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EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4100299/2021

Held in Glasgow by Cloud Video Platform (CVP) on 6 April 2021

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Employment Judge B. Beyzade

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Mr Ewan McArthur

**Claimant
In Person**

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Hillcrest Finance Limited

**Respondent
Not Present
Not Represented**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The Judgment of the Tribunal is that:

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1. The claimant's application for a preparation time order is granted and the respondent is ordered to pay the claimant the sum of ONE HUNDRED AND SEVENTY-TWO POUNDS AND TWENTY PENCE (£172.20). No order for expenses is made.

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2. 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 SEVEN HUNDRED AND EIGHTY POUNDS AND FIFTY-FOUR PENCE (£780.54), 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 THREE HUNDRED AND NINETY POUNDS AND TWENTY-SEVEN PENCE (£390.27).

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REASONS

Introduction

- 5 1. I gave Judgment in this case on 6 April 2021 (“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.
- 10 2. Oral reasons were given at the Final Hearing held via CVP on 06 April 2021.
- 15 3. Following the Judgment being delivered orally at the Final Hearing the claimant made an oral application for an award of expenses and a preparation time order. This account, which included preparation time leading up to the Final Hearing and solicitor’s fees he incurred obtaining advice in relation to his claim. The application referred to paragraph 76(1) of the *Employment Tribunals (Constitution and Rules of Procedure) Regulation 2013* (“the Rules”). The application was made on the basis that the respondent had acted unreasonably by failing to turn up to the Final
20 Hearing or respond to the claim, and that the respondent had no reasonable prospect of successfully defending the claim. The claimant also submitted that the respondent represented to him that it had made a payment to him by providing a screenshot purporting to be from its bank account and had represented to HMRC that it had made payments to HMRC (which were
25 not in fact correct), and that the same amounted to unreasonable conduct. The principal claim was for unpaid wages.
- 30 4. The respondent was invited to respond in writing. The Tribunal indicated to the respondent in the Judgment that the respondent should confirm whether the application was opposed and if so on what grounds. The Judgment also explained that the Tribunal could consider the respondent’s ability to pay. No submissions or information was received by the Tribunal after the Judgment was issued.

5. In the Judgment I also 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 7 days of issue of the judgment. I have been informed that it has not done so. I have therefore considered the issue of penalty anew.

The Law

- To those facts that the Tribunal found following the Final Hearing on 6 April 2021, the Tribunal applied the law –

Expenses and preparation time order

6. Rule 75(1)(a) coupled with Rule 76 gives the Employment Tribunal power to make an expenses order against one party to proceedings. Rule 76(1)(a) is in the following terms:

76.—(1) *A Tribunal may make a costs order or a preparation time order, and shall consider whether to do so, where it considers that—*

- (a) a party (or that party’s representative) has acted vexatiously, abusively, disruptively or otherwise unreasonably in either the bringing of the proceedings (or part) or the way that the proceedings (or part) have been conducted; or*

(b) any claim or response had no reasonable prospect of success.

7. Rule 78 sets out provisions in relation to the amount of an expenses order (the Tribunal can make an award up to £20,000) whereas the amount of a preparation time order is prescribed under Rule 79. The Tribunal may have regard to the paying party’s ability to pay both in terms of deciding whether to make the order and in determining the amount (Rule 84). Rule 74 provides that *“In Scotland all references to costs (except when used in the expression “wasted costs”) shall be read as references to expenses.”*

8. Rule 75 (3) provides “A costs order under paragraph (1)(a) and a preparation time order may not both be made in favour of the same party in the same proceedings. A Tribunal may, if it wishes, decide in the course of the proceedings that a party is entitled to one order or the other but defer until a later stage in the proceedings deciding which kind of order to make.”

Financial penalty

9. 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.

10. The provision was quoted in the Judgment, but for ease of reference sets out 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, except that—

5 (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.

10 (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.

15 (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—

(i) no more than £20,000, and

20 (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).

25 (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—

30 (a) section 140(3) of the Trade Union and Labour Relations 10 (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 15 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 non30 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 35 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,".

11. 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'.

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

"An employment tribunal may be more likely to find that the employer's behaviour in breaching the law had aggravating features where the action

5 *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 micro business, has only a limited human resources function, or the breach was a genuine mistake."*

10 **Discussion and decision**

13. On the basis of the findings made the Tribunal disposes of the issues identified in the Judgment as follows –

15 14. The Tribunal has considered matters further. In doing so the Tribunal had regard to the facts that were set out in the Judgment.

Expenses and preparation time order

20 15. This was not a case where the respondent could have raised a defence and gone into the Final Hearing without an appreciation of the difficulties that it faced and the true situation that pertained to its repeated failure to pay the claimant's wages and its attempts to purport to show the claimant by sending screenshots from its bank account and by representing to HMRC that payments were made to the claimant (when, in fact, they not been
25 made). The respondent company did not lodge an ET3 Form. The claimant flagged up in his ET1 Form that he received repeated assurances and excuses about the respondent's failure to make payments to him and in fact he did not receive payment of his wages. The duties on the respondent to
30 make wages payments to the claimant were readily apparent from the relationship between the parties and the correspondences that the Tribunal were referred to. The claim was for unpaid wages, and it was presented on the basis that the respondent had not fulfilled the obligations to the

claimant by making the payments in question despite repeated assurances. The evidence for these matters was substantial and the respondent must have been fully aware of that.

5 16. The respondent did not respond to the claim. The Tribunal was not aware of any reasonable excuse for the respondent's repeated non-payment of the claimant's wages. There was no evidence before the Tribunal that the respondent was experiencing financial hardship.

10 17. The award of expenses and preparation time is not the rule in Employment Tribunal cases and such awards are still relatively rare. The Employment Tribunal has a discretion in relation to the grant of an expenses and preparation time order application. There is a two-stage test. The first is whether the Tribunal considers that the Rule is engaged by the
15 respondent's conduct. In the present case although the claimant was entitled to raise proceedings for withheld salary (he had been told it would be paid several times), that matter was not resolved, and proceedings had to be issued by the claimant. The expenses occasioned by the respondent's actions arose in relation to the claimant's claim. The claimant was faced
20 with little choice but to pursue his claim given the non-payment by the respondent and the issues he were facing with his finances and Universal Credit. The expenses occasioned in bringing his claim would be relatively small but not insubstantial insofar as the claimant was concerned, particularly given that he appeared to be experiencing financial issues
25 owing to the respondent's conduct. I take into account the fact that the claimant was a litigant in person during most of his claim and I also have no evidence to show whether the respondent had legal representation. However, the respondent did not appear before me at the hearing, and it did not make any written representations following receipt of the Judgment.
30 The respondent knew when making its claims that payment had been made (including sending incorrect information to the claimant purporting to be from its bank account and filing information with HMRC that was not correct), that they were misconceived.

18. The respondent should have taken advice both in relation to the ramifications of non-payment of the claimant, its repeated assurances given to the claimant and its subsequent conduct. If the respondent had done so then it would have been aware that any defence in respect of the claim for unpaid wages would founder and furthermore that its conduct could be considered as unreasonable given the circumstances. As is clear from the Judgment the respondent lacked candour and was evasive in relation to these matters and its overall conduct.

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19. In the circumstances, it is the Tribunal's view that the threshold test has been met. The Tribunal still has an unfettered discretion as to whether to make such an order. The factor that weighed most heavily as noted above was the respondent's lack of candour and the fact that as it was required to pay the claimant's wages, it gave assurances to the claimant that were not true, and it made representations to HMRC that were not only misconceived, but the information provided to HMRC caused issues to the claimant in terms of his finances and his claim for Universal Credit.

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20. It should be noted that the respondent did not seek to respond to the Claimant's application and the Tribunal has no information from the respondent about its current financial position which the Tribunal would have been prepared to consider. The amounts claimed by the claimant have been carefully prepared and the sums sought appear in the Tribunal's experience to be modest.

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21. In the Judgment the Tribunal set out that the claimant claimed preparation time of six hours he spent preparing his claim and his papers at £41.00 per hour (totalling £246.00) plus £85.00 expenses he incurred in instructing a solicitor to provide him with advice on his claim and preparation of documents. The total amount claimed was therefore £331.00. The respondent did not make any submissions in relation to the amount sought by the claimant or its ability to pay this sum.

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22. Taking account of the fact that the claimant instigating the proceedings itself would have been necessary in any event (and that there was no evidence at the time that the ET1 was filed of any additional work the claimant had
5 to undertake as a result of the respondent's conduct above what is normally required in similar cases), I will not award the full sums sought but will reduce the award for preparation time by 30% to reflect that and I award 70% of the amount sought in respect of preparation time (totalling £172.20). In the circumstances, I make no award in respect of expenses.

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Financial penalty

23. The Tribunal concluded that there was a breach of the claimant's rights which was serious, in that he was not paid his wages in respect of
15 November and December 2020, 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 failing to pay the claimant his wages in November and December 2020, providing a screenshot of its bank account purporting to give assurances that payment
20 had been made to the claimant (despite this not being the case), and representing to HMRC that £1200 was paid to the Claimant each month (which was not correct), and doing so when the issue of non-payment had been raised by the claimant on a number of occasions, and despite the issue causing difficulties in terms of the claimant's finances and his ability
25 to claim Universal Credit. The respondent failed to take any or any adequate steps to remedy the matter. The claimant appeared to be in financial difficulty and hardship because of the respondent's conduct.

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24. In considering whether to impose a penalty, I require to consider the issue
30 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

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penalty and had that not been the case the respondent had the opportunity to make representations, which it has not taken up.

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

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26. 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 small employer, and the limited information that I had in relation to the respondent.

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27. I intimated in the Judgment that I considered that the amount of such an order (if I were satisfied that there were grounds to order a penalty, and as I have found above I am satisfied of the same) should be £780.54 (that is 50% of the amount that the Tribunal has awarded the respondent to pay to the claimant in his wage arrears claim). I take into account that the respondent failed to make any representations in relation to the amount payable.

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Conclusion

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28. The claimant's application for a preparation time order succeeds. I make no order in respect of expenses. The respondent shall pay to the claimant the sum of £172.20.

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29. I impose a penalty as above. The amount of penalty is reduced by 50% if paid within 21 days. 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.

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I confirm that this is my judgment in the case of 4100299/2021 Mr Ewan McArthur - v- Hillcrest Finance Limited and that I have signed the order by electronic signature.

5 Employment Judge: Beyzade Beyzade
Date of Judgment: 19 July 2021
Entered in register: 26 July 2021
and copied to parties

10 **ANNEX TO THE JUDGMENT (Financial Penalty)**

To the respondent:

15 **The Tribunal has, under section 12A of the Employment Tribunals Act 1996, imposed a financial penalty on the respondent in the sum of £780.54. That sum is now payable to the Secretary of State. Responsibility for the collection of that payment has been passed to a Debt Collection Agency who has been appointed by the Department of Business, Energy, and Industrial Strategy, to collect such penalties on behalf of the Secretary of State. The Debt Collection Agency will contact you within the next few days to explain how that payment should be made. You should note that if the financial penalty is paid no later than 21 days after the date this document is sent to you, the sum payable is reduced by 50%. In the event of an application for reconsideration of, or appeal against, the decision to impose a financial penalty, recovery will be suspended until the outcome of the application for reconsideration or appeal is known. However, please note that the 21-day period referred to above is not**
20 **affected by any application for appeal or reconsideration.**
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