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## **EMPLOYMENT TRIBUNALS (SCOTLAND)**

**Case No: 4107551/2019**

**Hearing in chambers in Glasgow on 2 December 2021**

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**Employment Judge D Hoey**

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**Mr J Inglis**

**Claimant**

**X Arthurlie Ltd**

**First Respondent**

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**Alpine 2018 Ltd**

**Second Respondent**

**Baljit Singh and Tarsem Kumar**

**Third Respondent**

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**Alpino's Fish and Chips**

**Fourth Respondent**

**Neilston Ltd**

**Fifth Respondent**

### **JUDGMENT OF THE EMPLOYMENT TRIBUNAL**

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**(1) The second respondent, namely Alpine 2018 Ltd, was the entity that employed the claimant as at his dismissal and the claims against the first, third, fourth and fifth respondents are accordingly dismissed.**

**(2) The second respondent, Alpine 2018 Ltd, shall pay to the claimant the following sums:**

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- a. Holiday pay in the gross sum of £1,294.56 (less such deductions required by law) pursuant to regulations 13, 14, 16 and 30 of the Working Time Regulations 1998;**

**b. Compensation in respect of his unfair dismissal for the following:**

**i. A basic award in the sum of £1,674; and**

**ii. A compensatory award in the sum of £6,067.50.**

5 **c. The sum of £1,116 in respect of the failure to provide the claimant with a written statement of his particulars of employment pursuant to section 38, Employment Act 2002.**

**(3) The claim in respect of a redundancy payment fails.**

10 **REASONS**

1. The claimant had raised claims for holiday pay, unfair dismissal and redundancy payment by claim form accepted on 2 July 2019. The claimant had been unsure who his employer was having received no notice of the entity that employed him and so he raised his claim against 5 different entities, being  
15 the entities that he thought could be his employer (which was what ACAS had advised him to do).

2. A skeletal response form had been lodged in respect of each of the respondents except the first respondent (which did not respond), all stating that they did not employ the claimant saying he was employed by the first  
20 respondent. There was an active proposal to strike off the first respondent from the companies house register. No other information was received from the respondents (who were initially represented by an accountancy practice which later withdrew from acting).

3. At a case management preliminary hearing held on 8 July 2020 only the  
25 claimant attended. He explained that he believed his employer was the first respondent as he recalled there perhaps being a pay slip from that entity.

4. In the absence of participation from any of the respondents the claimant was ordered to provide a written statement setting out who he believed his

employer to be and why (with appropriate evidence being provided) and full detail in respect of the sums he claimed. That included the holiday pay to which he believed he was entitled and what he sought by way of his claim for unfair dismissal (including the steps he had taken to mitigate his losses).

5 5. The claimant provided a detailed statement to the Tribunal on 31 July 2020 which he stated had been sent to the respondents. In it he explained that he had been mistaken when he said he had received a pay slip from one of the respondents as that related to a previous period of employment. He had received no written communication from his employer setting out any details,  
10 He had undertaken research and set out whom he considered his employer to be, with reasons and appropriate evidence. He also set out the sums he claimed with appropriate vouching.

6. The respondents were given time to make any comment, particularly given the claimant's position that the second respondent was in fact his employer.

15 7. No response was received by any of the respondents, the respondents having been given the opportunity to comment upon the claimant's submission.

8. Unfortunately due to an administrative oversight the matter was not progressed until October 2021 when the parties were advised that in the absence of any response from any of the respondents to the submission  
20 produced by the claimant, a hearing in chambers would be convened and a written judgment issued from the material that had been provided to the Tribunal.

9. The Tribunal is able to make the following findings in fact from the information presented to it, which was not contested by the respondent.

25 **Facts**

10. The claimant was employed as a fish fryer in a chip shop commencing his employment on 20 August 2016. His first employer transferred the business on 30 November 2018.

11. At the premises where the claimant worked the least was taken on by the first respondent. That occurred on 30 November 2018, the date the claimant's employment transferred. The directors of that business, at the date of transfer, were the individuals convened as the third respondent, the individuals who managed the claimant on a day to day basis following the transfer. The entity employing the claimant did not change.
12. The claimant received no written statement of particulars, pay slips or other documents evidencing who his employer was.
13. The claimant received his wages in cash, having been told that his employer would pay the necessary tax and national insurance sums.
14. The claimant's employer was the first respondent at the date the claimant's employment ended which was on 28 April 2019. The claimant had asked to be paid his wages, there having been a delay in respect of his and others. The claimant's manager, Mr Singh, was unhappy with the claimant's approach and decided to summarily dismiss the claimant. The claimant was aged 59 at the date of his dismissal.
15. The claimant earned around £558 gross per week, £427.50 net.
16. Following his dismissal he secured a role paying £100 a week at another fish shop which continued until 25 August 2019 when the claimant secured comparable alternative employment. He had taken steps to obtain another job, including by approaching 7 other fish shops for work.
17. The claimant did not secure any statutory benefits.
18. When the claimant had been dismissed there were 11.6 days holiday outstanding for the holiday year that he had not taken. He had not been paid in lieu of those holidays.

**Law**

**Holiday pay**

19. A worker is entitled to 5.6 weeks' paid annual leave in each leave year (inclusive of bank holidays). This is the effect of regulations 13 (1) and 13A of the Working Time Regulations 1998 (WTR). The worker's leave year begins on the day in which he commences employment, unless there is an agreement between employer and employee to the contrary.
20. By regulation 14, a worker is entitled on termination of employment to payment for accrued but unused holiday in his final leave year. Where there is no agreement between employer and employee to the contrary, regulation 14 provides a formula for calculation of the entitlement when termination occurs part way through a leave year.
21. The formula is "(A x B) – C Where: A is the period of statutory leave to which the worker would have been entitled for the whole of the leave year in which employment ends, calculated in accordance with regulations 13 and 13A. B is the proportion of the worker's leave year which expired before the termination date, expressed as a fraction. C is the period of leave taken by the worker between the start of the leave year and the termination date."
22. Regulation 15A sets out the rules by which a worker accrues holiday in the first year of employment, but those accrual rules do not affect the calculation using the formula in regulation 14.
23. The way in which statutory holiday pay is calculated is set out in sections 221 to 229 ERA and depends on whether or not the worker has 'normal working hours'. Where the worker does not have normal working hours, his holiday pay is calculated as an average of all remuneration earned in the previous 52 weeks, or the number of complete weeks the worker has been employed if less than 52.
24. The Working Time (Coronavirus) (Amendment) Regulations 2020, SI 2020/365, were made and brought into force with immediate effect on 27 March 2020. They amend reg 13(9) of the Working Time Regulations to permit the carry over of annual leave (but not additional annual leave) in the

circumstances set out in new regs 13(10) and 13(11). Reg 13(10) provides that leave may be carried over where it was 'not reasonably practicable' for a worker to take some or all of his annual leave in the correct leave year as a result of the effects of coronavirus (including on the worker, the employer or the wider economy or society) and reg 13(11) provides that the period of carry forward is the two leave years immediately following the leave year in respect of which the leave was due.

### Unfair dismissal

25. In order to claim unfair dismissal, an employee requires to have 2 year's service: section 108 Employment Rights Act 1996.

26. In terms of section 98 of the Employment Rights Act 1996:

"In determining whether the dismissal of an employee is fair or unfair, it is for the employer to show: -

(a) the reason (or if more than one, the principal reason) for the dismissal; and

(b) that it is either a reason falling within subsection 2 or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held."

27. Potentially fair reasons for dismissal include conduct, capability and redundancy.

28. Section 98(4) of the Employment Rights Act 1996 states:

"Where the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reasons shown by the employer): -

a. depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee; and

b. shall be determined in accordance with equity and the substantial merits of the case.”

29. It is for the employer to show that there was a potentially fair reason to dismiss and the Tribunal must then decide whether the statutory wording is satisfied  
5 to assess whether the dismissal was fair or not. If the employer fails to show that there was a potentially fair reason, the dismissal is unfair.
30. A successful claimant is entitled to a basic award (section 119), which is calculated in a similar way to a redundancy payment.
31. Section 123(1) provides for a compensatory award which is such amount as  
10 the Tribunal considers just and equitable in all the circumstances having regard to the loss sustained by the complainant in consequence of the dismissal in so far as that loss is attributable to action taken by the employer. The Tribunal needs to assess how long the employment would have continued and ensure any compensation is just and equitable. A Tribunal  
15 should also consider whether the claimant contributed to the dismissal, to any extent, any reduce the award accordingly.
32. Ultimately the compensatory award should be such amount that is just and equitable.
33. A compensatory award is capped at a maximum of 52 week’s gross pay (or  
20 £86,444 if less).
34. If a claimant has received certain benefits, including Job Seeker’s Allowance and Universal Credit (as in this case), the Employment Protection (Recoupment of Jobseeker’s Allowance and Income Support) Regulations 1996 apply. This means that the respondent must retain a portion of the sum  
25 due until the relevant Government department has issued a notice setting out what the claimant is to be paid and what is to be refunded to the Government.

#### **Failure to provide written statement**

35. Under section 38 of the Employment Act 2002 where an Employment Tribunal, in respect of certain proceedings, either finds in favour of an

employee and makes no award or makes an award and in either case the employer was in breach of a duty to provide a written statement of particulars under section 1 of the ERA then the Employment Tribunal must make or increase the award by the minimum amount and may, if it considers it just and equitable in all the circumstances, make or increase the award by the higher amount. The minimum amount is two weeks' gross pay. The higher amount is four weeks' pay.

### **Redundancy payment**

36. Redundancy is defined in section 139 of the Employment Rights Act 1996 as arising where the dismissal is wholly or mainly attributable to the fact the employer ceases or intends to cease to carry on the business for the purposes he was employed or in the place he was employed or where there is a cessation or diminution of the requirements for employees to carry out work of a particular kind or to carry out work of a particular kind in the place they were employed.

37. Under section 163 of the Employment Rights Act 1996, where an employee has been dismissed by reason of redundancy, they may be eligible for a statutory redundancy payment. An employee must have a minimum of 2 year's complete service and the payment is calculated according to the formula set out at section 162 of the 1996 Act, whereby the employee receives 1.5 week's gross pay for every year of employment in which they were not below 41, 1 week's gross pay for each year of employment when they were below 41 but not below 22 and 0.5 week's gross pay for each year they were below 22. The cap on a gross week's pay for someone dismissed in 28 April 2019 is £525. A maximum of 20 years can be taken into account.

### **Decision and reasons**

38. I shall deal with each claim in turn.

### **Holiday pay**



39. The claimant had accrued 11.6 days holidays by the date of his dismissal. These were holidays that had accrued but not been taken. No payment had been made for those holidays. He is therefore entitled to be paid in lieu of 11.6 days holidays, which is 2.32 weeks.

5 40. The claimant is therefore entitled to be paid 2.32 week's holiday pay, which is  $2.32 \times £558$  which is £1,294.56, less any statutory deductions that require to be deducted.

### Unfair dismissal

10 41. From the information before the Tribunal there was no fair reason shown for the claimant's dismissal. There was no procedure that led to his dismissal. His summary dismissal was unfair. The respondent did not enter a response to defend the unfair dismissal claim nor provide any evidence to support a finding that the dismissal was for a fair reason. There was no suggestion of any process being followed that could support a finding of a fair dismissal.  
15 From the information before the Tribunal, the claimant was unfairly dismissed.

42. The claimant is therefore entitled to a basic award in the sum of  $3 (1.5 \times 2) \times £558$  which amounts to £1,674.

20 43. A compensatory award must be such sum that is just and equitable so far as flowing from the dismissal. Any award must be just and equitable ensuring that the claimant does not receive more by way of compensation than he would have received had he not been unfairly dismissed. The object of the compensatory award is to compensate the claimant for financial losses as if he had not been unfairly dismissed. It is not designed to punish the employer for wrongdoing.

25 44. I have considered the position carefully. The claimant took reasonable steps to secure alternative employment. After 17 weeks he secured alternative employment. It is just to award him 17 weeks' pay less the sum he received in the interim role he secured (which was 15 weeks  $\times$  £100 namely £1,500).

45. The claimant is therefore due 17 x £427.50 which is £7,267.50 less £1500 which is £5,767.50.

46. I also award the sum of £300 in respect of the loss of statutory rights.

47. The total compensatory award is therefore £6,067.50.

5 48. As the claimant was not in receipt of relevant benefits the recoupment regulations do not apply.

49. The total compensation for unfair dismissal is therefore £1,674 by way of a basic award and £6,067.50 by way of a compensatory award.

#### **Failure to provide a written statement**

10 50. Finally as the claimant had not received a written statement I award the claimant 2 week's pay, which is 2 x £558, namely £1,116. I do not consider it just to award 4 week's pay.

#### **15 Redundancy payment**

51. There was no redundancy situation. The claimant was unfairly dismissed, there being no fair reason for his dismissal. In any event the compensation in respect of unfair dismissal (in terms of the basic award) amounts to the same sum that would be awarded by way of a redundancy payment. The claim in  
20 respect of a redundancy payment fails.

#### **Summary**

52. In summary the respondent shall pay to the claimant:-

(1) Holiday pay in the gross sum of **£1,294.56** (less statutory deductions) pursuant to regulations 13, 14, 16 and 30 of the Working Time Regulations 1998;

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(2) Compensation in respect of his unfair dismissal for the following:

a. A basic award in the sum of **£1,674**; and

b. A compensatory award in the sum of **£6,067.50**.

(3) The sum of **£1,116** in respect of the failure to provide the claimant with  
5 a written statement of his particulars of employment pursuant to  
section 38, Employment Act 2002.

Employment Judge: David Hoey

Date of Judgment: 03 December 2021

10 Entered in register: 06 December 2021  
and copied to parties