



## EMPLOYMENT TRIBUNALS (SCOTLAND)

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**Case No: 4101438/2022**

**Final Hearing held on papers on 8 June 2022**

**Employment Judge A Kemp**

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**Mr Graham Breckney**

**Claimant  
In person**

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**X402 Ltd**

**Respondent  
No appearance**

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### **JUDGMENT OF THE EMPLOYMENT TRIBUNAL**

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**The Tribunal orders the respondent to pay a financial penalty to the Secretary of State for Business, Energy and Industrial Strategy, under section 12A of the Employment Tribunals Act 1996, in the amount of TWO THOUSAND THREE HUNDRED AND TWENTY FOUR POUNDS THIRDTY ONE PENCE (£2,324.31).**

### **REASONS**

#### **Introduction**

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1. Judgment was issued in this case dated 18 May 2022. Consideration of whether or not to impose a penalty was deferred for the period of fourteen days to allow the respondent to make representations. It has not done so.

#### **The law**

2. The terms of the law were set out in the earlier Judgment but are repeated for completeness. Employment Tribunals have a discretionary power in E.T. Z4 (WR)

certain circumstances to order employers to pay a financial penalty to the Secretary of State, under the Employment Tribunals Act 1996 section 12A, which was inserted by section 16 of the Enterprise and Regulatory Reform Act 2013. It has subsequently been amended.

5 3. The provision is as follows:

**“12A Financial penalties**

(1) Where an employment tribunal determining a claim involving an employer and a worker—

10 (a) concludes that the employer has breached any of the worker's rights to which the claim relates, and

(b) is of the opinion that the breach has one or more aggravating features,

15 the tribunal may order the employer to pay a penalty to the Secretary of State (whether or not it also makes a financial award against the employer on the claim).

(2) The tribunal shall have regard to an employer's ability to pay

(a) in deciding whether to order the employer to pay a penalty under this section;

20 (b) (subject to subsections (3) to (7)) in deciding the amount of a penalty.

(3) The amount of a penalty under this section shall be—

(a) at least £100;

(b) no more than £20,000.

This subsection does not apply where subsection (5) or (7) applies.

25 (4) Subsection (5) applies where an employment tribunal—

(a) makes a financial award against an employer on a claim, and

(b) also orders the employer to pay a penalty under this section in respect of the claim.

30 (5) In such a case, the amount of the penalty under this section shall be 50% of the amount of the award, except that—

(a) if the amount of the financial award is less than £200, the amount of the penalty shall be £100;

(b) if the amount of the financial award is more than £40,000, the amount of the penalty shall be £20,000.

(6) Subsection (7) applies, instead of subsection (5), where an employment tribunal—

(a) considers together two or more claims involving different workers but the same employer, and

5 (b) orders the employer to pay a penalty under this section in respect of any of those claims.

(7) In such a case—

(a) the amount of the penalties in total shall be at least £100;

10 (b) the amount of a penalty in respect of a particular claim shall be—

(i) no more than £20,000, and

(ii) where the tribunal makes a financial award against the employer on the claim, no more than 50% of the amount of the award.

15 But where the tribunal makes a financial award on any of the claims and the amount awarded is less than £200 in total, the amount of the penalties in total shall be £100 (and paragraphs (a) and (b) shall not apply).

20 (8) Two or more claims in respect of the same act and the same worker shall be treated as a single claim for the purposes of this section

(9) Subsection (5) or (7) does not require or permit an order under subsection (1) (or a failure to make such an order) to be reviewed where the tribunal subsequently awards compensation under—

25 (a) section 140(3) of the Trade Union and Labour Relations (Consolidation) Act 1992 (failure to comply with tribunal's recommendation),

(b) section 117 of the Employment Rights Act 1996 (failure to reinstate etc),

30 (c) section 124(7) of the Equality Act 2010 (failure to comply with tribunal's recommendation), or

(d) any other provision empowering the tribunal to award compensation, or further compensation, for a failure to comply (or to comply fully) with an order or recommendation of the tribunal.

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(10) An employer's liability to pay a penalty under this section is discharged if 50% of the amount of the penalty is paid no later than 21 days after the day on which notice of the decision to impose the penalty is sent to the employer.

5 (11) In this section—  
“claim”—

(a) means anything that is referred to in the relevant legislation as a claim, a complaint or a reference, other than a reference made by virtue of section 122(2) or 128(2) of the Equality Act 2010 (reference by court of question about a non-discrimination or equality rule etc), and

(b) also includes an application, under regulations made under section 45 of the Employment Act 2002, for a declaration that a person is a permanent employee;

15 “employer” has the same meaning as in Part 4A of the Employment Rights Act 1996, .....

“financial award” means an award of a sum of money, but does not including anything payable by virtue of section 13

20 “worker” has the same meaning as in Part 4A of the Employment Rights Act 1996, .....

4. This power was granted to tribunals, according to the Explanatory Notes to the 2013 Act by which that amendment was introduced:

25 “to encourage employers to take appropriate steps to ensure that they meet their obligations in respect of their employees, and to reduce deliberate and repeated breaches of employment law”.

5. The Explanatory Notes also comment on the factors that a Tribunal might take into account as follows:

30 “An employment tribunal may be more likely to find that the employer’s behaviour in breaching the law had aggravating features where the action was deliberate or committed with malice, the employer was an organisation with a dedicated human resources team, or where the employer had repeatedly breached the employment right concerned. The employment tribunal may be less likely to find that the employer’s

behaviour in breaching the law had aggravating features where an employer has been in operation for only a short period of time, is a micro business, has only a limited human resources function, or the breach was a genuine mistake.”

5 6. I consider that there was a breach of the claimant’s rights which was serious, in that he was dismissed for redundancy without the appropriate payments being made to him, and that there were aggravating features by the actions of the respondent in accepting that the sums were due, but not making payment. That has continued to the point of the Judgment, and no  
10 further information or representations have been made.

7. In considering whether to impose a penalty, I require to consider the issue of ability to pay under sub-section 2(a), as well as all the circumstances of the case. No representations have been made to me. I have no information from the respondent as to its ability to pay or otherwise. I am  
15 not aware that any formal insolvency proceedings have been undertaken in relation to the respondent.

8. In all the circumstances I am satisfied that a penalty is appropriate, and that the amount of that should be 50% of the sum awarded to the claimant. The penalty in that amount is therefore ordered as specified in the  
20 Judgment. The address of the local office of the Department to which the payment is to be made is AB1 Building, Crimon Place, Aberdeen AB10 1BJ.

25 Employment Judge: Sandy Kemp  
Date of Judgment: 08 June 2022  
Entered in register: 10 June 2022  
and copied to parties

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