



EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4100142/2023

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Held in Edinburgh on 11 May 2023

Employment Judge M Sangster

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Mr K Kossakowski

**Claimant
In Person**

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Archie McKinnon Painter and Decorators Limited

**Respondent
Not Present**

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JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The judgment of the Tribunal is as follows:

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1. The claimant's claim under section 23 of the Employment Rights Act 1996 (**ERA**) is successful and the respondent is ordered to pay to the claimant the gross sum of £927.00 which was unlawfully deducted from his wages, contrary to s13 ERA;

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2. The claimant's claim for unfair dismissal, contrary to section 104(4)(a) ERA, is successful. The respondent is ordered to pay the claimant the sum of **£4,280.00** by way of compensation;

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3. The respondent failed to give the claimant a written statement of particulars of employment, as required by s1 ERA.

E.T. Z4 (WR)

4. In consequence of the claimant succeeding in a claim of a kind mentioned in Schedule 5 of the Employment Act 2002 (namely unauthorised deductions from wages and unfair dismissal), and the respondent having failed to issue the claimant a written statement of particulars of employment, the Tribunal awards the claimant two weeks' pay (capped at £571 per week), that is **£1,142.00**, in accordance with s38(3) of the Employment Act 2002.

REASONS

Introduction

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1. The claimant presented complaints of unauthorised deductions from wages, automatically unfair dismissal and failure to provide a written statement of employment particulars. The claim was served on the respondent. No ET3 was received. The claim was considered by an Employment Judge under Rule 21 of the Rules of Procedure, but it was not possible to make a determination of the claim on the basis of the available material. A hearing was accordingly fixed for 11 May 2023. Both parties were notified of this. The respondent was not present or represented at the hearing.

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Issues to be Determined

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2. Did the respondent fail to provide the claimant with a written statement of his employment particulars in accordance with s1 ERA?
3. Did the respondent make unauthorised deductions from the claimant's wages (Section 13 ERA) and, if so, how much was deducted?
4. Was the sole or principal reason the claimant was dismissed the fact that he asserted that the respondent had infringed a relevant statutory right, contrary to s104 ERA?
5. If the claim for unfair dismissal/unauthorised deductions from wages is successful, is it appropriate to make any award under section 38 of the Employment Act 2002?

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Findings in Fact

6. The Tribunal found the following facts, relevant to the issues to be determined, to be admitted or proven.
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7. The claimant is a decorator. The claimant entered into discussions with Archie McKinnon (**AM**), director of the respondent, in late 2022, in relation to the possibility of the claimant working for the respondent. It was agreed that the claimant would work on a trial basis initially, working 38 hours per week, for £18 per hour. If he proved himself in the first week, his hourly rate would increase to £20 or more. The rate was to be discussed and agreed between the parties at the end of the trial.
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8. The claimant commenced employment with the respondent on 14 November 2022. He worked for 37 hours the first week. AM appeared happy with his work in that time. At the end of the first week, the claimant sent a text to AM to check he was indeed happy and see if they could now negotiate a rate for going forward.
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9. The following week the claimant worked 14.5 hours over Monday 21 and Tuesday 22 November 2022.
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10. On Tuesday 22 November 2022, AM attended the site where the claimant was working. The claimant asked AM about agreeing what he would be paid after the work trial. AM said he would text him regarding this. AM later sent a text suggesting that the claimant should be paid £780 for each house he completed. The claimant was not happy at this suggestion. AM sought to renege on the agreement to pay the claimant £18 per hour during the work trial, suggesting that he would now only pay him £780 per house, and only on completion. The claimant was again not happy at this suggestion. He had expected to be paid at the end of his first week of employment, in accordance with the terms agreed. On 23 November 2022, prior to commencing work for the day, the claimant asked AM to be paid at least some of his wages, as he required to pay for fuel to get to and from work. He stated (having looked this
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up online) that he was entitled to a written statement of terms and conditions of employment, and asked to be provided with this. In response, AM stated that he could not work with the claimant any longer, wished him all the best and thanked him for undertaking a work trial. The claimant's employment terminated at that point.

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11. Despite requests, the claimant received no payment for the work he carried out for the respondent.

10 12. The claimant was not, at any stage, provided with a written statement of employment particulars by the respondent.

13. The claimant secured alternative employment commencing on 17 January 2023, earning £18 per hour. He was accordingly out of work for 8 weeks. He did not receive any unemployment benefits in that period.

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Relevant Law

14. S1 ERA provides that where a worker begins employment with an employer, the employer shall give to the worker a written statement of particulars of employment

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15. S13 ERA provides that an employer shall not make a deduction from a worker's wages unless:

25 a. The deduction is required or authorised by statute or a provision in the worker's contract; or

b. The worker has given their prior written consent to the deduction.

16. A deduction occurs where the total wages paid on any occasion by an employer to a worker is less than the amount of the wages properly payable on that occasion. Wages are properly payable where a worker has a contractual or legal entitlement to them (***New Century Cleaning Co Limited v Church [2000] IRLR 27***).

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17. S104 ERA provides that an employee who is dismissed shall be regarded as unfairly dismissed if the reason (or, if more than one, the principal reason) for the dismissal is that the employee alleged that the employer had infringed a right of his which is a relevant statutory right. A relevant statutory right includes the right to be provided with a written statement of particulars of employment, in accordance with s1 ERA. S108 ERA provides that an employee does not require to have two years' service to bring a complaint of unfair dismissal under s104 ERA.
18. S38(3) of the Employment Act 2002 provides that where an award is made to an employee in respect of relevant proceedings specified in Schedule 5 of that Act (unauthorised deductions from wages falling within the scope of that), and where, when the proceedings began the employer was in breach of his duty under s1 or s4 ERA, the Tribunal must increase the award by an amount equal to 2 weeks' pay and may, if it considers it just and equitable, increase the award by a sum equal to four weeks' pay.

Discussion & Decision

19. The Tribunal found that the claimant was entitled to the sum of £18 per hour on the commencement of his employment. He worked for the respondent for 51.5 hours in the period from 14-22 November 2022. He was accordingly entitled to be paid £927 gross. He did not receive any payments from the respondent. The gross sum of £927 was accordingly deducted from his wages by the respondent.
20. The Tribunal concluded that the reason the claimant was dismissed was because he stated to AM that he was entitled to a written statement of employment particulars. Prior to the claimant requesting this, the intention was that the claimant would continue working for the respondent, to finish painting the house he was working on. When he stated that he was entitled to be provided with a written statement of employment particulars, he was summarily dismissed. By doing so, the claimant was asserting a that the

respondent had infringed a relevant statutory right. He was dismissed as a result of doing so. The Tribunal concluded that this was the principal reason for the claimant's dismissal and he was unfairly dismissed, contrary to s104 ERA, as a result.

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21. The Tribunal considered the appropriate remedy for that unfair dismissal. The claimant is not entitled to a basic award, given his length of service. He secured alternative employment commencing 17 January 2023. He was out of work for 8 weeks. His wages with the respondent would have been a minimum of £684 gross per week (38 hours x £18). That equates to £535 net per week. He accordingly incurred financial losses of £4,280 as a result of his dismissal (£535 x 8). The Tribunal conclude that it is appropriate to make a compensatory award for that sum.

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15 22. The claimant ought to have received a written statement of employment particulars on, or prior to, commencing employment, but did not. He did not receive that at any point during his employment with the respondent or thereafter.

20 23. Given that the Tribunal uphold the claimant's claims for unauthorised deductions and unfair dismissal, and also finds that the respondent failed to provide a written statement of terms and conditions, the Tribunal is required to make an award equivalent to 2 weeks' pay, capped at £571 per week, namely £1,142. The Tribunal did not consider that it was just and equitable to award a higher sum.

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30 **Employment Judge: M Sangster**
Date of Judgment: 11 May 2023
Entered in register: 15 May 2023
and copied to parties

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