee on 26 November 2019

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Employment Judge A Kemp

15 **Mr R Mason**

**Claimant
Represented by:
Mr D McCusker
Solicitor**

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Daniel Hoey

**Respondent
No appearance**

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JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The Judgment of the Tribunal is that

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- (1) the claimant's employment was terminated by the respondent summarily in breach of contract**
- (2) the respondent made unlawful deductions from the wages of the claimant**
- (3) the respondent did not provide written particulars of employment**

(4) the claimant is awarded the following sums payable by the respondent:

(i) FIVE HUNDRED AND TWENTY ONE POUNDS AND SEVENTY SIX PENCE (£521.76) as damages for breach of contract

5 **(ii) THIRTEEN THOUSAND FOUR HUNDRED AND TWENTY SEVEN POUNDS AND EIGHTEEN PENCE (£13,427.18) as unlawful deductions from wages, subject to any appropriate statutory deductions for income tax and national insurance contributions, apportioned as follows:**

10 **(i) October 2017 – 31 March 2018 £3,680.20**

(ii) 1 April 2018 – 31 March 2019 £8,681.78

(iii) 1 April 2019 to 30 April 2019 £1,065.20

(iii) SIX HUNDRED AND SIXTEEN POUNDS (£616) as compensation for the failure to provide written particulars of employment.

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20 **REASONS**

1. This claim called for a Final Hearing on 26 November 2019. The claimant attended with his witness and solicitor, but there was no appearance made by the respondent. An attempt was made to contact him by telephone around 25 10am, when the hearing ought to have commenced, without success, but a message was left on his mobile telephone. After that was reported to me the hearing commenced, with evidence heard until around noon.

2. There was then a break over lunch and to allow the claimant's solicitor to 30 prepare his submissions, when I was informed that the respondent had called the tribunal at around 11.15am to state that his solicitor had advised him not to attend the hearing, but to await the decision made following it. Although

the clerk explained to him that there would be no evidence from him to consider, he confirmed that he would not be attending the hearing.

Evidence

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3. A single document was produced by the claimant, being an excel spreadsheet which was referred to in the schedule of loss that had been prepared as a "table". Evidence was given orally by the claimant, and by his father Mr Roderick Mason, a retired police officer of 32 years' service.

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Issues

4. The Tribunal identified the following issues as arising in the case:
 - (i) Was the respondent in breach of contract in terminating the contract between the parties summarily?
 - (ii) Did the respondent make unlawful deductions from the wages of the claimant by not paying the claimant the sums due under the National Minimum Wage Regulations 2015?
 - (iii) Did the respondent fail to provide a statement of terms and conditions of employment in writing, as required by section 1 of the Employment Rights Act 1996?
 - (iv) In the event that the claimant succeeds on any issue, what remedy is he entitled to?

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The facts

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5. I found the following facts to have been established:
6. The claimant is Robert Mason. His date of birth is 25 March 1996.
7. The claimant had commenced an apprenticeship as a plumber with another employer in September 2016. The apprenticeship was intended to be for a period of four years. It involved a combination of time spent at a Further

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Education College, and on the job training. The level of each varied throughout the period of it such that the time at college was initially highest, and latterly reduced to none in the final year. The claimant's performance was assessed periodically by his employer, the College, and the trade body the
5 Scottish and Northern Ireland Plumbing Employers Federation ("SNIPEF").

8. When that employment ended after a little over a year the claimant commenced his employment with the respondent, who had also been an employee of the same employer and had set up his own business. The
10 claimant's employment with the respondent had the effect of continuing his apprenticeship he had commenced with the first employer.

9. The claimant was employed by the respondent as an apprentice plumber from mid October 2017 until his dismissal on 30 April 2019.

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10. When the claimant commenced working with the respondent he (the claimant) continued on the second year of the contract of apprenticeship. He worked on three days per week with the respondent, during which he was given on the job training, and spent two days per week at College being taught
20 as part of the apprenticeship programme. Each day, whether at work or at College, was from 8am to 5pm.

11. The apprenticeship assessments of the claimant by a representative of each of SNIPEF and the College continued.

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12. When the claimant entered the third year of his apprenticeship in September 2018 the period spent at College was reduced to one day per week, and the balance of his time during the working week was spent working with the respondent, including with on the job training, but with some time working
30 alone. That continued for the remainder of the claimant's employment with the respondent.

13. There were some days, on average about one per month, when the claimant would work with the respondent on plumbing matters rather than attend College. The claimant also on occasion worked overtime at the weekend, but very rarely so.

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14. At no time from when the claimant started employment with the respondent did the respondent provide him with any statement in writing of the particulars of his terms and conditions of employment.

10 15. The respondent made irregular payments to the claimant by way of wages. The wages on occasion varied in amount, and were not paid regularly on the same day each week.

15 16. When the claimant commenced working, he was told that he would be paid for attendance at College, and his understanding was that he was paid at the rate of £120 per week. He was paid sums that on occasion were at, or near, the level of £120 per week. Although the payments were not made regularly and consistently, in general the payment pattern was of weekly pay.

20 17. An excel spreadsheet produced by the claimant's father accurately and comprehensively records the amounts paid by the respondent to the claimant, the date of each payment being made, and the number of days in each month that the claimant worked either by working with the respondent or by attending College for training. It makes no allowance for overtime, but does record any day spent working on a Saturday or Sunday if that occurred. Its material terms as to the hours worked and sums due therefor is the national minimum wage rate applicable for someone aged 21 – 24 ("NMW") is due are as follows (with Oct 17 referring to October 2017 and so on):

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Month	Hours worked	Rate of NMW	Total due
Oct 17	88	£7.05	£620.40

	Nov 17	168	£7.05	£1,184.40
	Dec 17	168	£7.05	£1,184.40
	Jan 18	184	£7.05	£1,297.20
	Feb 18	160	£7.05	£1,128.00
5	Mar 18	176	£7.05	£1,240.80
	Apr 18	168	£7.38	£1,239.84
	May 18	184	£7.38	£1,357.92
	Jun 18	168	£7.38	£1,239.84
	Jul 18	168	£7.38	£1,239.84
10	Aug 18	184	£7.38	£1,357.92
	Sep 18	160	£7.38	£1,180.80
	Oct 18	184	£7.38	£1,357.92
	Nov 18	176	£7.38	£1,298.88
	Dec 18	168	£7.38	£1,239.84
15	Jan 19	184	£7.38	£1,357.92
	Feb 19	160	£7.38	£1,180.80
	Mar 19	168	£7.38	£1,239.84
	Apr 19	176	£7.70*	£1,355.20

20 [Note – the NMW was increased in April 2019 but the claimant's schedule did not make provision for that]

18. No deductions were made by the respondent from the wages paid for any sums paid for income tax or national insurance contributions. The parties
25 understood that the level of pay was below the threshold for the pay to be subject to such deductions.

19. There were increases in the sums paid to the claimant from time to time, but not consistently and latterly in about November 2018 the level of payment
30 reverted to about £120 per week.

20. On 19 March 2019 the claimant was working at the premises of a customer, and damage was sustained to the van he was driving. At the time he thought

that the van had gone into a pothole, such that a trestle within the van had moved leading to a loud noise. Later when at the premises of the customer and making a call to the respondent he noticed that there was damage to the van, and informed him of that.

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21. On 19 March 2019 the claimant was suspended. There was a disciplinary hearing on 3 April 2019, after which by letter dated 10 April 2019 the claimant was summarily dismissed. The claimant sought to appeal that decision by letter sent shortly after receipt of the letter of dismissal. In the letter of appeal, prepared by his father, details were set out of the claim for not paying the national minimum wage to the claimant with the details being those provided in the excel spreadsheet prepared by the claimant's father.

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22. The respondent did not provide an appeal, nor did he respond to the claim in respect of failing to pay the national minimum wage. The respondent did however agree to defer the date of termination to 30 April 2019 to allow the claimant to sit an examination for the apprenticeship.

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23. The claimant's employment with the respondent terminated on 30 April 2019 following the decision by the respondent to terminate it.

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24. The sums paid as wages to the claimant by the respondent during his employment with the respondent totalled £9,584.58.

25. Following the termination the claimant received benefits for a period, and conducted some part time work as a delivery driver. He was in receipt of benefits of about £240, and the income from his part-time driving was £600.

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26. The claimant commenced new employment to enable him to continue and in due course complete his apprenticeship as a plumber on 6 August 2019.

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Submission

27. Mr McCusker asked me to accept the evidence from the claimant and his father as credible and reliable. He argued that there was no evidence of conduct by the claimant which would entitle an employer to terminate the contract as was done. The claim for breach of contract had therefore been established as no evidence to justify the decision made was submitted by the respondent.

28. In relation to the claim for payment of the national minimum wage for a person aged 21-24 he argued that the claimant was on a contract of apprenticeship, but that Regulation 5 of the 2015 Regulations did not apply as the claimant had completed the first 12 months of his apprenticeship before commencing employment with the respondent, such that throughout the period of employment the apprenticeship rate was not payable, but the standard rate for a person of that age. He submitted that the calculations shown on the spreadsheet produced were accurate.

29. In relation to the failure to provide written particulars of employment he argued that none had been, and that the maximum four weeks' pay ought to be awarded.

30. After discussion he submitted to the tribunal a revised schedule of loss by email dated 2 December 2019, which I took into account although for the reasons set out below I did not accept all that was argued for.

25 **Law**

31. The Tribunal has jurisdiction to consider a claim for breach of contract under the terms of the Employment Tribunals (Extension of Jurisdiction) (Scotland) Order 1984. Where there is a termination of employment by the respondent without notice, the onus falls on the respondent to prove, on the balance of probabilities, that he was entitled to do so on account of a repudiatory breach of contract by the claimant himself. If that is not done, the respondent has not

proved any entitlement to terminate the contract without giving notice, and the claimant is entitled to damages for breach of contract.

5 32. An employee (as a worker) has entitlements under the National Minimum Wage Regulations 2015 (“the Regulations”). They are made under the National Minimum Wage Act 1998. The entitlement to be paid not less than the appropriate national minimum wage is set out in section 1, and section 17 provides for that being a term of the contract between the parties. The sums for the national minimum wage itself are set by the Secretary of State, and are reviewed annually. Different rates apply to those at different ages. At all material times the claimant was aged in the bracket for those aged 21 – 24.

10 33. There are provisions for an apprenticeship rate in Regulation 4A, which applies under Regulation 5. That Regulation provides that it is applicable to a worker

15 “(a) who is employed under a contract of apprenticeship....or is treated as employed under a contract of apprenticeship, and (b) who is within the first 12 months after the commencement of that employment or under 19 years of age.”

20 34. Subject to that, the rate for the national minimum wage for a person of the claimant’s age was £7.07 per hour for the period to 5 April 2018, and thereafter was £7.38 per hour.

25 35. There are four categories of work set out in the Regulations. Chapter 3 of the Regulations has provision for “time work”, where the worker is entitled to be paid by reference to time worked, and under Regulation 33 that includes time spent at training.

30 36. The right not to suffer an unlawful deduction from wages is provided for in section 13 of the Employment Rights Act 1996. Wages is defined in section 27 as “any sums payable to the worker in connection with his employment....”

The right to make a complaint to a tribunal for any unlawful deduction from wages is provided for in section 23.

5 37. The right to a written statement of the particulars of employment is provided for in section 1 of the Employment Rights Act 1996. The Tribunal may award between 2 and 4 weeks' pay for a failure to do so under the Employment Act 2002, provided that there is also a claim that succeeds listed in Schedule 5. A claim for deduction from wages is one such claim under that Schedule.

10 Discussion

38. I accepted the evidence of both witnesses as credible and reliable. I had no hesitation in doing so.

15 39. I deal initially with the claim for **breach of contract**. The Response Form from the respondent addressed matters largely on the basis of there being a claim for unfair dismissal, and stating that the ACAS Code of Practice was followed. This is not however a claim for unfair dismissal, but for breach of contract. There was no dispute that there was a contract. No issue was taken with the
20 description of the claimant as an apprentice plumber. The respondent argued in the Response Form that the claimant had been guilty of gross misconduct, and it was inferred from that that the respondent argued that he was entitled to terminate the contract summarily by virtue of the claimant's repudiatory conduct.

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40. There are two difficulties with the respondent's position. He did not appear at the hearing and he tendered no evidence. The claimant did appear, and denied any wrongdoing. The fact of damage being caused to a van does not lead inevitably to a finding of repudiation. Whilst there was a pleaded case of
30 attending work when unfit through having consumed alcohol, driving the van in such a condition, failing to report the damage, and reputational damage to the respondent, no evidence was before me to support those allegations. In

the absence of any evidence, the respondent has not discharged the onus of proof on him.

41. The second difficulty is that a contract of apprenticeship cannot in any event
5 necessarily be terminated for gross misconduct. In ***Jones v Revenue and
Customs Comrs UKEAT/0458/13*** the EAT had to consider whether
'equestrian trainees' working at a livery stables were employed under
contracts of apprenticeship for the purposes of the national minimum wage
provisions. The trainees performed yard duties and gave riding lessons to
10 paying customers of the stables but they also received riding instruction
towards the British Horse Society examinations from the employer. The EAT
decided that some aspects of the trainees' contracts were inconsistent with a
contract of apprenticeship. For example, such their contracts could be
terminated for gross misconduct whereas a contract of apprenticeship can
15 only be brought to an end by some 'fundamental frustrating event or
repudiatory act', not simply by conduct that would justify dismissal.

42. I do not consider that the mere fact of an accident involving damage to a van,
which the claimant admitted had occurred, can amount to a repudiatory act
20 of itself. There was no evidence supporting the remaining allegations. On the
contrary, the claimant denied them and I have accepted his evidence as
credible and reliable.

43. It follows that the claim for breach of contract succeeds.
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44. The second issue of whether there were **unlawful deduction from earnings**
is more complex. The matter arises under the terms of the Regulations, which
where they apply create an entitlement to a minimum level of pay, which falls
within the definition of wages under the 1996 Act. The failure to pay the
30 national minimum wage is a deduction under section 13 of that Act.

45. Originally, apprentices were excluded from the provisions, but that was
changed with effect from 1 October 2010. There are different rates set for

workers, dependent on their age, and there are particular provisions that apply to apprentices which must be considered, as referred to above.

5 46. The first question is whether the claimant was employed under a contract of apprenticeship under the terms of the Regulation 5(1)(a). He described himself as “Apprentice Plumber” on the Claim Form, and no issue was taken with that description in the Response Form. The claimant’s evidence, which I accepted, was that he was an apprentice plumber. He had started that with another business and then became an employee of the respondent when in
10 the second year of a four year apprenticeship. He had initially, when employed by the respondent, worked for two days per week at College undergoing training, and that reduced to one day per week in the third year of his apprenticeship, also when working with the respondent, with the balance of the working week spent working with the respondent and being
15 given on the job training. The apprenticeship was for a defined period of four years in total. The apprenticeship started before the employment with the respondent, continued during that employment, and indeed has continued after termination of the contract by the respondent.

20 47. In submission it was accepted by Mr McCusker that the claimant was employed under a contract of apprenticeship. I am satisfied that he was right to do so. The circumstances are very different to those in **Jones**, in which a summary of the law relating to apprenticeships is provided. The circumstances of the claimant’s case do, I consider, fall within the definition
25 of apprenticeship for the purposes of Regulation 5(1)(a).

48. The terms of Regulation 5(1)(b) then require consideration. The facts here are not perhaps entirely the standard, in that the identity of the employer changed during the course of the apprenticeship. The submission for the
30 claimant was that the phrase “who is within the first 12 months after the commencement of that employment” was a reference to the apprenticeship overall, with the reference to “that employment” being to that employment whereby the apprenticeship was commenced, rather than the employment

with this particular respondent where there had been a change shortly after the start of the second year.

- 5 49. The terms of the Regulation are ambiguous. At first glance, the words in Regulation 5(1)(b) when read in isolation appear to apply to the first twelve months of employment with an employer, rather than the apprenticeship looked at as a single period.
- 10 50. The possibility of a change of employer may not have been in the forefront of the mind of the drafter of the Regulations. I have also noted that advice on the government website and other sources is to the effect that the apprenticeship rate does not apply beyond the first year of the apprenticeship, but that is at best guidance.
- 15 51. The point is not an easy one, but I concluded that having regard to the terms of the Regulations as a whole, the context of the level of the apprenticeship rate, and the alternative to the first 12 months being of a person under the age of 19 years, that the intention of the legislation was that the words “that employment” do refer to the words in Regulation 5(1)(a) to “employed under
20 a contract of apprenticeship”, that that reference to “a” contract was intended to mean a single contract of apprenticeship rather than to a succession of contracts with different employers all within one umbrella of an apprenticeship, such that it was intended to apply only to the first 12 months of the apprenticeship itself, rather than to apply to the first 12 months of any
25 new employment relationship during such an apprenticeship. Were it to be otherwise, if a person aged over 19 changed employer in the latter stages of their apprenticeship for example because the first employer ceased to trade, the level of their pay would reduce substantially simply because of that fact. That did not appear to me to be in accordance with the scheme of the statute,
30 and not likely to have been the intention of the legislation.

52. The editors of *Harvey on Industrial Relations and Employment Law* appear to consider that that is the appropriate conclusion, as the following is stated at section B1 paragraph 178 in relation to Regulation 5(1)(b)

5 “Currently, there is an 'apprentice rate' which is lower than the other NMW rates and is paid to qualifying apprentices who are (i) under 19 years of age; or (ii) aged 19 or over but still in the first year of their apprenticeship”.

10 53. I concluded that the claimant was employed by the respondent under a contract of apprenticeship, but that the first 12 months of employment under a contract of apprenticeship within the terms of that Regulation had concluded, such that he was entitled to the level of the national minimum wage for a person aged 21 – 24 and not the apprenticeship rate.

15 54. The evidence was that no **written particulars** of employment were ever provided, and the respondent did not claim in its Response Form that it had done so. As indicated above no evidence was tendered by the respondent. I find that the failure to do so is established. I find that there was a breach of the requirement to do so.

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Remedy

25 55. I revert to the issue of breach of contract. The claimant commenced new employment as an apprentice plumber after a delay of a little over three months, and during that delay he both had benefits, and for a period work as a part-time delivery driver. There is no argument that he did not mitigate loss and in any event I am satisfied that he did so. In the period 1 May 2019 to 6 August 2019 there are 14 weeks. The weekly wage at national minimum wage rates for the claimant was £308 per week. For 14 weeks that is £4,312.

30 Deducting the earnings of £600 leaves £3,712. The claimant has not however sought that, but sought the sum of £521.76. In light of that I award the sum that is sought in the schedule of loss, being £521.76. I strongly suspect that there was a miscalculation in the schedule of loss, but the evidence was given

on the basis of it, the onus is on the claimant to prove loss, the issue is loss rather than entitlement under the national minimum wage provisions, and I consider that that sum is the appropriate award to make for loss proven in such circumstances. The claim made is not one to which the recoupment of benefits provisions applies.

56. In respect of the claim for unlawful deduction from wages I concluded that the claimant was employed on time work, and that under Regulation 33 that work included time at College where training was being undertaken.

57. The claimant was entitled to the level of the national minimum wage for someone of his age, and the rates were £7.05 for the period to 1 April 2018, £7.38 for the year following that, and £7.70 for the period from 1 April 2019, in each case the figure being the hourly rate. I accepted that the calculations on the excel spreadsheet I have referred to were accurate, save for the final month which did not take account of the increase provided by statute to £7.70 per hour, and they properly set out the number of hours in each month that the claimant worked (indeed they somewhat under-reported them as they did not include all overtime). Whilst the schedule was spoken to in evidence and had the April 2019 figure calculated at the former rate of £7.38 per hour I did not consider it correct to use that figure, as the national minimum wage is, as the name implies, a minimum and there is a statutorily imposed term of contract to give effect to it. I have therefore used the April 2019 rate of £7.70 in the calculation.

58. The sums to which the claimant was entitled by the national minimum wage provisions set out above was £22,002.88. The sums which the claimant was paid during his employment totalled £9,584.58. The balance was an unlawful deduction from the wages of the claimant.

59. The amount of the unlawful deduction requires to be set out separate for each of those periods so as to have the detail for tax and national insurance contributions purposes, and is as follows:

	(i)	October 2017 – 31 March 2018	£3,680.20
5	(ii)	1 April 2018 – 31 March 2019	£8,681.78
	(iii)	1 April 2019 to 30 April 2019	<u>£1,065.20</u>
		TOTAL	£13,427.18

60. These sums are gross. They are payable to the claimant subject to any applicable deductions for income tax and national insurance contributions. The respondent will have records of the sums paid to the claimant in each tax year, and should have the P45 from the first employer for the calculation to be made for the period for prior to his employment of the claimant in October 2017. The respondent should provide the claimant with both his calculations of the deductions and evidence of the sums being paid for those deductions to Her Majesty's Revenue and Customs when making payment to the claimant. If he does seek to make such deductions. Failing that, the award is payable to the claimant gross, and he may require to disclose that to HMRC.

61. Finally, I address the claim for a failure to provide a written statement of particulars of employment. The Tribunal has a discretion on what to award, and it can be between 2 and 4 weeks' pay. I take into account that the respondent is a very small business, with the claimant its only employee, and there was no evidence of the claimant requesting written particulars (although there is no need to do so).

62. Although the issue was raised in the Claim Form it did not appear in the initial Schedule of Loss, but did in the amended version.

63. In all the circumstances I have decided that the appropriate award is the minimum of 2 weeks, and I calculate that, at the level of the national minimum wage of £7.70 per hour, for 40 hours per week, at £616 in total.

64. I have therefore made the awards set out in the Judgment above.

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

Alexander Kemp
04 December 2019
15 December 2019