



IN THE EMPLOYMENT TRIBUNAL (SCOTLAND)

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**Judgment of the Employment Tribunal in Case No: 4104004/2024 Issued
Following Open Preliminary Hearing Held at Edinburgh on the 10th July 2024
at 10 am**

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Employment Judge J G d'Inverno

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Ms D MacIver

**Claimant
In Person**

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The Nail and Beauty Zone Ltd

**Respondent
Represented by:
Mr Lumsden, Director**

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JUDGMENT OF THE EMPLOYMENT TRIBUNAL

(First) The Judgment of the Employment Tribunal is that the claimant's claim for notice pay being a claim which enjoys no reasonable prospect of success is struck out.

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(Second) The claimant's claim for asserted outstanding holiday pay, being a claim enjoying no reasonable prospect of success, is struck out.

(Third) The claimant's complaint of unauthorised deduction from her final wages, being a claim enjoying no reasonable prospect of success is struck out.

5 (Fourth) The claimant, by reason of time bar, lacking Title to Present and the Tribunal Jurisdiction to Consider her claim for payment of bonus said to be due and payable on the 31st of April 2023, the claim for a bonus payment is struck out for want of jurisdiction.

10 (Fifth) Declines to Strike Out the claim for constructive unfair dismissal but, considering the complaint to be one which enjoys little reasonable prospect of success, Directs that it shall be the subject of a Deposit Order in terms of Rule 39 of the Rules of Procedure, as a condition precedent of its being progressed to a Final Hearing.

15 (Sixth) The claimant shall pay a deposit, quantified in the sum of £500 taking account of the claimant's ability to pay as confirmed by her at Hearing, as a condition precedent of advancing the complaint of constructive unfair dismissal to a Final Hearing.

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Employment Judge:	d'Inverno
Date of Judgment:	01 August 2024
Entered in register:	06 August 2024
and copied to parties	06/08/2024

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I confirm that this is my Judgment in the case of **MacIver v The Nail and Beauty Zone Ltd** and that I have signed the Judgment by electronic signature.

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REASONS

1. This case, previously set down for Final Hearing on the 10th and 11th of July called for Open Preliminary Hearing on the 10th of July for the purposes of determining the respondent's Application for Strike Out of the claims.
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2. In terms of her initiating Application ET1 the claimant who was employed by the respondents from 22nd June 21 up to 7th December 2023, the Effective Date of Termination of her employment upon expiry of one month's written notice of resignation sent to the respondent on 7th November 2023.
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3. In terms of her initiating Application ET1 the claimant gave notice of the following claims:-
 - 15 (a) A claim for notice pay
 - (b) A claim for what was said to be 1 day's accrued but outstanding paid annual leave entitlement
 - 20 (c) A complaint of unauthorised deduction from her final wages of 3 days pay
 - (d) A claim for a bonus payment said to have fallen due and payable by the respondent to the claimant on the 31st of April
25 2023
 - (e) A complaint of constructive unfair dismissal in terms of section 95(1)(c) and 98 of the Employment Rights Act 1996

30 The Respondent's Position

4. The respondent has entered appearance denying the claims asserting, in relation to the complaint of constructive unfair dismissal that the matter which the claimant gives notice of as founding upon as the "last straw" constituting

material breach of contract, the convening of her by the respondents to disciplinary proceedings, being a matter omitted under the contract and thus not capable of constituting a breach of contract and the complaint of constructive unfair dismissal should be struck out as enjoying no reasonable prospect of success.

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5. In relation to the remaining claims the respondent seeks Strike Out of the claim for notice pay, holiday pay and on the grounds that the documentary presented establishes that these claims have no reasonable prospect of success, of the complaint of unauthorised deduction from wages on the basis that the admitted deduction of 3 days pay being a deduction of an overpayment and further something authorised in terms of the claimant's contract was a permitted deduction falling outwith the protection of the provisions of section 13 of the ERA and thus enjoys no reasonable prospect of success; and, in relation to the claim for a bonus payment while being something to which the claimant did not have a contractual entitlement is in any event on its face time barred in circumstances in which the claimant cannot demonstrate that it was not reasonably practicable for her to have submitted the complaint timeously and thus maintaining that the claim should be struck out for want of jurisdiction.

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6. The claimant attended In Person and gave evidence on her own behalf on affirmation including answering questions in cross examination put to her by the respondent's Director and representative Mr Lumsden who also gave limited evidence (on oath).

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Sources of Documentary Evidence

7. Each party lodged a Hearing bundle in the case of the respondent extending to 220 pages and of the claimant to 141 pages, to some of which reference is made by parties in the course of evidence and submissions. Following the evidential part of the Hearing each party addressed the Tribunal in submission.

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Findings in Fact

- 5 8. On the oral and documentary evidence presented the Tribunal made the following essential Findings in Fact restricted to those relevant and necessary for the determination of the Application for Strike Out of the claims.
9. The claimant was employed by the respondent from 22nd June 2021 until 7th December 2023.
- 10 10. On 7th November 2023 the claimant resigned from her employment giving the respondent 1 month's written contractual notice of termination.
11. The Effective Date of Termination of the claimant's employment was 7th December 2023 being the date upon which the notice period expired.
- 15 12. The claimant worked her period of notice from 7th November to 7th December 2023 and was paid for her notice period worked in the normal way.
13. As at the Effective Date of Termination the claimant had accrued a proportionate entitlement to paid annual leave of 19 days.
- 20 14. As at the Effective Date of Termination the claimant had taken a total of 22 days paid annual leave, that is 3 days paid leave more than the entitlement which she had accrued.
- 25 15. (Letter of resignation (R-43)) (record of holidays (R-56)).
16. In their letter of reply dated 10th December 2023 to the claimant's letter of resignation the respondent gave the claimant notice that a deduction of 3 days pay would be made from her final payment in respect of the overpayment of holiday pay which resulted from the claimant having taken, at that point in time, 3 days more than her accrued entitlement of paid annual leave. (R-55). The right to make such a deduction is one conferred upon the
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respondent and agreed by the claimant in terms of her written terms and conditions of employment (R-221 at 223).

- 5 17. The deduction of 3 days pay made by the respondent from the claimant's final wage was an authorised deduction.
18. The claimant had no outstanding entitlement to arrears of pay.
- 10 19. The claimant's claims for, notice pay, arrears of pay, accrued but untaken paid annual leave entitlement and the claimant's complaint of unauthorised deduction from her final wages are complaints upon the uncontroverted documentary evidence before the Tribunal can be seen to be complaints without foundation in fact and as such are complaints which enjoy no reasonable prospect of success.
- 15 20. Let it be assumed, for the purposes of determination of the Applications for Strike Out, that the claimant could, at a full Hearing, establish some entitlement in law to receive the bonus payment of £800 claimed by her that entitlement and cause of action arose on 31st April 2023 being the date upon which any such bonus would have fallen due for payment.
- 20 21. The statutory time period during which such a complaint of non payment of the bonus might be raised with the Employment Tribunal, being a period of 3 months minus 1 day, began to run on the 30th of April 2023 [when revising correct previous references to 31st April to refer to 30th April 2023.] and expired on 30th July 2023.
- 25 22. The claimant first engaged with early conciliation on the 5th of February 2024 and was issued with an Early Conciliation Certificate on the 9th of February 2024 (ACAS EC Reference Number R118294/24/11) (some 7 months after the expiry of the time limit.
- 30 23. The claimant first presented her Form ET1 which incorporated the claim for a bonus payment to the Employment Tribunal on 9th March 2024, following the

expiry of a further month, that is some 8 months after the expiry of the time limit.

- 5 24. The claimant had always considered that her entitlement to receive the bonus had continued notwithstanding her promotion and she had expected it to be paid when it fell due at the end of April 2023.
- 10 25. In terms of correspondence passing between her and the respondents at the end of April 2023 (C-47-51) the claimant was aware that the respondents did not accept that she had any continuing entitlement together with their reasons for so considering and further, was aware, that the respondent had confirmed their decision not to make payment of such bonus to the claimant. The claimant had within her possession throughout the initial 3 month minus a day statutory time period and throughout the 5 month period following thereafter all of the information that she required to raise her complaint with the
15 Employment Tribunal. There was nothing which would have prevented her from doing so had she chosen to do so.
- 20 26. The claimant's reason for not doing so was that she had in contemplation arranging a face to face meeting with the appropriate Director of the respondent with a view to "resolving the issue" she felt confident that the issue could be resolved at least to her satisfaction, if not to the extent of the respondents agreeing to pay her the bonus. She took a decision not to raise a claim with the Employment Tribunal or to lodge a formal grievance about
25 non payment of the bonus because her preferred route was to seek a resolution by way of a face to face meeting.
- 30 27. Although not the principal reason for not raising her claim for bonus payment timeously the claimant had separately been under the mistaken belief that the 3 month minus a day time limit, about which she knew, in relation to any claim that was connected with her employment would begin to run from the Effective Date of Termination of her employment. Her mistaken belief in that regard was not reasonable in the circumstances. She could have and would have easily been aware of that error had she taken reasonable steps to

enquire into the exercising of her right to claim such a payment before the Tribunal. She was aware of how to make such reasonable enquiry and had the means to do so, including access to the internet and or making contact with ACAS which she subsequently successfully did.

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28. Let it be assumed that the principal reason for the claimant's failure to lodge her claim timeously had been her mistaken belief as to the time at which the 3 month minus a day period began to run, which the Tribunal has not found to be the case, and that mistaken belief would not, in the circumstances, have rendered it not reasonably practicable for the claimant to lodge her claim.

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29. Separately and in any event the claimant on her own evidence became aware of that mistaken belief not later than the beginning of February when she made contact with ACAS. Despite being aware of the same and thus the expiry of the relevant time limit and despite being issued with an Early Conciliation Certificate on the 9th of February 2024 and despite having given the respondents notice of termination of her employment the claimant delayed the raising of her claim until after the expiry of a further month. In the circumstances the claim does not fall to be regarded as having been presented within such "further period as was reasonable".

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30. The claimant accordingly lacks Title to Present and the Tribunal lacks Jurisdiction to Consider her claim for a bonus payment, by reason of Time Bar, and the claim falls to be dismissed for want of Jurisdiction.

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The Complaint of Constructive Unfair Dismissal

31. The respondent seeks Strike Out of the constructive unfair dismissal complaint also, on the ground that it enjoys no reasonable prospect of success. In the respondent's contention the claimant bears to give notice of founding upon, as the "last straw" which when taken together with other matters constitutes a material breach of contract. The respondent's letter of 6th November 2023 sent to the claimant inviting her to attend an investigatory/disciplinary meeting on the 8th of November 2023. In the

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respondent's representative's contention in so writing to the claimant and in so convening her to an investigatory and disciplinary process the respondent was acting in a manner permitted under the Contract of Employment (R-220, *et seq*) and thus was acting in a manner not capable of constituting a breach of contract and further and separately was in any event acting in accordance with the applicable ACAS Code of Conduct.

32. While it is accepted that actings by an employer which are permitted under the Contract of Employment cannot, of themselves constitute a breach of contract, an act of an employer, in order to qualify as a "last straw" under that doctrine, need not of itself constitute a breach of contract. It is sufficient that, not being an innocuous or insufficient act, when taken together with earlier acts may function as a last straw entitling the employee to regard the contract as having been materially breached for the purposes of section 95(1)(c) of the Employment Rights Act 1996. In the instant case it was the claimant's position both in evidence and in submission that it was not receipt of the letter *per se* nor of the respondents convening her to disciplinary proceedings *per se* which she regarded as the last straw but rather:-

- (a) The content and tone of the letter
- (b) The multiplicity of aspects of her conduct which the respondent had taken it upon itself to enquire into
- (c) The fact that her Line Manager, the person to whom she would normally look and expect to receive support in such a circumstance had been tasked to be the note taker and thus would not be available to her in that role
- (d) The fact that the particular Directors/Managers of the respondent before whom the Hearing would be conducted were the very individuals whom she considered had failed in their duty to respond to her on issues of pay and pension relating to members of her team

(e) That the above combined to convey to her an impression that the outcome of the disciplinary proceedings had been predetermined such that when taken together with earlier failures to respond to her enquiries made on behalf of members of her team she regarded it as destructive of the essential term of confidence and trust implied within her Contract of Employment. She regarded as being a material breach of contract. The offers to prove at a full Hearing that it was in response to that material breach of contract which she resigned communicating her decision in that regard to the respondents in terms of her letter of 12th November 2024. While understanding the basis of the submission made by the respondent's representative the Tribunal was unable to hold in the circumstances that the complaint of constructive unfair dismissal of which notice is given was one which enjoyed no reasonable prospect of success.

33. The Tribunal did, however, consider that the claim given notice of was one which enjoyed little reasonable prospect of success and in the circumstances grants the respondent's representative's Application, made in the alternative, that the progressing of that complaint of constructive unfair dismissal to a Final Hearing be made the subject of a Deposit Order in terms of Rule 39 of the Employment Tribunal (Constitution and Rules of Procedure) Regulations 2013 and the Tribunal has so ordered.

34. The claimant addressed the Tribunal, in the course of submission advising as to her current financial means and her ability to pay any such Order were one to be made. Taking account, in terms of Rule 39(2) of the information provided by the claimant the Tribunal fixes the amount of the Deposit Order in the sum of £500 (Five Hundred Pounds).

35. In the event that the claimant elects to pay the deposit now ordered the residual complaint of constructive unfair dismissal should be relisted for a

Final Hearing of 2 days duration on dates to be afterwards fixed by listing stencil.

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Employment Judge:	d'Inverno
Date of Judgment:	01 August 2024
Entered in register:	06 August 2024
and copied to parties	06.08.2024

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I confirm that this is my Judgment in the case of Maclver v The Nail and Beauty Zone Ltd and that I have signed the Judgment by electronic signature.