



EMPLOYMENT TRIBUNALS (SCOTLAND)

Case Nos: 4122844/2018 V

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**Employment Judge: Rory McPherson
Members Eddie McCall
Martha McAllister**

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**Glasgow on 29 September 2020 (via CVP)
Deliberation 30 September 2020 (via Teams Video)**

Mrs C Stones

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**Claimant
In Person**

Civil Nuclear Police Authority

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**Respondents
Represented by
D Stilitz QC
Counsel and
A Rathbone
Solicitor**

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RECONSIDERATION JUDGMENT OF THE EMPLOYMENT TRIBUNAL

30 The unanimous judgment of the Employment Tribunal is that

1. the claimant's claim for Breach of Contract (failure to pay contractual annual leave and contractual notice pay) in terms of Reg 3 Employment Tribunals Extension of Jurisdiction (Scotland) Order 1994/1624 arising or outstanding on the termination of the employment of the employee succeeds and the respondent is ordered to pay to the claimant the sum of **EIGHT THOUSAND NINE HUNDRED AND NINETY FIVE POUNDS AND NINETY FOUR (£8,995.94)** in respect of this claim for breach of contract and that sum is payable immediately; and

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E.T. Z4 (WR)

2. the claimants' claims in respect of s13 of the Employment Rights Act 1996 (ERA 1996) for unlawful deduction of wages (in respect of alleged unpaid backpay) do not succeed and are dismissed; and
3. in respect that the sums due reflect contractual sums due, the Employment Protection (Recoupment of Jobseekers Allowance and Income Support) Regulations 1996 do not apply.

REASONS

Introduction

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Preliminary Procedure

1. By Judgment of this Tribunal dated **Tuesday 28 April 2020** sent to the parties **Tuesday 19 May 2020**, some 22 claims asserted at the Final Hearing were dismissed following an eight-day Hearing.
2. Mrs. Stones sought reconsideration of the Tribunal's judgment under Rule 70 of the 2013 Rules.
3. By Reconsideration Judgment dated Tuesday 30 June 2020 sent to the parties 30 June 2020 (the **Reconsideration Judgment**) this Tribunal held that Mrs. Stones claims in respect of section of the Employment Rights Act 1996 (ERA 1996) and for breach of contract under regulation 3 of the Employment Tribunals Extension of Jurisdiction (Scotland) Order 1994 (SI 1994/1624) arising or outstanding on the termination of her employment should be permitted to proceed to a Hearing setting out at para 33: *"The Claimant's application for reconsideration ... restricted to her claims in respect of section 13 of the Employment Rights Act 1996 for unlawful deduction of wages and breach of contract claims in terms of Reg 3 Employment Tribunals Extension of Jurisdiction (Scotland) Order 1994/1624 arising or outstanding on the termination of the employment of the employee, are allowed to proceed*

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to a one day Final Hearing.” This Tribunal rejected all other aspects of Mrs. Stones’ application for a reconsideration.

4. Directions were also made permitting CPNA to provide Further and Better Particulars in response and which were provided Friday 31 July 2020 and CPNA provided updated calculations Monday 1 September 2020 which Mrs Stones responded to also on Monday 1 September 2020.
5. This Hearing took place via CVP (video- supplemented by audio telephone link in parts) by reason of the current pandemic and having regard to the geographic location of the parties.
6. The claimant Mrs. Stones represented herself and Mr Stilitz QC represented CPNA, instructed by Ms. Rathbone. A Joint Bundle (titled Tribunal Index) was provided, which incorporated a number of documents, including a number of spreadsheets provided by CPNA, copy payslips, HMRC extract records together with a document prepared by Mrs. Stone headed Calculation of Outstanding Payment. That Joint Bundle was supplemented by additional bundle (titled Case Papers Index). Both were collated by CNPA.
7. Both parties provided written submissions supplemented by oral submissions following the conclusion of this evidential hearing, reference to same where relevant, is made below.

Evidence

8. The Tribunal heard evidence from the claimant Mrs. Clare Stones who provided a witness statement which she had prepared for this Hearing and which statement she confirmed at this Hearing and which was thereafter taken as read following upon which she was cross examined. Witness evidence on behalf of CPNA was also provided via witness statements; from Rob Poole who is presently Chief Finance Officer of CPNA, and from Nigel Couzens as HR Business Partner of CPNA at material times and which was taken as read each of whom confirmed their statements at this Hearing and

which were thereafter taken as read following upon which they were cross examined. The Tribunal found the evidence of Mr Poole straightforward. The evidence of Mr Couzens was factual. Where any dispute of fact occurred between the parties relevant to the issues in this Final Hearing the panel preferred the evidence of Mr Poole and Mr Couzens to that of Mrs. Stones.

Findings in Fact

9. Mrs. Stones was initially advised, by letter dated Friday 24 August 2018 that in consequence of what was anticipated to be her employment terminating on Friday 17 August 2018, she would receive a contractual payment constituted of 4 elements;

- a. Capability Payment, initially set out as £12,970.13 gross; and
- b. Pay In Lieu of Notice (PILON), initially set out as £5,666.58 gross; and
- c. Untaken leave, initially set out as £2,073.41; and
- d. Pay adjustment in respect of unpaid backpay, initially set out as £15,112.49 gross

all as identified in CPNA's letter of Friday 24 August 2018 (the August 2018 letter).

10. Subsequent to that letter Mrs. Stones' actual date of termination was agreed as Friday 16 November 2018.

Annual Leave

11. The parties agreed in evidence, the annual leave calculation provided by CPNA which identified as a total sum to which Mrs. Stones was entitled as **£2,792.12** (which is the same figure as set out by Mrs. Stones in her Calculation of Outstanding Payments). Mrs. Stones, had received part payments in respect of unused holiday of **£663.60** (as shown in the October 2018 payslip) and a further payment of **£185.46** in the September 2018 payslip. Both these sums fall to be deducted from the total of **£2,792.12**, leaving a contractual entitlement **£1,943.06**.

General Findings Regarding Pay Entitlements and Payments made:

12. Prior to Monday 13 November 2017 Mrs. Stones had been entitled to;
- a. Half Pay and Statutory Sick Pay from Wednesday 18 January 2017 to Friday 3 February 2017; and
 - b. Half Pay (and no Statutory Sick Pay) from Saturday 4 February 2017 to Sunday 13 August 2017; and
 - c. Sick Pay at what CPNA describe as Pension Rate from Monday 14 August 2017 to Sunday 12 November 2017.

However, during those periods Mrs Stone, was through error on the part of CPNA paid full pay. As such CPNA had made overpayments. Mrs Stones did not dispute the overpayments although she considered that the overpayments were wholly extinguished by application of what she described as untaken annual leave. They were not.

13. It was not in dispute that Mrs. Stones was subsequently entitled to receive full pay from Monday 13 November 2017 to Friday 17 August 2018, for reasons set out at para 229 of this Tribunal's Judgment dated 18 April 2020, sent to the parties 13 May 2020.

14. The correct calculation balancing the overpayments with underpayments (that is the back pay) is calculated by CPNA to be **£10,791.94** net. That sum was paid to Mrs. Stones in **September 2018**. It was wrongly labelled by CPNA as "*Settlement Agree*" rather than what might have been more accurately (and usefully) described as Back Pay.

15. While Mrs. Stones, agreed in cross that this sum (**£10,791.94**), was the sum paid by CPNA in respect of Back Pay (although wrongly labelled as "*Settlement Agree*"), her own Calculations of Outstanding Payment (in which she calculated back pay of £17,288.59) provided to the Tribunal in the Joint bundle, made no provision either in respect of actual payment of backpay received or in respect of the periods of overpayment.

16. Specific net sums received by Mrs. Stones were ascertainable both from her payslips and her bank statements. In summary, and in so far as relevant to the issues for this Tribunal, she received:

- a. On 30 August 2018: Net pay **£1,382.27**;
- b. on Thursday 27 September 2018: Net pay **£10,791.94**;
- c. on Tuesday 30 October 2018: Net pay of **£7,978.03** being the final cumulative net payment.

- 5 17. CPNA's breakdown spreadsheet explanation of the itemising of the August 2018 and September 2018 payslips provided in the course of the hearing within the Tribunal Index was accepted Mrs. Stones in the course of this hearing.

Errors in the Penultimate Payslip (and sums paid)

- 10 18. In the **Penultimate Payslip** (which covers Sunday 1 September to Sunday 30 September 2018), CPNA included a payment (which is wrongly labelled as "*Settlement Agree*" and is wrongly stated to be £10,695.37) reflecting the balancing of the overpayments with underpayments being **£10,791.94** net. That sum was paid to Mrs. Stones in **September 2018** although was wrongly
- 15 labelled by CPNA as "*Settlement Agree*" rather than what might have been more accurately (and usefully) described as back pay and as indicated was wrongly set out in the penultimate payslip as £10,695.37. That backpay was attributed via communication to HMRC, for HMRC purposes over the relevant pay periods to which the back pay was attributable.

Present Calculations

It is a matter of agreement as between the parties that Mrs. Stones was contractually entitled, by the time of termination, to what is described as a Capability Payment (provided within CPNA's Leavers Policy) and a Notice Payment.

- 25 19. On Tuesday 1 September 2020 CPNA set out its final position on the pay due which it calculated (gross) at £7,835.30 comprising of;
- a. Sick Pay at what is described as pension rate for Nov 2017 being £235.66; and

b. Underpaid Untaken Annual Leave being £1,943.06; and

c. Notice Pay being £5,666.58.58.

which applying interest at 8% for 22 months would amount to £1,150.64 giving a total sum of £8,995.94 due to Mrs Stones.

5 **Findings of Fact re Mr Couzens and Mr Poole.**

20. Mr Couzens had commenced employment with CPNA June 2018 as an HR Business Partner and had previously held a number of HR/Business Management positions in the private and public sector. A number of calculations had been provided to Mr Couzens by others within CPNA for
10 incorporation in the August 2018 letter. Although those calculations were not made by Mr Couzens he had no reason, based on the information provided to him by CPNA at the, time to consider that they contained errors. It is now accepted by CPNA and by Mr Couzens that those calculations contained errors.

15 21. The calculation table for the Capability Table was provided by and explained by Mr Couzens. It was not challenged.

22. CPNA's methodology of calculation of annual leave was explained by Mr Couzens. It was not challenged.

20 23. Mr Couzens had not been provided with copy of CPNA payslips by CPNA in course of preparing of the August 2018 letter. Mr Couzens had attended and given evidence at the previous Full Hearing (4, 5, 6, 7, 10, 11, 12 and 13 February 2020) which culminated in the Tribunal's Judgement dated 28 April 2018 and which sent to the parties 13 May 2020.

25 24. Mr Couzens accepts that errors have occurred in payroll information provided to him.

25. In 2018 CPNA's payroll was carried out by an outsourced payroll company called CGI.

26. Mr Poole has been the Head of Finance for CNC for the last 4 years and for the last 18 months has been as its Chief Finance Officer. He is a qualified

accountant and has previous experience in senior management in Local Government and the NHS.

27. Mr Poole in his capacity of Head of Finance oversees a team within CNC Finance. He instructed his team to provide an analysis of the pay position to him receiving data including pay information. Prior to attending the Tribunal, he has satisfied himself based on his experience and the analysis of the team which he oversees that the position as set out by CPNA including by reference to its communication to the Tribunal and Mrs. Stones on Tuesday 1 September 2020 reflects the correct position. It was his evidence that a 2% pay award had been factored into the calculations as was an organisational wide assimilation.

28. Mr Poole expressly apologised for the errors which had occurred.

Errors in the Final Payslip (and sums paid)

29. An erroneous deduction was made by CPNA in the **Final Payslip** (which is described to cover to Wednesday 31 October 2018 but in fact covers to Friday 16 November 2018), deducting a figure of £5,666.64 (and which is wrongly labelled as *Prior Year Adjus* in that payslip). That error arose from a mistaken belief by CPNA, and those who provide payroll services to them, that CPNA had previously made a payment of a sum of 3 months' Pay in Lieu of Notice (Notice Pay) when it had originally been anticipated by CPNA, that Mrs. Stones' employment would terminate as at Friday 17 August 2018. No such earlier Notice Pay payment had been made.

30. Mrs. Stones was paid the contractually due capability payment of £13,101.95 as part of the final payroll and contained within the Final Payslip (that payment being relatively accurately labeled as Capability Exit Pay) additional to her basic salary covering the period to the termination of her employment on Friday 16 November 2018, in the sum of £5,738.17 together with a sum in respect of untaken annual leave (£663.60).

General Findings Regarding Payments Not Otherwise Made

31. Mrs. Stones is entitled to outstanding sums, as reflected in the CPNA communication of 1 September 2020 being a gross figure of £7,835.30 comprising of;

5 a. Sick Pay at what is described as pension rate for Nov 2017 being £235.66; and

b. Underpaid Untaken Annual Leave being £1,943.06; and

c. Notice Pay being £5,666.58.58.

which applying interest at 8% for 22 months would amount to £1,150.64 giving a total sum of £8,995.94 due to Mrs Stones.

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Additional matter

32. In the course of this hearing Mrs. Stones, in her witness statement stated, in broad terms, that in around June 2018 she was unable to apply for maternity leave, and put that position to Mr Couzens by reference to emails which were not addressed to him. Mr Couzens did not accept in his evidence Mrs. Stones' position when it was put to him by Mrs. Stones. Mrs. Stone in her written statement suggested that she raised a question on **Tuesday 2 August 2018**; it was not suggested that it had been raised with Mr Couzens, it was not put to Mr Poole. No findings of fact are made in relation to same. That matter was not set out in the application for reconsideration. The Tribunal has reminded itself of the findings in fact set out at paragraphs **220**, **221** and para **231** of this Tribunal's Judgement of **28 April 2020** and sent to the parties **13 May 2020**. No findings of fact or decision beyond the existing Tribunal's Judgement of 28 April 2020 and sent to the parties 13 May 2020 is appropriate.

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Relevant Law

33. **The Employment Tribunals Act 1996** provides at ss (2) and (3) that:

(2) Subject to subsection (3), this section applies to—

(a) a claim for damages for breach of a contract of employment or other contract connected with employment

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(b) a claim for a sum due under such a contract, and

(c) *a claim for the recovery of a sum in pursuance of any enactment relating to the terms or performance of such a contract, if the claim is such that a court in ... Scotland would under the law for the time being in force have jurisdiction to hear and determine an action in respect of the claim.*

(3) *This section does not apply to a claim for damages, or for a sum due, in respect of personal injuries.*

34. **The Employment Tribunals (Extension of Jurisdiction) (Scotland) Order 1994** provides that

“3 Extension of Jurisdiction

Proceedings may be brought before an employment tribunal in respect of a claim of an employee for the recovery of damages or any other sum (other than a claim for damages, or for a sum due, in respect of personal injuries) if—

(a) *the claim is one to which (s 3(2) Employment Tribunals Act 1996) applies and which a court in Scotland would under the law for the time being in force have jurisdiction to hear and determine;*

(b) *...*

(c) *the claim arises or is outstanding on the termination of the employee's employment.*

35. In terms of s13 of the **Employment Rights Act 1996 (ERA 1996)** provides that an employer shall not make unlawful deduction of wages. s23 of the ERA 1996 provides that such claims may present such a complaint to the Employment Tribunal. s24 of ERA 1996 provides for determination of such complaints.

Relevant Law

Additional matter raised by Mrs. Stones during this Final Hearing

36. In relation to the additional matters set out above, this Tribunal has reminded itself of the guidance set out in **Ministry of Justice v Burton** 2016 [2016] ICR 1128 (**Burton**) and **Flint v Eastern Electricity Board** [1975] ICR 395 (**Flint**) noting the importance of finality of litigation, both of which cases were

identified and relevant sections were out at para 6 of this Tribunal's (Reconsideration) Judgment dated **30 June 2020** and sent to the parties **30 June 2020**. There was no fair notice of the additional matter in the application for Reconsideration to which CPNA would have been able to respond in their Further and Better Particulars.

37. The Tribunal has reminded itself that in **C v D** [2019] UKEAT 0132 19 1709 (**C v D**) the EAT at para 12 sets out "*the author should seek to set out a brief statement of relevant facts, and the cause of action relied upon by the Claimant. The purpose of doing so is to allow the other side to understand what it is that they have done or not done which is said to be unlawful.*" Further the Tribunal has reminded itself that as the EAT observed in **Khetab v AGA Medical Ltd** [2010] 10 WLUK 481 (**Khetab**) that the purpose of pleadings "*...is so that the other party and the Employment Tribunal understand the case being advanced by each party so that his opponent has a proper opportunity to meet it*", and further in **Chandhok and Another v Tirkey** [2015] IRLR 195 (**Chandhok**) Langstaff J, commented at para 18 the parties should set out the essence of their respective cases and "*... a system of justice involves more than allowing parties at any time to raise the case which best seems to suit the moment from their perspective. It requires each party to know in essence what the other is saying, so they can properly meet it*".

Relevant Law

Payroll errors

38. Section 8(1) of Employment Rights Act 1996 provides that:

(1) [A worker] has the right to be given by his employer, at or before the time at which any payment of wages or salary is made to him, a written itemised pay statement.

39. Section 11 of ERA 1996 provides that

"(1) Where an employer does not give a worker a statement as required by section 1, 4 or 8 (either because the employer gives the worker no statement or because the statement the employer gives does not comply with what is

required), the worker may require a reference to be made to an employment tribunal to determine what particulars ought to have been included or referred to in a statement so as to comply with the requirements of the section concerned.

5 (2) Where—

(a) a statement purporting to be a statement under section 1 or 4, or a pay statement or a standing statement of fixed deductions purporting to comply with section 8 or 9, has been given to a worker, and

10 (b) a question arises as to the particulars which ought to have been included or referred to in the statement so as to comply with the requirements of this Part,

either the employer or the worker may require the question to be referred to and determined by an employment tribunal.

15 (3) For the purposes of this section—

(a).

(b) a question as to the particulars which ought to have been included in a pay statement or standing statement of fixed deductions does not include a question solely as to the accuracy of an amount stated in any such particulars.

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(4) An employment tribunal **shall not** consider a reference under this section in a case where the employment to which the reference relates has ceased unless an application requiring the reference to be made was made—

25 (a) before the end of the period of three months beginning with the date on which the employment ceased, or

(b) within such further period as the tribunal considers reasonable in a case where it is satisfied that it was not reasonably practicable for the application to be made before the end of that period of three months.”

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40. The role of the Tribunal would be restricted, in terms of s11 of ERA 1996 to ascertaining what information ought to have been included.

41. Section 12 of ERA 1996 provides that a Tribunal may, where such an application is made within 3 months of termination, order an employer to pay the deducted sum where it is not otherwise paid.

Recoupment

- 5 42. Employment Protection (Recoupment of Jobseekers Allowance and Income Support Regulations 1996 (the Recoupment Regs 1996) have been considered by the EAT (Judge Pugsley presiding) in **Homan v Al Bacon Ltd** [1996] ICR 721 which stated “*In our view the prescribed element deals with the element in the award which is attributable to loss of wages and the only*
10 *period to which it can apply was the period for which compensation was awarded*”.

SUBMISSIONS.

43. The panel do not consider it necessary to set out the full submissions. However, it is noted that Mrs. Stones sets out at;
- 15 a. Para 11 “*When I have made my calculation sheet for this bundle ... I have not stated I have been paid or am owed any amount in respect of any particular element, because I found it impossible to know which elements I have been truly been paid for, I have merely tried to make calculation based on what was due for each element to provide a total amount due*”;
- 20 b. Para 15 “*It has been very difficult to try to pinpoint the sources of errors and I believe it still remains difficult*” describing that she considers that “*there is simply a state of confusion which remains to (t)his day*”.
- The panel notes that her submission does not offer an alternate methodology to that provided by CPNA and while she concluded in her oral submission that that the spreadsheets were complex and suggested
25 that they did not appear to show payments she had received, she did not state which payments she was referring to.

44. For CNPA their submission concludes “*It is plainly unfortunate that calculating all sums due to Mrs Stones have proved so difficult*” and sets out that it now
30 (as at the date of submission) considers that it has “*now correctly calculated*

the sums due to her” and invited the Tribunal to make an award of £7,845.30 plus interest on that sum at 8%, in line with the current applicable ET awards, for a period of 22 months (up to the date of this hearing) giving rise to a total sum as of the date of the hearing of £8,995.94.

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DISCUSSION AND DECISION

45. To say that it is unfortunate for CPNA to have taken so long to correct their errors is an understatement of some magnitude. CPNA confirmed their corrected calculation by email on Tuesday 1 September 2020, almost two years after the termination of Mrs Stones employment with them. It was stated on behalf of CPNA at the conclusion of this hearing that CPNA can hardly take issue with Mrs Stones decision to proceed with this hearing against that delay. The panel wholeheartedly agrees.

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46. The errors were those of CPNA and those who provide payroll to them. It is not open to this Tribunal to make an award of compensation for distress caused by CPNA. Having regard to the terms of s 8, 11 and 12 of ERA 1996 no articulated claim was presented with specific reference to s11 of ERA 1996. Had such a claim been presented it is considered that no additional award beyond that set out above would have fallen to be made.

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47. Mrs Stones offered criticism of the evidence Mr Poole that he had not carried out the calculations himself and suggested it was possible that the calculations identified at Tuesday 1 September 2020 could continue to contain some errors (although no explicit specification as to where those errors may exist was provided by Mrs Stone).

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48. In the context of the history of this case Mrs Stones reservations are entirely reasonable however, against the standard which the Tribunal is required to apply being on the balance of probabilities; having regard to the oversight described by Mr Poole of his team and those who provided calculations for him; his own clear evidence; taken with his explicit apology, and the clear

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(and accepted by Mrs Stones in cross) correlation between payments which CPNA claim to have made and Mrs Stones own bank statements, the Tribunal accepts that CPNA's calculations as of Tuesday 1 September 2020 are correct.

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CONCLUSION

49. It is plainly unfortunate that calculating all sums due to Mrs Stones has proved so difficult. The CPNA considers that it has now correctly calculated the sums due to her and invites the Tribunal to make an award in the sum of **£7,845.30** plus interest on this sum at 8%, in line with the current rate applicable to Employment Tribunal awards, for a period of 22 months, totalling £1,150.64. This gives rise to a total contractual liability to Mrs Stones of **£8,995.94** and that sum is payable immediately.

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Employment Judge	Rory McPherson
Date of Judgement	30 September 2020
Date sent to parties	6 October 2020

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