



**EMPLOYMENT TRIBUNALS (SCOTLAND)**

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**Case No: 4101269/2020 (V)**

**Final Hearing held remotely on 13 October 2020**

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**Employment Judge A Kemp**

**Mr G Leighton**

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**Claimant  
Represented by:  
Mr P McGregor  
Solicitor**

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**Balnacraig Farm and Estates Limited**

**Respondent  
No appearance**

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**JUDGMENT OF THE EMPLOYMENT TRIBUNAL**

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**1. The claimant was automatically unfairly dismissed by the respondent in breach of section 100 of the Employment Rights Act 1996, and he is awarded the sum of NINE THOUSAND EIGHT HUNDRED AND THIRTEEN POUNDS FIFTY SEVEN PENCE (£9,813.57) in compensation, payable by the respondent.**

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**2. The respondent made an unlawful deduction from the wages of the claimant in respect of holiday pay due to him in the sum of ONE THOUSAND ONE HUNDRED AND FOUR POUNDS SIXTY ONE PENCE (£1,104.61) and he is awarded that sum, payable by the respondent.**

3. **The Tribunal reserves a decision on whether or not to impose a penalty under Section 12A of the Employment Rights Act 1996 for a period of 14 days to allow the respondent to make written representations.**

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## **REASONS**

### **Introduction**

1. This Final Hearing took place remotely in accordance with directions given by the Tribunal following an earlier Preliminary Hearing. The respondent had not entered an appearance, and did not attend the hearing, although contact was made by a person on behalf of the Tribunal prior to the hearing asking for a further copy of the Notice of Final Hearing to be sent, which was duly carried out by email.
2. The claims made were for automatically unfair dismissal, and in relation to holiday pay.

### **Evidence**

3. Evidence was given by the claimant himself. The claimant had provided the Tribunal with documentation including a Schedule of Loss with supporting vouching. The hearing was held remotely and appropriately, such that I am satisfied that it is in accordance with the overriding objective in Rule 2 to make a Judgment. The terms of the Practice Direction in relation to such remote hearings were also followed.

### **Facts**

4. I made the following findings in fact on matters relevant to the Claim made:
5. The claimant is Mr Gavin Leighton.
6. The claimant was employed from 15 October 2018 by Helical Technology Limited until 27 September 2019 when he was presented with a contract

of employment with Balnacraig Farm and Estates Limited and required to sign it which failing his employment would terminate. He did so. He was employed as a Groundsman and Estate Manager. His employment continued until the termination referred to below.

- 5 7. The claimant had a gross weekly salary of £450 on average, which was £383.62 net. The deductions from his wage included employee pension contributions of £17.64 per week. The employer pension contributions were £23.57 per week. The claimant's pay varied according to the hours that he worked. He worked Monday to Friday, together with overtime at  
10 weekends.
8. On 25 October 2019 the claimant was working at Gibliston House, Cupar, Fife, a site where he had had responsibility for managing. It had been arranged that he would be shown by a third party, whose name is not  
15 known to the claimant, how to carry out jobs without using a chain saw. When the person attended on site he latterly did use a chain saw, to create notches on strainer posts for a paddock the claimant was building there, but did so without using any personal protective equipment (PPE). The PPE required for work with a chain saw includes a helmet and visor, safety gloves, trousers and boots, all of which are appropriate for working with  
20 such equipment. The claimant considered that the work being carried out in close proximity to him by a person who did not have such PPE, and where the claimant himself did not have such PPE, were harmful or potentially harmful to the health of that person and to the claimant himself. The risk was particularly that there may be a sudden movement of the  
25 chain saw, known as a kick, which can happen without warning, and cause it to move in an unpredictable and sudden way, potentially coming into contact with either the other person holding it, or the claimant who was standing close to him. The risk of harm included serious injury or death.
9. The claimant reported the matter to the managing director of both the  
30 respondent and Helical Technology Limited, Mr Andrew Morris, at that time, and indicated that he wished to return to Balnacraig Farm where he normally worked. Mr Morris told him that he could not work with the claimant in the way that he, the claimant, wished to work, and dismissed

him summarily. No disciplinary process was followed by Mr Morris when intimating that decision. There was no safety representative or safety committee established by the respondent.

- 5 10. The claimant sought to raise the matter of the decision by emails dated 25 and 28 October 2019. He sent an email setting out an appeal, referring to issues of health and safety, on 31 October 2019. A letter of appeal decision was provided to him by Ms Sara Pendlebury the Head of Human Resources and Health and Safety of Helical Technology Limited refusing it and stating that Mr Morris had the right to dismiss him summarily. 10 Although bearing the date 28 October 2019 it refers to the email dated 31 October 2019 and was clearly prepared after that email accordingly.
- 15 11. The claimant sought to find new employment after the dismissal by the respondent. He spoke to local employers, but none were recruiting as it was the end of the season at that time. He continued in his efforts at seeking new employment, and succeeded in doing so on 16 March 2020, when his new employment paid no less than the pay from the respondent.
- 20 12. The holiday year for the respondent was the calendar year. In the period to the date of termination of employment the claimant had taken three weeks' holidays in total, an equivalent of fifteen days. No payment was made to him for the balance of the holidays to which he was entitled.
13. The claimant did not apply for any state benefits after his dismissal from the respondent.

### **Submission**

- 25 14. Mr McGregor made a brief submission with regard to the Schedule of Loss, and invited me to give Judgment in the sums sought therein.

### **The law**

15. Section 100(1) of the Employment Rights Act 1996 has provisions for automatic unfair dismissal in circumstances relating to health and safety matters, and sub-section (1)(c) applies where, in the circumstances set

out in that sub-section, the employee brought to his employer's attention, by reasonable means, circumstances connected with his work which he reasonably believed were harmful or potentially harmful to health or safety. Further, sub-section (d) applies where in circumstances of danger which the employee reasonably believed to be serious and imminent and which he could not reasonably have been expected to avert he left or proposed to leave his place of work.

16. In the event of breach of that section, a compensatory award may be made as provided for in section 123 of that Act.
- 10 17. The provisions for an unlawful deduction from wages are found in Part II of the Employment Rights Act 1996. The right not to suffer unlawful deduction from wages is provided for in section 13.
18. The definition of wages is provided for in section 27 and includes "any sums payable to the worker in connection with his employment including  
15 (i) any .....holiday pay....."
19. The entitlement to holidays is regulated by the Working Time Regulations 1998 ("the Regulations"). They are made to give effect to the Working Time Directive 93/104/EC and require to be construed purposively in light of that. They can be exceeded by contract, and act as a minimum  
20 entitlement.
20. The Regulations provide for an entitlement to annual leave under Regulations 13 and 13A, which amount to a total of 5.6 weeks per annum, capped at 28 days. For someone who works 5 or more days per week, the entitlement is to 28 days' leave per annum.
- 25 21. Regulation 14 has provision for the entitlement where a worker's employment starts and/or ends in the leave year.

## Discussion

22. I had no difficulty in accepting the evidence from the claimant. He spoke in an entirely convincing way, and was I consider a credible and reliable

witness. He referred to written documentation to support the claims made, which included payslips, emails and the appeal letter referred to above.

23. I shall deal with each of the heads of loss in turn.

(i) *Automatic unfair dismissal*

5 24. I was entirely satisfied that the incident spoken to by the claimant took place as he alleged, in that a person attended with the claimant, and used a chain saw in his presence without any PPE, and in circumstances where there was a danger to the safety of that person, and the claimant who was standing nearby, such that the circumstances were harmful or potentially  
10 harmful. The claimant reported his concerns reasonably. I was also satisfied that when the claimant reported his concerns on that to Mr Miller he was then and there summarily dismissed. That took place without any disciplinary procedure at all, and in the face of entirely reasonable concerns over health and safety. There was no safety representative or  
15 committee and section 100(1)(c) was breached accordingly. In addition, I consider that the terms of sub-section (d) were breached, in that the situation was one of serious and imminent danger, and the claimant left or proposed to leave his place of work, and was dismissed as a result.

20 25. The claimant sought to appeal that decision, and although there was an opportunity to consider that issue afresh, the respondent through a related company not only did not do so, but sent a letter of decision which failed to take the slightest account of the terms of section 100 of the Employment Rights Act 1996. That that took place by someone with the designation of Ms Pendlebury was very surprising indeed.

25 26. I was satisfied that the dismissal was a breach of that section, and automatically unfair. Whilst the claimant does not have service to claim “ordinary” unfair dismissal under section 94 of the Act, no service is required for a claim under section 44.

30 27. The claimant was not working for 21 weeks. He mitigated his loss in my judgment, and has no loss beyond the date when he found new employment. His compensatory award is therefore for a period of 21

weeks, on the basis of the net earnings of £383.62 per week, employee pension contributions of £17.64 and employer contributions of £23.57. The total weekly sum is £424.83, and for 21 weeks the sum is £8,921.43.

28. There was a complete failure to follow the ACAS Code of Practice on Discipline and Grievance Procedures, in that the claimant was not invited  
5 to a disciplinary hearing, did not have allegations and evidence obtained put to him, did not have the possibility of someone to accompany him to that meeting, and no proper appeal hearing took place, and I was invited by the claimant in his Schedule of Loss to increase the award in light of  
10 that, by a sum of 10%. That is a moderate amount given all the circumstances, and I have a discretion to award an increase of up to 25% by virtue of section 207A of the Trade Union and Labour Relations (Consolidation) Act 1992, as amended. I consider that the increase sought is appropriate in all the circumstances, and amounts in this case to  
15 £892.14.

29. The schedule of loss sought a sum for loss of statutory rights, but in light of the service of the claimant he had not acquired statutory rights to unfair dismissal for a section 94 claim, and I do not make any award under that head.

20 30. I award the total sum of £9,813.57 as a compensatory award under section 123 of the 1996 Act accordingly.

31. I accepted the claimant's evidence that he did not apply for any state benefits, and the recoupment provisions are not engaged accordingly.

*(ii) Holiday Pay*

25 32. The next claim is in relation to holiday pay. The holiday year was the calendar year. The annual entitlement was to 28 days under the Working Time Regulations 1998, that being the cap under the Regulations. The claimant had worked for 15 days, leading to a balance of 13 days. The claimant's daily rate on the basis of working five days per week was  
30 £84.97. Whilst he did not work the full calendar year that is because of an unlawful dismissal as set out above, but for which he would have done. I

consider therefore that the sum to award for holiday pay, an unlawful deduction from wages, is £1,104.61 being the daily rate for 13 days.

## Penalty

5 33. Employment Tribunals have a discretionary power in certain circumstances to order employers who lose a claim to pay a financial penalty to the Secretary of State, under the Employment Tribunals Act 1996 section 12A, which was inserted by section 16 of the Enterprise and Regulatory Reform Act 2013. It has subsequently been amended.

34. The provision is as follows:

10 **“12A Financial penalties**

(1) Where an employment tribunal determining a claim involving an employer and a worker—

- 15 (a) concludes that the employer has breached any of the worker's rights to which the claim relates, and  
(b) is of the opinion that the breach has one or more aggravating features,

the tribunal may order the employer to pay a penalty to the Secretary of State (whether or not it also makes a financial award against the employer on the claim).

20 (2) The tribunal shall have regard to an employer's ability to pay

- (a) in deciding whether to order the employer to pay a penalty under this section;  
(b) (subject to subsections (3) to (7)) in deciding the amount of a penalty.

25 (3) The amount of a penalty under this section shall be—

- (a) at least £100;  
(b) no more than £20,000.

This subsection does not apply where subsection (5) or (7) applies.

(4) Subsection (5) applies where an employment tribunal—

- 30 (a) makes a financial award against an employer on a claim,  
and



(b) also orders the employer to pay a penalty under this section in respect of the claim.

(5) In such a case, the amount of the penalty under this section shall be 50% of the amount of the award, except that—

5 (a) if the amount of the financial award is less than £200, the amount of the penalty shall be £100;

(b) if the amount of the financial award is more than £40,000, the amount of the penalty shall be £20,000.

10 (6) Subsection (7) applies, instead of subsection (5), where an employment tribunal—

(a) considers together two or more claims involving different workers but the same employer, and

(b) orders the employer to pay a penalty under this section in respect of any of those claims.

15 (7) In such a case—

(a) the amount of the penalties in total shall be at least £100;

(b) the amount of a penalty in respect of a particular claim shall be—

20 (i) no more than £20,000, and

(ii) where the tribunal makes a financial award against the employer on the claim, no more than 50% of the amount of the award.

25 But where the tribunal makes a financial award on any of the claims and the amount awarded is less than £200 in total, the amount of the penalties in total shall be £100 (and paragraphs (a) and (b) shall not apply).

(8) Two or more claims in respect of the same act and the same worker shall be treated as a single claim for the purposes of this section

30 (9) Subsection (5) or (7) does not require or permit an order under subsection (1) (or a failure to make such an order) to be reviewed where the tribunal subsequently awards compensation under—

- (a) section 140(3) of the Trade Union and Labour Relations (Consolidation) Act 1992 (failure to comply with tribunal's recommendation),
- 5 (b) section 117 of the Employment Rights Act 1996 (failure to reinstate etc),
- (c) section 124(7) of the Equality Act 2010 (failure to comply with tribunal's recommendation), or
- 10 (d) any other provision empowering the tribunal to award compensation, or further compensation, for a failure to comply (or to comply fully) with an order or recommendation of the tribunal.

15 (10) An employer's liability to pay a penalty under this section is discharged if 50% of the amount of the penalty is paid no later than 21 days after the day on which notice of the decision to impose the penalty is sent to the employer.

(11) In this section—  
“claim”—

- 20 (a) means anything that is referred to in the relevant legislation as a claim, a complaint or a reference, other than a reference made by virtue of section 122(2) or 128(2) of the Equality Act 2010 (reference by court of question about a non-discrimination or equality rule etc), and
- 25 (b) also includes an application, under regulations made under section 45 of the Employment Act 2002, for a declaration that a person is a permanent employee;

“employer” has the same meaning as in Part 4A of the Employment Rights Act 1996, .....

“financial award” means an award of a sum of money, but does not including anything payable by virtue of section 13

30 “worker” has the same meaning as in Part 4A of the Employment Rights Act 1996, .....

35. This power was granted to tribunals, according to the Explanatory Notes to the 2013 Act by which that amendment was introduced:

“to encourage employers to take appropriate steps to ensure that they meet their obligations in respect of their employees, and to reduce deliberate and repeated breaches of employment law.”

5 36. The Explanatory Notes also comment on the factors that a Tribunal might take into account as follows:

10 “An employment tribunal may be more likely to find that the employer’s behaviour in breaching the law had aggravating features where the action was deliberate or committed with malice, the employer was an organisation with a dedicated human resources team, or where the employer had repeatedly breached the employment right concerned. The employment tribunal may be less likely to find that the employer’s behaviour in breaching the law had aggravating features where an employer has been in operation for only a short period of time, is a micro business, has only a limited human resources function, or the breach was a genuine mistake.”

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20 37. I have considered the actions by the respondent in summarily dismissing him in the circumstances set out above, together with their failure to follow any process in doing so, or to remedy matters to any extent on appeal. I consider that the respondent may be in breach of the rights of the claimant and that that has one or more aggravating features such that a penalty under section 12A of the Employment Tribunals Act 1996 might fall to be imposed. That penalty can be one half of the award made, which in this case totals £10,918.18, such that a penalty of up to £5,459.09 may be considered.

25 38. Before I consider whether to issue such a penalty and if so in what sum, I propose to give the respondent 14 days in which to make written representations as to why I should not do so, or if I do what the amount of the penalty ought to be, having regard to the circumstances and the respondent’s ability to pay such an award, all as provided for in section 30 12A itself. I shall reserve the decision on penalty for 14 days to allow the respondent to provide a written response accordingly.

**Conclusion**

39. I find that the claimant was unfairly dismissed under section 100 of the Employment Rights Act 1996, that there was an unlawful deduction from his wages in regard to holiday pay, and award the sums set out above.

5 40. I reserve the issue of penalty meantime.

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

**Alexander Kemp  
15 October 2020  
15 October 2020**