



EMPLOYMENT TRIBUNALS (SCOTLAND)

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Case No: 4101269/2020 (P)

Hearing held on further consideration on 3 November 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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The Tribunal orders the respondent to pay a financial penalty to the Secretary of State for Business, Energy and Industrial Strategy, under section 12A of the Employment Tribunals Act 1996 in the sum of THREE THOUSAND POUNDS (£3,000.00), unless paid within 21 days after the day on which notice of the decision to impose the penalty is sent to the respondent in which event the sum shall be ONE THOUSAND FIVE HUNDRED POUNDS (£1,500.00).

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REASONS

Introduction

1. I gave Judgment in this case on 15 October 2020 (“the Judgment”). The Claim had been intimated to the respondent but it did not present a Response Form, nor appear at the Final Hearing, and the Judgment was made in the absence of the respondent accordingly.
2. In the Judgment I stated that consideration was being given to imposing a penalty under the provisions set out below, and allowed the respondent to provide its written response on that issue within 14 days. I have been informed that it has not done so. I have therefore considered the issue of penalty anew.

The Law

3. 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.
4. The provision was quoted in the Judgment, but for ease of reference is as follows:

“12A Financial penalties

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

(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).

(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.

5 (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.

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

- (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—

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- (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.

20 (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.

25 (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—
 - 30 (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.

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

(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),

(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

(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.

(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”—

(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

(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

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

- 5 5. 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’.

- 10 6. The Explanatory Notes also comment on the factors that a Tribunal might take into account as follows:

15 “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
20 micro business, has only a limited human resources function, or the breach was a genuine mistake.”

Discussion

7. I have considered matters further. In doing so I had regard to the facts that were set out in the Judgment I gave.
- 25 8. I consider that there was a breach of the claimant’s rights which was serious, in that he was dismissed for raising an issue of health and safety in the circumstances set out in the Judgment, that that fell within the terms of section 12A, and that there were aggravating features by the actions of the respondent in dismissing without following any form of procedure, doing so when a clear issue of health and safety had been raised by the
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claimant, and when the issue was referred to on an appeal being taken by the claimant failing to remedy the matter in any way.

9. In considering whether to impose a penalty, I require to consider the issue of ability to pay under sub-section 2(a), and in doing so I proceed in the absence of representations from the respondent. There is nothing before me that indicates that the respondent does not have the ability to pay a penalty, and had that not been the case the respondent had the opportunity to make representations, which it has not taken up.

10. I consider that a penalty should be imposed in those circumstances.

11. I consider that under the Act it is appropriate to impose a penalty of less than the maximum possible, which takes account of the fact that the respondent appears to be a very small employer, and from the terms of the appeal decision that it may have thought, albeit wrongly, that there was no impediment to a summary dismissal as the claimant did not have two years' service. In all the circumstances I consider that a penalty in the sum of £3,000 is appropriate.

Conclusion

12. I impose a penalty as above.

13. The amount of penalty is reduced by 50% if paid within 21 days.

14. The imposition of a penalty in such circumstances is a judgment under Rule 1 in Schedule 1 to the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013, and has been set out above accordingly.

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

Alexander Kemp
10 November 2020
11 November 2020