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**EMPLOYMENT TRIBUNALS (SCOTLAND)**

**Case No: 4110826/2021 (V)**

**Held on 10 January 2022 (By Cloud Video Platform)**

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**Employment Judge: B Campbell**

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**Ms Hilary Stevenson**

**Claimant  
In Person**

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**Ms Tharaga Rajendran**

**Respondent  
Not Present and  
Not Represented**

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**JUDGMENT OF THE EMPLOYMENT TRIBUNAL**

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1. The claimant was paid in respect of accrued annual leave on termination of her employment, and no further sum is due to her;
2. The claimant did not receive all of her accrued wages following termination of her employment, which amounted to both a breach of contract and an unlawful deduction from her wages, and the respondent is ordered to pay her £19.72 as the value of that sum;
3. The claimant is entitled to a basic award in respect of her unfair dismissal and the respondent is ordered to pay her the sum of £1,283.04 in that respect;

4. The claimant is also entitled to a compensatory award in respect of her unfair dismissal and the respondent is ordered to pay her of £71.28;
5. The claimant was denied the right to take rest breaks during working time, and the respondent is ordered to pay her the sum of £142.56 as compensation.

## BACKGROUND

1. This claim arises out of the claimant's employment with the respondent which ended on 25 June 2021 by way of her resignation.
2. The claimant submitted a claim form to the employment tribunal. The respondent did not submit a response form and therefore the claim was not defended. On 14 October 2021 a judgment was issued in the claimant's favour under rule 21 of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013.
3. By virtue of that judgment the following claims were identified as having been presented by the claimant, and granted in her favour:
  - a. Unfair dismissal under section 94 of the Employment Rights Act 1996 ('ERA');
  - b. Unpaid pay for accrued annual leave accrued under Regulation 14 of the Working Time Regulations 1998 ('WTR');
  - c. Unpaid wages (unlawful deduction from wages) under section 13 ERA;
  - d. Breach of contract at common law; and
  - e. Further breach of WTR in respect of the provision of paid daily rest breaks (Regulation 12).
4. The judge making that judgment did not have adequate information to calculate the amount of any monetary awards to be made to the claimant and her claim was continued to a separate remedy hearing on 16 December 2021.

On that day the claimant attended the hearing by Cloud Video Platform but there were two issues. First, she had technical difficulties seriously impairing her ability to participate in the hearing. Secondly, she had not produced or gathered to hand any information or documents which would have assisted in calculating compensation, despite having received case management orders requiring her to do so.

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5. As it was not possible to resolve those issues on the day the hearing was therefore adjourned until today, on the joint conditions that the claimant undertake a system check beforehand and that she produce any information and documents relevant to the calculation of her remedy.

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6. The claimant undertook a CVP system check before today's hearing and no technical issues were experienced during the course of the proceedings. She did not produce any documents in response to the case management orders but emailed the Tribunal office on 23 December 2021 stating the amounts she was seeking in respect of each of her claims. The terms of that email were considered along with oral evidence she provided at the hearing.

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## ISSUES

The following issues had to be determined:

1. What is the claimant's entitlement to annual leave, and what was the reference period (i.e. the holiday year) for calculating annual leave accrued?;
2. What annual leave did the claimant take in the last holiday year of her employment, and was any accrued leave remaining at the end of her employment?;
3. If so, what is the value of that remaining accrued leave?;
4. What is the value of a basic award under section 119 ERA and should it be reduced for any reason?;
5. Should a compensatory award be granted to the claimant under section 123 ERA, and if so in what amount?;

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6. Should any separate award of damages be made in respect of the respondent's breach of the claimant's contract, and if so in what amount?;
7. Did the respondent prevent the claimant from taking rest breaks during her work as permitted by Regulation 12 WTR, and if so should any compensation be awarded as a consequence?

## FINDINGS OF FACT

### Background and initial working terms

7. The claimant was employed by the respondent as a sales assistant. The respondent operates the 'McColl's' newsagent store within the Paisley Centre, which is a shopping centre. Her employment transferred to the respondent under the Transfer of Undertakings (Protection of Employment) Regulations 2006 on or around 1 November 2020 from another employer which was a company trading under the name McColl's. She commenced her service with that employer around April 2015. Her terms of employment did not vary at the time of the transfer. Only her employer changed.
8. The claimant resigned from her employment with the respondent by giving a week's notice which expired on 25 June 2021. That is her effective date of termination.
9. The claimant's period of continuous service for the purposes of ERA was therefore six complete years.
10. The claimant's duties were primarily to serve customers in the store and replenish stock.
11. The claimant's hours of work were originally expressed as 20 hours per week with the option to work additional paid hours on request. That would be split as two full days of eight hours and an additional half day.
12. To begin with the store only had three staff including the claimant and she frequently worked extra hours, for example to cover for the holidays and other

absences of her colleagues. There would typically be two sales assistants present in the store at any time.

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13. She was paid at the National Living Wage hourly rate throughout her service. At the time of her resignation that was £8.91 per hour. Between April 2020 and April 2021 it was £8.72.
14. Her annual holiday entitlement was the minimum provided by the WTR, i.e. 28 days per year pro rata to her hours of working. Her holiday year was the calendar year.

**Events following transfer of employment to the respondent**

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15. Only two of the three sales assistants employed at the store transferred to the respondent in November 2020. To ensure the store was able to open for its full range of hours, the respondent agreed with the claimant and her colleague who transferred that each would increase their working time to 24 hours per week as standard. This suited both employees.
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16. The respondent then recruited a further sales assistant in January 2021 and as a result cut the claimant's hours to 16 per week. This was done without the claimant's agreement but she accepted the new arrangement and worked to it for the rest of her period of service. She would therefore typically work for two full days per week. Only by exception would she be offered more hours from that point onwards, such as when a colleague was ill or took a holiday.
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17. From November 2020 the respondent scheduled the hours of staff so that only one was working in the store at a time. This had the effect of denying the claimant her entitlement to a daily rest break of at least 20 minutes per normal working day. If she required to briefly locate stock at the back of the store or use the toilet she would ask a security guard employed by the centre to watch the customer area, but no provision was made by the respondent to cover for her.
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18. The claimant found that she could no longer tolerate her working conditions. She submitted her resignation to the respondent, giving one week of notice which expired on 25 June 2021. Around this time she submitted a grievance.
19. The claimant took up a new role with the business who had employed her before the transfer of her service to the respondent. She began working in the new role on 30 June 2021. Her position was more senior and she was paid more than with the respondent. She is still in that role.
20. At the date of her resignation the claimant had taken two working days of paid annual leave in the calendar year. By that date she had accrued 5.5 days. She had 3.5 days still to take.
21. The claimant was paid monthly at the end of each month. She received no pay from the respondent in respect of hours worked in June 2021 or relating to her remaining accrued leave. She worked two days per week in June up until her resignation, a total of 8 days of 8 hours each.
22. Following her contact with ACAS in order to begin early conciliation, the respondent paid the claimant approximately £800 in response to the claims she was asserting.

## DISCUSSION AND CONCLUSIONS

23. It is clear on the evidence that the claimant had 3.5 days of annual leave remaining at the end of her employment, which amounted to £249.48.
24. The claimant had also worked a total of 64 hours in June 2021, amounting to £570.24 in wages.
25. Based on the level of her earnings she would not have had to pay income tax or employee National Insurance contributions on those sums. She was therefore entitled to be paid £819.72 for both her holidays and her wages on the termination of her employment.
26. The claimant confirmed that the respondent had paid her approximately £800 after early conciliation commenced via ACAS. She could not recall the precise

amount and had not produced any documentary evidence. She was sure it was not more than £800. It is therefore found that she received the sum of £800, for which the respondent is given credit.

27. It is therefore found that her accrued annual leave was completely paid for by the respondent, but that there were unpaid accrued wages of **£19.72** remaining. The respondent is ordered to pay that sum to her. It was in breach of section 13 ERA, the right of an employee not to have unlawful deductions made from their pay, which can include a failure to pay wages as well as payment of less than the employee was due:

**13 Right not to suffer unauthorised deductions.**

*(1) An employer shall not make a deduction from wages of a worker employed by him unless—*

*(a) the deduction is required or authorised to be made by virtue of a statutory provision or a relevant provision of the worker's contract, or*

*(b) the worker has previously signified in writing his agreement or consent to the making of the deduction.*

*(2) In this section "relevant provision", in relation to a worker's contract, means a provision of the contract comprised—*

*(a) in one or more written terms of the contract of which the employer has given the worker a copy on an occasion prior to the employer making the deduction in question, or*

*(b) in one or more terms of the contract (whether express or implied and, if express, whether oral or in writing) the existence and effect, or combined effect, of which in relation to the worker the employer has notified to the worker in writing on such an occasion.*

5 (3) *Where the total amount of wages paid on any occasion by an employer to a worker employed by him is less than the total amount of the wages properly payable by him to the worker on that occasion (after deductions), the amount of the deficiency shall be treated for the purposes of this Part as a deduction made by the employer from the worker's wages on that occasion.*

28. The respondent's failure to pay the claimant was also a common law breach of contract, specifically the term entitling an employee to receive pay at the agreed rate for work performed.

10 29. It has already been found that the claimant was unfairly dismissed. More specifically, she had been constructively unfairly dismissed under section 95(1)(c) ERA by resigning by reason of her employer's conduct.

15 30. If an employee is unfairly dismissed then by default they are entitled to a basic award of compensation as provided for in section 119 ERA. The calculation is essentially arithmetical, being a product of the employee's age at termination of employment, length of service and earnings level:

**119 Basic award.**

(1) *Subject to the provisions of this section, sections 120 to 122 and section 126, the amount of the basic award shall be calculated by—*

20 (a) *determining the period, ending with the effective date of termination, during which the employee has been continuously employed,*

(b) *reckoning backwards from the end of that period the number of years of employment falling within that period, and*

25 (c) *allowing the appropriate amount for each of those years of employment.*

(2) *In subsection (1)(c) "the appropriate amount" means—*



(a) *one and a half weeks' pay for a year of employment in which the employee was not below the age of forty-one,*

(b) *one week's pay for a year of employment (not within paragraph (a)) in which he was not below the age of twenty-two, and*

5 (c) *half a week's pay for a year of employment not within paragraph (a) or (b).*

(3) *Where twenty years of employment have been reckoned under subsection (1), no account shall be taken under that subsection of any year of employment earlier than those twenty years.*

10 31. A basic award for the claimant is calculated as six years, enhanced by a multiplier of 1.5 to recognise that she was over 40 for each year of service, and multiplied by the figure of a week's pay - £142.56. This produces a figure of **£1,283.04** (6 x 1.5 x £142.56).

15 32. In limited circumstances an employment tribunal may reduce the amount of a basic award. That tends to be where the employee's conduct has contributed towards their dismissal. There is no reason to make a reduction in the claimant's basic award and therefore she is granted the full amount.

20 33. An Employment Tribunal must also consider whether to make a compensatory award under section 123 ERA when a claimant is found to have been unfairly dismissed. The calculation of compensation is more discretionary than for a basic award, as section 123 recognises:

***123 Compensatory award.***

25 (1) *Subject to the provisions of this section and sections 124, 124A and 126, the amount of the compensatory award shall be such amount as 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.*

34. A compensatory award can only be for monetary losses, and not for instance injury to feelings or distress.
35. The claimant's service with her new employer began on the Wednesday of the week following her resignation. As such the period when she was out of work was very short. It is found that she would have worked for the respondent on one day of the week commencing Monday 28 June 2021, and therefore her financial loss should be calculated on that basis, i.e. a day's pay. After that point she was working for her new employer and earning more money, and so incurring no further losses.
- 10 36. Taking this approach, the claimant's compensatory award is **£71.28** which the respondent is ordered to pay.
37. Lastly, the uncontested evidence of the claimant was that from November 2020 she went from working alongside a colleague for at least part of her working time, to working alone. The respondent did not put any arrangements in place for her to take her entitlement to a paid rest break of at least 20 minutes in each shift of six or more hours' duration, as required by the WTR. This situation continued until the very end of her employment and therefore her claim is in time.
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38. Under Regulation 30 of the WTR, an employment tribunal has the power to make a declaration to the effect that an employer has refused to permit an employee to take paid rest breaks which they are entitled to under Regulation 12. Such a declaration is now made in relation to the respondent's treatment of the claimant.
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39. A Tribunal is also able to make an award of compensation in the employee's favour. Paragraph 4 of Regulation 30 states:
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- (4) The amount of the compensation shall be such as the tribunal considers just and equitable in all the circumstances having regard to—*
- (a) the employer's default in refusing to permit the worker to exercise his right, and*

*(b) any loss sustained by the worker which is attributable to the matters complained of.*

40. Taking into account those provisions, and the evidence in this case, it is decided that an award equivalent to a week's pay is appropriate. This amounts  
5 to **£142.56** and is the final amount which the respondent must pay the claimant.

41. For completeness, it is recorded that no award is made in damages for breach of contract relating to the claimant's weekly hours being reduced in January  
10 2021. This is because the claimant did not indicate in the hearing that she wished to pursue such a sum, and she did not provide any evidence of the losses claimed or mitigation. On the evidence it is found that she affirmed the breach (i.e. by her actions she accepted it) by continuing to work for the claimant for five months before resigning. She cannot therefore go back and use it as a basis to claim a loss. It is also noted that this hearing was her  
15 second opportunity to substantiate her claims.

Employment Judge: Brian Campbell  
Date of Judgment: 28 January 2022  
Entered in register: 31 January 2022  
20 and copied to parties