



EMPLOYMENT TRIBUNALS (SCOTLAND)

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Case no: 4102758/2020

Hearing held by CVP on 29 September 2021

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**Employment Judge I McFatridge
Tribunal Member J Smillie
Tribunal Member R Henderson**

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Mrs L Beaton

**Claimant
In person**

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Chemcem Scotland Ltd

**Respondent
Represented by
Ms Morgan,
Solicitor**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

25 The unanimous judgment of the Tribunal is that

(One) The claimant's claim of unlawful deduction of wages does not succeed and is dismissed.

(Two) The claimant's claim for holiday pay is dismissed following withdrawal.

30 (Three) The claimant's claim of unlawful discrimination on grounds of sex/marital status is dismissed following withdrawal.

REASONS

1. The claimant submitted a claim to the Tribunal in which she claimed that she had been unlawfully discriminated against on grounds of sex/marital status. She also claimed that she was due arrears of holiday pay and that she had suffered an unlawful deduction of wages in that she had been paid below the level of the national minimum wage. The respondent submitted a response in which they denied the claims. They made various points in relation to specification of the discrimination claim. They also made the point that such a claim was time barred. With regard to the holiday pay claim they pointed out that the claimant had been paid her full pay for the years in question and that accordingly the only claim open to her was in respect of the current year where it was their position that the claimant was still able to take the annual leave to which she was entitled. They denied that the claimant had been paid at a rate less than that of the national minimum wage and it was their position that there had been no unlawful deduction of wages. The claim was subject to a degree of case management following which various orders were made. The hearing was due to take place over two days on 29 and 30 September but in the event was concluded within one day. The claimant gave evidence on her own behalf. She had been ordered to provide a witness statement but did not do so and in the event gave her evidence in chief orally. Alasdair Beaton the Managing Director of the respondent gave evidence on behalf of the respondent. He gave his evidence in chief by way of a witness statement. A joint bundle of productions was lodged by the parties. During her evidence the claimant sought to refer to certain emails which she had not previously sought to lodge with the Tribunal and she was allowed to do so. During the course of her evidence the claimant confirmed to the respondent's agent that she was no longer insisting on her claim for arrears of holiday pay. She indicated that she now accepted the legal position as set out by the respondent at previous preliminary hearings. Her position was that she would be taking the holiday which she was due for the current holiday year. In her evidence in chief the claimant made no reference whatsoever to any matter connected with her discrimination claim. On being questioned about this by the Employment Judge the claimant confirmed that she now accepted that her discrimination claim

could not proceed and that accordingly she was withdrawing it. This left the claim of unlawful deduction of wages as the only claim before the Tribunal. On the basis of the evidence and the productions the Tribunal found the following factual matters relevant to this claim to be proved or agreed.

Findings in fact

2. The claimant is a shareholder in and director of the respondent. The claimant is married to the current Managing Director of the respondent Alasdair Beaton. The respondent was set up by the claimant and Mr Beaton in or about 1983. Both the claimant and Mr Beaton have been directors of the company since its inception.
3. The parties separated in or about 2016. There are ongoing divorce proceedings between the parties. There are also ongoing proceedings under the Companies Act in relation to an application by the claimant as minority shareholder to have her shares compulsorily purchased by Mr Beaton. The company is successful and currently has a turnover of around £4 million per annum. It has around eight employees.
4. Up until the point where the parties separated matters proceeded on the basis that the claimant essentially did most of the administrative work for the company whilst Mr Beaton was out on site. The company was operated from the parties' former matrimonial home at Wester Crosshill which is a farm. Within the matrimonial home is an office from which the claimant worked and indeed continues to work on administrative tasks for the company.
5. Up until 2015 the claimant and Mr Beaton tended to take remuneration from the company both in the form of a wage paid to them for their work as Directors and in the form of dividends. At some point in or around 2015 Ms Beaton and her husband changed accountants and their new accountant advised them that the way they had been paying themselves from the company was less tax efficient than it might have been. He suggested that in future they should not pay themselves a wage as Directors but should pay themselves an annual dividend which would have the advantage of not rendering them liable to pay National Insurance

contributions on the sums taken out. As a result neither the claimant nor Mr Beaton took any salary during the tax year 2015/16. The claimant's P60 for this period demonstrates this and was lodged (page 39). In or about June 2016 the claimant met with the company's accountants. The accountant indicated that so far as director's remuneration was concerned what he had intended the parties to do was to reduce the director's remuneration paid through the PAYE system to a minimal amount but for the claimant and Mr Beaton to be paid something through PAYE so as to maintain pension entitlement etc. What he intended was that the bulk of director's remuneration be taken by way of an annual dividend. The claimant agreed with the accountant that she would be paid the sum of £1000 per month. It was also agreed that Mr Beaton be paid a sum through the PAYE system. The intention was that each year the company would declare a dividend which would provide the bulk of the director's remuneration. Dividends have been paid for the years since with the exception of last year for which no dividend was paid.

6. In or about the summer of 2016 the claimant and Mr Beaton separated. The separation was acrimonious. As noted above, up to that point the claimant had been carrying out administrative work for the company which was carried out from the home office at the former matrimonial home. The claimant continued to reside in the matrimonial home and continued to do administrative work for the company from the home office. The amount of administrative work which the claimant was required to do was reduced from what it had been before. Previously, the claimant had processed the company payroll herself. Initially she had used the HMRC tables for this but by 2016 she was using a software package. After 2016 the company's accountants took on the task of running the payroll. The accountants also did the quarterly VAT return. Tenders for work were dealt with by the company's Quantity Surveyor Rennie Leitch.

7. At present the claimant's administrative role is mainly confined to processing invoices received and paying these. The company has a number of credit accounts with suppliers. Invoices come in to the claimant together with a monthly statement. The claimant checks the invoices and checks the statement and then in some cases arranges for payment to be made using the BACS system. Other payments are made direct through

automated bank processes such as direct debit. The number of payments is not high. The respondent's main business account is account no. 00124290 and the statement for this account was lodged (J43). In addition to this account the respondent has what was referred to as a savings account. Money is automatically transferred into this account from the day to day business account once the figure in the business account is above a certain sum. The claimant is required to monitor the amount in the business account and from time to time she requires to transfer money back from the savings account into the business account so as to ensure it does not become overdrawn. The number of such transactions in the course of a year is not high. The statement for the savings account was lodged (J42).

8. In addition to those basic duties the claimant also occasionally becomes involved in ad hoc matters such as ensuring that the company's particulars are up to date in various contractor databases, sending copies of insurance details and dealing with insurance claims in respect of company vehicles. The work carried out by the claimant for the company takes around one or two hours per day.

9. The claimant is paid a monthly salary of £1000. On the balance of probabilities the Tribunal considered that the claimant works around 50 hours per month.

Observations on the evidence

10. The Tribunal found this an extremely frustrating case. The case was subject to a degree of case management and various orders had been made for the claimant to provide further particulars of her claim. In particular, the claimant had been asked to clearly set out what hours she had actually worked during the period she was relying upon. The claimant did not provide this information. The claimant accepted during the course of the hearing that this was entirely her fault and that she was "her own worst enemy" for having failed to produce this information. As a result, the Tribunal was unable to make any realistic enquiry into what ought to have been the appropriate question namely how many hours had the claimant actually worked during the reference period. The claimant's position in her pleadings was that she worked 39 hours per week. During cross

examination the claimant maintained this was still her position on average but when pressed stated that she had simply found it too difficult to set out the hours she had actually worked over any particular period. As a result the only evidence which the Tribunal heard was evidence from the claimant setting out various pieces of administrative work which she carried out and evidence from the respondent to the effect that this work would not have taken the claimant anything like 39 hours per week. Having heard the evidence of the claimant and perused the documents in particular the bank statements showing the actual number of payments being made the Tribunal's view was that the work which the claimant carried out could easily be carried out in less than two hours per day. In the absence of any evidence from the claimant saying how long she actually took we were required to base our factual findings on this.

11. It was clear to the tribunal that the respondent's intention was to minimise the amount of work which the claimant was required to do by getting outside firms in to do a lot of the work which she had previously done. Mr Beaton in his evidence expressed some frustration at the fact that the claimant was the person who had been involved in agreeing her rate of pay with the accountants in the first place. It was also clear to us from hearing the claimant's evidence that the claimant appeared to conflate the amount of work she was currently doing with the amount of work she had carried out in the past. She mentioned having to do the payroll herself but then accepted that in fact the accountants had been doing this since 2016. She also referred to her having to carry out a substantial amount of administrative work in the early days when her and Mr Beaton were building up the company. None of this was relevant to her current claim. At the end of the day the Tribunal felt the claimant's evidence was somewhat unreliable and we were only prepared to accept this when operated from other sources. We preferred the evidence of the bank statement as showing what the claimant was actually doing.

12. As noted above the claimant gave no evidence in relation to her holiday pay claim or her claim of discrimination. She subsequently clarified in both cases that she was no longer proceeding with these claims.

13. The Tribunal accepted Mr Beaton as being a credible and reliable witness. He himself did not have any first-hand information about what hours the claimant had actually worked during any reference period. His position however was clearly that the small amount of administrative work left to the claimant could easily be carried out in under two hours a day. There was a minor dispute in the parties' evidence about when Mr Beaton had become aware that the claimant considered she was being paid less than the rate of the national minimum wage. We permitted the claimant to lodge emails which showed that she had raised this matter with Mr Beaton in or around 2018. That having been said we accepted Mr Beaton's evidence that he had no recollection of this. It appeared to us that Mr Beaton had little interest in administrative matters. The letters were sent in the context of what appears to be acrimonious dispute between the parties. We accepted Mr Beaton's evidence that he had only become aware that the claimant had raised the current proceedings on or about the last day for lodging a response since the claimant had given the respondent's address as her own address.
14. We should also say that an unfortunate incident occurred during the tribunal hearing at the outset of Mr Beaton's evidence. Mr Beaton had not been in attendance during the evidence of the claimant. The tribunal were not told why this was so. There was a short adjournment to allow Mr Beaton to come on line to give his evidence. When the hearing recommenced Mr Beaton was present and was clearly having a conversation with someone off camera who was telling him about what had happened at the hearing that morning and what the claimant had said and Mr Beaton was replying to say what his position was. The Employment Judge sought to intervene by loudly advising Mr Beaton that he could be heard and asking him to desist. He did not respond to this and it subsequently transpired that the loudspeaker on his device was not working and he could not hear the tribunal. Shortly thereafter, the respondent's representative returned to her computer and, when asked, confirmed that she had been the person who had been telling Mr Beaton about the events of the morning. The tribunal's view was that whilst it was understandable that the respondent's representative might wish to brief the person instructing her about what had been said in the morning it

would have been prudent for her to have asked the tribunal in advance whether or not there were any objections to this. At the end of the day the tribunal did not feel that the witness was being coached and were prepared to allow the hearing to proceed.

5 **Discussion and decision**

15. Both parties made legal submissions. In her submission the claimant accepted that she had not provided the information which would have enabled the Tribunal to deal appropriately with her claim.

Issues

10 16. Given that the claimant withdrew her claim of sex discrimination and in relation to holiday pay the sole claim which the Tribunal required to determine was the claim that the claimant had suffered an unlawful deduction of wages. The claimant's position in her pleadings was that she worked a 39-hour week and that as a result she was paid at an hourly rate
15 less than that of the national minimum wage and had therefore suffered an unlawful deduction of wages.

17. We can deal with the claim shortly. The evidential burden was on the claimant to show the hours she worked during the pay reference period. The claimant failed to provide any evidence as to the actual hours worked.
20 When questioned she said she found it to be too difficult. In those circumstances the Tribunal required to proceed on the basis that we could only infer the number of hours worked from the work which required to be done. We did so and our factual findings are set out above. That having been done, the Tribunal agreed with the respondent that the first stage of
25 the claimant's claim was to determine her hourly rate of pay in terms of the National Minimum Wage Regulations 2015. This required the Tribunal to calculate the total pay received by the claimant during a pay reference period and the total number of hours worked by the claimant during that pay reference period.

30 18. It appeared to the Tribunal, again agreeing with the respondent's representative that the claimant undertook salaried work in which she received a salary of £1000 per month. The claimant did not make reference to any specific pay reference period and the Tribunal considered

that we required to establish how many hours the claimant worked during the average month. As noted above, the Tribunal considered that on the basis of the evidence the claimant probably worked between one and two hours per day. If she worked one hour per day this would equate to around 31 hours per month, if she worked two hours per day this would equate to around 62 hours per month. The Tribunal considered that on average the claimant worked 50 hours per month. The claimant's hourly rate of pay was therefore £20. This is in excess of the national minimum wage. The claimant's claim therefore does not succeed.

19. Finally, it was clear to the Tribunal that there is considerable animosity between the claimant and her estranged husband. It is clear that there are ongoing proceedings dealing with financial aspects of their separation. It is somewhat unfortunate that the Employment Tribunal has been dragged in to these proceedings particularly since, having commenced the proceedings, the claimant then entirely failed to comply with the case management orders made which would have enabled the Tribunal to have a much clearer insight into any actual employment law issues which arose. We would also agree with the respondent's representative that it was discourteous for the claimant not to have advised the respondent and the Tribunal in advance of the hearing that she no longer intended to proceed with her holiday pay and discrimination claims.

Employment Judge: Ian McFatridge
Date of Judgment: 13 October 2021
Entered in register: 26 October 2021
and copied to parties