



EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 8000180/2022

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Held in Glasgow via Cloud Video Platform (CVP) on 31 January 2024

Employment Judge L Doherty

10 Miss Alessia Portalivo

Claimant
In Person

Clements Europe Limited

Respondent
Represented by:
Mr K Aggrey-Orlans
Counsel

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JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The Judgment of the Employment Tribunal is that the claimant's claim under Section 13 of the Employment Rights Act 1996 is well founded and the respondents are ordered to pay the claimant the sum of £1,167.36.

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REASONS

1. The claimant presented a claim of the disability discrimination and a number of monetary claims on 13 December 2022. The disability discrimination claim was dismissed on 16 October 2023, but the monetary claims remain before the tribunal, and are disputed. This was a hearing to consider these claims.

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2. The claimant's claims, as specified in the response to an unless order are for the following:

(a) Two months' salary (final salary +lieu of notice): $(£26,000/12) \times 2 = £4,333.3332$.

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(b) 8,5 days unpaid leave (calculated based on 52 working weeks (per year): $((£26,000/52)/5) \times 8.5 = £8503$

- (c) Four months of unpaid pension scheme (from start of employment and calculated at 10% of the salary): $(£26,000/12) \times 10\% \times 4 = £866.6664$.
- (d) Other benefits (e.g. health and dental): £5005.
- (e) Taxes to be paid by the Respondent.

- 5 3. The respondent's position is that no monies are due. They accept that they have made a deduction of £1,167.36 in terms of Section 13 of the Employment Rights Act 1996 (the ERA) from monies due to the claimant, however their position is that they were entitled to make this deduction under Section 13 (2) (a) of the ERA on the basis of a clause in the claimant's contract
- 10 of employment. It is their position that they were entitled to make this deduction, as the claimant has refused to return a laptop belonging to them, which was supplied to her for the purposes of her employment with them.
4. The issue for the tribunal was whether any of the sums claimed by the claimant were due to be paid to her and had not been paid. This included
- 15 consideration of whether the respondents were entitled to rely upon the claimant's contract of employment in terms of Section 15 (1) (a) of the ERA.
5. An adjustment was made for the claimant to the start time of the hearing, which commenced at 12 noon. The hearing was conducted by CVP. The claimant appeared on her own behalf, and the respondents were represented
- 20 by Mr Aggray–Orleans, Counsel
6. Both sides lodged documentary productions.
7. The claimant gave evidence on her own behalf, and for the respondents, evidence was given by Ms Rodrigues, head of Global HR.

Findings in fact

- 25 8. From the evidence before it the tribunal made the following findings in fact.
9. The claimant commenced her employment with the respondents on 25 July 2022, following interview. The claimant was provided with a contract of employment, which she signed. She was also providing with copies of policies

and procedures which the respondent applied to work issues. She attended a work orientation at or around the time of the commencement of employment during which she was provided with information about her employment, including some aspects of her terms and conditions.

5 10. The claimant's salary was £26,000 gross and per annum. Her salary was paid monthly in arrears on or around the end of each calendar month. It was agreed that the claimants daily gross rate of pay was £100.

11. The claimant's contract of employment provided at Clause 8 - Other Benefits:

10 8.1 *You are eligible to participate in the company private health insurance scheme, dental insurance, group income protection scheme and life insurance in place at the time of entering into this agreement. You will also be eligible to participate in the Company pension scheme upon completing a successful assessment under the Auto Enrolment and the Workplace Pension Scheme guidelines. We reserve the right to*
15 *discontinue or amend the schemes at our discretion.*

12. The workplace pension scheme guidelines provided that auto enrolment took place after three months of employment. The orientation information which the claimant received stated that employees became eligible for the pension scheme 90 days after the commencement of the employment.

20 13. The claimant's contract provided at Clause 9 Holidays:

9.1. *Holiday year runs from first December to 31st of January.*

9.2 *In addition to public holidays, you will be entitled to 24 days in each complete holiday year.*

25 14. The respondents Employee Handbook, which the claimant received, provided in respect of annual leave that employees were entitled to 24 days annual leave excluding public holidays. The handbook referred employees to the respondent's annual leave policy.

15. The respondents Worldwide Annual Leave policy (UK) provided that the London office will be closed on eight bank holidays.

16. The information provided to the claimant in orientation, which she produced at the hearing, stated holiday entitlement was 24 days annual leave.

17. The orientation information under Leave Programmes provided under the heading Mental Health Day:

5 *“3 Mental Health Days are given to all employees effective 1st January of every year and must be used by 31st December of that year.*

- *If you start part-way through the year you will receive a prorated amount of Mental Health Days.*
- *You must receive approval in advance from your manager for all time-off requests.*
- *Mental Health Days cannot be rolled over into the following year.”*

18. There was a three month probationary period.

19. Clause 12 of the contract of employment provided:

15 12.1.2 (b) *the employer, may if your performance is considered unsatisfactory give you not less than one months’ notice in writing to terminate your employment.*

20. Clause 14 of the contract provided:

Termination of employment

20 14.6 *Instead of requiring you to work during your notice period (or any remaining part of it) we may at our discretion choose to terminate your employment immediately and pay a sum equivalent to your gross basic salary only (less appropriate PAYE deductions) in lieu of your notice period (or the remaining part of it).*

21. Clause 15 of the contract provided:

25 ***Return of property and passwords:***

5 15.1 *Upon termination of your employment you must: (a) Immediately return all items of our property which you have in our possession in connection with your employment (including any mobile phone, computer, memory sticks, credit cards, documents or copies of documents);and*

.....

10 15.3 *We may withhold payment of your final salary or any other payment due or outstanding upon termination of your employment until you have fully complied with your obligations to return property and reveal passwords.*

22. The claimant was provided with a laptop to carry out her work. The cost of this to respondents was £1,145.33.

23. The claimant applied for a number of benefits during her employment including Cinga (dental insurance); Medicash; and Unum (life insurance).

15 24. The claimant was not auto enrolled for a pension due to her length of service.

25. The claimant was paid her salary for the portion of July from 25 July and August on 28 August. A deduction was made from this for repayment of a student loan of £88. The respondents considered they were under an obligation to make this deduction under the regulatory regime in place.

20 26. The claimant was absent from work due to ill health on 26 August 2022. Her application for a mental health day was declined for that day, but she was paid for sick leave which was payment in full.

27. The claimant' was on annual leave on 29 August, which was a bank holiday.

25 28. The claimant's application for one day's annual leave in September was approved.

29. The claimant's application for a mental health day on 30 August was declined. She was unfit for work on that day and was paid for sick leave, which was payment in full.

30. The claimant was unfit for work from 1 September up until the date of the termination of her employment which was on 16 September 2023.
31. In terms of the respondents' policies, she was entitled to 35 days full pay, to include SSP in respect of sickness absence.
- 5 32. The respondents terminated the claimant's contract with immediate effect on 16 September. They did so in exercise of clause 14.6 of the contract. On the termination of her contract of employment, the respondents requested the claimant return the laptop they had supplied and other equipment, being a headset the cost of which was £22.
- 10 33. The claimant refused to return the laptop. She denied ever having received a headset. The respondents therefore withheld the claimant's pay in lieu of notice, and payment of outstanding wages and holiday pay.
34. The claimant has refused to return the laptop to the respondents on the basis that it contains evidence which she will use in court. The laptop has still not
15 been returned.
35. On 10 February 2023, the respondents paid the claimant £1,796.61. The basis of their calculation is set out on a pay slip produced at page 101.
36. This payment represented the following:
- Wages from 1 to 16 September, to include sick pay of £1200, less tax and NI;
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 - One month's pay in lieu of notice of £2,166.67 (£26,000 /12) less tax and NI; and
 - Three days holiday leave of £300 less tax and NI.
37. This totalled £3,666.67. From this amount, the respondents deducted
25 £1,167.36 which represented the cost of the laptop and a headset. The cost of the headset was £22.
38. The respondents no longer insist that the claimant was supplied with a headset.

39. The respondents also made a deduction of £73 for a student loan.

Note on Evidence

5 40. Although there was considerable argument over each aspect of the claim, there were not many significant disputes on the evidence as to the relevant facts.

41. The most contentious issue of fact related to holiday leave which the claimant had taken, and her entitlement to annual leave in terms of her contract of employment.

10 42. It was at the claimant's position that she was entitled to 24 days leave plus 10 days bank holiday. She suggested that this was on the basis that there were 10 days bank holidays in the UK in 2022.

15 43. In his submission and cross examination Mr Aggrey- Orleans cited the terms of the contract which made provision for 24 days annual leave. It was however the evidence of Ms Rodriguez that employees were entitled to bank holidays in addition to 24 days leave.

20 44. For reasons which are dealt with more fully below, the Tribunal considered the terms of the contract of employment which provides "*in addition to public holidays, you will be entitled to 24 days in each complete holiday year*" and the terms of the Worldwide Annual leave policy (UK) , which provided that the London office will be closed on eight bank holidays, and was satisfied that the entitlement was to 24 weeks + 8 bank holidays. The tribunal was not persuaded that there was a contractual entitlement to 10 bank holidays as suggested by the claimant on basis that that was number bank holidays in 2022. There was nothing beyond the claimant's assertion that this was the case to support such a conclusion.

25 45. The second area of dispute arose in connection with the number of leave days the claimant had taken from the commencement of employment and to its termination.

46. The respondents produced records of the leave applied for by the claimant, which the respondents had granted or declined. The claimant said that she could not trust the respondents' records, and her position was that she had taken no annual leave from the date of commencement of employment until its termination.
47. The respondents' records, which were spoken to by Miss Rodriguez, noted that leave had been taken on 29 August, which was a bank holiday, and that approval had been given for one days leave in September. On balance the tribunal was satisfied that these records were correct. The Tribunal was satisfied that that bank holidays were allocated as leave in terms of the respondents leave policy, and the fact that the claimant was marked as being on leave on a bank holiday date, tended to suggest that the respondents' records of leave taken were more accurate than the claimant's recollection.

Submissions

48. Both parties made oral submissions.

Claimant's submissions

49. In summary it was the claimant's position that she was entitled to all of the sums claimed. She did not accept that the respondents were entitled to withhold payment of all monies due to her pending the return of the laptop. She was not obliged to return the laptop as it contained evidence essential to her position. In any event the laptop was not worth the amount the respondents had subtracted from her final payment. She estimated that it was worth at most between £360 and £650.
50. The claimant submitted she was due to be paid in respect of mental health days.
51. She submitted she was entitled to compensation for benefits including dental benefits which she was not able to use because of the respondents had terminated the employment. She also submitted she was entitled to be compensated for pension payments which she had not received as she was not enrolled into the respondent's pension scheme.

52. The claimant sought to add to that claim the amounts which had been deducted by way of deductions for repayment of a student loan. Her submission was the respondents were not entitled to make these deductions as she had not achieved the requisite income threshold.

5 53. Lastly the claimant sought £1000 as compensation for the financial hardship, and work which the respondent's actions have occasioned her.

Respondent's submissions

54. Mr Aggrey-Orleans accepted that the respondents had made a deduction from the claimant's wages under Section 13 of the ERA. His position was that they were entitled to do so in terms of the claimant's contract of employment which she had signed. The respondents were entitled to withhold the final payment due to the claimant. They had exercised discretion and paid her final payment less the cost of the laptop. The laptop was the respondent's property, and the claimant was not entitled to retain it. He emphasised that if the claimant returned the laptop the respondents would pay her the sums which they had deducted from the final pay. He also advised that the respondents are no longer insisting on the return of a headset, and he advised that that £22 of the £1167.36 reflected the cost of this.

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Consideration

Pay in respect of holiday leave accrued but not taken upon the termination of employment.

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55. The tribunal began by considering the claimant's entitlement to payment in respect of annual leave accrued but not taken upon the termination of employment.

56. Regulation 14 of the Working Time Regulations 2014 (the Regulations) provides:

14.—

(1) *This regulation applies where—*

5 (a) *a worker's employment is terminated during the course of his leave year, and*

(b) *on the date on which the termination takes effect ("the termination date"), the proportion he has taken of the leave to which he is entitled in the leave year under regulation 13(1) differs from the proportion of the leave year which has expired.*

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(2) *Where the proportion of leave taken by the worker is less than the proportion of the leave year which has expired, his employer shall make him a payment in lieu of leave in accordance with paragraph (3).*

57. It is the claimant's position that she is due to be paid 8.5 days in lieu of annual leave. The tribunal understands she assessed this on the basis of 10 day public holidays, three mental health days, and a continuing entitlement to accrue annual leave entitlement after her dismissal for a period of 1 month.

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58. The Tribunal was satisfied that the respondents were entitled in terms of the claimant's contract to summarily dismiss her and give her a payment in lieu of her notice period, and that they did that, by dismissing her summarily on the 16 of September 2022. That was that date upon which the claimant's employment came to an end and she did not continue to accrue entitlement to holiday leave, or other benefits, after that date.

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59. The Tribunal were satisfied that the claimant was contractually entitled to 32 days leave per annum, being 24 days plus 8 days which were allocated as public holidays. It reached this conclusion on the basis of the terms of the contract of employment which made reference to 24 days **in addition** to public holidays. It is clear from this term that it is intended that the employee's contractual entitlement is not restricted to 24 days. Albeit the Tribunal was not

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taken to any evidence to demonstrate that the employee handbook or the annual leave policy was incorporated into the contract of employment and had contractual status, the tribunal was satisfied that it was entitled to imply into the contract an entitlement to 8 days public holiday. It did so on the basis of the conduct of the parties firstly in that the respondent's Annual leave Policy provided for eight days annual leave which were taken as public holiday. Secondly it was the evidence of Ms Rodriguez that it was the respondents' practice to give employees paid public holidays in addition to the 24 days leave specified in the contract term.

60. The tribunal did not conclude that the claimant had a contractual entitlement to 3 days leave as mental health days, which could properly be treated as a leave for the purposes of assessing payment in lieu of leave entitlement accrued but not taken on the termination of employment for the purposes of Regulation 14. The Tribunal was not taken to any written documentation that made provision for to Mental Health Days other than information provided to the claimant at orientation, The tribunal accepted Ms Rodriguez' evidence that mental health days were not recognised by the respondents as leave for the purposes of assessing payments due for leave not taken upon the termination of employment, and that the mental health days were a bonus or benefit for those who are working. There was no evidence upon which to imply a term into the contract of employment that the claimant was entitled upon the termination of her employment for payment for mental health days which she had not taken.

61. The claimant worked 8 weeks out of 52. She was entitled to 32 days leave in the period from 1 January to 31 December. She had taken 2 days leave prior to the termination of her employment.

62. Applying the provisions of Regulation 14, the claimant's annual leave entitlement is calculated as follows:

- $(32 \text{ days} \times 8/52) = 4.9 \text{ days} - 2 \text{ days leave taken.}$

63. The claimant is therefore entitled to be paid for three days in respect of leave accrued but not taken upon the termination of her employment. It was agreed

that the gross daily rate of pay was £100 per day. This is the sum, less tax and NI which the respondents assessed as being due to the claimant in respect of annual leave accrued but not taken on the termination of her employment, as shown on the payslip at P101.

5 *Pension scheme*

64. There was no dispute that the claimant was not enrolled into the respondents' pension scheme. The tribunal was not satisfied that claimant had a contractual right to enrolment into the pension scheme, which the respondents had breached, giving rise to a damages claim equivalent to 4
10 months unpaid of unpaid pension contributions of 10% of the claimant's salary, as she claimed.

65. The contract term provided: *"You will also be eligible to participate in the Company pension scheme upon completing a successful assessment under the Auto Enrolment and the Workplace Pension Scheme guidelines."*

15 66. The claimant had not completed a successful assessment under the Auto Enrolment and the Workplace Pension Scheme, and therefore the obligation to enrol the claimant into the pension scheme had not been triggered.

67. The Tribunal was also satisfied that the Auto Enrolment and the Workplace Pension Scheme guidelines, referred to in the contract term, provided that
20 auto enrolment took place after three months of employment. The claimant had not worked for length of time, which explained why auto enrolment did not take place.

Other benefits

68. The claimant claimed an entitlement to other benefits, citing in particular,
25 dental costs. She appeared to make two arguments in connection with this. The first was that she was entitled to benefits during the period of notice, and secondly, she was deprived of access to benefits, as she did not have time to utilise then, because the respondents brought her employment to an end.

69. The claimant would not be entitled to benefit from any of the workplace benefits which she enjoyed in employment after her employment came to an end. The fact that the claimant's employment was of short duration and she did not access benefits during that time does not impact on this.

5 70. The tribunal was satisfied that in terms of the claimant's contract of employment, the respondents were entitled to bring her employment to an end summarily, on payment of a sum in lieu of notice. That sum was specified to be one month's basic salary in terms of clause 14.6 of a contract of employment. The claimant's employment came to an end on 16 September
10 2022. She was therefore not entitled to damages in respect of loss of benefits for a notice period beyond that date. Even if the claimant had been so entitled, there was no evidence before the tribunal to allow them to assess the value of these.

Taxes

15 71. Section 13 (1) (a) of the ERA permits deductions if they are authorised to be made by virtue of a statutory provision. This covers payment of Tax and PAYE.

72. The claimant did not advance any basis upon which the Tribunal could conclude that sums deducted from the claimant's earnings in respect of tax or
20 national insurance were unauthorised.

73. The claimant also made submissions to the effect that the respondent should not have deducted amounts in respect of a student loan. She said in submissions that they were not entitled to do this as she had not reached the requisite income threshold. This was a claim which was not before the
25 tribunal, and of which the respondents had no notice. There was no amendment procedure allowing the claim. The prejudice to the respondents in considering such a claim was considerable, as they had no opportunity to investigate or prepare the defence to it. No explanation was advanced as to why the claim was introduced the course of the hearing. The claimant
30 continues to be able to insist upon the other elements of her claim, and taking these factors into account, and the prejudice to the parties in allowing or

refusing to consider the claim, the Tribunal was satisfied that the claim should not be permitted to proceed at this stage.

Claim for two months' salary

5 74. The claimant's claim was in respect of two months' salary. She assesses this at £4,333.33 gross. This, she said, represented her final salary, plus one month's pay in lieu of notice.

75. The tribunal was satisfied that the claimant was entitled to be paid her salary for the days which she worked in September. That was for 1 September to 16 September. It was agreed that the claimant's gross rate of pay was £100 per day. The period from 1st to 16th September comprised 12 working days. She was therefore entitled to £1200 pay subject to tax and NI for that period.

76. This is the amount which the respondents assessed as the claimant's entitlement to pay for that period, as per the respondent's payslip at 101.

15 77. There is no basis upon which to conclude that the claimant is due payment of salary for any period beyond 16 September.

78. The claimant is however also due one month's basic net pay in lieu of notice. There is no dispute between the parties that one month's basic pay is £2,166.67 gross and that the claimant was entitled to this as payment in lieu of notice.

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Unauthorised deduction from wages

79. The respondents rely on the provisions of clause 15 of the contract, which they submit authorised them under section 13 (1) (a) of the ERA to make the deduction which they made.

25 80. The Tribunal was satisfied that the claimant's entitlement to payment was for the following elements:

- Holiday pay £300 subject to tax and NI;

- Wages for the period from 1 to 126 September 2022 of £1200, subject to tax and NI; and
- One month's pay in lieu of notice £ 2166,67 subject to tax and NI.

81. It was also satisfied that the respondents had paid the claimant this amount
5 in February 2023, less the sum of £1,167.36, which represented the cost of their laptop and a headset.

82. The issue for the tribunal was whether they were entitled to make that deduction. The respondent has the burden of proof on this point.

83. Section 13 of the ERA provides:

10 (1) *An employer shall not make a deduction from wages of a worker employed by him unless—*

(a) *the deduction is required or authorised to be made by virtue of a statutory provision or a relevant provision of the worker's contract, or*

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

(2) *In this section "relevant provision", in relation to a worker's contract, means a provision of the contract comprised—*

20 (a) *in one or more written terms of the contract of which the employer has given the worker a copy on an occasion prior to the employer making the deduction in question, or*

...

84. Section 15 of the ERA provides:

25 (1) *An employer shall not receive a payment from a worker employed by him unless—*

(a) *the payment is required or authorised to be made by virtue of a statutory provision or a relevant provision of the worker's contract, or*

(b) *the worker has previously signified in writing his agreement or consent to the making of the payment.*

(2) *In this section "relevant provision", in relation to a worker's contract, means a provision of the contract comprised—*

(a) *in one or more written terms of the contract of which the employer has given the worker a copy on an occasion prior to the employer receiving the payment in question, or*

(b) *in one or more terms of the contract (whether express or implied and, if express, whether oral or in writing) the existence and effect, or combined effect, of which in relation to the worker the employer has notified to the worker in writing on such an occasion.*

85. The Tribunal considered whether the clause in the claimant's contract relied upon, authorised the deduction which had been made under Section 13 (1) (a).

86. The contract term at clause 15 is drafted in very wide terms. Clause 15 (1) provides that: *"upon termination of employment and employee must (a) Immediately return all items of our property which you have in our possession in connection with your employment (including any mobile phone, computer, memory sticks, credit cards, documents or copies of documents)..."*

87. Clause 15 (3) provides *We may withhold payment of your final salary or any other payment due or outstanding upon termination of your employment until you have fully complied with your obligations to return property and reveal passwords.*

88. That potentially encompasses a variety of types of defaults. The clause provides no mechanism as to how the value of the employee's default is to be

assessed for the purposes of authorising a deduction. On the respondent's case, they would be entitled to withhold all final salary or other payment due on termination to an employee because they had not returned any item of property belonging to the respondents, regardless of its value. The clause does not provide that the respondents are authorised to make a deduction in respect of the cost of an item of property which has not been returned to them (which is what the respondents did here) .

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89. The clause provides that "*final salary or any other payment outstanding upon termination of your employment*" without recognition of the fact that this might comprise of payment in lieu of wages, as it did in this case, which are not regarded as wages properly payable from which a deduction under Section 13 can properly be made.

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90. For these reasons the Tribunal concluded that clause 15 of the claimant's contract was too ambiguous and widely drafted to be relied upon to authorise the deduction which the respondents made under Section 13 of the ERA.

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91. The effect of that conclusion is that the Tribunal found the claimants claim under Section 13 to be well founded and the respondents are ordered to pay the claimant the sum of £1,167.36 which they deducted from the final payment which was due to her.

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92. It may be that some other remedy is open to the respondents in respect of the claimant's failure to return their laptop to them, but that is not a matter for this Tribunal.

Other matters

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93. The Tribunal was not persuaded that there was any basis to make an award of £1000 to the claimant as she sought. There was no evidence to justify such an award, and the legal basis upon which it was sought was not clear to the Tribunal.

LDoherty

Employment Judge

9/02/24

Date

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Date sent to parties

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