



EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4106905/2019

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Held in Glasgow on 20 November 2019

Employment Judge C McManus

10 **Mrs M Burns**

**Claimant
Represented by:
Ms Young -
Friend**

15 **South Ayrshire Council**

**Respondent
Represented By
Ms C McMenamin -
Solicitor**

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JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The Judgment of the Tribunal is that:-

- The sum sought by the claimant from the respondent is not an unauthorised deduction from wages contrary to Section 13 of the Employment Rights Act 1996 because the exclusion in section 27(2)(c) of that legislation applies.
- The claim is dismissed.

REASONS

Introduction

1. The claimant claims that there has been an unauthorised deduction from wages in respect of the amount paid to her in a Settlement Agreement. It is not in dispute that that Settlement Agreement did not take into account a later implemented and back dated Scottish National Joint Council pay award. The claimant's position is that the Settlement Agreement amount ought to have been recalculated to take into account that pay award.

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2. The respondent deny that there has been any unpaid wages within the meaning of the Employment Rights Act 1996, with reference to section 13 and section 26. The respondent asserted in their ET3 that the claim had not been brought within the applicable time limit. A Preliminary Hearing on the issue of time bar was heard on 1 August 2019. The Judgment of the Employment Tribunal (Employment Judge Wiseman) was issued on 7 August 2019. That Judgment was that the claim was presented in time and would proceed to be listed for a hearing. That hearing was later scheduled to take place on 20 November 2019.
3. No Orders had been requested by either party or had been issued by the Tribunal in this case. At this Final Hearing, the claimant was again represented by her friend, Ms A Young. Ms Young informed me that she is not legally qualified but does have a background in HR. Some time was given after initial discussions to allow Ms Young time to prepare questions for examination in chief of the claimant and for cross examination of the respondent's witness.
4. The claimant relied on documents numbered 1 – 11. Some of those documents extended to more than one page. Some of those documents were allowed to be included during the course of the proceedings, without objection from the respondent's representative. The documents relied upon by the claimant are herein referred to as C1 to C11.2. The respondent relied on two documents which extended over three pages, referred to herein as R1, R1.1 and R2.
5. Evidence was heard from the claimant and, for the respondent, from Mr John Dunne (HR Manager). All evidence was taken on oath or affirmation. It was noted that Mr Dunne was present throughout this hearing, as instructing the respondent's representative, although Mr Dunne was also a witness for the respondent in this case. It was confirmed by both parties in preliminary discussions that there was no dispute in relation to an account of events e.g. what had occurred at a particular meeting when both the claimant and Mr Dunne were present.

Issues for Determination

6. It was agreed at preliminary discussions that the issue for my determination is as follows:-

5 Whether the respondent is due to pay to the claimant the sum of £954 in respect of unlawful deductions from wages, as part of a severance agreement, that sum being to take into account backdated increase in salary of 3.5% for the period from 1/4/18 to 18/10/18.

Findings in Fact

7. The following material facts were not in dispute or were found by the Tribunal to be proven:-

8. The respondent is a local authority. The claimant was employed by the respondent from 06/07/1981 until 18/10/2018. The relevant written particulars of terms of the claimant's employment with the respondent are set out in offer to the claimant re the post of Principal Officer: Education, Culture and Lifelong Learning, dated 13 March 2008 (at C2 – C2.1). Those terms include the following at clause 1:-

20 *“Your terms and conditions of employment in general and in particular in respect of those to be given in terms of sections 1-6 of the Employment Rights Act 1996, as amended, except for the Superannuation Scheme, will be in accordance with (a) the existing collective agreements of the NJC for Local Authorities’ APT and C Services (Scottish Council) and the Scheme of Conditions of Service for APT and C, Residential and Nursery Staff as applied by South Ayrshire Council, (b) certain agreed additional terms and conditions*

25 *determined by South Ayrshire Council as contained in updates issued by the Head of Personnel Services and (c) any special conditions referred to hereunder.”*

9. Those terms also include the following at clause 3:-

5 *“The current grade for this post is PO13, and the salary scale for this is £37,557 - £40,233 and your placing thereon is £40,233 per annum. For the purpose of overtime and other calculations, a day’s pay is calculated at 1/365. For those employees who are not currently at the maximum of the scale, further annual increments are payable in accordance with the general conditions of service referred to in paragraph 1 above.”*

10. Those terms also include the following at clause 6:-

10 *“In the unlikely event of any overpayments being made to you due to any error, these will be recovered directly from your salary after consultation with you, and if appropriate, your trade union. Similarly, repayment of any underpayments will be made directly into your salary.”*

15 11. The document at C8 is a document which was given to the claimant in June 2018 in respect of a then ongoing review of management structure within the respondent’s organisation. This document identifies that in this management structure review two posts were identified by the respondent as being suitable posts for the claimant. These were ‘Co-ordinator (Community Development) and Co-ordinator (Golf and Community Facilities). The job grade for both of these posts was stated on this form as being ‘Level 13’. The claimant did not complete this form to indicate whether she considered either of those posts to be potentially suitable alternative employment for her, or her order of preference. The claimant instead indicated by ticking a box on that form in respect of voluntary severance. Under the heading ‘Voluntary Severance’ in that form (C8) is stated:-

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‘There may be further opportunities for voluntary severance as a result of this process. Please indicate if you wish to now apply.’

The claimant ticked the box against:-

“I now want to formally apply for Voluntary Severance.”

That form was signed by the claimant on 19/06/18.

12. The claimant was issued a letter by John Dunne (HR Manager and Service Lead (HR Policy and Operations) following her completing and submission to the respondent of the form which is at C8. That letter to the claimant from John Dunne is dated 20 June 2018 and is at C9. That letter is in the following terms:-

“Voluntary Severance

Further to recent correspondence in which you advised that you wish to formally apply for voluntary severance, I write to confirm that your application has been approved and to provide you with details of the financial severance package you would receive. Please note that the financial information detailed below is based on a notional leaving date of 31 July 2018 for indicative purposes; obviously if a different leaving date is agreed, updated figures will be provided.

There are two options available:

Option 1 - Voluntary Severance - Up to 3 Added Years' Pensionable Service.

As at 31 July you will have 40 years pensionable service which would entitle you to an estimated annual pension of £26,900 and a one off lump sum payment of £56,500 when your employment ends. This estimate is based on a salary of £48,983 and includes 2.93 added years pensionable enhancement.

Option 2 - Voluntary Severance - Severance Payment with no Added Years' Pensionable Service.

As at 31 July 2018 you will have 37 years and 26 days' pensionable service with no added years. Your estimated annual pension would be £25,130 and your one off lump sum payment would be £51,000. In addition to accessing your pension, you would receive a severance

payment of £26,700. This figure equates to 28.5 weeks' pay and is based on 37 years' service by your leaving date.

For the purposes of this illustration of benefits your pensionable pay is based on the last 365 days salary prior to the date of your retirement, nor does it include any AVC fund you may have.

Although these figures are indicative they are normally reasonably accurate but the final figures applicable will be those calculated by the Pension Office. At that point, you will also be given advice on commutation of lump sum / pension which, if you choose to do so, would result in you agreeing adjusted figures with the Strathclyde Pension Fund.

At this stage I would be grateful if you could advise me by email, as soon as possible, of the option you prefer. I then prepare a mutual agreement document for your signature.

If you have any general questions on this matter or feel that any of the information used to calculate the estimated figures is incorrect, then please contact me on <number given but here redacted> or at <email address given but here redacted>.”

13. On 9 July 2019 the claimant advised the respondent of her agreement to her employment being terminated with payment to her of voluntary severance. The claimant so advised the respondent in her email to Brian Milligan of 9 July 2018 (at R2), which is in the following substantive terms:-

“Based on the figures provided by HR, I have decided to take the VS redundancy package with a leaving date of 17/10/18.

14. The claimant's leaving date (effective date of termination of employment) was later changed at the claimant's request to 18/10/18. That date is the claimant's birthday. This agreed change in leaving date had the effect of increasing the payment made to the claimant in the voluntary severance payment, because one of the factors taken into account in the calculation of that voluntary severance payment was the claimant's age. That change in

leaving date was requested by the claimant in her email to Brian Milligan of 12 July 2018 (C11.2), in the following substantive terms:-

5 *"I have read the letter that you handed to me on Tuesday and regarding my outstanding leave, I have a day more than I thought so wish to change my leaving date to 18/ 10/18. Sorry about that, but I can't take any days before this.*

10 *Also Strathclyde pension got back to me following my request for an illustration of benefits, as discussed, to say 'Unfortunately, these figures cannot be provided to yourself, your employer has to request these.' So what do you think - can you request these? I know you said it can take a while. However, I would like an accurate figure as I'm aware, '...similar' means the amount could go up or down."*

15 15. The details of the claimant's illustration of benefits were then requested on behalf of the respondent from Strathclyde pension fund. This illustration benefits was not immediately passed on to the claimant on their receipt by the respondent. The claimant sent an email to Brian Milligan chasing up the matter on 20 July 2018 (C11.2). His reply on the same date was in the following substantive terms (C11.1 – C11.2):-

20 *"Waiting on Payroll detailing the pensionable salary on both the S12 pension form and the request for retirement calculation form.*

Once I get the S12 back you can complete the pension forms. The request for retirement calculation will be forwarded to SPFO.

I'll chase up Cheryl on her return on Monday."

25 16. On 14 August 2018 (at 13.36) the claimant sent an email to Brian Milligan, copied to John Dunne, in the following substantive terms (at C11.1):-

"I received a letter from SPFO saying they have now received notification of my retirement from my employer. Does this mean I am not first receiving an illustration of benefits from them?"

I understand from colleagues in our authorities who have gone through this, that the SPFO illustration of benefits is supplied to employees as part of their HR process and that this takes, on average 2 / 3 weeks to come through, which is different from what you said at our original meeting first week in July, i.e. that this could take months to come through so I'd be better requesting this myself.

I would like to ask for a meeting with an HR officer to discuss this."

17. Brian Milligan replied to the claimant by email sent at 13.41 on 14 August 2018 (C11.1), stating:-

"I've got the illustration of benefits. I'll bring them over shortly."

18. The voluntary severance payment was calculated by the respondent using factors of age, length of service and gross weekly pay, similarly to the calculation of a statutory redundancy payment, but without any cap on a week's pay or on number of years of service. The severance payment made to the claimant was calculated taking into account the claimant's gross weekly pay as at the date of termination of employment of 18/10/18.

19. The claimant's employment with the respondent terminated on 18 October 2018. The claimant received payments from the respondent on termination of employment as set out in letter to her from John Dunne dated (erroneously) 9 July 2018. That letter is at C1, with a signed copy at R1. The terms of that letter are as follows:-

"Voluntary Severance

Further to recent correspondence in which you advised that you wish to formally apply for voluntary severance, I write to confirm that your application has been approved and that your employment will end by mutual agreement on 18 October 2018.

This means that you will have immediate access to your pension benefits from the Local Government Pension Scheme. In addition you will receive a Severance Payment of £27,242. You have previously

received an illustration of benefits due to you and this agreement is based on your final benefits being the same or similar to these figures:

Annual Pension: £23,970

Pension Lump Sum: £46,190

5 *As previously advised, under the terms of the Council's voluntary severance arrangements, you are not entitled to a statutory redundancy or any other severance payment and, since voluntary severance involves a mutual termination of employment, it is not a dismissal and therefore there is no entitlement to notice."*

10 *I can also confirm that a payment in lieu of your 18 days outstanding annual leave will be made to you in your final pay.*

The necessary paperwork has already been forwarded to Strathclyde Pension Fund and any further communication in relation to your pension benefits will come from them. Your final payslip, detailing your salary up to your leaving date, will be posted to your home address along with your P45 form, which relates to your income tax.

15 *Your Manager will contact you regarding any necessary practical arrangements before your employment ends, for example, the return of your ID badge; Council equipment; uniform; keys; mobile phone, etc.*

To confirm your acceptance of this agreement please sign and date below one copy of this letter and return it to me. You should retain the second copy for your records.

20 *Finally, I want to take this opportunity to formally record my appreciation and thanks for the significant contribution you have made to the council and to wish you the very best for the future."*

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20. That document then has a section headed 'Voluntary Severance - Mutual Termination of Employment' (at C1.2 and R1.2). That section is in the following terms and then signed below by the claimant and dated 17/08/18:-

“I, Margaret Burns, agree that my employment with the Council will end on 18 October 2018 through mutual agreement with the Council on the terms outlined above.”

21. The ‘*illustration of benefits*’ which the claimant had previously received, as referred to in R1.1 and C1.1 (as set out above), is included in the claimant’s documents at C1.3. That document (C1.3) is headed “Voluntary Severance - Indicative Financial Implications”. That document sets out various information in respect of the claimant and payments which would be made to her on voluntary severance, including the following:-

10	Salary	£48,983
		Grade 4 / Level 14(SCP96)
	Continuous Service Date	6 July 1981 (37 years’ service)
	Date of Birth	18 October 1959
	Age	59
15	Termination Date	18 October 2018
	Average Weekly Wage	£939.40
	Severance Payment	£27,242.60
	Pensionable Pay	£48,983
	Total Pensionable Service	34/255
20	Basic Pension	£23,974.02
	Basic Lump Sum	£46,198.35
	Added Years Pension: Efficiency	£1,836.86
	Added Years Lump Sum: Efficiency	£5,510.59
	Total Pension: Severance	£23,974.02
25	Total Pension: Efficiency	£25,810.88

Total Lump Sum: Severance £46,198.35

Total Lump Sum: Efficiency £51,708.94

22. The claimant's employment with the respondent terminated by mutual agreement on 18 October 2018. The claimant was not dismissed by the respondent. On termination of employment the respondent paid the claimant the sum of £27,242 by way of severance payment. From termination of employment, the claimant also became entitled to receipt of pension payments on the basis of an annual pension starting at £23,970. On termination of employment. The claimant received a one off pension lump sum payment of £46,190. The claimant did not consider that these payments made to her in respect of severance payment, annual pension or pension lump sum to be *'the same or similar'* to the figures set out in the indicative figures previously set out to her (at C1.3). The payments made to the claimant are the same or similar to the figures set out in that document C1 .3 in respect of payments on the 'severance option'. These figures are not the same or similar to the figures set out in respect of payment on the 'efficiency option'. The 'severance option' and the 'efficiency option' are the two options outlined in letter to the claimant from John Dunne dated 20 June 2018, at C9. The 'efficiency option' is 'Option 1' in that letter at C9. The 'severance option' is 'Option 2' in that letter at C9. The document with indicative figures, which is at C1 .3, makes no explicit reference to 'Option 1' or 'Option 2'.
23. There is no reference in the documents referred to above to any recalculation, of the severance payment to take into account any backdated wage increase.
24. There is no reference in the documents referred to above to the severance payment amount being in full and final settlement.
25. An effect of the agreement and implementation of the Scottish National Joint Council pay award was a back dated pay increase, being an increase in salary for the claimant of 3.5% for the period from 1/4/18 to 18/10/18.
26. In March 2019, the claimant sent an email to the respondent's payroll department in the following terms (C10.3):-

"I would like to request my pay, Voluntary Severance payment and pension be recalculated from 1st April to 18th October 2018 to reflect the 3.5% pay increase agreed for 2018 -19. I left South Ayrshire Council's employment on 18/10/2018.

5 *My understanding is that the pay award would apply to my:*

1. *Voluntary severance payment*
2. *Pay during this period*
3. *Holiday pay (18 days paid in lieu of notice)*
4. *Pension including my lump sum and final annual pension.*

10 *I also never received a payslip for my final pay up to 15th November 2018 and would be obliged if you can arrange for this to be sent / emailed to me.*

Thank you."

15 27. That email was forwarded on 5 March 2019 by Liz Alcroft in the respondent's payroll department to Jane Murray (Senior Employee Services Advisor) in email headed '*CLD Margaret Burns - Local authority pay increase awarded for 2018-19 - Pension recalculation and backdated pay.*' (C10.2). Jane Murray replied to Liz Alcroft on 5 March 2019 in the following substantive terms (at C10.2):-

20 *"We will get payment processed for pay award.*

Back pay won't include a voluntary severance adjustment.

The pension payment will be dealt with by the pension office.

Please find copy payslip attached."

25 28. That email was forwarded to the claimant on 6 March 2019 by Liz Alcroft (C10.2). The claimant replied to Jane Murray by email of 6 March in the following substantive terms (C10.1 – 10.2):-

“Can I please clarify a couple of points:

- 1. Pension - can you please confirm that SAC finance will contact the pension office to ask them to recalculate my pension?*
- 2. The attached payslip says the termination date was 17th October 2018, when my actual last working date was 18th October 2018 – am I due a day’s pay?*
- 3. Voluntary Severance - my understanding is that as the VS was based on my actual salary (weekly wage) and in local government terms and conditions the National pay award was implemented from 1st April 2018, then I am entitled to this?”*

29. Jane Murray replied to the claimant by email on 6 March 2019 in the following substantive terms (C10.1):-

“I’ve checked your final pay, and I don’t know why the screen dumps, says 17 October. You have been paid three days from 16 October two leaving date on 18 October in your final payment.

*Monthly salary equals £4081.92 / 31 days * 3 days = £395.02*

We will contact the pension office and notify them of your new salary.

I am passing your query regarding voluntary severance payment on to my manager, Frank Fulton. We have presently been instructed not to calculate backpay on this.

30. Frank Fulton (Service Lead - Payroll, HR Business and Resourcing) also sent an email to the claimant on 6 March 2019 (C3). That email was in the following substantive terms:-

“I have been passed your email seeking clarification of a couple of points I understand that in relation to the first two points concerning pension and the termination date. These have been responded to by Jane Murray.

In relation to point 3 concerning the payment of your voluntary severance, I would make the following comments.

As a former employee, you are duly entitled to any wage related payments, such as arrears of pay claims, which we will process and make payment to you on 13 March 2019. In relation to severance, this is a payment made to an employee who has lost their job by taking voluntary severance. This is not a wage related payment and is not covered by the same rules as wage related payments. Any severance payment is based upon the employee's contractual weekly rate of pay as at the 'calculation date' for calculating severance payment.

In this respect, you are unfortunately not due to have a recalculation done for your severance as you suggest."

31. On 13 March 2019, the claimant was sent by email a soft copy payslip from the respondent for pay date 16 March 2019 (C5). That payslip showed certain payments and deductions, with a net pay figure to the claimant of £703.77. That payslip (C5) set out the following under the column '*Payments*':-

"Salary Retro	940.77
Pay Lieu Hol Retro	120.13
Severance Pay NT	954.10
Severance Pay NT	-954.10
Severance Pay Tax	0.00
Total	1060.90

32. The claimant was then sent a paper payslip from the respondent for period ending 15 March 2019 (C6). That payslip showed certain payments and deductions, with a net pay figure to the claimant of £1,713.22. That payslip (C6) set out the following under the column '*Payments*':-

"Pay Lieu Hol Retro 120.13 PAYE

Salary Retro 940.77 NI A

Severance Pay NT Ret 954.10

33. The claimant believed from that payslip at C6 that a decision had been made by the respondent that she would receive payment in respect of the recalculation of her severance payment to take into account the back dated pay increase. The claimant sent an email to Jane Murray on 19 March 2019 in the following substantive terms:-

“I received my payslip by post today thank you.

Can you please let me know if I am due to receive another payment?

10 It says on my payslip my net pay is £1713.22, however, I have only received £703.77 into my bank account (on 13th March).”

34. The claimant has not received any further payment from the respondent. The claimant has received payments from the respondent reflected the backdated pay increase for the period from 1/4/18 in respect of salary payments. The claimant’s severance payment has not been recalculated to take into account that pay increase.

Observations on the Evidence

35. The claimant clearly felt aggrieved about what she perceived to be a lack of communication from the respondent, perceived lack of clarification of the sums she would receive following opting for voluntary severance and the sums received being lower than what the claimant had expected. I was satisfied on the evidence presented by the claimant, and it was not disputed by the respondent, that information from the Strathclyde Pension Fund with the claimant’s detailed illustration of pension benefits was not passed to the claimant timeously on receipt by the respondent. In so finding I attached weight to the timing of the emails at C11.1, as set out above.

36. I accepted that the letter at R1 & C1 is erroneously dated 9 July and could not have been issued to the claimant on that date because it reflects a changed termination date which was first requested by the claimant on 12 July 2018.

37. I observed that there appeared to be a lack of explanation given to the claimant in respect of the differences between the figures in option 1 and option 2 of the voluntary severance options.

38. I found both the claimant and John Dunne to be credible and reliable witnesses. The relevant material facts in this case are not materially in dispute. The issue before me comes to down to an interpretation of the relevant law to those facts.

39. There is dispute in respect of the claimant representative's position in submissions that other local councils have paid recalculated severance pay to take into account the backdated pay increase for year 2018/19. I accepted the respondent's representative's position that no evidence was presented before me on that and therefore have not taken that particular submission into account, nor have I made any findings in fact in that respect.

40. Although the letter at R1 / C1 refers to "...*the terms of the Council's voluntary severance arrangements*". These were not before me.

Relevant Law

41. The Employment Rights Act 1996 ('the ERA') at section 13 provides for the right of an employee not to suffer unauthorised deductions from wages. An unlawful deduction from wages claim may be brought before an Employment Tribunal in terms of that legislation. Section 13(3) states:

'Where the total amount of wages paid on any occasion by an employer to a worker employed by him is less than the total amount of the wages properly payable by him to the worker on that occasion (after deductions), the amount of the deficiency shall be treated for the purposes of this Part as a deduction made by the employer from the worker's wages on that occasion.'

42. Section 27 sets out provisions with regard to meaning of wages, including at section 27(1)(a) '*any fee, bonus, commission, holiday pay or other emolument referable to his employment, whether payable under his contract or otherwise.*' There are certain exclusions set out in section 27(2) and (5). A

worker cannot seek recovery of those excluded payments by bringing an unlawful deduction from wages claim. Section 27(2)(c) excludes “any payment by way of a pension, allowance or gratuity in connection with the worker’s retirement or as compensation for loss of office.”

5 43. In *Richmondshire District Council v Dodds* EAT 1240/96, the EAT held that the section 27(2)(c) exclusion applied to a provision in a contract of employment entitled retiring employees to a period of extra paid leave in the year before they retired. The EAT held that that was an allowance in connection with retirement rather than wages and so was excluded by the provisions of section 27(2)(c).

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44. In *Webber v NHS Direct* EAT 0627/11, the EAT held that a claim for protection payments following an employee’s redeployment to a lower salary post was not ‘compensation for loss of office’, but ‘wages’, and so was not excluded in terms of section 27(2)(c).

15 **Submissions**

45. Neither party relied on any case law before me.

46. The claimant’s representative spoke to provided written submissions. Her position was that severance pay was wholly calculated based on weekly contractual wage as per the claimant’s contract of employment with the respondent. On that basis, the claimant sought recalculation of the severance payment to take into account the national SJC backdated annual increase, from the date of implementation of that increase to termination date of 18 October 2019. The claimant sought the sum of £953.10 in that respect.

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47. The claimant’s representative relied on the letter at C1 in respect of the termination of employment being by mutual agreement, based on the indicative financial figures in that letter. Reliance was placed on that letter referring to the terms of final benefits being the ‘same or similar’. The claimant relied on the illustration document with the heading ‘Voluntary Severance - Indicative Financial Implications’ as inferring that the severance amount was subject to change.

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48. The claimant's representative relied on section 13(2) and section 27(1) of the ERA. Her position was that the severance payment was wages because it was a payment under the contract and related wholly to that. Reliance was placed on the contract of employment between the claimant and the respondent having a clear and unequivocal expressed term that those terms and conditions of employment are in accordance with the NJC (later SJC) collective agreement. Reliance was placed on Frank Fulton's position in email at C3 that *'any severance payment is based upon the employee's contractual weekly rate of pay as at the calculation date.'* The claimant's representative's position was that the increase in salary effect and was backdated to 1 April 2018, as at the 'calculation date' the claimant's weekly rate of pay had increased. Reliance was placed on the claimant's understanding that the voluntary severance payment was calculated on contractual weekly wage as shown in the illustration document. Reliance was placed on the claimant having an expectation that the severance payment would be increased as a result of the backdated pay increase.
49. The claimant's representative took into account that the calculation date must be before the claimant employment with the respondent terminated. Her position was that the severance pay should have been calculated on the basis of the increased weekly wage. Her position was that if the pay increase had been implemented before the termination date, the contractual weekly pay would have then increased, as effected by the backdated agreement, and the severance payment would then have been calculated based on the increased weekly wage.
50. Reliance was placed on the communications the claimant received from the respondent and in particular that at no time was the claimant told by or on behalf of the respondent that the severance payment would not be later recalculated to take into account and backdated pay increase. Reliance was placed on the claimant's expectation that the severance payment would be recalculated with any such backdated pay increase. Reliance was placed on there being no reference at the time of the agreement to the payment of £27,242 being in full and final settlement, or being 'final and not open to

negotiation' as is relied upon by the respondent in their ET3. Reliance was placed on lack of any documentary evidence to support the respondent's position that the severance payment would not be increased in the circumstances. Reliance was placed on the calculation of the severance payment being done using the statutory redundancy tables and the employees' weekly wage, and not being a figure 'plucked out of the sky'.

51. The claimant relied on the documents before me at C1 – C11. Reliance was placed on the payslip showing severance pay due (C6). It was submitted that the documents show inconsistencies and lack of clarity within the respondent's organisation.

52. The claimant's representative submitted that the restructure program was not completed, and no conclusion had been reached, when the claimant decided to enquire about voluntary early release. It was on that basis that the claimant's representative argued that the Severance Payment was not compensation for loss of office. Her submission was that there was a mutual termination. Her position was that the claimant had chosen to leave and had given no comment on the two job options which had been available to her (C8). Reliance was placed on the Local Government (Discretionary Payments and Injury Benefits) (Scotland) Regulations 1998. Her submission was that the pension the claimant received was triggered at the discretion of the respondent by way of the mutual termination of employment, and in the interests of efficiency and not loss of office. Reference was made to loss of office in the Companies Act 2006. It was submitted that this was not a payment referable to the claimant's redundancy. Reliance was placed on the claimant not having been forced to leave and restructure not having been completed when the claimant signed her agreement to mutual termination of contract. It was submitted that loss of office is mainly referenced to directors of companies under the Companies Act 2006 and is additionally defined as where an employee is forced to leave the employment before the expiry of the contract. It was submitted that the claimant's situation is not loss of office because the claimant signed for a mutual termination of employment, terminating on 18 October 2018 by mutual agreement. Reliance was placed

on C1 / R1 stating that the claimant was not entitled to '*statutory redundancy or any other severance payment*'.

53. Reliance was placed on the delay in pension figures being provided to the claimant and the difference between the sums the claimant expected to receive and the lower figures she actually received.

54. In summary, it was the claimant's representative's position that: -

- the claimant's weekly wage from 1 April 2018 to 18 October 2019, had increased on implementation of the collective bargaining clause within the claimant's contract of employment
- 10 • the calculation of the voluntary severance payment was based on contractual wage as shown in the documents relied upon by the claimant
- a payslip was provided to the claimant by the respondent showing that an increase in the voluntary severance payment was due on implementation of the collective bargaining clause
- 15 • the voluntary severance payment was not a settlement agreement but was an amount paid unambiguously calculated using the claimant's contractual weekly wage
- the respondent did not tell the claimant that the severance payment would not be increased as a result of the national pay award, nor that the payment was in full and final settlement and the claimant had an expectation that the severance payment would be recalculated on implementation of the national pay award
- 20 • the claimant did not suffer loss of office and was not made redundant
- 25 • reliance was placed on the email correspondence between the claimant and the respondent.
- the claimant seeks the sum of £954.10 in respect of recalculating the severance pay to take into account the back dated pay increase. This

is relied upon as being a deduction of wages in respect of non-payment of the difference in the calculations.

55. In her submissions, the respondent's representative asked that any matter referred to in the claimant's representative's submissions which was not based on evidence before the Tribunal should be treated with appropriate caution.
56. The respondent's representative relied on this being a claim for unlawful deductions from wages. Her position was that recalculation of a voluntary severance payment to take into account a backdated pay increase was not wages. It was noted that there was little dispute between the parties on the evidence. Reliance was placed on the claimant having elected to apply for voluntary severance. It was submitted that there is an inference from the claimant's completion of the form which is C8 that she did not wish to pursue the options of the alternative employment options. Reliance was placed on the respondent having amended the claimant's termination date to 18 October 2019, at her request and to her financial advantage.
57. Reliance was placed on R1 / C1 as setting out the terms on which the severance payment was made. It was accepted that on the evidence of the claimant and of Mr Dunne it is likely that that letter was sent out after 9 July 2018 (which is the date stated on that letter). It was accepted that as the claimant asked for the termination date to be changed on 12 July 2019, and R1 reflects that changed date, R1 must have been finally produced after 12 July, most likely from a template worked on on 9 July 2018. It was submitted that Mr Dunne had provided this reasonable explanation and that that should be accepted.
58. Reliance was placed on the claimant having signed R1 and so accepting that her employment with the respondent would end by mutual agreement on the terms set out in that letter, being that the claimant would (1) have immediate access to her pension (2) receive a severance payment of £27,242. Reliance was placed on the illustrative benefits and the reference to 'the same or similar' being in relation to pension and lump sum figures, rather than to the

severance payment figure. It was submitted that the agreement was predicated on the annual pension and lump sum being the same or similar to the figures in that letter. It was submitted that the severance figure was separate to those figures.

5 59. In respect of the calculation of the severance payment, the respondent's representative referred to C11.1. It was not disputed that the formula used to calculate the severance payment was based on salary, similarly to the calculation of a statutory redundancy payment, as had been accepted by Mr Dunne in his evidence. The respondent's representative submitted that the
10 severance payment figure was calculated as at the calculation date and, as stated in R1, constitutes a mutual agreement between the parties. Reliance was placed on it being made clear in R1 that this was not a redundancy or other severance payment, and that there was no dismissal. It was submitted that the figure was an amount paid on mutual agreement to termination of
15 employment and is an accommodation reached between the parties calculated with reference to salary as at the calculation date but from which no deductions were then made. Reliance was placed on Mr Dunne's evidence that the severance payment is in effect compensation for loss of employment.

20 60. Reliance was placed on R1 as being the agreement signed by both parties and binding as at that date. It was submitted that if the arrangements had been different and there had subsequently been the case in salary, then the severance payment would not have been reduced. It was submitted that the figure set out in R1 is the agreed figure.

25 61. In respect of the claimant's reliance on the email at C3, it was submitted that the references to payment on loss of jobs. It was submitted that this is not a wage -related payment it was convenient to the respondent to calculate the payment with reference to the employee's wages.

30 62. It was submitted that the voluntary severance payment comes outside the definition of wages in the employment rights act because all the exclusion in section 27(2)(c) in respect of compensation for loss of office. Failing that it

was submitted that the severance payment is a gratuity and there is no contractual entitlement to the payment.

63. With regard to the payslips relied upon by the claimant. It was submitted on behalf of the respondent that the inclusion of an amount in respect of the recalculation of the severance payment was ‘an unfortunate mistake’, but was a mistake.
64. In respect of the claimant’s reliance on a delay in the respondent issuing to her details of her pension figures it was submitted that that was not relevant to the heart of the matter before this Tribunal.
65. In summary, it was submitted for the respondent that the claimant and the respondent entered into an agreement on 9 July 2018 that was accepted by the claimant when she signed the letter at R1.2 and that the claimant cannot claim for an amount in respect of the calculation of that amount because of the exception to the legislation set out in ERA s27(2)(c). On that basis the respondent submitted that the claim should be dismissed.

Decision

66. Section 27(2)(c) of the ERA excludes “any payment by way of a pension, allowance or gratuity in connection with the worker’s retirement or as compensation for loss of office.” In this case, the severance payment is a payment made to the claimant when her employment came to end by mutual agreement. Part of that mutual agreement was that the claimant receive pension payments. Pension payments are payable on retirement. In that sense then the severance payment here is a payment in connection with the worker’s retirement.
67. I did not accept the claimant’s representative’s submissions that the severance payment was not compensation for loss of office. The agreement came to effect because the claimant agreed to accept the severance payment as an alternative to continuing employment (in an alternative role). The severance payment was then compensation for loss of office. The provisions

of section 27(2)(c) do not require loss of office to be enforced. These provisions include where there has been a mutual agreement to loss of office.

68. In so deciding, I followed the reasoning of the EAT in *Richmondshire District Council v Dodds* EAT 1240/96.

5 69. Had the exception in section 27(2)(c) not applied, I would have accepted the claimant's reliance on there being no provision that the severance payment be in full and final settlement and would have accepted the claimant's position that the implementation of the backdated pay increase ought to have had the effect of increasing the calculation of the severance pay with regard to the relevant period (from 1 April 2018 to 18 October 2018) because the severance
10 pay was calculated with regard to the relevant weekly wage.

70. The Tribunal does not have jurisdiction to make an award to the claimant in respect of the recalculation of severance pay because the exception to section 13 ERA which is set out in section 27(2)(c) ERA applies. For that
15 reason, the claim is dismissed.

Employment Judge: C McManus

Date of Judgment: 12 December 2019

Date sent to parties: 19 December 2019