



EMPLOYMENT TRIBUNALS (SCOTLAND)

Case Number: 4101659/2023

Held in Glasgow on 25 April 2023

Employment Judge P McMahon

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B Walters

**Claimant
In Person**

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Todos Media LTD

**Respondent
No appearance and
No representation**

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JUDGEMENT OF THE EMPLOYMENT TRIBUNAL

The judgment of the Tribunal is that:-

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- (i) The respondent made an unlawful deduction from the claimant's wages in December 2022 in respect of the non-payment of the claimant's December 2022 salary of the gross sum of £6,199.99 (SIX THOUSAND, ONE HUNDRED AND NINETY NINE POUNDS AND NINETY NINE PENCE) contrary to section 13(1) of the Employment Rights Act 1996 (the "ERA").

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- (ii) The respondent made a series of unlawful deductions from the claimant's wages in respect of its failure to pay the sum of £258.34 into the NEST pension scheme as employee pension contributions in respect of the Claimant in the months of October, November and December 2022 in the gross sum of £775.02 (SEVEN HUNDRED AND SEVENTY FIVE POUNDS AND TWO PENCE) contrary to section 13(1) of the ERA.

- 5 (iii) The respondent is ordered to pay the claimant the gross sum of £4,975.01 (FOUR THOUSAND, NINE HUNDRED AND SEVENTY FIVE POUNDS AND ONE PENCE) (being £6,199.99 + £755.02 - £2,000) in accordance with section 24(1) and section 25 (3) of the ERA.
- 10 (iv) The respondent shall be at liberty to deduct from the above sums prior to making payment to the claimant such amounts of Income Tax and Employee National Insurance Contributions (if any) as it may be required by law to deduct from a payment of earnings of that amount made to the claimant, provided that if it does so, the respondent shall duly remit such sums so deducted to His Majesty's Revenue and Customs (HMRC), and provide to the claimant written evidence of that fact, the amount of such deduction and of the sums deducted having been remitted to HMRC, and
- 15 if it does so, payment of the balance to the claimant shall satisfy the requirements of this judgment.
- (v) The claimant's claim for unlawful deduction from wages in respect of employer pension contributions is unsuccessful and is dismissed.

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REASONS

Introduction

1. This case was heard on 25 April 2023. The claimant had presented a claim of unlawful deduction from wages. The respondent in the case did not submit a response, and the case proceeded to the hearing already listed on 25 April 2023 to determine the claimant's claim. At the hearing the claimant represented himself and the respondent was neither present nor represented.
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2. The claimant's claim for unlawful deduction from wages consisted of:
- 2.1. A claim in respect of the non-payment of the claimant's salary for the month of December 2022 (the "December Salary");
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- 2.2. A claim in respect of deductions from the claimant's wages for employee pension contributions in October, November and December 2022 which the respondent did not pay into the pension scheme (the "Employee Pension Contributions"); and
- 5 2.3. A claim in respect of employer pension contributions in October, November and December 2022 which the respondent did not pay into the pension scheme (the "Employer Pension Contributions").
3. At the hearing the claimant confirmed that it was only the claims referred to at 2.1 to 2.3 above which were being made and the claimant was no longer seeking repayment of overdraft charges and/or loan interest payments. The claimant also confirmed that the total sum he was seeking was under deduction of £2,000 the Respondent had paid to the Claimant on or around the beginning of March 2023.
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4. A Bundle of documents was provided by the claimant.
- 15 5. Evidence was heard on affirmation from the claimant. The claimant was the only witness.

Issues

6. The issues to be determined by the Tribunal were as follows:-
- 6.1. Had there been an unlawful deduction from the claimant's wages contrary to section 13(1) of the ERA in respect of:
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- 6.1.1. The December Salary;
- 6.1.2. The Employee Pension Contributions; and/or
- 6.1.3. The Employer Pension Contributions; and
- 6.2. If so, should the respondent be ordered to pay the claimant the amount of any such deduction in accordance with section 24(1) of the ERA.
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Findings in fact

7. The Tribunal considered the following facts to be admitted or proved:

8. The Claimant commenced employment with the Respondent on or around 1 July 2021.
9. In the relevant period to which the claimant's claim relates (i.e. October to December 2022):
 - 5 9.1. The Claimant's gross salary per month was £6,458.33;
 - 9.2. The sum of £258.34 per month was deductible from the Claimant's gross salary per month by the Respondent, to be paid into the National Employment Savings Trust (NEST) pension scheme as employee pension contributions in respect of the Claimant; and
 - 10 9.3. The Respondent was due to pay the sum of £193.75 per month into the NEST pension scheme as employer pension contributions in respect of the Claimant.
10. In November 2022 the claimant gave notice to terminate his employment with the respondent on 28 December 2022 and the claimant's employment
15 accordingly terminated on 28 December 2022. The claimant's wages in respect of the month of December 2022 were due to be paid to the claimant by the Respondent by the end of December 2022 but the Respondent did not do so.
11. The Respondent deducted the sum of £258.34 from the Claimant's gross
20 salary, to be paid into the NEST pension scheme as employee pension contributions in respect of the Claimant, in October and November 2022 but did not pay the sums so deducted into the NEST pension scheme as employee pension contributions in respect of Claimant and nor did it pay this sum into the NEST pension scheme as employee pension contributions in
25 respect of Claimant for the month of December 2022.
12. The Respondent did not pay the sum of £193.75 per month into the NEST pension scheme as employer pension contributions in respect of the Claimant for the months of October, November and December 2022.

13. The claimant received correspondence from the NEST pension scheme between January and March 2023 advising that it had reported the respondent to The Pensions Regulator.
14. On or around the beginning of March 2023 the Respondent paid to the Claimant the sum of £2,000. The Claimant believes that this was part-payment of the wages he had been due to be paid by the Respondent in December 2022.

Observations on the evidence

15. The Tribunal applied the civil standard of proof, being “on the balance of probabilities” as noted below under the Relevant law section, and considered whether the evidence was such that it could say “we think it more probable than not” in respect of each key factual issue it required to determine.
16. The Tribunal’s findings in fact were based on the claimant’s oral evidence and the documents provided (which included a copy contract of employment, copy payslip for the month of December 2022, a copy download of the pension contributions history in respect of the Claimant from the NEST website and copy correspondence from NEST to the Claimant between January and March 2023).
17. Generally speaking, the Tribunal considered that in his evidence the claimant was giving an honest account of events as he remembered and understood them, that his evidence was consistent or not inconsistent with the documents produced, and the Tribunal accepted this evidence as being sufficiently credible and reliable.

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Relevant law

18. In dealing with this case the Tribunal had regard to the overriding objective set out in Rule 2 of Schedule 1 of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013.

19. It is the Tribunal's task to determine the case 'on the balance of probabilities', which is the civil standard of proof applied in employment Tribunal cases. Lord Denning (then Mr. Justice Denning) in **Miller v Minister of Pensions 1947 2 All ER 372, KBD**, explained the civil standard of proof in these terms:

5 *"[The degree of cogency] is well settled. It must carry a reasonable degree of probability, but not so high as is required in a criminal case. If the evidence is such that the Tribunal can say "we think it more probable than not", the burden is discharged, but if the probabilities are equal, it is not.'*

10 20. Part II of the Employment Rights Act 1996 (ERA) sets out the statutory prohibition on deductions from wages.

21. Section 13(1) contains the general prohibition as follows:

"(1) An employer shall not make a deduction from wages of a worker employed by him..."

22. Section 13(3) of the ERA provides that a deduction from wages occurs where:

15 *"...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....."*

23. Section 13(3) of the ERA also makes clear that:

20 *"...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."*

24. A failure to pay at all can amount to a deduction under Section 13 (3) of the ERA, as if an employee is due to be paid and receives nothing, non-payment is to be treated as a deduction from their wages on that occasion (see
25 **Delaney v Staples [1991] ICR 331 at 340**).

25. There are certain exceptions and qualifications to the general prohibition on deductions from wages. As well as containing the general prohibition against

deductions from wages, Section 13(1) of the ERA also provides that the prohibition does not apply where:

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

5 26. In the case of **Gibson v Lothian Leisure ETS/4105009/2020** the Tribunal found that deductions made from an employee’s wages for the purposes of paying the sums so deducted into a pension scheme in respect of that employee is still an unlawful deduction from wages if the employer kept the money rather than paying it into the pension fund. In that case the Tribunal
10 held that the worker's agreement to deductions made from his wages for the purposes of paying the sums so deducted into a pension scheme was, in reality, conditional on the money being used for the purposes for which agreement had been given, namely payment into the pension scheme and a deduction which was not paid into the scheme was therefore not authorised.
15 Alternatively, the Tribunal held that the failure to pay the contributions into the pension fund was a breach of contract for which the employer would be liable in damages. Whilst this is a decision of the Tribunal, which is therefore not binding on this Tribunal, it is a decision which is relevant to the facts of this case.

20 27. Section 27(1) of the ERA 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
25 otherwise.”*

28. The definition of wages in Section 27(1) of the ERA does not include contributions paid to a pension provider by an employer on behalf of an employee (i.e. employer's pension contributions) for the purposes of an unlawful deduction from wages claim (see **Somerset County Council v
30 Chambers UKEAT/0417/12**).

29. Section 24 (1) of the ERA provides that, where a complaint that an employer has made a deduction from a worker's wages in contravention of Section 13 of ERA is well founded, it shall make a declaration to that effect and shall order that the employer pay to the worker the amount of any deduction made in contravention of Section 13 of ERA.

30. Section 25(3) of the ERA provides that, where it is determined that an unlawful deduction from wages has occurred:

“(3) An employer shall not under section 24 be ordered by a Tribunal to pay or repay to a worker any amount in respect of a deduction or payment, or in respect of any combination of deductions or payments, in so far as it appears to the Tribunal that he has already paid or repaid any such amount to the worker.”

31. Section 25(3) of the ERA applies to payments made by an employer to a worker in respect of a deduction at any time before the date on which the Tribunal makes an order against the employer (see **Robertson v Blackstone Franks Investment Management Ltd 1998 IRLR 376, CA** and **Autonomy Systems Ltd v Cuddington EAT 0854/02**).

Submissions

32. The claimant was given the opportunity to, but did not, make any additional written or oral submissions.

Discussion and decision

33. As noted above, the issues for the Tribunal to determine in this case were:

33.1. Had there been an unlawful deduction from the claimant's wages contrary to section 13(1) of the ERA in respect of:

33.1.1. The December Salary;

33.1.2. The Employee Pension Contributions; and/or

33.1.3. The Employer Pension Contributions; and

33.2. If so, should the Respondent be ordered to pay the Claimant the amount of any such deduction in accordance with section 24(1) of the ERA.

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The December Salary

34. The Tribunal made a finding in fact that the Respondent did not pay the Claimant's salary in December 2022 when it fell due to be paid at the end of December 2022.

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35. The Tribunal noted the general prohibition on the deduction from wages contained within Section 13(1) of the ERA and the provisions of Section 13(3) of the ERA referred to under the Relevant Law section above, i.e. that a deduction from wages occurs where:

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"...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....." and "...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."

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and, as observed in **Delaney v Staples**, a failure to pay at all can amount to a deduction under Section 13 (3) of the ERA.

36. Accordingly, the Tribunal concluded that the Respondent made an unlawful deduction from the Claimant's wages in respect of the Claimant's December 2022 salary in the gross sum of £6,199.99 (being the claimant's gross salary for December 2022 of £6,458.33 less the sum of £258.34 which was due to be deducted from the Claimant's gross salary to be paid into the NEST pension scheme as employee pension contributions in respect of Claimant in December 2022) contrary to section 13(1) of the ERA.

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The Employee Pension Contributions

37. The Tribunal made a finding in fact that the sum of £258.34 was deductible from the Claimant's gross salary per month by the Respondent, to be paid into the NEST pension scheme as employee pension contributions in respect of the Claimant and that Respondent did not pay the sum of £258.34 it had deducted from the Claimant's gross salary in this respect into the NEST pension scheme as employee pension contributions in respect of Claimant in the months of October and November 2022, nor did it pay this sum into the NEST pension scheme as employee pension contributions in respect of Claimant for the month of December 2022.
38. It was not clear whether the deduction of such employee pension contributions from the Claimant's wages had been agreed. The Tribunal considered whether, in accordance with Section 13(1)(b) of the ERA referred to under the Relevant Law section above, the general prohibition against deductions from wages would not apply to the deduction of such employee pension contributions if they had been agreed.
39. The Tribunal concluded, with reference to the case of **Gibson v Lothian Leisure** (which the Tribunal considered was relevant, although not binding), that even if the deduction of such employee pension contributions from the Claimant's wages had been agreed, such deductions were for the purposes of paying the sums so deducted into the NEST pension scheme and, the Respondent not having done this, meant that the deductions were still unlawful deductions within the meaning of Section 13 of the ERA.
40. Accordingly, the Tribunal concluded that the Respondent made a series of unlawful deductions from the claimant's wages in respect of its failure to pay the sum of £258.34 into the NEST pension scheme as employee pension contributions in respect of the Claimant in the months of October, November and December 2022 in the gross sum of £775.02 contrary to section 13(1) of the ERA.

The Employer Pension Contributions

41. Notwithstanding the Tribunal's finding in fact that the Respondent did not pay the sum of £193.75 per month into the NEST pension scheme as employer pension contributions in respect of the Claimant for the months of October, 5 November and December 2022, as observed under the Relevant Law sections above with reference to the guidance to be found in the case of **Somerset County Council v Chambers**, the definition of wages in Section 27(1) of the ERA does not include contributions paid to a pension provider by an employer on behalf of an employee (i.e. employer's pension contributions) 10 for the purposes of an unlawful deduction from wages claim and accordingly, the Tribunal cannot conclude that the Respondent made an unlawful deduction from the claimant's wages contrary to section 13(1) of the ERA in this respect.

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Treatment of sums already paid by the Respondent to the Claimant

42. In light of the Tribunal's finding in fact in relation to the payment by the Respondent to the Claimant of the sum of £2,000 on or around the beginning of March 2023 and the Claimant's position in this respect, it appeared to the 20 Tribunal that the Respondent had paid to the Claimant part of the deduction it had made to the Claimant's wages in respect of the Claimant's December 2022 salary before the date on which the Tribunal makes an order against the Respondent in this case and, accordingly, given the provisions of section 25(3) of the ERA and with reference to the cases of **Robertson v Blackstone** 25 **Franks Investment Management Ltd** and **Autonomy Systems Ltd v Cuddington**, all as referred to under the Relevant Law section above, the Tribunal concluded that the sum the Respondent is ordered to pay to the Claimant in respect of the unlawful deduction from wages in this case should not include the £2,000 already paid by the Respondent to the Claimant.

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5 **Employment Judge: P McMahon**
 Date of Judgment: 24 June 2023
 Entered in register: 29 June 2023
 and copied to parties

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