



EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4100033/2019

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Held in Glasgow on 1 July 2019

Employment Judge F J Garvie

10 **Mr J Robb**

**Claimant
In Person**

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Jordan McPhail

**First Respondent
Not present and
Not represented**

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Aspire Community Solutions

**Second Respondent
Not present and
Not represented**

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REASONS

1. In this case, a judgment was issued by the Tribunal dated 2 July 2019. It was explained that written reasons would follow separately. These are the reasons for that judgment.

2. In his claim, (the ET1) received on 28 December 2018, the claimant alleges that there were outstanding wages due to him from the first respondent. The ACAS early conciliation certificate was not in the name of the first respondent but this was not referred to an employment judge when the claim was accepted and acknowledged on 8 January 2019 with the respondent directed to provide a response by no later than 5 February 2019. A response, (the ET3) was received on 8 March 2019. The first respondent denied that they

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had employed the claimant and maintained that the claim should not have been brought against the first respondent personally.

3. There was then a preliminary hearing held by way of telephone conference call. Employment Judge Shona Maclean then issued a Note in which she set out the issues for determination by a tribunal at a final hearing.

The final hearing

4. At the start of the final hearing, there was no one present for or on behalf of the first or the second respondents.
5. The second respondent had been ordered to be added as an additional respondent by Judge Maclean but no response was received from the second respondent.
6. As neither the first or second respondents were present or represented, I directed that the clerk contact the first respondent. She attempted to do so but there was no reply from the telephone number given in the ET3 for the first respondent.
7. On my direction she then sent an email enquiring if it was his intention to attend the hearing and, if so, to reply by return. The first respondent did not do so. He did, however, later reply by email of 1 July 2019 saying that he was unable to attend as he was not well enough to do so.
8. In the meantime, the claimant had provided a number of documents but these had not been numbered. I therefore directed that during the adjournment while the clerk attempted to contact the first respondent the claimant should number these documents. He duly did so. There was a set for the witness stand and a set for the Tribunal.
9. When the hearing was then reconvened, the claimant gave evidence.
10. It is appropriate to record that the clerk remained present during the hearing.

Findings of Fact

11. The Tribunal found the following essential facts to have been established.

12. By email dated 8 August 2018, (page 1) the first respondent acknowledged an application from the claimant to work as a Multi Trade Operative. The claimant acknowledged this on the same date and arrangements were made for a meeting on 9 August 2018, (page 2). A meeting then took place and by
5 email of 14 August 2018, (pages 3/4) the first respondent wrote to the claimant as follows:

“Hi John,

Please take this email as a conditional offer of employment with Aspire Community Solutions SCIO within the role of Multi Trade Operative.

to The conditions in the necessary documentation which you need to meet will be sent in due course. This can usually take a few days as we carry out some checks before finalising contracts and there has been a slight delay in one of the checks with yourself.”

13. The claimant acknowledged this by email of 15 August 2018, (page 4) in
15 which he indicated that he wanted to accept the offer. He also explained that his notice period had been submitted and his last day with his current employer was 7 September so he would be available from 10 September 2018.

14. By email of 28 August 2018, (pages 4-5) the first respondent wrote to a
20 recruitment team who worked with the second respondent asking that they liaise with the claimant regarding any start up checks that were needed.

15. By email of 29 August 2018, the first respondent wrote to the claimant asking if he had a valid CSCS Card, (page 6).

16. The claimant replied on the same date confirming he had held a CSCS card
25 but it had expired, (page 7). The first respondent then emailed the claimant on 5 September asking when the claimant would be ready to start working, (again page 7).

17. The claimant replied on 5 September advising he would be available from 10 September 2018, (page 8). He then sent a follow up email on 10 September asking when he would start work, (again page 8).
18. This was acknowledged on 14 September by the recruitment team on behalf of the second respondent confirming they would be in touch with details (page 9). The first respondent then wrote to the claimant on 14 September 2018, (page 10) indicating that he had been on leave and that he would have to refer to the board although he was the MD and Founder of the second respondent.
19. His email then continued as follows:
- “In terms of offering of a Contract, at this time we can not offer you a full one it will need to be a three month trial period and upon completion of this a contract this is to allow for the following to take place.
- Candidate to ensure his valid CSCS Card as per specification at beginning of recruitment process.
 - Candidate to provide proof of Full Uk driving Licence.”
20. Other points were set out but they are not relevant for the purposes of the issues before the Tribunal.
21. Further information was set out in the email, (page 10).
22. The claimant replied on 14 September agreeing with what had been set out and stating that he was happy to start on 17 September, (page11).
23. There was then correspondence about insurance so that the claimant could drive vehicles belonging to the second respondent, (page 12).
24. The claimant provided his licence, (page 13).
25. It was agreed the claimant would commence work on 17 September (page 17) and, by email of 17 September, the first respondent set out a schedule of work, (page 20).

26. The claimant was provided with work to carry out in premises in Eaglesham, (pages 23 and 24). The claimant carried out work which he had been directed to do. He then indicated by email of 20 September that he would take the following day as a holiday, (page 30). He then did further work, (page 33).
5 By email of 26 September 2018, (page 37), the claimant emailed the first respondent as follows:

"Good afternoon Jordan

I formally resign my post of Multi-Trade Operative effective immediately.

There has been several issues I have tried to overcome without any success.

10 As with before I again ask for my salary owed to be paid. To date I am due 6.5 days. Please let me know when this will be paid and I will provide further details"

27. This followed an email from the first respondent to the claimant which indicated that the claimant was not to be paid to work another day on the site
15 where he had been based and it was this that resulted in the claimant tendering his resignation, (page 36).

28. Subsequently, there was an email sent to the claimant by the first respondent dated 27 December 2018, (page 41) which refers to the claimant which stated as follows:

20 "This 'Update' you require has already been sent to your postal address. Firstly to get the facts correct you technically were dismissed from employment with Aspire, but due to your outburst and action pepping onto the office and storming off I didn't get a chance to speak."

29. The email continued with further comments from the first respondent about
25 what the claimant had been doing during his time with the second respondent. These are not relevant to the issues before this Tribunal. In essence, the first respondent was not prepared to have the second respondent make any payment to the claimant.

30. By email of 21 January 2019, (page 45) the claimant wrote to the first respondent referring to his employment having commenced with the second respondent on 17 September 2018 and that he had taken 21 September 2018 as a bank holiday which had been agreed with the first respondent and that subsequently the claimant resigned from the second respondent on 26 September 2018. His email referred to a salary of £26,400 and that he had completed 6.5 days of continuous employment with the second respondent and he sought the sum of £650 for those days worked.

31. There was also a text from the first respondent of 9 August 2018, (page 48) which refers as follows:

“Hi John, sorry to text, Jordan from Aspire here. Just to let you know I think roughly your salary is 26,400 I believe from speaking to the accountant there. Cheers Jordan”

Deliberation and Determination

32. The first issue for determination was whether the claimant was an employee of the first or second respondent.

33. On the basis of the evidence before the Tribunal, it was clear that the claimant was an employee not of the first respondent but of the second respondent. Accordingly, as indicated in the judgment issued on 2 July 2019, the first respondent was dismissed from the proceedings.

34. In relation to the next issue of whether the claimant was an employee or worker, the Tribunal was satisfied that he had been offered employment by the first respondent on behalf of the second respondent.

35. The Tribunal was also satisfied that the claimant had carried out 6.5 days' work for the second respondent the value of which he had calculated on a daily rate of £115.78 based on an annual salary which he understood to be £26,400.

36. In assessing the calculation, the Tribunal concluded that the correct daily rate was £114.78, this being based on a salary of £26,400 divided by 46 weeks

which is a period of 230 working days. £26,400 divided by 230 gives a daily rate of £114.78 and the Tribunal was therefore satisfied that it was appropriate to award the claimant the sum of £746.07, being 6.5 hours x £114.78 per hour rather than the figure originally sought by the claimant of £115.78 as the daily rate.

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37. Accordingly, since the Tribunal was satisfied that the claimant was employed by the second respondent and that he had carried out work for the second respondent, the Tribunal concluded that it was appropriate to make an award of £746.07 (Seven Hundred and Forty Six Pounds and Seven Pence) in relation to unauthorised deductions from wages and that award is the amount which the second respondent is ordered to pay to the claimant.

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38. If there is any tax and national insurance contributions payable then that is a matter for the claimant to follow up with HMRC.

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Employment Judge: J Garvie
Date of Judgment: 18 July 2019
Entered in register: 22 July 2019
and copied to parties

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