



EMPLOYMENT TRIBUNALS (SCOTLAND)

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Case No: 4101462/2020 (V)

Held by CVP on 7 January 2021

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Employment Judge I McFatridge

Mrs M Grygiel

**Claimant
In person**

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Damian Gasiorowski (Deceased)

**Respondent
Not present or
represented – no ET3**

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JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The judgment of the Tribunal is

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1. The claimant's claim of unlawful deduction from wages succeeds. The respondent shall pay to the claimant the sum of One Thousand Four Hundred and Seven Pounds and Sixty Pence (£1407.60). The respondent shall also pay to HMRC direct the sum of Four Thousand Seven Hundred and Eighty Four Pounds (£4784.00) in respect of tax and national insurance payments which ought to have been paid to HMRC in respect of the claimant's employment.
2. The respondent shall pay to the claimant the sum of One Thousand and Eleven Pounds and Fifty Pence (£1011.50) in respect of holiday pay for paid annual leave to which the claimant was entitled but was not paid.

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E.T. Z4 (WR)

3. The claimant's claim of sex discrimination succeeds. The respondent shall pay to the claimant the sum of One Thousand Pounds (£1000) in compensation therefor.

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REASONS

1. The claimant submitted a claim to the Tribunal in which she claimed that she had been unfairly dismissed and unlawfully discriminated against on grounds of sex. She also claimed that she was owed a sum in respect of holiday pay and other payments. She indicated that the employer had not accounted to HMRC in respect of PAYE tax and national insurance payments deducted from her pay. A preliminary hearing for case management purposes took place on 7 September 2020 before Employment Judge Eccles. Following that the claimant provided certain additional information to the Tribunal. At the hearing the claimant gave oral evidence through an interpreter. The claimant had not lodged any documentation whatsoever for the hearing. During the course of the hearing she indicated that this was because she had anticipated the hearing would be in person and was planning to bring it along herself. She had not been in a position to understand the orders made by the Tribunal in respect of the CVP hearing. That said the claimant was quite clear that the Tribunal process was causing her considerable stress and she wished the matter to be concluded. In the circumstances I decided it was preferable to proceed with the hearing rather than postpone it so that documents could be provided. In any event, it would appear that there was very little documentation which could have been provided which would have been relevant. On the basis of the claimant's evidence I found the following essential facts to be proved.

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Findings in fact

2. The claimant commenced employment with the respondent on 2 March 2018. She had worked some trial shifts for the respondent prior to this. The claimant was employed as a shop assistant to work in the respondent's shop initially in Dunfermline. Shortly after commencing employment the claimant found herself running the Dunfermline shop. She was then

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required to work in setting up a new shop which the respondent had purchased in Glenrothes. The claimant found herself having to run both shops.

3. Mr Gasiorowski provided the claimant with a statement of terms and conditions of employment shortly after she started working. The claimant signed a copy but was not provided with a copy by Mr Gasiorowski.
4. Towards the end of her employment in or about November/December 2019 an issue arose between the parties as to the length of notice which the claimant was required to give. Mr Gasiorowski then advised the claimant that her original contract had been lost and provided a further copy which she signed. Once again the claimant was not provided with a copy of this. Accordingly, no contract of employment was before the Tribunal at the hearing.
5. The agreement between the claimant and the respondent was that the claimant was due to be paid at the rate of £9 per hour cash in hand. By this the parties meant that the claimant would be entitled to receive £9 per hour and that the respondent would pay any tax and national insurance over and above this and account for it to HMRC. The claimant's hours of work varied but she generally worked five or six days per week. Her normal pay was around £300 to £320 per week however some weeks she earned over £400. The claimant calculated that her average pay during the whole period of her employment was £325 per week.
6. The claimant initially received one or two pay slips but these did not say anything about her tax position. The claimant questioned this and was told that the matter was being dealt with. The claimant raised the issue of her pay slips on many occasions during the course of her employment but each time she was told that the matter was in the hands of Mr Gasiorowski's accountants. The claimant latterly did not receive any pay slips at all and accordingly no pay slip information was before the Tribunal.
7. The only holidays which the claimant took during the course of her employment was a period of one month which the claimant took off in or about June 2019. This was for her daughter's wedding. Mr Gasiorowski paid the claimant a total of £360 by way of holiday pay for the whole month.

The claimant questioned this. Mr Gasiorowski said that he was not sure how much he was supposed to pay and that the matter was in the hands of his accountant. He promised that as soon as they told him how much he was meant to pay he would pay the balance to the claimant. No further payment was ever made in respect of holiday pay. The claimant has no recollection as to whether there was any provision in the statement of terms and conditions of employment which he signed which related to the holiday year.

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8. Initially the claimant worked primarily with Mathieu Gasiorowski who is the brother of Damian Gasiorowski the respondent. She had very little contact with Damian Gasiorowski. Things however changed in or about the summer of 2019 when she began to have more contact with Damian Gasiorowski. At that point the claimant was effectively running the shop in which she worked. The respondent was critical of the claimant and kept comparing her unfavourably with his wife. He would say that he expected the claimant to deal with ordering and checking deliveries. When the claimant said this was not her job the respondent would say that his wife was able to do this. He complained that the claimant worked too slowly and that his wife worked more quickly.

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9. The claimant was required to work in getting the new shop in Glenrothes ready. On the day before it was due to open she required to work until 11:00pm. She had been unable to connect all of the equipment and when she advised the respondent of this he was very critical of her. He insisted that she go into the shop early the following morning to make sure that all of the equipment was ready to operate by 10:00am when the first customers were due to arrive. The claimant began to be stressed as a result of the continual criticism from the respondent. On many occasions she would be in tears as a result of the way he spoke to her.

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10. In or about September 2019 the respondent indicated to the claimant that he wanted her to take over the running of the shop in Dunfermline. The claimant indicated that she was not prepared to take this on, she felt it would be too much for her. The respondent was angry at the claimant for this. He criticised her. On various occasions he criticised her in front of customers in the shop.

11. At that time the claimant was working in the shop with another female shop assistant called Alicia. There was a chair situated behind the service counter. Mr Gasiorowski said that neither the claimant nor Alicia were to sit in the chair while they were working in the shop.
- 5 12. The claimant was also working several days a week in the Glenrothes shop at the same time as she was working in the Dunfermline shop. The Glenrothes shop was extremely busy. The claimant's previous arrangement was that she was meant to take breaks when the shop was quiet. The claimant was unable to take any breaks whilst working in the
10 Glenrothes shop because there were always customers there. She raised this with the respondent but he did not make any other arrangement for her to have breaks.
13. On one occasion in October 2019 the claimant started crying as a result of the way she was spoken to by the respondent. The respondent noticed this
15 and said to her "there is no need to cry, come over and here and I'll give you a cuddle". The claimant felt this was inappropriate and felt demeaned by this. The claimant felt that the respondent was treating her this way because he felt that she was weak and a woman. She considered that he would not have offered to cuddle a man who was crying in the same way.
- 20 14. On another occasion at around this time the respondent complained about out of date stock being on the shelves. He threatened the claimant that if there was out of date stock on the shelves the cost of this would be deducted from her wages.
- 25 15. In or about November 2019 the respondent presented the claimant and other members of staff with a schedule showing where and when they would be working for the next few weeks. The claimant was distressed to see that she was rota'd to be on duty with Mr Damian Gasiorowski for virtually the whole period including the Christmas holiday period which she knew from experience would be busy. She was very concerned since by this stage her
30 working relationship with the respondent was very poor. The claimant had begun suffering from symptoms of stress from October 2019 onwards. She developed a stomach problem which she attributed to stress. She sought assistance from her GP regarding this and was prescribed medication

which the claimant still takes. The claimant decided that she was not prepared to continue working. She told the respondent that she wished to leave immediately. The respondent told her that she was required to give two weeks' notice. It was at this point that the respondent produced a further copy of the statement of terms and conditions for the claimant to sign. The claimant did sign this. The respondent told the claimant that if she did not work her notice then he would be forced to call it a disciplinary dismissal. The claimant did work her two weeks' notice and her final day of employment with the respondent was 1 December 2019.

- 10 16. Following the termination of her employment the claimant asked the respondent to confirm that her tax and national insurance had been paid. He said the matter was in the hands of his accountant. She also asked him for holiday pay. He said that this was being dealt with by his accountant. The claimant asked her partner to check the position with HMRC. The claimant's partner did this and found that HMRC had absolutely no record of the claimant working for the respondent. The respondent had not paid any payments to HMRC in respect of tax or national insurance during the period of the claimant's employment. The claimant's partner contacted HMRC who advised that the claimant should commence Tribunal proceedings which the claimant duly did. As yet the claimant has not suffered any detriment as a result of the respondent's failure to account to HMRC for payment of tax and national insurance in the sense that she has not been refused benefits or paid benefits at a lower rate because of this failure. That having been said she remains liable to account to HMRC for the tax and national insurance which ought to have been paid on her earnings by the respondent. In addition, the claimant has not yet been credited with national insurance contributions for purposes of calculation of her state pension entitlement for the whole period of her employment.
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17. The respondent died in May 2020. The respondent's personal representatives are aware of the action.
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Matters arising from the evidence

18. In this case the respondent is deceased having died on 28 May 2020. He died after the claim had been presented on 16 March and without having

submitted an ET3 response. It would appear that the respondent's family have been in contact with the Tribunal Service and have been advised to seek legal advice in the matter on the basis that any claim would be a debt on the respondent's estate. Despite this they did not seek to lodge an ET3 late or indeed make any response. I therefore required to proceed on the basis that the claimant's evidence was essentially unchallenged.

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19. I questioned the claimant carefully about aspects of her evidence which appeared to me to be somewhat improbable. For example, I questioned whether it was not more likely to be the case that she was to be paid £9 per hour gross. This would mean that although tax and national insurance payments ought to have been deducted from this these would have primarily been the claimant's responsibility rather than the respondent's. The claimant was however quite clear and adamant in her evidence that the arrangement with the respondent was that she would be paid £9 per hour net. I had no reason to disbelieve her and have accepted her evidence on this basis. With regard to her discrimination claim the claimant had been invited at the preliminary hearing in September to provide additional specification of this. The claimant confirmed that she wished to proceed with the claim but did not provide any additional specification. I put it to her that much of what she complained of might amount to unpleasant bullying behaviour but could not be linked to her sex. It was at this point that the claimant mentioned the incident which took place in October where Mr Gasiorowski offered to give her a cuddle. She indicated that there were various WhatsApp messages which had been exchanged at the time with the respondent's brother and that the respondent's brother had apologised on the respondent's behalf for this incident. The WhatsApp messages were not lodged. At the end of the day I felt I required to accept the claimant's evidence in relation to this point and I considered that she was entirely genuine in her belief that she was bullied because of the respondent's perception that she was a weak female.

Discussion and decision

Issues

20. The claimant claimed that she had suffered an unlawful deduction of wages in that payments which ought to have been paid to HMRC on her behalf had not been paid. She also claimed that she was due holiday pay following the termination of her employment. She also claimed that she had been unlawfully discriminated against on grounds of sex. During the course of the hearing it appeared to me that the claim she was making was one of direct discrimination in terms of section 13 of the Equality Act and harassment in terms of section 26 of the Equality Act. Although the claimant had ticked the box on the Tribunal application form indicating she was making a claim of unfair dismissal it was clear that she did not have sufficient qualifying service to make such a claim. The claimant had also ticked the box indicating a claim for notice pay however her evidence was to the effect that she had given notice and had worked for and been paid for her notice period.

Discussion and decision

21. On the basis of the evidence I accepted the claimant's somewhat unusual contention that her entitlement was to be paid such a sum as would give her £9 per hour cash net. On that basis the respondent have made an unlawful deduction from wages in that, despite what they told her they would do it, they have not accounted to HMRC for the tax and national insurance which they ought to have done. It is clear that this amounts to an unlawful deduction of wages however given that this is money which ought to have been paid to HMRC I consider it appropriate that I make an order that the sum be paid to HMRC. I have calculated the sum as follows on a fairly rough and ready basis however presumably once the respondent's representatives have been in contact with HMRC, HMRC may be able to advise them if this figure is in fact correct or not. Should it be necessary, it is open to them to apply to the Tribunal for a review judgment setting out the correct amount.

22. Taking the figure provided by the claimant of £325 per week net the claimant would require a gross pay of £377 per week. Out of this she would pay £27

tax and £25 national insurance. She thus suffered a deduction from wages of £52 per week during the whole period of her employment. By my calculation her employment lasted for a total of 92 weeks and the total amount which now requires to be paid to HMRC in order to regulate the position is accordingly £4784.

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23. In addition to this however I am concerned that the claimant has suffered a loss as a result of the fact that this sum was not paid at the appropriate time in that her eventual state pension may be reduced. I am aware that it is possible for the claimant to regularise the position by paying voluntary Class 3 payments to HMRC. The current rate for Class 3 voluntary national insurance contributions is £15.30. It therefore follows that in order to put herself in the same position vis a vis her state pension as she would have been had the respondent paid the NICs when they were supposed to, she will require to pay the sum of £1407.60 (92 x £15.30) in voluntary Class 3 contributions. I consider that this cost to her flows directly from the unlawful deduction of wages made by the respondent and that she is entitled to be compensated for this. I therefore award this sum to be paid direct to the claimant. It will then be up to the claimant to make the appropriate arrangements with HMRC to pay this.

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24. With regard to holiday pay it appears to me that given I have no information regarding any agreement that the holiday year be different that the statutory position should apply and the holiday year would run from 2 March to 1 March in each year being the anniversary of the commencement of employment. The claimant was entitled to 28 days' paid leave for the full year which equates to 21.1 days' pay for the period from 2 March to 1 December. This equates to £1371.50 based on the claimant's net pay of £325 per week. The claimant's evidence was that she has already received £360. The respondent shall therefore pay to the claimant the sum of £1011.50 in respect of the balance of holiday pay owed.

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25. With regard to the claimant's claim of sex discrimination I found the evidence regarding this to be somewhat thin. My view was that what the claimant described was generalised bullying and improper behaviour by the respondent which, apart from in one respect, was not related to her sex. The claimant complained essentially that she was overworked and under-

appreciated. She complained that the respondent was overly critical of her and complained that she did not work as hard as his wife. Nothing in this amounts to either direct sex discrimination or harassment. On the other hand it appears to me that the claim in respect of the incident in October was well-founded. I considered that this incident was related to the claimant's sex, the respondent offered to give her a cuddle when she was crying. It was clear to me from the claimant's evidence that this was conduct which was unwanted and had the effect of violating the claimant's dignity I did consider that it was related to sex. I also considered that this single act amounted to direct discrimination in that it was accepted in the claimant's evidence that this was not treatment which would have been meted out to a hypothetical male comparator. I also considered that it amounted to less favourable treatment because it was clear that this was a manager offering a hug to a subordinate who is in tears as a result of the manager's behaviour. Clearly offering someone a hug is not always going to amount to less favourable treatment but in the particular circumstances here where there was a very poor working relationship I consider that it did amount to direct discrimination. The claimant was subject to this treatment because she was a woman and it is not treatment which would have been meted out to a male comparator.

26. I did not find that the incident led to the claimant losing her job. She left essentially because she had a poor relationship with the respondent for reasons which had nothing to do with the one isolated incident of sex discrimination and she did not want to be rota'd to work with him over the Christmas period. I considered that compensation should be based solely on injury to feelings. With regard to this I note that the claimant required to consult her GP for stress. She advises that she has been diagnosed with stress and depression. It appears to me however that a lot of this was general work-related stress which related to other matters than the sex discrimination. The claimant's principal complaint appears to be that she was required to do work which was well above that of a shop assistant which was what she considered she had agreed to. She was being asked to run two stores and work between two locations. She was being asked to carry out ordering work and work in making the shop look attractive for customers and subject to continual criticism all of which she found extremely stressful.

It appears to me that the sex discrimination element only added a small part to this. That having been said I have no doubt that the claimant found this to be an unpleasant incident albeit it was a one-off incident. Taking all of the above into account I consider that the incident falls towards the lower
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Employment Judge:
Date of Judgment:
Date sent to parties:

Ian McFatridge
20 January 2021
21 January 2021