



EMPLOYMENT TRIBUNALS (SCOTLAND)

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Case No: 4100413/2021 (V)

Hearing held by CVP on 26 April 2021

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Employment Judge King

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Mr Kenneth Madden

**Claimant
Represented by
His wife, Lynne
Madden**

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Fenton Bespoke

**Respondent
Not in attendance
and not represented**

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JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The Judgment of the Employment Tribunal is that the respondent is ordered to pay the claimant the sum of £1,271.36, which is made up as follows :-

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- (a) £663 in respect of unpaid salary,
- (b) £528.36 in respect of accrued holiday pay,
- (c) £80 in respect of fuel costs.

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This is a gross award and the claimant shall be liable to HMRC for any payments of tax and national insurance thereon.

REASONS

1. The claimant originally presented claims that the respondent had unlawfully failed to pay him salary and to reimburse him in respect of fuel costs that he had incurred for the company vehicle he was given in order to carry out his duties.

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2. By email dated 30 March 2021, in response to a request from the Tribunal that he provide a valuation of his claim, the claimant produced a valuation of his estimated losses in respect of unpaid salary, fuel costs incurred and also accrued holiday pay at the termination of his employment. A claim for unpaid holiday pay had not been advanced in his ET1. In the circumstances he was informed that if he wished to pursue a claim for unpaid holiday pay he would have to seek to amend his claim.

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Amendment

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3. At the outset of the hearing the claimant confirmed that he wished to amend his claim to include a claim for unpaid holiday pay. He explained that he had never been issued with a contract of employment despite having made several requests during his short period of employment. He had therefore initially been unaware of his holiday entitlement or his entitlement to paid holidays at all. It was only after raising his claim that he became aware of that right and that a claim for accrued holiday pay was available to him.

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4. The Tribunal firstly had regard to ***Cocking v Sandhurst (Stationers) Limited 1974 ICR 650***, in which it was held that it must consider all the circumstances of the case and in particular, "*any injustice or hardship which may be caused to any of the parties... if the proposed amendment were allowed, or, as the case may be, refused*".

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5. Further, in the leading case of ***Selkent Bus Company Limited (trading as Stagecoach Selkent) v Moore 1996 IRLR 661***, the EAT had held that, when faced with an application to amend, a Tribunal must carry out a careful balancing exercise of all the relevant circumstances and exercise its discretion in a way that is consistent with the requirements of "*relevance,*

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reason, justice and fairness inherent in all judicial discretions". Such '*relevant circumstances*' would include the nature of the amendment, the applicability of time limits and the timing and manner of the application.

- 5 6. The Tribunal noted that the claimant's employment had terminated on 27 November 2020, that he had commenced Acas early conciliation on 9 December 2020 and that an early conciliation certificate had been issued on 20 January 2021. Thereafter he had presented his ET1 on 29 January 2021 and his proposed amendment to add a holiday pay claim had been
10 submitted to the Tribunal on 30 March 2021.
7. The Tribunal considered the circumstances in which the amendment application had been made. The application had been made reasonably promptly and was not time barred; the ordinary limitation period having been
15 extended by 42 days by virtue of the early conciliation period between 9 December 2020 and 20 January 2021.
8. The proposed amendment was closely related to the claim originally pled as it arose from a failure to pay monies due to the claimant on termination of his
20 employment. The Tribunal accepted that the claimant had initially been unaware of his right to make a claim for unpaid holiday pay and that the respondent's failure to issue him with a contract of employment had contributed to his lack of awareness as to the full extent of his rights.
- 25 9. In all the circumstances, the Tribunal was satisfied that the prejudice to the claimant in refusing his amendment application in these circumstances would outweigh the prejudice that would be suffered by the respondent who would suffer prejudice but had not lodged a response in any event. The Tribunal therefore allowed the amendment application in respect of the claimant's
30 claim for unpaid holiday pay.

Findings in fact

10. The Tribunal heard evidence from the claimant who gave his evidence in a credible and reliable manner.

5 11. The claimant began his employment as a joiner with the respondent on 12 October 2020. He was employed on a full time basis, working 42 hours per week at an hourly rate of £17 per hour. His gross weekly pay was £714 before deductions for tax and national insurance contributions and his daily rate was therefore £142.80 gross.

10 Fuel costs

12. The claimant was provided with a company vehicle to carry out his duties. Although on occasion the respondent gave him cash in advance to pay for fuel, the claimant reached a verbal agreement with the respondent's Paul
15 Gallagher on 26 October 2020 that if he had not been provided with cash in advance and required to buy fuel for company business then he would be reimbursed in full on production of valid fuel receipts.

13. The claimant subsequently bought fuel for company business on
20 17 November 2020 and 23 November 2020 in circumstances where he had not been given cash in advance to pay for that fuel. On each occasion the claimant incurred a cost of £40 for which he produced valid fuel receipts to Mr Gallagher but was not reimbursed.

25 Incident on 23 November 2020

14. On 23 November 2020 while driving his company vehicle the claimant clipped a parked car by accident, causing damage to it. He immediately reported this incident to Mr Gallagher who explained that he knew the car owner and
30 would speak to him about the damage.

15. On 27 November 2020 Mr Gallagher approached the claimant and subjected him to a barrage of abuse because of the incident on 23 November and

because earlier on the morning of 27 November he had emptied soil into a skip, which had displeased Mr Gallagher.

- 5 16. As the claimant was unwilling to take this abuse from Mr Gallagher he left the workplace and subsequently tendered his immediate resignation by text message to Mr Gallagher later that same day.
- 10 17. Following the termination of his employment the respondent did not pay the claimant his salary for the last week of his employment, 23 to 27 November 2020, during which he had worked 39 hours for which he should have been paid the gross sum of £663.
- 15 18. In response to the claimant's e-mail dated 4 December 2020, in which he sought payment of his unpaid salary for his last week of employment, Mr Gallagher replied that same day, as follows -

“Hi Kenny, you will be paid once we find out the cost of repairing the Mercedes car you crashed into. This cost will be deducted from your final wage”.

- 20 19. The claimant replied to Mr Gallagher's e-mail to the effect that there was no contractual agreement in place that would permit the respondent to withhold any of his wages in these circumstances. The respondent has still not paid the claimant for the final week of his employment.

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Holidays

- 30 20. The claimant was employed between 12 October 2020 and 27 November 2020, totalling 7 weeks. As a full time employee he had accrued 3.7 days paid holidays, but took none. He was not paid any accrued holiday pay upon termination of his employment.

Relevant Law

Pay and Bonuses

21. Section 13 of the Employment Rights Act 1996 provides as follows:

13. Right not to suffer unauthorised deductions

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(1) An employer shall not make a deduction from wages of a worker employed by him unless –

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(a) the deduction is required or authorised to be made by virtue of a statutory provision or a relevant provision of the worker's contract, or

(b) the worker has previously signified in writing his agreement or consent to the making of the deduction.

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(2) In this section "relevant provision", in relation to a worker's contract, means a provision of the contract comprised –

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(a) in one or more written terms of the contract of which the employer has given the worker a copy on an occasion prior to the employer making the deduction in question, or

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(b) in one or more terms of the contract (whether express or implied and, if express, whether oral or in writing) the existence and effect, or combined effect, of which in relation to the worker the employer has notified to the worker in writing on such an occasion.

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Section 27(1)(a) of the 1996 Act provides that "wages" includes "(a) any fee, bonus, commission, holiday pay or other emolument referable to his employment, whether payable under his contract or otherwise".

22. Regulation 14 of the Working Time Regulations 1998 provides:-

"14: -

5 (1) Paragraphs (1) to (4) of this regulation apply where –

(a) a worker's employment is terminated during the course of his leave year, and

10 (b) on the date on which the termination takes effect ("the termination date"), the proportion he has taken of the leave to which he is entitled in the leave year under regulation 13 and regulation 13A differs from the proportion of the leave year which has expired.

15 (2) Where the proportion of leave taken by the worker is less than the proportion of the leave year which has expired, his employer shall make him a payment in lieu of leave in accordance with paragraph (3).

20 (3) The payment due under paragraph (2) shall be:

(a) such sum as may be provided for for the purposes of this regulation, in a relevant agreement, or

25 (b) where there are no provisions of a relevant agreement which apply, a sum equal to the amount that would be due to the worker under regulation 16 in respect of a period of leave determined according to the formula:-

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$$(A \times B) - C$$

where –

A is the period of leave to which the worker is entitled under regulation 13 and regulation 13(a);

B is the proportion of the worker's leave year which expired before the termination date, and

C is the period of leave taken by the worker between the start of their leave year and the termination date

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(4) A relevant agreement may provide that, where the proportion of leave taken by the worker exceeds the proportion of the leave year which has expired, he shall compensate his employer, whether by a payment, by undertaking additional work or otherwise.

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Discussion and Decision

Fuel costs

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23. The Tribunal accepted the claimant's evidence that the respondent had agreed to reimburse him for any fuel costs incurred to carry out his duties, which he paid out of his own pocket. It also accepted that the claimant had incurred such costs in the amounts of £40 on 17 November 2020 and £40 on 23 November 2020, for each of which he had not been reimbursed. He is therefore entitled to be paid the sum of £80 by way of reimbursement.

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Salary

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24. The Tribunal concluded that the respondent had failed to pay the claimant his salary for the week from 23 to 27 November 2020 in circumstances where it was evident that his pay was withheld because the claimant had caused damage to a third party vehicle while driving the respondent's vehicle on duty.

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25. The Tribunal accepted that there was no statutory provision and no "relevant provision" in the claimant's contract that entitled the respondent to deduct from the claimant's wages the cost of the repair to the third party vehicle in these circumstances. The Tribunal was also satisfied that the claimant had not previously signified in writing his agreement or consent to the making of

such a deduction. In the circumstances, the respondent has made an unauthorised deduction from the claimant's wages in breach of section 13 of the Employment Rights Act 1996.

- 5 26. The claimant is therefore entitled to payment from the respondent of his unpaid salary for the week of 23 to 27 November 2020, in the amount of £663. This is made as a gross award and the claimant shall be liable to HMRC for any payments of tax and national insurance thereon.

10 Holiday pay

27. In respect of holiday pay the Tribunal the claimant had accrued 3.7 days holiday, none of which he had taken and none of which he had been paid for on termination. He was therefore entitled to be paid in lieu for those accrued
15 holidays on termination of his employment by virtue of regulation 14 of the Working Time Regulations 1998.

28. At his daily rate of £142.80 he is therefore entitled to a gross payment of £528.36. This is made as a gross award and the claimant shall be liable to
20 HMRC for any payments of tax and national insurance thereon.

25 Employment Judge: Robert King
Date of Judgment: 13 May 2021
Entered in register: 13 May 2021
and copied to parties

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