



**EMPLOYMENT TRIBUNALS (SCOTLAND)**

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**Case No. 4110697/2019**

**Preliminary Hearing held at Inverness on 9 December 2019**

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**Employment Judge A Kemp**

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**Mrs C Mochan**

**Claimant  
In person**

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**Andrew Farmer t/a Mackenzies Highland Inn**

**Respondent  
No appearance**

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**JUDGMENT**

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**The claimant was dismissed for redundancy and is entitled to a statutory redundancy payment in the sum of TWO THOUSAND THREE HUNDRED AND THIRTY TWO POUNDS EIGHTY PENCE (£2,332.80) payable by the respondent.**

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## REASONS

### Introduction

- 5 1. A Preliminary Hearing had been fixed by Notice dated 23 October 2019, to address the issue of jurisdiction on the basis of time-bar, and thereafter, if there was jurisdiction, to proceed to a Final Hearing.
- 10 2. The claimant appeared for herself. The respondent had not entered appearance, and was understood to have left the premises at which the claimant worked. His present whereabouts were not known to the claimant.

### Amendment

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- 20 3. By email sent to the Tribunal on 21 November 2019 the claimant's adviser then acting for her, the Citizens Advice Bureau, made an application to amend the claim so that it only included a claim for a statutory redundancy payment. There had originally been claims made for holiday pay and for notice.
- 25 4. It appeared to me that the claimant was entitled to pursue such a claim, that it was in accordance with the overriding objective in Rule 2, and the authority with regard to whether amendments should be allowed. The nature of that exercise was discussed in the case of **Selkent Bus Company v Moore [1996] ICR 836**, which was approved by the Court of Appeal in **Ali v Office for National Statistics [2005] IRLR 201**. All of the circumstances must be considered. There are three particular issues that require consideration.
- 30 5. Firstly the nature of the amendment. Here the claimant did not make explicit that she sought a statutory redundancy payment, but the basic circumstances were set out in that she was dismissed without notice when the business which employed her closed. There was a factual basis on
- 35 which redundancy would naturally arise.

6. Secondly, the applicability of time limits is a further factor. Here, the time limit to pursue the statutory redundancy payment claim made by the proposed amendment has not expired, as set out more fully below.

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7. Thirdly the timing and manner of the amendment is to be considered. The application was made as set out above.

8. I explained to the claimant that under section 97(2) of the Employment Rights Act 1996 it appeared that the effective date of termination was postponed by her entitlement to 12 weeks' notice, such that arguments over the ability to make claims beyond redundancy may arise. I also explained that there may be arguments in relation to a relevant transfer. She confirmed however that she did not wish to make such arguments, and wished to proceed only with a claim for a statutory redundancy payment.

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9. I considered that it was appropriate to allow the amendment made.

## 20 **Jurisdiction**

10. On the basis of the foregoing, it appeared to me that there was no argument but that her claim for that was made in time. Not only do the terms of section 97(2) apply, but also the timebar for claiming a statutory redundancy payment is six months not three months as for other claims. Her dismissal was intimated on 18 March 2019. The present claim was presented to the Tribunal on 9 September 2019. That was therefore in time.

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11. I accordingly concluded that the Tribunal did have jurisdiction, and matters proceeded to a Final Hearing. The issue for that was what sum was the claimant entitled to.

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**Evidence**

12. The claimant gave evidence herself at the Final Hearing, and spoke to a Bundle of documents that had been prepared. I was satisfied that she was  
5 a credible and reliable witness.

**Facts**

13. I found the following facts to have been established:  
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14. The claimant is Mrs Carolanne Mochan. Her date of birth is 23 December 1956.
15. She was employed by Mr Andrew Farmer at MacKenzies Highland Inn, 125 Grampian Road, Aviemore, Inverness-shire.
16. Her employment at those premises started on 1 May 2004.
17. There were a series of relevant transfers under the Transfers of Undertaking (Protection of Employment) Regulations 2006, such that her  
20 continuity of service dates from that date, culminating in a transfer to the respondent.
18. The claimant worked as a bar person, generally working 40 hours per  
25 week.
19. Latterly she reduced her hours when her husband became seriously ill.
20. Her gross earnings shown on the wage slips she produced in her bundle  
30 were as follows:

<b>Month</b>	<b>Amount</b>
February 2019	£543.74
January 2019	£558.35
35 October 2018	£977.64

21. She worked on average 55.4 hours per month in the twelve week period leading up to 18 March 2019. That is the equivalent of 12.8 hours per week.

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22. She was paid at the rate of £8.10 per hour.

23. On 18 March 2019 the claimant received a text message from the respondent stating that he was ceasing to trade with immediate effect. His business did cease on that date.

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24. The premises were closed for two days in the period from 18 March 2019.

25. The business then reopened under new owners.

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26. The new owners of the business did not accept that there was any relevant transfer under the Transfer of Undertakings (Protection of Employment) Regulations 2006, and threatened to call the police when she attended at the premises on 20 March 2019 such that she left. She was not employed by the respondent or the new managers of the premises from and after 18 March 2019.

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27. The claimant did not receive any redundancy payment from the respondent.

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## **Law**

28. The entitlement to a redundancy payment is found in section 135 of the Employment Rights Act 1996 ("the Act"). What is dismissal for redundancy is set out in sections 136 and 139 and includes where a business ceases to trade.

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29. The amount of the statutory redundancy payment is set out in section 162 as follows:

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**“162 Amount of a redundancy payment**

(1) The amount of a redundancy payment shall be calculated by—

- 5 (a) determining the period, ending with the relevant date, during which the employee has been continuously employed,
- 10 (b) reckoning backwards from the end of that period the number of years of employment falling within that period, and
- (c) allowing the appropriate amount for each of those years of employment.

(2) In subsection (1)(c) “the appropriate amount” means—

- 15 (a) one and a half weeks' pay for a year of employment in which the employee was not below the age of forty-one,
- (b) one week's pay for a year of employment (not within paragraph (a)) in which he was not below the age of twenty-two, and
- 20 (c) half a week's pay for each year of employment not within paragraph (a) or (b).

(3) Where twenty years of employment have been reckoned under subsection (1), no account shall be taken under that subsection of any year of employment earlier than those twenty years.

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(4) ...

30 (5) ...

(6) [Subsections (1) to (3)] apply for the purposes of any provision of this Part by virtue of which an [employment tribunal] may determine that an employer is liable to pay to an employee—

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- (a) the whole of the redundancy payment to which the employee would have had a right apart from some other provision, or
  - (b) such part of the redundancy payment to which the employee would have had a right apart from some other provision as the tribunal thinks fit,
- as if any reference to the amount of a redundancy payment were to the amount of the redundancy payment to which the employee would have been entitled apart from that other provision.

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30. The amount of a week's pay is calculated for statutory purposes by applying sections 221 – 229 of the Act.

### Discussion

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31. I considered on the evidence before me that the claimant met the statutory definition of redundancy, and was therefore entitled to a statutory redundancy payment. The business in which she had worked ceased to trade, and she was dismissed on receipt of the text from the respondent on 18 March 2019.

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32. Whilst it could have been contended that there was a relevant transfer under the 2006 Regulations that was not the position of the new owners, and not an argument that was before me. A number of factors must be considered if there is to be a finding of a relevant transfer, and evidence on them, which was not before me. It was in any event far from clear that such a finding would, or could, have been made.

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33. Applying the statutory terms for the calculation of a week's pay however I concluded that the week's pay was less than that contended for in a schedule of loss within the bundle. That is because the figure used in the schedule of loss was applied over a calendar year.

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34. I consider that I require to apply the earnings over the 12 weeks period prior to the dismissal, and that the claimant was a shift worker under

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section 222 of the 1996 Act. That is as the evidence before the tribunal in writing showed a difference in the hours worked, and in the pay received for those hours, albeit that that difference was not very large. The written evidence was from two pay slips during that period, being for January and February 2019, and I was satisfied that they were accurate evidence of the earnings received, and that they were reliable evidence for the remainder of the statutory period, which was from 24 December 2018 to 18 March 2019 such that the pay slip produced for October 2018 was outside that statutory period. No payslip was produced for December 2018 or for March 2019.

35. I concluded on that basis that the weekly wage for the claimant under the statutory provisions was £103.68 per week.

36. The statutory redundancy payment I calculated to be on the basis of 15 years of service, all over the age of 41, therefore a total of 22.5 years for statutory purposes, at the weekly wage of £103.68 which led to a total sum of £2,332.80.

## 20 **Conclusion**

37. The claimant was redundant, was entitled to a statutory redundancy payment, the amount of which is £2,332.80 and the award is made accordingly.

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

**Alexander Kemp**  
**10 December 2019**  
**17 December 2019**