



**EMPLOYMENT TRIBUNALS (SCOTLAND)**

**Case No: 4110857/2019**

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**Held in Glasgow on 6 December 2019**

**Employment Judge L Doherty**

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**Ms C McCartney**

**Claimant  
In Person**

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**Caledonia Pension Administration Ltd**

**Respondent  
Represented by:  
Mr S Bates -  
Director**

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**JUDGMENT OF THE EMPLOYMENT TRIBUNAL**

The judgement of the Employment Tribunal is that;

1. The claimant's claim in respect of failure to pay redundancy pay succeeds, and the respondent is ordered to pay the claimant the sum of £3,937.5
- 25 2. The claimant's claim in respect of breach of contract succeeds, and the respondent is ordered to pay the claimant damages of £872.76 in respect of failure to make payment in lieu of notice.
3. The claimant's claim in respect of failure to pay holiday pay is dismissed

**REASONS**

- 30 1. The claimant presents claims of failure to pay redundancy payment, breach of contract in respect of failure to give notice or pay in lieu of notice, and failure to pay holiday pay.

**E.T. Z4 (WR)**

2. The claimant appeared in person, and the respondents were represented by Mr Bates, the Director of the respondent company.
3. It is accepted by the respondents that the claimant's position was redundant. What is in issue is her length of service for the purposes of calculating the redundancy pay due to her.
4. The respondents deny that any damages are due for breach of contract in failing to give notice, their position being that the claimant was given notice of the termination of employment on 11 July, but was paid until the end of that month.
5. Respondents also deny any holiday pay is due.
6. The claimant give evidence on her own behalf, and Mr Bates give evidence for the respondents. Both sides lodged documentary productions.
7. The Tribunal notes that in advance of this hearing Mr Bates wrote to the Employment Tribunal advising that although the company was not struck off, it had no funds with which to pay the claim and questioned whether a tribunal was worthwhile. The ability of the respondent to pay the claim is clearly not a matter for the tribunal, and there were disputes in fact and law on each of the claims which the claim presented which the tribunal had to adjudicate upon.

### **Findings in fact**

8. The respondents at the company engaged in the business of pension administration. The company was incorporated on 31 January 2013. The company did not initially return company accounts.
9. In late September/October 2013 the claimant (date of birth 21/12/1996) was employed by a company by the name of Sovereign Caledonian, of which a Mr Mike Rutherford was a director.
10. The claimant was placed on secondment to the respondent's company in late September/October 2013, and after a period of six months became employed by the respondents. The claimant was issued with a copy of a contract of employment dated 24th March 2014 (produced by the claimant). That contract

at clause 1.1 identifies her employer as *Caledonian Pensions*, which was referred to as (Company or we) in terms of the contract and stated that the claimant's employment commenced on 1 April 2014. The contract was signed on behalf of Caledonian Pensions by Mr Bates and was signed by the claimant. There is a date under the claimant signature of 25 March 2014.

11. The work which the claimant did was the administrative tasks associated with pensions administration. This was the work which the claimant did from April 2014 until the date of dismissal, albeit she commenced dealing with regulated pension schemes after September 2015.
12. The claimant understood that she was employed by the respondents. Mr Bates was a director of the company and was responsible for the management of claimant and the direction of the work she performed from April 2014 up until the point of dismissal.
13. The claimant was paid monthly, directly into her bank account. Her gross salary was £30,000 per annum, which was £576.92 per week gross. Her monthly net salary which she received was £1,891.
14. In the period prior to September 2015 the claimant received payment from a variety of different companies. From September 2015 the respondents set up a payroll, and the claimant was paid by the respondents directly into her bank account as of that date, though she did not always receive payslips.
15. The claimant was also issued with a second contract of employment and a by the respondents, which she signed on 25 April 2018, as did Mr Bates. That contract contained a clause which stated that her employment commenced on 1 April 2016 and no employment with the previous employer counted towards her continued employment with the respondents.
16. That contract provided at clause 10 that the notice required from the company to terminate an employee's contract who has two years continuous service or more, shall be one week for each completed year of continuous employment up to a maximum of 12 weeks' notice. In terms of the contract at clause 10.2

the respondents could exercise a discretion to terminate employment without notice and make a payment of basic salary in lieu of notice.

17. The respondent company began to experience financial difficulties, and on 11 July 2019 Mr Bates spoke to the claimant and told her that the company could not continue to trade because of lack of funds, and that her position within the company was redundant with effect from 31 July 2019. The claimant was not required to work on the period from 11<sup>th</sup> to 31<sup>st</sup> July.

18. Mr Bates was a director of another company, Wren and Fraser and offered the claimant a position within this company on a lesser salary. He asked the claimant to think about this. They had a meeting on 18 July to discuss this. The meeting on 18 July became heated due to a disagreement about redundancy pay, and the offer of alternative employment was no longer available to the claimant.

19. The claimant received payment of a final salary on 31 July, in the sum of £1,799.

20. The respondents' holiday year runs from 1 January to 31 December, and the second contract which the claimant signed made provision for 28 days holiday, plus public holidays. The claimant had taken periods of leave between first January and 18 July but could not indicate how much leave she had taken.

#### **Note on evidence**

21. There was some material dispute on evidence, which the tribunal has dealt with below in its consideration

#### **Submissions**

22. The claimant submitted that the monies were clearly due, and the respondent had acted unfairly. She was always employed by the respondents and the job had always been the same throughout. She had not read the second contract as she did not expect her employer to insert information which was untrue in that document.

23. Mr Bates submitted that the claimant had not been employed by the respondent but by different company up until September 2015. She had been paid by different company and was doing a different job as the respondent company dealt only with regulated pension schemes.
- 5 24. The claimant had been given notice of the termination of employment and notice of the pay was not due. The claimant had taken her full holiday entitlement by the time her employment came to an end.

### Consideration

- 10 25. The tribunal firstly considered the claim for failure to pay redundancy pay. The tribunal was satisfied that the claimant's post was redundant, and the indeed seemed to be no issue in relation to that.
- 15 26. Tribunal then had to determine was the length of the claimant's service with the respondents for the purposes of calculating her redundancy pay. Mr Bates's position was that the claimant was not employed by the respondents from April 2014, but she was employed at that stage by another company, Active Corporate.
27. In support of this position Mr Bates submitted that the respondents, although incorporated 2013, had not submitted company accounts; his position was that it was not trading till 2015.
- 20 28. The tribunal did not have a record of exactly when the respondents began to submit company accounts, but it did have an email from the respondent's accountants, indicating that the first payroll was set up in September 2015. It was accepted by the claimant that she was not paid by the respondent company initially, and payment of her wages payment came from a variety of  
25 different sources.
29. The tribunal was satisfied that the claimant was employed by the respondents from April 2014. The tribunal did not consider that the fact the company had failed to lodge accounts meant that it could not have been the claimant's employer. The entity which paid the claimant's salary is not wholly indicative  
30 of her employer, and it appeared in any event this entity changed from time

to time. The claimant was issued with a contract of employment in March 2014 which was signed by her and by Mr Bates. Mr Bates in evidence said he could not recollect having signed the contract, but it did not appear to be suggested that he had not signed it. That contract identified employer as Caledonia Pensions. Mr Bates pointed to the fact that this was not the same as Caledonian Pensions Administration Ltd, but he accepted it was a shortening of that name.

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30. The tribunal takes into account that the claimant was always managed by Mr Bates, and understood that she was employed by the respondents, and it attached considerable weight to this.

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31. The tribunal also take into account that the claimant was issued with a second contract, which identified her date of commencement of employment as 1 April 2016. Mr Bates's position in relation to this was that albeit the respondent company been incorporated earlier, he took on the management of his own business in September 2015, having had a disagreement with the director of Active Corporate. He issued employees with new contracts, which had been drawn up by a firm of lawyers. He said he met with his employees including the claimant and gave the contracts to the employees, together with a company handbook. It was not suggested however that he advised the claimant that the identity of their employer had been changed. In addition, the date of commencement of employment on the second contract was 1 April 2016. To suggest that this clause in the contract fixed the date upon which the claimant's employment *de facto* commenced is inconsistent with Mr Bates position that the respondents began paying the claimant from September 2015, and therefore the tribunal did not attach too much weight to this.

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30. Furthermore, the tribunal accepted the claimant's evidence that the work she did was substantially the same from 2014, until the termination of employment in 2019. Mr Bates suggested the work was entirely different as of September 2015 as it became regulated, but he did not suggest that the claimant was no longer working in the administration of pensions. Regulation may have impacted on how the claimant went about the day-to-day tasks in which she was engaged in the administration of pensions, but the Tribunal accepted the

claimants evidence that her core duties remained administrative tasks associated with pension administration.

33. Taking these circumstances into account the tribunal was satisfied that the respondents were the claimant's employer and had been from 1 April 2014.

5 34. Having reached that conclusion, the tribunal was satisfied that the claimant was entitled to redundancy payment of £3,937.50. This is based on her age at the date of dismissal (50 years), resulting in a 1.5 weeks' pay for each year worked. Length of service, which is five complete years (April 2014 to July 2019), and a week's gross pay, to which the statutory of £525 applies. The  
10 calculation is therefore  $1.5 \times 5 \times £525 = £3937.50$ .

#### **Breach of Contract**

35. The tribunal want to consider the claim in respect of breach of contract, the basis of which was an alleged failure give notice of termination of employment. The tribunal is satisfied that the notice period is five weeks.

15 36. The first issue which the tribunal had the determine was when the claimant's employment came to an end. The Claimant appeared to suggest that she was dismissed with effect from 11 July when she was advised that position redundant, however this position is inconsistent with the information contained in her ET1 claim form which puts her termination date at 31 July.  
20 That is consistent with Mr Bates position which was that when he initially met with the claimant, he told her she would be made redundant with effect from 31st July. She was therefore dismissed as of that date with notice given on from the 11<sup>th</sup> July. The period from 11<sup>th</sup> to 31<sup>st</sup> July is broadly 3 weeks

37. The claimant was paid until the end of July. Her final salary was for £1,799.

25 38. The claimant's normal salary each month was £1,891. On this basis the tribunal assessed the claimant's weekly wage at £436.38.

39. The claimant was due five weeks' pay in lieu of notice and was therefore due £2,181 .90 which would have reflected five weeks payment due up until 15th August.

40. At the end of July, she was paid £1,799. Applying a broad-brush she was therefore paid 3 weeks of the five weeks' notice which she was due, (£1,309.14) and the tribunal shall award damages of £872.76 in respect of the failure to make a payment in lieu of notice.

5 **Holiday Pay**

41. The claimant accepted that she had taken leave, during the relevant leave year but also accepted that she could not recall at all what leave she had taken the period from January 2019 until her dismissal. It was Mr Mates evidence that the claimant had taken all the leave which was due to her. The  
10 burden of proof rests with the claimant to establish an entitlement to annual leave and the absence of evidence as to what was due, no award shall be made.

15 **Employment Judge: L Doherty**  
**Date of Judgment: 10 December 2019**  
**Entered in register: 11 December 2019**  
**and copied to parties**