



## **EMPLOYMENT TRIBUNALS (SCOTLAND)**

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**Case No: 4123515/2018**

**Held in Edinburgh on 7 November 2019**

**Employment Judge: M Sutherland (sitting alone)**

10 **Aleksandra Kalinowska**

**Claimant**

**Represented by:**

**Ms E Drysdale, Trainee Solicitor**

15 **Blue Morpho Body and Mind Limited**

**Respondent**

**No appearance**

### **JUDGMENT OF THE EMPLOYMENT TRIBUNAL**

20 The judgment of the Tribunal is that –

(1) the Claimant was unfairly dismissed and the Respondent is ordered to pay to the Claimant the sum of £7,660.97 by way of compensation. The prescribed element is £6,975.73 and relates to the period from 14 September 2018 to 31  
25 January 2019. The monetary award is £7,660.97. The monetary award exceeds the prescribed element by £685.24.

(2) The Claimant suffered an unlawful deduction from wages and the Respondent is ordered to pay to the Claimant the sum of £74.95 (from which  
30 tax and national insurance fall to be deducted).

- (3) The Claimant was not provided with a statement of employment particulars and the Respondent is ordered to pay to the Claimant the sum of £1,370.49.

## REASONS

### 5 Introduction

1. The Claimant presented a complaint of unfair dismissal, failure to give a statement of employment particulars and unlawful deduction from wages.
2. The Claimant was represented by Ms Drysdale, Trainee Solicitor. The Respondent did not appear and was not represented. It was understood that the Respondent was to be dissolved and they did not intend to maintain their defence. As at the date of the hearing the Respondent remained on Companies House register.
3. The Claimant lodged productions and gave evidence on her own behalf.

### 15 Findings of Fact

4. The tribunal makes the following findings of fact –
5. The Claimant was employed by the Respondent from 23 March 2016 until 13 September 2018. The Claimant was employed by them as a Physiotherapist.
6. She was employed to work 25 hours a week at a rate of £9.50 an hour (gross). She also received payment of £100.73 gross in respect of guaranteed overtime and commission. The Claimant also benefited from an employer's pension contribution of 1%. The Claimant was not issued with a written statement of employment particulars.
7. The Respondent terminated her employment on 13 September 2018 because she refused to work weekends.
8. The Respondent did not conduct any investigation or hold a meeting with the Claimant regarding the termination of her employment.

9. The sum of £74.95 was deducted from her final wages in respect of changing the locks following her departure. There was no contractual term which entitled a deduction from wages in respect of the cost of changing the locks.

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10. The Claimant set up her own therapy business which began trading in October 2018.

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11. The Claimant took steps to find suitable alternative employment following her dismissal until end January 2019. Thereafter she has focused on growing her therapy business.

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12. The earnings from her business in October 2018 were £17.30, in November 2018 were £163.68, in December were £891.32 and in January 2018 were £549.56 (totalling £1,621.86).

13. The Claimant was 28 years old when her employment was terminated.

### **Relevant law**

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1. Section 94 of Employment Rights Act 1996 ('ERA 1996') provides the Claimant with the right not be unfairly dismissed by the Respondent.

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2. It is for the Respondent to prove the reason for her dismissal and that the reason is a potentially fair reason in terms of Section 98 ERA 1996. At this first stage of enquiry the Respondent does not have to prove that the reason did justify the dismissal merely that it was capable of doing so.

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3. If the reason for her dismissal is potentially fair, the tribunal must determine in accordance with equity and the substantial merits of the case whether the dismissal is fair or unfair under Section 98(4) ERA 1996. This depends whether in the circumstances (including the size and administrative resources of the Respondent's undertaking) the Respondent acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee. At this second stage of enquiry the onus of proof is neutral.

4. If the reason for the Claimant's dismissal relates to the conduct of the employee, the tribunal must determine that at the time of dismissal the Respondent had a genuine belief in the misconduct and that the belief was based upon reasonable grounds having carried out a reasonable investigation (*British Home Stores Ltd v Burchell* [1978] IRLR 379, [1980] ICR 303).
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5. Any provision of a relevant ACAS Code of Practice which appears to the tribunal may be relevant to any question arising in the proceedings shall be taken into account in determining that question (Section 207, Trade Union and Labour Relations (Consolidation) Act 1992). The ACAS Code of Practice on Disciplinary and Grievance Procedures provides in summary that –
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- a. *Employers and employees should raise and deal with issues promptly and should not unreasonably delay meetings, decisions or confirmation of those decisions.*
  - b. *Employers and employees should act consistently*
  - c. *Employers should carry out any necessary investigations, to establish the facts of the case.*
  - d. *Employers should inform employees of the basis of the problem and give them an opportunity to put their case in response before any decisions are made.*
  - e. *Employers should allow employees to be accompanied at any formal disciplinary or grievance meeting.*
  - f. *Employers should allow an employee to appeal against any formal decision made*
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6. Compensation is made up of a basic award and a compensatory award. A basic award, based on age, length of service and gross weekly wage, can be reduced in certain circumstances.
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7. Section 123 (1) of ERA provides that the compensatory award is such amount as the Tribunal considers just and equitable having regard to the loss sustained by the Claimant in consequence of dismissal in so far as that loss is attributable to action taken by the employer. Subject to a Claimant's duty

to mitigate their losses, this generally includes loss of earnings up to the date of the Final Hearing (after deducting any earnings from alternative employment), an assessment of future loss of earnings, if appropriate, a figure representing loss of statutory rights, and consideration of any other heads of loss claimed by the Claimant from the respondents.

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8. Section 207A of the Trade Union and Labour Relations (Consolidation) Act 1992 (“TULRCA”) provides that if, in the case of proceedings to which the section applies, it appears to the Tribunal that the claim concerns a matter to which a relevant Code of Practice applies, and the employer has unreasonably failed to comply with the Code in relation to that matter, then the Tribunal may, if it considers it just and equitable in all the circumstances, increase the compensatory award it makes to the employee by no more than a 25% uplift. The ACAS Code of Practice on Disciplinary & Grievance Procedures is a relevant Code of Practice.

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9. Section 13 of the Employment Rights Act 1996 (‘ERA 1996’) provides that an employer shall not make a deduction from wages of a worker employed by him unless the deduction is required or authorised by statute, or by a provision in the workers contract advised in writing, or by the worker’s prior written consent. Certain deductions are excluded from protection by virtue of s14 or s23(5) of the ERA.

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10. Under Section 13(3) there is a deduction from wages where the total amount of any wages paid on any occasion by an employer is less than the total amount of the wages properly payable by him to the worker on that occasion.

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11. Under Section 27(1) of the ERA “wages” means any sums payable to the worker in connection with their employment.

12. Section 38 of the Employment Act 2002 applies where the Employment Tribunal makes an award to an employee and, when the proceeding began, the employer was in breach of his duty to the employee to issue to the employee of a statement of main terms and conditions of employment.

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13. Where section 38 applies the Tribunal must make an award in favour of the employee of a minimum amount of two weeks' wages and, if the Tribunal considers it just and equitable in all the circumstances to do so, it must increase the award to the higher amount of four weeks' wages.

5 **Discussion and decision**

14. The Claimant was dismissed by the Respondent. No procedure was followed in respect of that dismissal in respect of investigation or hearing and accordingly that dismissal was unfair. The Claimant took adequate steps to mitigate her losses in the period up to and including January 2019. She no  
10 steps to mitigate her losses thereafter (her losses being the difference between her wages and her business earnings).

15. The Claimant is entitled to a basic award in sum of £685.24 (£339.23 + 1% pension x 2 years).

15 16. The Claimant is entitled to a compensatory award in sum of £5,580.59 (£339.23 + 1% pension x 20 weeks (from dismissal until end January 2019) plus £350 in respect of her loss of statutory rights less earnings from her business of £1,621.86).

20 17. The Respondent wholly and unreasonably failed to comply with the ACAS Code of Practice on Disciplinary & Grievance Procedures. It is considered just and equitable in all the circumstances to increase the compensatory award by 25% to £6,975.73.

25 18. The Employment Protection (Recoupment of Job Seeker's Allowance and Income Support) Regulations 1996 apply to this award. The prescribed element comprises financial loss in the period from 14 September 2018 to 31 January 2019. Net of income received but to include the provision in respect  
30 of the ACAS uplift that amounts to £6,975.73. The monetary award is £7,660.97. The monetary award exceeds the prescribed element by £685.24.

19. The Claimant suffered an unauthorised deduction of wages in sum of £74.95.

20. The Claimant was employed over 2 years and did not receive any statement of employment particulars. It is considered just and equitable to make the higher award of £1,370.49 equal to 4 week's pay.

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**Employment Judge: M Sutherland**

**Date of Judgement: 7<sup>th</sup> November 2019**

**Entered in Register: 12<sup>th</sup> November 2019**

**And Copied to Parties**

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