



## EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4102724/2023

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Held via Cloud Video Platform (CVP) in Glasgow on 5 July 2023

Employment Judge P O'Donnell

10 Miss Megan Doherty

Claimant  
In Person

15 Indemnis Limited

Respondent  
No appearance and  
No representation

### JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The Judgment of the Employment Tribunal is:

1. The claims of deduction of wages and breach of contract were lodged out of  
20 time but the Tribunal exercises its discretion to hear these claims as it was  
not reasonably practicable for these claims to be lodged in time and they were  
lodged in a further period which the Tribunal considers reasonable.
2. The Claimant was dismissed by reason of redundancy and is entitled to a  
25 redundancy payment of £1413.45 (One thousand four hundred and thirteen  
pounds, forty-five pence).
3. The Claimant was dismissed without notice and is awarded compensation for  
this breach of contract in the sum of £996.93 (Nine hundred and ninety-six  
pounds, ninety-three pence).
4. The Respondent acted in breach of contract by not paying sums deducted  
30 from the Claimant's wages in respect of pension contributions into her pension  
fund. The Claimant is awarded the sum of £60 (Sixty pounds) as  
compensation for this breach of contract.

5. The Respondent has failed to pay the Claimant for her holiday entitlement and she is awarded the sum of £1255.45 (One thousand two hundred and fifty-five pounds, forty-five pence) in respect of this deduction of wages.
6. The Respondent has failed to pay the Claimant for her Statutory Maternity Pay and she is awarded the sum of £6163.08 (Six thousand, one hundred and sixty-three pounds and eight pence) in respect of this deduction of wages.

## REASONS

### Introduction

1. The Claimant has brought a number of complaints arising from the termination of her employment with the Respondent as a result of the Respondent ceasing to trade.
2. At the start of the hearing, I clarified with the Claimant what claims were being pursued and she confirmed the following claims:-
- a. Statutory redundancy pay.
  - b. Breach of contract in respect of two matters:
    - i. A failure by the Respondent to give notice of dismissal.
    - ii. A failure by the Respondent to pay the sum of £60 deducted from the Claimant's November 2022 salary in respect of pension contributions into the pension fund.
  - c. Unlawful deduction of wages in respect of two matters:-
    - i. Statutory maternity pay.
    - ii. Pay in lieu of untaken holidays at the termination of employment.
3. This hearing was originally listed as a closed preliminary hearing to be heard by telephone to discuss issues of case management. On 3 July 2023, it was converted to an open preliminary hearing to be held remotely by way of Cloud Video Platform to deal with the issue of time bar. The reason for this was

that the ET1 was lodged after the expiry of the three month time limit which applies to almost all of the claims being pursued. The exception being the claim for redundancy pay which has a six month time limit.

4. Having reviewed the case papers, I was of the view that it would be in keeping with the Overriding Objective to use this hearing to issue a final judgment rather than only dealing with time bar and then bringing the Claimant back for a hearing on the redundancy pay claim along with any other claim which survived the time bar issue.
5. However, I appreciated that this would not give the Claimant the notice of a final hearing normally required by the Rules. I, therefore, invited her to confirm whether or not she would consent to waiving that notice and would be content to proceed on the basis that this hearing was converted to a final hearing. She confirmed that she was happy to proceed on that basis and I was satisfied that she would not be materially prejudiced by this. The Respondent, having ceased trading, had not entered a response to the claim and so is not entitled to participate in any hearing. In any event, they were not in attendance.

### **Findings in fact**

6. The Tribunal made the following relevant findings in fact.
7. The Claimant commenced employment with the Respondent on 25 June 2019 as a claims handler. The Claimant's date of birth is 12 March 1996.
8. The Claimant earned £24500 a year before tax and her net pay was £1600 per month.
9. The Claimant was due to give birth on 30 November 2022 and had planned to start maternity leave on that date. She took annual leave from 11 November 2022. The Claimant gave birth on 24 November 2022 and so her maternity leave started on that date.
10. The Claimant received her last wage on 30 November 2022. This was due to be paid on 28 November but was delayed by a few days. A deduction of

£60 was made from her wages in respect of her contribution to the pension scheme but this sum was not paid into the pension fund by the Respondent.

11. On or around 30 November 2022, the Claimant heard from colleagues that the Respondent was going to cease trading. However, the Claimant was not informed of this by the Respondent until 8 December 2022. On this date, the Claimant made contact with the owner of the company, Stephen Mullen, who informed her that the Respondent had ceased trading and that her employment had terminated as a result with immediate effect.
12. The Claimant received no payment from the Respondent in respect of Statutory Maternity Pay.
13. The Claimant's holiday year ran from 1 January to 31 December each year. She had 17 days' untaken holiday as at the termination of her employment.
14. The Claimant remained in contact with colleagues and one of them advised her of the right to bring a claim to the Employment Tribunal in respect of redundancy pay and other sums owed to them. The Claimant and her colleagues decided to take this forward as a group.
15. On 14 February 2023, the group commenced ACAS Early Conciliation. The names provided to ACAS included that of the Claimant. However, when the ACAS Early Conciliation Certificate was issued on 27 February 2023, the Claimant's name was omitted. She was not aware of this when she submitted an ET1 on 1 March 2023 and only became aware when she received correspondence from the Tribunal dated 14 March 2023 rejecting this claim because she had not, on the face of it, complied with the requirement to engage Early Conciliation.
16. The Claimant spoke to ACAS about the matter who accepted that they had missed the Claimant's name from the 27 February Certificate. The Claimant engaged Early Conciliation again on 16 March 2023 and received a Certificate in her name on the same date.
17. She then lodged a second ET1 but cannot recall the date. This was rejected because of an error on the ET1 relating to the Respondent's name.

18. On 12 April 2023, the Claimant lodged a third ET1 which was accepted by the Tribunal and lead to the present hearing.

### Relevant Law

- 5 19. Section 135 of the Employment Rights Act 1996 provides that an employee is entitled to redundancy payment where they are dismissed in circumstances where they are redundant.
20. The definition of redundancy can be found in section 139 of the Employment Rights Act 1996 and includes the situation where the employer ceases to carry on the business in which the employee is employed.
- 10 21. The amount of any redundancy pay is determined by section 162 of the 1996 Act and is a number of weeks' pay depending on age and length of service.
22. An employee is entitled to notice of the termination of their employment. The amount of any such notice can be found in the contract of employment or by way of the minimum statutory notice to be found in section 86 of the  
15 Employment Rights Act 1996 which is based on length of service.
23. Where an employer does not give the correct notice of dismissal then an employee can recover damages for this breach of contract equivalent to the salary they have lost for the relevant period.
24. The Tribunal was given the power to hear breach of contract claims by the  
20 Employment Tribunals Extension of Jurisdiction (Scotland) Order 1994.
25. Section 13 of the Employment Rights Act 1996 (ERA) provides that an employer shall not make a deduction from a worker's wages unless this is authorised by statute, a provision in the worker's contract or by the previous written consent of the worker.
- 25 26. In terms of s13(3) ERA, a deduction of wages arises in circumstances where the total amount of wages paid by an employer to a worker on any occasion is less than the total amount of wages properly payable on that occasion.

27. Section 27 of the ERA defines “wages” which include any fee, bonus, commission, holiday pay or other emolument referable to a worker’s employment whether payable under the contract or otherwise. It also includes Statutory Maternity Pay. Section 27(2)(b) excludes the payment of expenses from the definition of “wages”.  
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28. Regulations 13 and 13A of the Working Time Regulations make provision for workers to receive 5.6 weeks’ paid holidays each year.
29. Where a worker leaves employment part way through the leave year then Regulation 14 of the 1998 Regulations provides for compensation to be paid to the worker in respect of untaken holidays.  
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30. Section 23(2) of the Employment Rights Act 1996 (ERA) states that the Tribunal shall not consider a complaint of deduction of wages unless it is presented within 3 months of the date of payment of the wages or the date when wages should have been paid in the case of a complete failure to pay the sums due.  
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31. The Tribunal has discretion under s23(4) to hear a claim outwith the time limit set in ss23(2) where they consider that it was not reasonably practicable for the claim to be presented within the 3 month time limit and it was presented within a further period that the Tribunal considers to be reasonable.
- 20 32. Similar provisions apply in relation to claims for breach of contract for both the time limit and the discretion to hear any breach of contract claim out of time. The only difference is that the time limit for such claims runs from the effective date of termination rather than the date of any breach.
- 25 33. Under s207B ERA, the effect of a claim entering ACAS Early Conciliation is to pause the time limit until the date on which the Early Conciliation Certificate is issued. The time limit is then extended by the period the claim was in Early Conciliation or to one month after the Certificate is issued if the Early Conciliation ends after the normal time limit.

34. The burden of proving that it was not reasonably practicable for the claim to be lodged within the normal time limit is on the claimant (*Porter v Bandridge Ltd* [1978] IRLR 271).
35. In assessing the “reasonably practicable” element of the test, the question which the Tribunal has to answer is “what was the substantial cause of the employee's failure to comply” and then assess whether, given that cause, it was not reasonably practicable for the claimant to lodge the claim in time (*London International College v Sen* [1992] IRLR 292, EAT and [1993] IRLR 333, Court of Appeal and *Palmer and Saunders v Southend-on-Sea Borough Council* [1984] IRLR 119).
36. Where the Tribunal concludes that it was not reasonably practicable for the claimant to have lodged his claim in time then it must go on to consider whether it was lodged in some further period that the Tribunal considers reasonable.
37. This is a question for the Tribunal to determine in exercising its discretion (*Khan*) but it must do so reasonably and the Tribunal is not free to allow a claim to be heard no matter how late it is lodged (*Westward Circuits Ltd v Read* [1973] ICR 301).
38. In assessing the further delay, the Tribunal should take account of all relevant factors including the length of the further delay and the reason for it. It will also be relevant for the Tribunal to assess the actual knowledge which the claimant had regarding their rights (particularly the application of the time limit) and what knowledge they could reasonably be expected to have or investigations they could reasonably be expected to make about their rights (*Northumberland County Council v Thompson* UKEAT/209/07, [2007] All ER (D) 95 (Sep)).

### Decision

39. The first issue for the Tribunal is whether to exercise its discretion to hear the claims for breach of contract and deduction of wages out of time.

40. There is no question that these claims were lodged out of time. The normal three month time limit ran from 8 December 2022 (which the Tribunal finds was the effective date of termination and the date on which any wages due on termination should have been paid) and expired on 7 March 2023. The  
5 ET1 which was accepted by the Tribunal was lodged after that date and so these claims were out of time.
41. The issue for the Tribunal is, therefore, whether to exercise its discretion to hear the breach of contract and deduction of wages claims out of time.
42. The first question for the Tribunal in exercising this discretion is whether it was  
10 not reasonably practicable for the claims to be lodged in time. In answering this question, the Tribunal has to determine the reason why the claims were late.
43. It was quite clear from the evidence that the reason for this was the  
15 administrative error by ACAS in omitting the Claimant from the Early Conciliation Certificate which was issued in respect of her colleagues. Had that error not occurred then her 1st ET1 would have been accepted and the claims would have been lodged in time.
44. This error was wholly out of the control of the Claimant who had done  
20 everything she was supposed to do in order to lodge her claim timeously. The error did not become apparent to her until she received the correspondence from the Tribunal rejecting her first claim; this was after the normal three month time limit had expired so she was unable to remedy the problem before that expiry.
45. In these circumstances, the Tribunal is satisfied that it was not reasonably  
25 practicable for the claim to have been lodged in time; no blame for the rejection of the first claim being rejected can be laid at the feet of the Claimant; there was nothing the Claimant could have done to prevent the administrative error occurring with the first Early Conciliation Certificate; she was not in a position to fix the error before the time limit expired.



46. The second question for the Tribunal is whether the claims were lodged within a further period that it considers reasonable. In this respect, the Tribunal notes that the Claimant acted quickly to obtain a valid Early Conciliation Certificate and then sought to re-lodge her claim. The Tribunal considers  
5 that the further period of just under a month to be reasonable in all the circumstances, in particular that it had no adverse impact on the ability of either party to deal with the case.
47. For these reasons, the Tribunal exercises its discretion to hear the claims of breach of contract and deduction of wages out of time.
- 10 48. The Tribunal now turns to the substantive issues in the case.
49. There is no question that the Claimant was dismissed by reason of redundancy. She lost her job because the Respondent ceased trading and this clearly falls within the definition of redundancy in s139 ERA.
50. The Claimant is, therefore, entitled to statutory redundancy pay. The  
15 Claimant had 3 full years' service at the termination of her employment and was 26 years' old. She is therefore entitled to a redundancy payment of 3 weeks' gross pay at £471.15 per week. The Tribunal awards the Claimant statutory redundancy pay of £1413.45 (One thousand four hundred and thirteen pounds, forty-five pence).
- 20 51. The Claimant was entitled to three weeks' notice given her length of service. It is quite clear that the Claimant was dismissed without notice and that amounts to a breach of contract.
52. The Tribunal awards the Claimant compensation for that breach of contract  
25 equivalent to the sum she would have been paid if she had been given the proper notice of 3 weeks. The Claimant would have been on Statutory Maternity Pay of 90% of her normal pay during the notice period which amounts to £332.31 a week. The Tribunal awards the Claimant compensation for breach of contract in respect of the failure to give her notice of dismissal of £996.93 (Nine hundred and ninety-six pounds, ninety-three  
30 pence).

53. The Tribunal considers that it was part of the contract of employment between the Claimant and Respondent that any deduction from her wages in respect of pension contributions would be paid into the pension fund. Although the Tribunal was not shown a written contract or any similar document relating to deductions for pension, it must be part of the agreement by which the Claimant consented to such deductions being made that those sums are paid into her pension fund. If not, the Claimant derives no benefit from paying such contributions and either the well-known “officious bystander” or “business efficacy” tests must imply such a term into the contract to make the deduction of pension contributions work.
54. In failing to pay the deduction of £60 made from the Claimant’s November pay into her pension fund, the Respondent has breached the contract. The Tribunal awards the Claimant compensation of £60 (Sixty pounds) in respect of this breach of contract.
55. The Claimant had 17 days’ untaken holiday at the end of her employment and she is entitled to pay in lieu of these days. This was not paid by the Respondent when the Claimant was dismissed and so there was a deduction of wages in respect of this. The Claimant is awarded £1255.45 (One thousand two hundred and fifty-five pounds, forty-five pence) in relation to this deduction.
56. The Claimant received no payment of Statutory Maternity Pay (SMP) from the Respondent. She was entitled to six weeks’ SMP at 90% of her normal pay (£332.31) and 33 weeks at a flat rate of £156.66. The obligation to pay SMP vests in an employer at the 15<sup>th</sup> week before the expected week of childbirth (the qualifying week) and they are not absolved of this if the employee leaves their employment (for any reason) after the qualifying week.
57. This means that the Respondent was liable to pay the whole of the Claimant’s SMP and they have failed to do so. This amounts to a deduction of wages. The total amount is £7160.01 based on the figures above. However, the SMP period overlaps the notice period and the Claimant has already been awarded a sum of compensation based on the SMP she would have been paid during

the notice period. In order to avoid double-counting, the Tribunal considers that the amount awarded for notice pay should be deducted from the sum to be awarded in respect of the deduction of wages relating to SMP. In these circumstances, the Tribunal awards the sum of £6163.08 (Six thousand, one  
5 hundred and sixty-three pounds and eight pence) in respect of the deduction of wages relating to SMP.

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**Employment Judge: P O'Donnell**  
**Date of Judgment: 07 July 2023**  
**Entered in register: 20 July 2023**  
**and copied to parties**

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