



EMPLOYMENT TRIBUNALS (SCOTLAND)

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Case No: 4102188/2020 (A)

Final Hearing held by telephone on 6 August 2020

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Employment Judge A Kemp

Mr N Hood

**Claimant
Represented by
Mr A Reid
Solicitor**

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Manser Saxon Limited

**Respondent
No appearance**

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JUDGMENT OF THE EMPLOYMENT TRIBUNAL

1. The claimant had unlawful deductions made by the respondent from his wages contrary to section 13 of the Employment Rights Act 1996 for (i) pay for February 2020 in the gross sum of £7,500.00 subject to any statutory deductions (ii) pay for the period 1 March 2020 to 20 March 2020 in the gross sum of £5,080.65 subject to any statutory deductions (iii) pay for annual leave accrued but untaken in the period 1 August 2019 to 20 March 2020 in the sum of £5,950.32 subject to any statutory deductions.
2. The respondent was in material breach of contract in not making payment to the claimant of wages due and expenses incurred, he was entitled to accept that repudiatory breach and terminate the contract, and he is awarded the following sums by way of damages for breach of contract:

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- (a) **£7,500 for the income he would have received during the contractual notice period, subject to any statutory deductions**
 - (b) **Repayment of expenses he had incurred in the employment of the respondent in the sum of £8,483.82.**
 - (c) **Bank interest and charges he incurred in the sum of £394.74.**
 - (d) **Additional loan interest for his matrimonial home in the sum of £1,405.**
- 10 **3. The respondent is ordered to pay the sums set out above to the claimant. The respondent shall be entitled to deduction sums for income tax, national insurance contributions or for employee pension contributions provided firstly that it so informs the claimant in writing when making such deductions, and secondly remits the**
- 15 **sums properly due to Her Majesty's Revenue and Customs or the pension provider as appropriate.**
- 4. The Tribunal reserves a decision on whether or not to impose a penalty under Section 12A of the Employment Rights Act 1996 for a**
- 20 **period of 14 days to allow the respondent to make written representations.**

REASONS

25 Introduction

- 1. This Final Hearing on the issue of remedy took place by telephone in accordance with directions given by the Tribunal in a letter dated 30 June 2020. The respondent had not entered an appearance, and did not attend the hearing.
- 30 2. The Claim was for unlawful deduction from wages in a number of respects, and damages for breach of contract.

Evidence

3. Evidence was given by the claimant himself. The claimant had provided the Tribunal with documentation and a statement with documentation in answer to points raised by the Tribunal in its email dated 8 June 2020, sent by the claimant's representative by email dated 25 June 2020, together with an email on 5 June 2020 with supplementary information.

Facts

4. I made the following findings in fact:
5. The claimant is Mr Neil Hood.
6. The claimant was employed by the respondent Manser Saxon Limited from 1 August 2019.
7. The claimant had a gross annual salary of £90,000. The salary was paid monthly, with a gross payment of £7,500. From that were statutory deductions for income tax of £2,120.20, National Insurance Contributions of £150.00 and employee pension contributions of £146.20. The claimant received a net monthly salary payment of £5,083.60 accordingly.
8. The claimant had a contractual entitlement as to notice of one month. He had a contractual entitlement for holidays totalling 30 days per annum. The holiday year was from 1 August 2019.
9. In the period of his employment which was less than a full year the claimant took two days' holidays, being Christmas Day and New Year's Day.
10. The claimant incurred expenses when working for the respondent totalling £8,483.82. He submitted those expenses to the respondent which informed him that he would be paid for them in February 2020. No payment for those expenses was made by the respondent.
11. The claimant worked in February 2020 but has not been paid salary for that month by the respondent.

12. The claimant worked in March 2020 up to 20 March 2020 when he resigned with immediate effect. He did so on the basis of the respondent having failed to pay his salary and expenses.
13. The respondent has not paid him for the work carried out by him in the period to 20 March 2020.
14. The claimant is married with three children. He and his wife own their property. They have a loan over it totalling £347,000. When the respondent did not pay the sums due to the claimant, the claimant and his wife were not able to afford to pay the loan repayments, and agreed a mortgage holiday with the lender for a period initially of three months. That period was later extended to a total of six months.
15. Whilst that mortgage holiday meant that the claimant did not pay the monthly loan repayment, he and his wife will require to pay increased interest charges. The total sum he will require to repay is £543,170 following that mortgage holiday. Had he not taken it, the total sum that would have been required to be repaid would have been £540,360. The increase in the sum payable due to the mortgage holiday is £2,810, one half of which is due by each of the claimant and his wife.
16. As a result of not having the salary and expenses due as aforesaid paid to him by the respondent the claimant incurred increased bank and interest charges totalling £394.74, on two separate accounts.
17. The claimant has not secured alternative employment, but has sought to do so and continues to do so.
18. The claimant is the sole shareholder of a limited company named Hood Property Limited. It owns three properties, which it lets out. The properties were purchased with a loan. The rental payments are used to fund the loan repayments, with a small surplus as a profit. After the respondent failed to pay the salary and expenses due to the claimant he utilised funds in the account held by Hood Property Limited for living expenses, and Hood Properties Limited incurred bank charges of £575.

19. The claimant commenced early conciliation on 23 March 2020. The Certificate was issued on 6 April 2020 and the present Claim presented on 13 April 2020.

Submissions

- 5 20. Mr Reid made a brief submission with regard to the sums sought, and why he argued they were due.

The law

- 10 21. The provisions for an unlawful deduction from wages are found in Part II of the Employment Rights Act 1996. The right not to suffer unlawful deduction from wages is provided for in section 13.

22. The definition of wages is provided for in section 27 and includes “any sums payable to the worker in connection with his employment including (i) anyholiday pay.....”

- 15 23. The Tribunal has jurisdiction to consider a claim for breach of contract for sums outstanding on termination of contract under the Employment Tribunals (Extension of Jurisdiction) (Scotland) Order 1994.

- 20 24. The entitlement to holidays is regulated by the Working Time Regulations 1998 (“the Regulations”). They are made to give effect to the Working Time Directive 93/104/EC and require to be construed purposively in light of that. They can be exceeded by contract, and act as a minimum entitlement.

- 25 25. The Regulations provide for an entitlement to annual leave under Regulations 13 and 13A, which amount to a total of 5.6 weeks per annum, capped at 28 days. For someone who works 5 days per week, the entitlement is to 28 days’ leave per annum, which is the equivalent of 2.33 days per month.

- 30 26. Regulation 14 has provision for the entitlement where a worker’s employment starts and/or ends in the leave year, as occurred to the claimant. *It states as follows:*

“14 Compensation related to entitlement to leave

(1) Paragraphs (1) to (4) of this regulation apply where—

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(a) a worker's employment is terminated during the course of his leave year, and

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(b) on the date on which the termination takes effect ('the termination date'), the proportion he has taken of the leave to which he is entitled in the leave year under regulation 13 and regulation 13A differs from the proportion of the leave year which has expired.

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(2) Where the proportion of leave taken by the worker is less than the proportion of the leave year which has expired, his employer shall make him a payment in lieu of leave in accordance with paragraph (3).

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(3) The payment due under paragraph (2) shall be—

(a) such sum as may be provided for the purposes of this regulation in a relevant agreement, or

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(b) where there are no provisions of a relevant agreement which apply, a sum equal to the amount that would be due to the worker under regulation 16 in respect of a period of leave determined according to the formula—

$$(A \times B) - C$$

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where—

A is the period of leave to which the worker is entitled under regulation 13] and regulation 13A;

B is the proportion of the worker's leave year which expired before the termination date, and

C is the period of leave taken by the worker between the start of the leave year and the termination date.

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(4) A relevant agreement may provide that, where the proportion of leave taken by the worker exceeds the proportion of the leave year which has expired, he shall compensate his employer, whether by a payment, by undertaking additional work or otherwise.

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(5) Where a worker's employment is terminated and on the termination date the worker remains entitled to leave in respect of any previous leave year which carried forward under regulation 13(10) and (11), the employer shall make the worker a payment in lieu of leave equal to the sum due under regulation 16 for the period of untaken leave.”

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27. The calculation of the sum due by contract is, by implied term, on a pro-rata basis for the period to date of termination on the same basis as set out in Regulation 14. The amount due is calculated for the Regulations by sections 221 – 224 of the Employment Rights Act 1996. The claimant having a salary the sum is based on that salary, both for statutory purposes and the contract of employment.

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Discussion

28. I accepted the evidence from the claimant. He spoke in a convincing way as to the lack of payment by the respondent, and the practical effect that that had. He referred to written documentation to support the claims made, which included the payslip for February 2020, and his claim for expenses, together with documentation from his lenders and bank.

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29. I shall deal with each of the heads of loss in turn.

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(i) Unlawful deduction from wages

30. The first claim is for salary for February 2020. I accepted that it had been earned and not paid. That is an unlawful deduction from wages. I have provided for that in the Judgment above on the basis of the gross payment, subject to statutory deductions for tax and national insurance, and employee pension contribution subject to the provisions that follow.

31. The second claim is for salary for the period of 1 March 2020 to 20 March 2020, when the claimant resigned with immediate effect. I accept that he had worked during that period, and was entitled in law to regard the failure to pay sums due to him as repudiatory breaches of contract, and accept them by bringing the contract to immediate termination. He was entitled to wages for the period to the termination. That is £7,500 gross per month, for 20 of 31 days in the month, a total, gross, of £5,080.65. I have provided for that on the same basis as for February 2020.

32. The third claim is in relation to holiday pay. The holiday year started when the claimant started with the respondent. The annual entitlement was to 30 days. On a pro rata basis, the entitlement to 20 March 2020 was 19.19 days. 2 days were taken as holidays. The balance due is 17.19 days.

33. The gross entitlement to pay per day is £346.15, being the daily equivalent for a five day week of a gross salary of £90,000 per annum. For 17.19 days the total due is £5,950.32. It is awarded on the same basis as that for salary above.

34. The total sums due, gross, for unlawful deduction from wages is £18,503.97, subject to any appropriate deductions.

(ii) Breach of contract

35. I turn to the claim in respect of breach of contract. I shall deal with each element separately.

36. Firstly, there is a claim for expenses, which I am satisfied fall under the 1994 Order. I accepted the claimant's evidence as to how they had been incurred, including for safety equipment required for a contract in London which he purchased for the company. I was also satisfied that he had

been told that the expenses had been approved, and would be paid in February 2020 but that they were not. I consider that these expenses were properly incurred, and ought to have been paid to him in February 2020 as the respondent had said it would. The failure to do so is a breach
5 of contract, and I am satisfied that the sum sought of £8,483.82 is due. No deductions are due from it.

37. Secondly, there is a claim for damages flowing from the respondent's repudiatory breach in not paying the sums due both for expenses and
10 salary as referred to above. There are various elements for that which I am satisfied are due. The first is for losses during the notice period, and the notice period under contract I accepted was for a month. Damages for that loss of income for that period are I consider due and that is a gross sum of £7,500. It is subject to a statutory deduction for income tax, but
15 not for National Insurance Contributions as made after termination. It is not known whether it may be subject to employee pension contributions, but if such a contribution is properly payable the respondent may deduct it provided that it complies with the provisions set out below.

20 38. The second is that the claimant incurred bank and interest charges for two accounts, one of £345.91 and the other of £48.83 as a result of the failure to pay the sums due to him. That was documented and I accepted that evidence. If the claimant had been paid the sums due, he would not have
25 incurred these charges, and I was satisfied that they fell as damages for breach of contract accordingly. No deductions are due from them. I might add that the claimant in the written statement sought a further sum of £345 for future losses, but I do not consider that such a sum falls within the principles of damages under Scots law.

30 39. The third is that the claimant was not able to pay his mortgage payments for his own home, which has a loan shared with his wife. I was satisfied that he has incurred extra interest charges that he would not have incurred had the respondent not breached the contract of employment as it did.
35 The total extra payment, which was documented, was £2,810, and one half of that was claimed with the other half borne by the claimant's wife. I was satisfied that the sum of £1,405 properly fell as damages for breach

of contract, that doing so was in accordance with the principles for damages for breach of contract under Scots law, and that sum is awarded. No deductions are due from it.

5 40. The final head of loss was in relation to charges incurred by Hood Property Limited, in the circumstances set out in the facts. I do not consider that that loss, by a different legal entity, falls within the principles of damages for breach of contract under Scots Law. I have therefore not included in the Judgment any aspect for that head of loss.

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41. The total of the awards for breach of contract is £17,783.56.

Deductions

15 42. The sums awarded for unlawful deductions from wages, and the element of damages for breach of contract related to the earnings that would have been recovered during the contractual notice period, are so awarded on the basis of gross earnings. In so far as they require to be subject to deductions for income tax, or national insurance contributions, or both, the respondent may deduct the sum properly due, provided firstly that notice of that is given in writing to the claimant when that is done, and secondly that the amount deducted is paid to Her Majesty's Revenue and Customs, all as provided for in the Judgment. In so far as any those sums awarded may also properly be the subject of deductions for employee pension contributions the sums properly due may be deducted provided firstly that notice of that is given in writing to the claimant when that is done and secondly that the amount deducted is paid to the pension provider. Should the respondent not do so in each of those respects, the full gross sum awarded remains payable to the claimant, and on payment the claimant shall account for payment once made to Her Majesty's Revenue and Customs as required by law.

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Penalty

43. I have considered the failures by the respondent to pay sums properly due for wages, and for expenses, and its failure to engage with the claimant or the Tribunal in respect of the other elements of the claims made and

upheld. I consider that the respondent may be in breach of the rights of the claimant and that that has one or more aggravating features such that a penalty under section 12A of the Employment Tribunals Act 1996 might fall to be imposed. That penalty can be one half of the award, and as the total of the awards is £36,314.53, and accordingly the potential penalty is up to £18,157.26..

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44. Before I consider whether to issue such a penalty and if so in what sum, I propose to give the respondent 14 days in which to make written representations as to why I should not do so, or if I do what the amount of the penalty ought to be, having regard to the circumstances and the respondent's ability to pay such an award, all as provided for in section 12A itself. When doing so the respondent may also confirm whether or not payment of the sums awarded has been made, which is a further factor that may be taken into account.

Conclusion

45. I award the claimant the sums set out above, and reserve the issue of penalty meantime.

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Employment Judge: Sandy Kemp
Date of Judgment: 07 August 2020
Entered in register: 12 August 2020
and copied to parties

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