



EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4101050/2022

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Held in Glasgow on 10 June 2022

Employment Judge Russell Bradley

10 **Mr Alexander Watt**

**Claimant
In Person**

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Group 3 Property

**Respondent
No appearance and
No representation**

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[No ET3 lodged]

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JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The judgment of the employment tribunal is:-

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1. That the claimant was not unfairly dismissed; that claim is dismissed;
2. That the claim for damages for breach of contract succeeds; the respondent shall pay damages to the claimant in respect of that breach of **ONE THOUSAND SIX HUNDRED AND EIGHTY TWO POUNDS AND NINE PENCE (£1682.09)**;
3. That the claim for accrued entitlement to paid annual leave (due upon termination) is well-founded. The respondent is ordered to pay to the claimant the sum of **EIGHT HUNDRED AND FIVE POUNDS AND NINE PENCE (£805.19)**;
4. To declare that the claimant's claim that the respondent has made a deduction from his wages (lying time) in contravention of section 13 of the Employment

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Rights Act 1996 is well founded; and to order the respondent to pay to the claimant the sum of **FOUR HUNDRED AND SIXTY FOUR POUNDS AND SIXTY TWO PENCE (£464.62)**;

5. To declare that the claimant's claim that the respondent has made a deduction from his wages (use and repair of van) in contravention of section 13 of the Employment Rights Act 1996 is well founded; and to order the respondent to pay to the claimant the sum of **ONE THOUSANCE SEVEN HUNDRED AND SIXTY POUNDS (£1760.00)**.

REASONS

10 Introduction

1. This was the final hearing of claims within an ET1 presented on 11 February 2022. Early Conciliation began on 13 January. The certificate was issued on 17 January. The contract of employment between the parties ended summarily on 7 January 2022. It began on 1 June 2021. The notice of claim was sent to the respondent at the above address. No ET3 form was lodged. The respondent received notice of the date and time of this hearing for information only. There was no appearance by or for the respondent at it. The hearing before me proceeded as an undefended claim.
2. The ET1 (8.1) identified claims of; unfair dismissal; and for notice pay, holiday pay, arrears of pay and "*other payments*".
3. On 25 March and 8 April in reply to requests from the tribunal the claimant provided further information and documentation relevant to his claims.
4. In discussion with the claimant and under reference to his letter received on 8 April, he maintained that notwithstanding a period of service of less than two years his (automatic) unfair dismissal was because he had asked questions about why his pension was not being paid but had been deducted from his wages. I took this to be a claim that he had been unfairly dismissed under section 104D of the Employment Rights Act 1996.

5. The claim for notice pay was for a payment in lieu of the period of notice (one month) and thus for the period 7 January to 7 February 2022.
6. The claim for holiday pay was for a payment in lieu of holidays accrued and not taken by the date of termination. The claimant understood this to be represented by an entry with the narrative of "*Gross Wages*" and in the sum of £933.23 shown on his payslip dated 31 January 2022.
7. The claim for arrears of pay (as per the letter of 8 April) was for the sum of £1269.85 being the net sum shown on the wage slip dated 31 January.
8. The claim for "*other payments*" was for £1760.00 being sums due in respect of the use of the claimant's van for work. This in turn was made up of £1360.00 for invoiced repairs to the van and £400 for sums due to him for the use of the van when working.
9. At the outset of the hearing the claimant lodged an amount of paperwork being:-
 - a. A series of emails in January 2022 between himself and work colleagues (including a director) at the respondent
 - b. Wage slips covering the period 31 July 2021 to 31 January 2022
 - c. Bank statements in the period 25 June 2021 to 7 February 2022
 - d. Correspondence from the National Employment Savings Trust (NEST) dated 3 and 17 March 2022
 - e. Email exchanges with the respondent on 27 and 28 May 2021
 - f. An invoice dated 10 January 2022 from SD Vehicle Repairs
 - g. Contract of employment between the parties bearing to have been issued on 28 May 2021.

25 Evidence

10. I heard evidence from the claimant. To the extent relevant he spoke to the material detailed at paragraph 9 above.

The issues

11. The issues for determination were:-

- a. Was the reason or principal reason for the claimant's dismissal a reason falling within section 104D of the Employment Rights Act 1996?
- 5 b. In summarily dismissing the claimant on 7 January 2022 was the respondent in breach of contract? And if so, to what damages is he entitled flowing from that breach?
- c. In respect of accrued and untaken holiday as at 7 January 2022, is the claimant entitled to be paid in terms of Regulation 14(2) of the Working
10 Time Regulations 1998?
- d. Did the respondent make unlawful deductions from the claimant's pay in failing to pay him for one week's "*lying time*"? If so to what remedy is he entitled?
- e. Did the respondent make unlawful deductions from the claimant's pay
15 in failing to pay him for sums due for the use and repair of his van? If so to what remedy is he entitled?

Findings in fact

12. From the ET1, the documents produced at the hearing and the claimant's evidence I found the following facts proved.
- 20 13. The claimant is Alexander Watt.
14. The respondent is Group 3 Property. One of its directors is Alan Gray. He is its managing director. It provides property maintenance services in Scotland. A main source of its work is from Macleod Lettings, Glasgow. That work is to carry out property maintenance and refurbishment for private landlords at
25 properties let to their tenants.
15. By emails exchanged on 27 and 28 May 2021 the respondent offered and the claimant accepted employment with it. On 28 May the respondent issued a written contract of employment. The covering email also confirmed that; the

claimant would use his own vehicle; the respondent would provide a fuel card; and would look after the vehicle's maintenance.

16. In terms of the written contract; employment began on 1 June 2021; the claimant was employed as a general handy man; his hours of work were 37.5
5 per week over Monday to Friday; salary was £28,000 per annum; holiday entitlement was 28 days per year including public and bank holidays accruing on a pro-rata basis, the holiday year being the calendar year; and notice to terminate by the respondent was one month on service up to one year. The respondent appears to have issued to the claimant some documentation
10 relating to his wish to join a pension scheme. The scheme Trustee, NEST, is a public corporation. It is accountable to Parliament through the Department for Work and Pensions.
17. The claimant began working for the respondent on 1 June. He worked from home. As and when required for work, he travelled to properties at places
15 including Glasgow, Stirling and Edinburgh. He travelled using his Ford Transit van registration number S4 WOY. As his job title suggests, his duties were those of a general handy man at domestic tenanted premises. Those duties could include anything from changing lightbulbs to bathroom restorations. On a daily basis the claimant received by email from the respondent a "*job list*".
20 It contained details of the work required of him for the following day.
18. He understood that he worked a week's "*lying time*". The effect of that arrangement was that in the first week of his employment he did not receive pay.
19. Albeit there was no payslip to vouch it, on 30 June 2021 the claimant was paid
25 (as per the corresponding page of his bank statement) the sum of £1545.27. The narrative includes the reference "*PAYE*". The same page shows a payment on 12 July of £273.00. Its narrative includes the reference "*Expenses Van.*" The payment of £273.00 was the reimbursement of materials which the claimant had purchased for the respondent.

20. On 29 July the claimant was paid (net of deductions for tax and national insurance) £1682.09. The gross amount shown on the corresponding wage slip is £2333.33.
21. On 13 August the claimant was paid £800.00. The bank statement narrative includes the reference "*Van, June, July*". This payment reflected an agreement between the claimant and Mr Gray that the respondent would pay the claimant £100 per week for the use by him of the van in the course of his work duties. The claimant understood that this amount was to cover the cost to him of insurance, road tax, use, and depreciation of the vehicle.
22. By the end of August the claimant had understood that contributions ought to have been made to his pension. He contacted NEST. He spoke to colleagues. No contributions had by that time been made, for him or them. He spoke with Myra Wynne (an employee of the respondent) about the issue. He was told that there had been a delay which resulted in a change of pension company.
23. At the end of both September and October, the claimant was paid net salary with deductions made from his pay representing his pension contributions. Both payslips showed (on the face of them) that the respondent was also making pension contributions. The claimant checked with NEST that they had been received. They had not.
24. The payslip dated 29 October showed a tax rebate due to the claimant of £1056.24. That payslip showed a net sum due to him of £2951.73. However the corresponding bank statement shows that he received only £1845.49. The tax rebate was not paid to him by the respondent until 1 December. By that time and in light of questions about pension contributions and the delay in paying the tax rebate, the claimant was beginning to have concerns and suspicions about the respondent.
25. On 31 December the payslip issued to the claimant showed net pay due to him of £1821.11. However, the respondent paid only £1333.00 that day. There was thus a balance due to him of £488.11. By that date, the respondent had not paid the £400 to the claimant due for the use of his van for the month of December.

26. On 5 January 2022 the claimant emailed to ask when would he receive the balance of his wages and payment of van expenses. Those expenses include the cost of repairs to it. On 6 January he emailed again asking for information and a payslip. On 7 January Mr Gray replied. In it he; maintained that having
5 checked with his bank the *“second payment went same as 1st”*; said he would call the bank; and asked for the amount for the van *“so I can move it too.”*
27. There then followed a series of emails between the claimant and Mr Gray on Friday 7 January. At 15.41 that day the claimant said, *“Still nothing. They better go in today if not I shall come and get them from you.”* Reference to
10 *“them”* was to monies owed to him. Ten minutes later (15.51) Mr Gray replied. He said, *“Threatening me over email is not right ... formally terminating your employment and do not expect you in work on Monday. As promised I will release the balance of wages today and would let you know when it would be done but rest assured it will be in. I’m still happy to pay for the van but insist on an invoice for this now following your last threatening email. Apologies this has not worked admitadly I understand your frustration as I am frustrated when it came to last weeks wages run which was taken out of my hands. Please invoice for the van and I’ll get that paid. Holidays etc will be worked out and released defo end of January.”* At 16.09 the claimant replied. He said,
15 *“Excuse me! There was no threat and as for my employment I won’t accept. I have been patient to no end.”* At 16.11 Mr Gray wrote by email *“I understand you have been patient and has been appreciated however your previously email was a threat to come and get wages off of me and I will not entertain that. As said I previously outstanding wages will be paid and I can only apologise they have not. Van – kindly send over an invoice for this as I wont release funds without. Holiday pay – this will be calculated and released before end of jan.”*
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28. On 7 January the claimant received payment of £488.11 being the balance due from his December wages.
- 30 29. By 7 January the claimant had done no work for the respondent.

30. On 10 January SD Vehicle Repairs issued an invoice addressed to Sandy Watt (G3 Property). The total due for repairs to the claimant's van was £1360.00.
31. On 19 January the claimant sent an email to Mr Gray, Ms Myra Wynne and two others at the respondent. In it he; noted he had had no correspondence from them; noted that he had asked for a meeting and appealed but had heard nothing; and asked for some contact from the respondent.
32. The claimant received a payslip dated 31 January 2022 from the respondent. It disclosed a payment of £933.23 (called "Gross Wages") and a payment of £538.50 (called "Week in Lieu"). They total £1,471.73. Sums for tax, national insurance and pension were shown as having been deducted. The net sum due is £1269.85. The claimant understands that the £933.23 shown represents payment in lieu of accrued and untaken holidays due to him. He understands that the £538.50 shown represents one week's lying time from the start of his employment.
33. The respondent has not paid to the claimant the sum shown on the payslip dated 31 January (£1269.85).
34. The respondent has not paid to the claimant the sum shown on the invoice (£1360.00)
35. The respondent has not paid to the claimant sums due for use of his van in December 2021 (£400.00).
36. The respondent has not paid to the claimant any payment in lieu of the period of notice to which he was entitled (one month).
37. In his ET1 form, the claimant says "*I am claiming against my previous employer as I was sacked for asking for money owed to me this included wages owed and expenses for the use of my van.*" He said in it that he had to pay £1360.00 for the return of the van.
38. Since 7 January the claimant has been unemployed. He has attempted to find alternative work without success. He did so by registering with several job

sites. He has had a few promises of work. None of them has resulted in paid work.

39. He has received payments of Universal Credit as follows:-

	a. 19 March	£634.84
5	b. 19 April	£603.63
	c. 19 May	£611.19

40. The claimant has now submitted a sick line in respect of State Benefits. It records his reason for unfitness for work as being Post Traumatic Stress Disorder. He is certified as unfit for work until 3 August 2022.

10 41. Correspondence from NEST (3 and 17 March) says that NEST has reported the respondent to the Pensions Regulator. The stated reason was either failure to pay contributions or failure to notify NEST that contributions were not due. NEST allege that this is a breach of the respondent's legal duty.

Comment on the evidence

15 42. I found the claimant to be both credible and reliable. For the most part he gave evidence by answering my questions. His evidence was considered and direct. He squarely answered questions without unnecessary additional information. His reference to his ordered contemporaneous bundle of papers enhanced his credibility.

20 The law

43. Section 104D(1) of the Employment Rights Act 1996 provides, *"An employee who is dismissed shall be regarded for the purposes of this Part as unfairly dismissed if the reason (or, if more than one, the principal reason) for the dismissal is that—(a) any action was taken, or was proposed to be taken, with a view to enforcing in favour of the employee a requirement to which this section applies; (b) the employer was prosecuted for an offence under section 45 of the Pensions Act 2008 as a result of action taken for the purpose of enforcing in favour of the employee a requirement to which this section*

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*applies; or (c) any provision of Chapter 1 of that Part of that Act applies to the employee, or will or might apply.” Section 104D is headed “**Pension enrolment**”.*

44. Article 3 of the Employment Tribunals Extension of Jurisdiction (Scotland) Order 1994 provides that *“Proceedings may be brought before an employment tribunal in respect of a claim of an employee for the recovery of damages or any other sum (other than a claim for damages, or for a sum due, in respect of personal injuries) if—(a) the claim is one to which section 131(2) of the 1978 Act applies and which a court in Scotland would under the law for the time being in force have jurisdiction to hear and determine;(b) the claim is not one to which article 5 applies; and (c) the claim arises or is outstanding on the termination of the employee’s employment.”* Article 5 does not apply in this case.
45. Regulation 14(2) of the 1998 Regulations provides that 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). Regulation 30 (1)(b) of the Regulations provides that a worker may present a complaint to an employment Tribunal that his employer has failed to pay him the whole or any part of any amount due to him under regulation 14(2).
46. Section 13 (1) and (2) of the 1996 Act provide that:- *“(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. “

47. Section 27(1)(a) of the 1996 Act provides, “(1) *In this Part “wages”, in relation to a worker, means any sums payable to the worker in connection with his employment, including—(a) any fee, bonus, commission, holiday pay or other emolument referable to his employment, whether payable under his contract or otherwise.”*

Submissions

48. The claimant made a short submission. In his view Mr Gray (on behalf of the respondent) had demonstrated a blasé attitude to making timeous payment of what was due to him, and some colleagues. He described his experience of having the respondent’s fuel cards declined by garages where he had tried to use them. He described having been issued with more than one fuel card but experience them being declined. That experience, along with his experience of late and non-payment of monies due formed the factual basis of his view. He said he had enjoyed working for the respondent which work he found fulfilling. He believes that work was unfairly taken from him. He has found that very difficult.

Decision and discussion

49. The claim of unfair dismissal does not succeed. I accept that the reason for the claimant’s dismissal was Mr Gray’s belief that on 7 January a threat had been made. That belief is evidenced by what Mr Gray said at the time in his emails at 15.51 and 16.11 that day. On the face of them, Mr Gray believed that a threat had been made. On the face of them, that belief was the reason for his decision to dismiss the claimant. There was no reference in the chain of emails in early January to the pension scheme or the fact that the respondent had not paid to NEST any contributions for the claimant. In his evidence, the claimant said that in his view his email of 15.41 on 7 January was not a threat. That may be so. But what is important for the purposes of section 104D is what was the reason (or principal reason) for the dismissal.

In my view it was the perception of a threat. The claimant was not unfairly dismissed under section 104D of the 1996 Act.

50. The claim for notice pay succeeds. In order to be persuaded that the respondent was entitled to summarily end the contract I would have required evidence of a repudiatory breach of contract by the claimant. Frequently, what is relied on is conduct which can be categorised as "*gross misconduct*". In this case the respondent has not offered any evidence of a breach. For completeness, and while I have accepted the reason for dismissal as per paragraph 49 above was genuinely held, I do not accept that the email in question (15.41 on 7 January) was the issuing of a threat. The email was insisting on electronic payment of the claimant's wages which failing he would collect them personally. The "*threat*" was nothing more than the idea of turning up at the respondent's premises and collecting his wages. The respondent was thus in breach of contract in failing to provide notice of one month to bring it to an end. The claimant is entitled to damages flowing from that breach. I deal with the quantification of them below.

51. The claim for accrued, untaken and unpaid holiday pay succeeds. The contract is clear as to the holiday year and the basis on which entitlement accrues. The respondent in some of its emails undertook to pay the claimant what was due to him. I accepted his evidence that the amount of £933.23 shown on the payslip of 31 January represented the gross version of what was due. I explain the amount ordered below.

52. The claim for arrears of pay (payment of a week's lying time) succeeds. I accepted the claimant's evidence that he worked a week at the start of his employment for which he was not paid. This appears to be supported by the narrative on the wage slip of 31 January, "*Week in Lieu*". In my view this cannot be in respect of notice to terminate the contract because the contract provides for notice of one month. With that excluded, the next most obvious explanation is that it was for a week's lying time. On the face of the payslip it was to be paid on 31 January. It has not been paid. The failure to pay it is a deduction which is breach of section 13 of the 1996 Act. I have made a declaration and order which corresponds with the remedy paragraph below.

53. The claim for payment for “other payments” (being £1760.00) succeeds. The respondent regularly made payment of £400 for use of the van for each month worked by the claimant with the exception of December 2021. I accepted the claimant’s evidence that those payments represented the agreed £100 per week for the use of his van. They were “*sums payable to the worker in connection with his employment.*” Similarly the respondent undertook in May 2021 to look after its maintenance. Indeed, Mr Gray asked for a copy of the invoice so that he could pay the amount. I accepted the claimant’s evidence that he paid for the work shown on the invoice. The amount of it is *also “sums payable to the worker in connection with his employment.”* Neither amount has been paid.
54. Finally, the claimant was content that his complaint about the respondent’s failure to pay to NEST his contributions to his pension was a matter for him to progress with the Pensions Regulator.

15 **Remedy**

55. On the claim for damages for breach of contract, the breach being the failure to make a payment in lieu of notice, my view is that the payslips suffice in showing that a typical net pay due to the claimant was £1682.09. I have ordered payment of this amount as damages for the breach of contract.
- 20 56. The sum paid as net pay in January 2022 was £1269.85. That is 86.28% of the gross amount shown on it, £1471.73. Accordingly, the net amount of holiday pay due to the claimant being 86.28% of £933.23 is £805.19. I have ordered payment of this amount for accrued and unpaid holiday pay.
- 25 57. The net amount of pay for lying time is subject to the same percentage reduction of 86.28% to £538.50 which is £464.62. As well as the declaration I have ordered payment of this sum.

58. As well as declaring that the non-payment of £1760.00 is in breach of section 13, I have ordered payment of it.

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Employment Judge: R Bradley
Date of Judgment: 15 June 2022
Entered in register: 16 June 2022

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and copied to parties