



EMPLOYMENT TRIBUNALS (SCOTLAND)

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Case No. 4100052/2020 A

Hearing held by telephone on 7 May 2020

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Employment Judge A Kemp

Mr P Jameson

**Claimant
In person**

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Ecosse Inns Limited

**Respondent
No appearance**

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JUDGMENT

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1. The claimant has an entitlement to (i) pay for annual leave under Regulation 14 of the Working Time Regulations 1998 in the sum of FIVE HUNDRED AND SEVENTY FOUR POUNDS SEVENTY PENCE (£574.70), and (ii) pay for one week for notice of termination of employment of ONE HUNDRED AND SEVENTY FIVE POUNDS SIXTY SIX PENCE (£175.66), and the respondent is ordered to pay the claimant the total sum of SEVEN HUNDRED AND FIFTY POUNDS THIRTY SIX PENCE (£750.36).

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2. The respondent shall have a period of 14 days from the date of this Judgment being sent to it in which to comment in writing on whether a penalty should be imposed under Section 12A of the Employment Tribunals Act 1996 and if so as to its ability to pay the same. In the event that no written comment is received from the respondent within that

period a decision shall be made on that matter without further recourse to the respondent.

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REASONS

Introduction

10 1. This is a claim for pay for annual leave and breach of contract. It has not been defended. On 19 February 2020 the Tribunal issued a Judgement in favour of the claimant on liability for those claims, and dismissing a claim for unfair dismissal as the claimant did not have sufficient qualifying service. A Final Hearing was arranged for 7 May 2020 on remedy only.

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2. That hearing could not proceed in person in light of arrangements made for the Covid 19 pandemic. It was conducted by telephone. The claimant attended, but there was no appearance by or on behalf of the respondent, to which notice of the hearing had been given.

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3. I discussed with the claimant whether a further hearing might be held remotely by a cloud video platform that the Tribunal has introduced. The claimant stated however that he did not have the facility to undertake that.

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4. In light of the fact that the claim is undefended, is for a moderate sum, and in view of the continuing effects of the pandemic, I considered that it was appropriate to conduct the hearing by telephone. The claimant gave his evidence on oath. He did not have access at that time to payslips, but was permitted to email them to the Tribunal within 7 days of that hearing. That was duly done. I considered that all of these arrangements, imperfect though they were, were capable of being made as they fell within the overriding objective of Rule 2 in Schedule 1 to the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013 ("the Rules"). I also took account of the terms of Rule 41 in reaching that decision.

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Facts

5. I made the following findings in fact:
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6. The claimant was employed by the respondent as a kitchen porter from 1 June 2019 to 15 October 2019.
7. The claimant does not have a copy of the contract of employment, but recalls signing such a document when his employment started.
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8. The claimant worked on average 3 days per week when employed by the respondent.
9. He was paid a daily rate at the level of the national living wage of £8.21 per hour.
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10. The claimant attended work regularly until late September 2019 when he fell ill with influenza.
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11. On 15 October 2019 when the claimant sought to return to work the claimant's employment was terminated summarily by the respondent. It did so verbally. No written confirmation of that dismissal was given to the claimant, nor did he receive a P45 for tax purposes.
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12. During his employment the claimant did not take any holidays.
13. On several occasions in the period of approximately four weeks after his employment the claimant contacted the respondent to seek the holiday pay and pay for notice to which he considered that he was entitled. The respondent indicated that it would pay him the former, but not the latter as he had, they stated, been employed for less than three months.
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14. The pay received by the claimant in the period prior to termination was confirmed by payslips issued every four weeks, as follows:

	Date	Hours	Gross Pay	Deductions	Net pay
5	12.7.19	103	845.63	21.84	823.79
	9.8.19	65.25	535.70	(62.00)	597.70
	6.9.19	84	689.64	3.12	686.52

15. There is a payslip dated 4 October 2019 which has no hours or pay within it.
10 There was a tax rebate issued within the payslip dated 9 August 2019 which is shown above. The payslips show no entries for employer or employee pension contributions.

The law

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16. 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.
- 20 17. 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. There was no evidence of a leave year other than that provided for in Regulation 13 being one that commences on the date of employment.
- 25 18. Regulation 14 has provision for the entitlement where a worker’s employment starts and/or ends in the leave year, as occurred to the claimant. It is a pro-rata calculation, and sets out the amount that is due.
- 30 19. The Tribunal has jurisdiction to consider a claim for breach of contract by the Employment Tribunals (Extension of Jurisdiction) (Scotland) Order 1994. The present claim, arising on termination, falls within the provisions of that Order. The claimant has a right to a minimum period of notice under section 86 of

the Employment Rights Act 1996, and is to one week where the employment is more than one month and less than two continuous years.

Discussion

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20. I accepted the evidence of the claimant. The respondent has chosen not to defend his claim. In addition, the claimant was told that he would be paid holiday pay, but the respondent simply failed to make the payment. The explanation about pay for notice was that the claimant had not been employed for long enough to qualify for that, which was untrue. The entitlement to notice of a week arises after one month. In any event the claimant had more than three months' notice even if that had been the requirement, as the respondent contended wrongly.

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15 21. The claimant worked an average of 21 hours per week during the period set out above. His average weekly pay gross was £172.41 and the net was £175.66 (the increase being because of the tax rebate).

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22. The claim for payment in respect of annual leave under Regulation 14 of the Regulations, known generally as for holiday pay, is for a period of 137 days. That equates to 10.5 days of holidays. The claimant took no holidays to termination. His entitlement continues during his absence from employment when ill. He worked on average 21 days per week, which equates to 7 hours per day for a three day week. The entitlement is therefore to 7 days x 10 hours per day x £8.21 per hour, a total of £574.70.

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23. The entitlement for breach of contract is for one week's pay. The average net pay per week is £175.66.

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24. The total sum due is £750.36, and I make an award in favour of the claimant for that sum as set out above. It is payable by the respondent without statutory deductions.

Penalty

25. 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.

26. The provision states 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.

(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—

(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.

.....

(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.

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

10 ‘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’.

15 28. I consider that that provision may be engaged by the circumstances of the present case. There was a breach of the claimant’s rights which might be regarded as serious, and there may be said to be aggravating features by the deliberate failure to pay holiday pay which the respondent accepted was due, its failure to do so when the present Claim was commenced, and its failure to engage with the claim in any way. The argument of the respondent as to
20 notice was simply wrong.

25 29. I am therefore considering imposing a penalty of between £100 which is the minimum and one half of the award made above. I am also however required by the statute to take account of the employer’s ability to pay. I have not been provided with any information as to that issue. I am also of the opinion that the respondent ought to have an opportunity to comment on the potential for a penalty, as it may not have been aware of that from the terms of the Claim Form. The penalty is not payable to the claimant, and not therefore a matter that is addressed directly in the Claim Form.

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30. I have therefore directed that the first respondent shall provide a written response on the potential for penalty, and on its ability to pay any penalty that

may be imposed, after which that issue shall be separately considered further.

31. In the event that no reply is received within that period, I shall consider the
5 matter from the information available to me.

10 Employment Judge: Sandy Kemp
Date of Judgment: 03 June 2020
Entered in register: 04 June 2020
and copied to parties