



IN THE EMPLOYMENT TRIBUNAL (SCOTLAND) AT EDINBURGH

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**Judgment of the Employment Tribunal in Case No: 4103350/2022 Heard at
Edinburgh on the 1st December 2023**

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Employment Judge J G d'Inverno

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Miss J Godfrey

**Claimant
In Person**

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Kinship Care Midlothian SCIO

**Respondent
Represented by:
Mr G Bathgate,
Solicitor**

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JUDGMENT OF THE EMPLOYMENT TRIBUNAL

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The Judgment of the Employment Tribunal is:-

(First) That the claimant's claim for statutory sick pay is dismissed.

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(Second) That the respondent shall pay to the claimant the agreed sum of
£826.74 in the name of compensation for accrued but untaken paid annual
leave entitlement as at the 17th of February 2022.

(Third) That the respondent shall pay to the claimant the sum of £721.68 by way of remedy in terms of section 38 of the Employment Act 2001 being an award equivalent to three times the claimant's agreed weekly wage of £240.56.

(Fourth) That in the period 1st to 17th February 2022 the respondent made an unauthorised deduction from the claimant's wages, contrary to the provisions of section 13 of the Employment Rights Act 1996, in the sum of £870 in respect of 58 hours worked by the claimant in that month; and the respondent shall pay to the claimant the sum of £870 being a sum equivalent to the deduction.

Employment Judge: EJ d'Inverno
Date of Judgment: 13 December 2023
Entered in register: 20 December 2023
and copied to parties

I confirm that this is my Judgment in the case of Godfrey v Kinship Care Midlothian SCIO and that I have signed the Judgment by electronic signature.

REASONS

1. This claim called for Final Hearing, "In Person", at Edinburgh on the 1st of December 2023. The claimant appeared on her own behalf, the respondent charity was represented by Mr G Bathgate, Solicitor, instructed by Ms L Maguire.

2. In compliance with the Tribunal's earlier Orders parties lodged a Joint Bundle of documents in which certain colour copies were substituted, of consent of parties, at the outset of the Hearing.

5 3. The Final Hearing followed upon the Judgment of Employment Judge R Mackay, as to the claimant's employment status, issued to parties on the 7th of August 2023 following the Open Preliminary Hearing which proceeded before him on the 2nd of June and in which he determined as follows:-

10 “(i) The claimant did not at any time have the status of “employee” within the meaning of section 230(1) of the Employment Rights Act 1996 (“ERA”).

15 (ii) In the period from 8th July 2021 to 17th February 2022, the claimant had the status of “worker” within the meaning of section 230(3) of the ERA.”

At paragraph 67 of the Note of Reasons attached to his Judgment, the Employment Judge directed:

20 “67. In light of these findings, the Tribunal will list the case for a Final Hearing to determine those claims brought by the claimant which require only worker status.”

25 4. In the Note issued by Employment Judge Macleod following the Closed Preliminary Hearing which proceeded before him on the 24th August 2023 and the claimant having, at that stage continued to insist upon her claim for statutory sick pay, Judge Macleod, at paragraphs 27 to 36, recorded the issues which were remitted to today's evidential Hearing, viz:-

30 “27. Unlawful Deduction from Wages: Statutory Sick Pay: (03/12/21 to 17/1/22)

28. Unlawful Deduction from Wages: Arrears of Pay for 60 hours worked in February;

33. Unlawful Deduction of Wages: Statutory Holiday Pay (proportionate to the period 08/07/21 - 17/02/22)

5 35. Failure to Provide a Written Statement of Particulars of Employment; and

36. Failure to Provide a Written Itemised Pay Statement”

10 5. Complaints of Unlawful Deduction of Wages (Statutory Sick Pay), and of Failure to Provide a Written Itemised Pay Statement were subject to the respondent’s challenge, on a Proof Before Answer basis, as to Jurisdiction standing the Tribunal’s Determination of the claimant’s employment status.

15 6. By letter dated 27th of November 2023 the respondent’s representative wrote to the Tribunal, and to the claimant, making certain concessions which had the effect of narrowing the issues in dispute between the parties requiring Determination at the Hearing.

20 7. In the course of Case Management Discussion conducted at the outset of the Hearing, and following a short adjournment thereafter to allow parties to liaise, the following matters were confirmed by parties as agreed and recorded as binding upon the Tribunal for the purposes of the Hearing:-

25 (a) That there was due and resting owing to the claimant, as at the Effective Date of Termination of her contractual relationship with the respondent as a “worker”, an accrued but untaken 3.4 weeks of entitlement to paid annual leave, in respect of which the claimant is entitled to be compensated in the sum of
30 £826.74.

(b) That the claimant’s agreed hourly rate of pay was £15 per hour.

(c) That the claimant's agreed weekly wage, for the purposes of her claims here presented was £240.56.

5 (d) That the respondent concedes liability in respect of the complaint of failure to provide written terms (of working) (section 1(1) of the Employment Rights Act 1996, and contends that the remedy under section 38 of the Employment Act 2002 should be restricted to the minimum award of two weeks pay at £240.56 per week, whereas, the claimant contends that the
10 remedy should be fixed at the maximum amount of four weeks pay x £240.56 per week, in the amount of £962.24.

8. Otherwise, the respondents confirmed that they maintained their positions;-

15 (a) That standing the Tribunal's earlier Determination of the claimant's "non employment" status, the claimant had no right or entitlement to claim and the Tribunal had no Jurisdiction to Consider her claim for statutory sick pay; and

20 (b) That while accepting that the claimant had carried out some work for the respondents in the month of February 2022 they did not accept that she carried out 60 hours of work and put the claimant to her proof in that regard.

25 **The Issues**

9. Thus, the issues which remained in dispute between the parties as requiring investigation and determination by the Tribunal at the Hearing were:-

30 (First) Had the claimant entitlement in law to receive, and had the Tribunal Jurisdiction to Consider her complaint of Unauthorised Deduction from Wages in so far as constituted by the non payment of statutory sick pay.

(Second) Let it be assumed that the claimant had such Title and the Tribunal had such Jurisdiction, which is denied by the respondent, did the claimant, in any event, comply with the notification requirements under the Statutory Sick Pay (General) Regulations 1982/84 such as to trigger an entitlement to law to receive statutory sick pay in the period 3rd 12th 21 to 17th January 2022.

(Third) Let it be further assumed that the claimant did so establish and trigger her entitlement to receive statutory sick pay, in what amount was she entitled to so receive statutory sick pay and accordingly, in what amount had the respondent made an unauthorised deduction from her wages in not making payment of statutory sick pay to her.

(Fourth) How many hours of work did the claimant carry out for the respondent in the month of February 2022 (for which work she is entitled to be remunerated at the rate of £15 per hour), and accordingly, by not so remunerating her, in what amount did the respondent make an unauthorised deduction from the claimant's wages contrary to the provisions of section 13 of the Employment Rights Act 1996.

(Fifth) What is the value of the award to which the claimant is entitled in terms of section 38 of the Employment Act 2002, standing the respondent's admitted breach of their obligations under section 1(1) of the Employment Rights Act 1996.

10. The claimant gave evidence on affirmation, on her own behalf. For the respondent the Tribunal heard evidence from Ms Maguire, now Chair of the respondent but at the time of the claimant's engagement the volunteer who, on the respondent's behalf, had entered into a contractual arrangement with the claimant.

11. Following the conclusion of evidence, parties each addressed the Tribunal in submission.

12. As already noted, parties lodged a Joint Bundle of documents to some of which reference was made in the course of evidence and submission.

Findings in Fact

13. On the documentary and oral evidence presented, the Tribunal made the following essential Findings in Fact and Findings in Fact and in Law, restricted to those relevant and necessary to the Determination of the Issues.

Claim for Statutory Sick Pay

The Applicable Law

14. Entitlement to (Eligibility to receive) Statutory Sick Pay is regulated by the terms of the Social Security Contributions and Benefits Act 1992 which prescribes that "employees" (which for this restricted purpose includes all those whose earnings are liable to Class 1 National Insurance Contributions (NICs) have eligibility to receive statutory sick pay; and Regulation 16 of the Statutory Sick Pay Regulations 1982 (which defines employee with reference to earnings). On the evidence presented, the claimant does not fall within the definition of employee as set out in section 151(1) and Regulation 16 of the SSP Regulations.

15. The Employment Tribunal has no Jurisdiction to Consider the claimant's complaint of Unauthorised Deduction from Wages in so far as it is founded upon an alleged failure on the part of the respondent to pay statutory sick pay.

16. Separately and in any event, let it be assumed that the claimant had eligibility and the Tribunal Jurisdiction, which matters the Tribunal has determined in the negative, the claimant did not comply with the requirements of Regulation 7(1)(b) of the SSP Regulations 1982 in respect of notification of sickness

absence such as to trigger any obligation on the part of the respondent to pay statutory sick pay.

- 5 17. The agreed arrangement which operated between the claimant and the respondent prior to dispute arising between them as to the number of hours worked by the claimant in the month of February 2022, was that the claimant would maintain a contemporaneous timesheet record of the number of 15 minute units worked by her in the course of a month and would thereafter invoice the respondent for the number of recorded units (hours) against which
10 invoice it was the respondent's practice to pay without requiring further vouching.
18. The claimant so maintained a contemporaneous record of the hours which she worked for the respondent in the month of February 2022.
- 15 19. That timesheet record is produced at page 226 of the Joint Bundle and records that between the 1st of February and the 17th of February 2022, (the latter being the date of termination of parties' contractual relationship), the claimant recorded a total of 232 15 minute units which is equivalent to 58
20 hours.
20. In the period 1st to 17th February 2022 inclusive the claimant carried out 58 hours of work for the respondent for which she is entitled to be remunerated at the agreed rate of £15 per hour, in the sum of £870.
- 25 21. The respondents retrospectively and exceptionally asked the claimant for additional documentary vouching of the work which she carried out in February of 2022. In response to that request the claimant constructed from her own record the more detailed Schedule and Specification of the work
30 carried out by her in the month of February 22 which is supported by elements of documentary vouching and which appear at pages 141 to 197 of the Bundle. The claimant accepted in cross examination that she compiled that more detailed Schedule after the event, in response to the respondent's

request that she vouch the hours returned on her timesheets and partly in contemplation of the current litigation.

- 5 22. The respondent failed to provide the claimant, in her capacity as a worker, with any written terms of “employment” (of working) at any point in the course of the parties’ contractual relationship.
- 10 23. In the same period the respondent variously referred to the claimant, in communications with the claimant and with others subsequently shared with the claimant, by various descriptive and at times contradictory terms including, amongst others, a beneficiary of the Trust, a volunteer, a volunteer worker, a key employee, an independent contractor. That changing spectrum of descriptors caused the claimant to be confused and concerned as to her status. It contributed to her belief that she was an employee and thus
15 enjoyed the full ambit of “employment rights”. It informed, in part, her decision to raise proceedings before the Employment Tribunal.
- 20 24. The respondent is a charity whose Board, at the time of their entering into a contractual relationship with the claimant was composed entirely of volunteers who failed to give consideration to the terms of their potential obligations arising under the Employment Rights Act 1996 and had, at that time, no employees. They did not engage with their obligations under section 1(1) of the ERA 96 until, at the earliest, they received a request from the claimant, on or about 17th of February 2022, that they provide her with written
25 terms of employment.
25. The respondent’s utilisation of varying descriptors of the claimant’s status aggravated their failure in their section 1(1) ERA 96 duty.
- 30 26. In the circumstances including the balancing of the respondent’s aggravation of their failure in their ERA section 1(1) obligation by the applying to the claimant of numerous varying descriptors, on the one hand, with their charitable and at the material time entirely voluntary status on the other, it is just and equitable that the claimant receive an award of three weeks pay, in

terms of section 38 of the Employment Act 2002, in compensation for the respondent's admitted failure in their ERA 1996 section 1(1) duty.

27. The agreed arrangement between the parties being that the claimant would invoice the respondent in respect of the hours worked by her at the agreed hourly rate on a monthly basis and that the respondent, for its part, would make payment to the claimant against such invoices, no duty arose on the part of the respondent, to otherwise provide the claimant with "written pay statements".

Parties' Submissions

28. The claimant, for her part, urged the Tribunal to make the maximum award of four weeks pay in terms of section 38 of the Employment Act. In doing so she founded upon the aggravation caused by the confusing, and at times contradictory, descriptors of her status applied by the respondent in communications with her, and with others shared with her, and notwithstanding the respondent's voluntary and charitable status.

29. In relation to statutory sick pay the claimant, upon consideration of extracts from the relevant Government website which appeared to indicate the same and which were provided to her by the respondent's representative, appeared to reluctantly accept that standing the Tribunal's earlier Determination of her "non employment" status that she did not have entitlement to receive statutory sick pay.

30. By way of explanation, the claimant stated that she had conceived of and presented her complaint in respect of statutory sick pay in the context of her believing that she was an employee which she was now constrained to accept, standing Judge Mackay's Determination, she was not.

31. In relation to hours worked, while maintaining her claim for 60 hours the claimant accepted that the contemporaneous timesheets, upon which she primarily founded, recorded 232 units or 58 hours of work. She accepted that

in quantifying her claim as one for 60 hours retrospectively, she did so on the basis that she felt she had worked more than 232 units, that is to say that she had carried out work which she had not recorded in her contemporaneous timesheet. She accepted that the more detailed particularisation of the work which was partly supported by documentary vouching upon which she also relied, was one compiled by her on her own laptop from records retained by her after the event and in response to the respondent's request that she provide her further vouching.

10 32. For the respondent Mr Bathgate reiterated his opening submission that the claimant fell outwith the definition of "employee" as contained in section 151(1) of the Social Security Contributions and Benefits Act 1992 and Regulation 16 of the Statutory Sick Pay (General) Regulations 1982/84, and that the claimant accordingly lacked Title, and the Tribunal Jurisdiction, to
15 respectively present and consider the claim in respect of statutory sick pay. He urged the Tribunal to dismiss that claim for want of Jurisdiction.

20 33. He submitted in the alternative and in any event that the claimant had not complied with notification of sickness absence requirements set out in the SSP Regulations such as to trigger obligation on the part of the respondent to pay statutory sick pay, let it be assumed that she fell within the employee category who enjoyed entitlement to it, which was denied by the respondent. In relation to the section 38 Employment Act Remedy, Mr Bathgate urged upon the Tribunal, in light of the respondent's charitable and, at the material
25 time entirely volunteer, status to view the remedy to be accorded to the claimant in light of the respondent's admitted breach of their section 1(1) ERA duties, as appropriately quantified in the minimum award of two weeks' pay.

30 34. In respect of the claim for arrears of pay in the month of February Mr Bathgate submitted that while the respondent accepted that the claimant had carried out some work for the respondent in the month of February 2022 they did not accept, and continued to put the claimant to her Proof in respect of, the number of hours claimed. In the respondent's estimate, he submitted, that the claimant might have worked for around 20 hours. He accepted that

the respondent had an obligation to pay the claimant, for the hours which the Tribunal determined the claimant had worked, at the agreed hourly rate.

Discussion and Disposal

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35. As the Tribunal has found in fact and in law the claimant's circumstances, at the material time for the purposes of her claim, did not place her within the relevant statutory definition of "employee" for the purposes of being entitled to receipt of statutory sick pay. Thus the claimant lacks Title to Present and the
10 Tribunal lacks Jurisdiction to Consider that complaint which falls to be dismissed on those grounds.

36. Separately, and in any event, let it be assumed that the claimant had an entitlement, the Tribunal has found in fact that she failed to notify her
15 employer in compliance with the requirements of the Statutory Sick Pay Regulations such as to trigger an entitlement to receive statutory sick pay.

37. The claimant confirmed in evidence that for the purposes of notification she relied entirely and solely upon the email sent by her to the respondent's
20 Ms Maguire on the 2nd of December 2021 which is copied and produced at page 89 of the Joint Bundle. The terms of that email, objectively construed, and according to the words used their normal English language meaning, do not amount to a notification (in terms of Regulation 7(1)(b) of the SSP Regulations 1982) that she was unfit to work, and of a sickness absence.
25 Although the claimant explained in the course of her oral evidence her reasons for composing and sending the email in the terms in which she did and that in effect it was a communication designed to mask the real situation namely that she felt unfit to work, that retrospective explanation does not result in the email constituting a notification. Further, and in any event, the
30 claimant sent further emails, subsequent to that of the 2nd December which again, objectively construed, bear to communicate that she was feeling better. She sent no email to the respondent, other than that of the 2nd December, in which she gave notification of unfitness to work.

38. By way of explanation in evidence the claimant stated that she had somehow become aware of the Government announcement, copied and produced at page 100 of the Joint Bundle which gave notice of a temporary "Covid suspension" in the requirement for those who were off work for more than seven days and whose sickness absence started between the 10th of December 2021 and the 26th of January 2022, to obtain and submit a Fit Note from their doctor until their absence exceeded 28 days. She explained that she had retrospectively misinterpreted that announcement as applying to her, albeit that she accepted that on her own evidence the first day of her asserted absence occurred on the 2nd of December and thus placing her outside, as meaning that she did not require to obtain or submit to the respondents, a doctor's Fit Note even though her absence, again in her assertion had exceeded seven days (as at the 9th of December 2021). I was not persuaded by that explanation standing the fact that the extract announcement upon which she relies was unequivocal in its terms and on her own evidence the claimant did not become aware of it until after the 9th of December, that being the date upon which, let it be assumed, she had been self-certifying sick absence for seven days, from 02 December 2021 her obligation to obtain and submit a doctor's Fit Note was triggered.
39. In relation to her obligation to give notification, a matter upon which the public announcement was silent and was not concerned with, the claimant submitted that an "employer's" obligation to enquire after the state of health of an employee who is on sick leave wholly absolved her of any obligation under the SSP Regulations to notify the respondent that she was or continued to be self-certifying sickness absence. That is a proposition which has no basis in law and which the Tribunal rejects

Remedy under section 38 of the Employment Act 2002

40. Upon the balancing of parties' submissions each of which I found to be relevant their being on the one hand an element of aggravation and on the other hand an element of mitigation, I have concluded that it is just and equitable in the circumstances that the claimant's remedy in terms of section

38 of the Employment Act be quantified in the amount of three weeks pay, that is 3 x £240.56 in the sum of £721.68; and the Tribunal Orders the respondent to make payment to the claimant in that amount.

5 **Arrears of Pay in February 2022**

41. I accepted as both credible and reliable, the claimant's evidence that she contemporaneously recorded in the timesheets set out at page 226 of the Bundle the number of 15 minute units spent by her carrying out work for the
10 respondent in the month of February 2022. That was evidence which the respondent had no factual basis to contest and thus, put the claimant to her Proof.

42. While the respondent challenged the validity and circumstances in which the
15 fuller specification of work carried out (which is partially supported by documentary vouching) was created by the claimant, the requirement that the claimant produce such further particularisation and documentary vouching was one which the respondent sought to impose retrospectively and after the work in question had been carried out.

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43. Prior to the respondent so doing, the accepted practice operated by the parties was that the claimant would contemporaneously record her hours worked on the timesheet document and would invoice the respondent based on that timesheet, without a requirement for any further particularisation or
25 vouching, and that the respondent would thereafter pay the claimant against that invoice and timesheet without a requirement for further vouching or particularisation. The only reason advanced by the respondent's Ms Maguire, in respect of the respondent's departure from that practice and the retrospective was that whereas she had previously trusted the claimant,
30 in respect of the February work invoiced she no longer trusted the claimant. The respondent had paid against all of the claimant's previous invoices which were supported only by her contemporaneously completed timesheet.

44. I accepted the claimant's evidence that she had contemporaneously recorded the units of time worked by her and set out in the timesheet at page 226 and I accordingly hold that the claimant has established, on the balance of probabilities, that she did work those recorded hours which total, however, only some 58 hours and not the 60 hours claimed. It was a matter of agreement between the parties that the respondent was liable to make payment to the claimant at the rate of £15 per hour for the number of hours which the Tribunal ultimately held she had worked. I accordingly determine that the respondent is due and resting owing to the claimant in the sum of £870 in respect of the 58 hours worked by her, at the agreed hourly rate, in the month of February 2022. In so withholding payment the respondent made an unauthorised deduction from the claimant's wages contrary to the provisions of section 13 of the Employment Rights Act 1996 and is ordered to make payment to the claimant in the sum equivalent to that deduction.

45. The fourth issue noted by Judge Macleod in his Case Management Note as being remitted to Final Hearing namely "failure to provide a written itemised pay statement" was one which was not focused by parties at the Hearing and which, in any event, given the agreement as to invoicing by the claimant and payment against invoice by the respondent can be seen to have fallen away.

Employment Judge:
Date of Judgment:
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EJ d'Inverno
13 December 2023
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