



EMPLOYMENT TRIBUNALS (SCOTLAND)

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Case No: 4107510/2019

Held in Dundee on 21 October 2019

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Employment Judge I McFatridge

Mr Richard Murphy

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**Claimant
In person**

Lawhill Services Ltd

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**Respondent
Not present or
represented -
no ET3**

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JUDGMENT OF THE EMPLOYMENT TRIBUNAL

30 The judgment of the Tribunal is that

(1) the claimant was automatically unfairly dismissed by the respondent in terms of section 104 of the Employment Rights Act 1996. The respondent shall pay to the claimant the sum of Seven Thousand Eight Hundred and Sixty One Pounds and Eighty Pence (£7861.80) as compensation therefor.

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(2) The respondent unlawfully withheld wages from the claimant in the sum of One Hundred and Twenty Six Pounds and Sixty Eight Pence (£126.68).

The respondent shall pay this sum of One Hundred and Twenty Six Pounds and Sixty Eight Pence (£126.68) to the claimant.

- 5 (3) The respondent shall pay to the claimant the sum of Ten Pounds and Twenty Six Pence (£10.26) in respect of annual leave accrued but untaken as at the date of termination of employment.

REASONS

- 10 1. The claimant submitted a claim to the Tribunal in which he claimed that he had been automatically unfairly dismissed by the respondent. He also claimed that he was due various sums following the termination of his employment. In particular he claimed that there was a shortfall of pay amounting to £114.94 in respect of the difference between hours contained on his pay slips and the actual payment. He said he claimed
15 there was a further difference of £11.74 in respect of underpayment for the months of December, January and February 2019. He also claimed that he had received £10.26 less than he was entitled to in respect of holiday pay. The respondent did not submit a response within the statutory period. A hearing was fixed and at the hearing the claimant
20 appeared and gave evidence on his own behalf. There was no appearance from the respondent. The claimant lodged various productions. On the basis of the evidence and the productions I found the following essential matters relevant to the claims to be proved or agreed.

Findings in fact

- 25 2. The claimant commenced employment with the respondent on or about 11 December 2018. The claimant had obtained the job following replying to an advert. The advert was lodged (C1-3).
- 30 3. He was employed as a Shop Assistant and his duties involved serving customers and stacking shelves. From the beginning the claimant raised with Mr Abdul Noor who he understood to be the owner of the respondent what his holiday entitlement was. Mr Noor told him that his accountant

would tell him what the claimant was entitled to and not to worry. Following the receipt of his pay slip in December 2018 the claimant spoke to Mr Noor in January. He asked again what the holiday year was. Mr Noor said again he would check with his accountant. The claimant waited until the
5 next pay day. He assumed Mr Noor would have the information by then. Mr Noor did not. This went on for a number of months.

4. In addition to this the claimant began to have concerns about his pay. Mr Noor operated a system whereby employees including the claimant were paid in cash every Sunday. They would then receive a pay slip at
10 the end of the month which Mr Noor said was produced by his accountant. The claimant noticed that the pay slip did not accurately record the hours he had in fact worked. In addition to this the payments shown as due to him on the pay slip were not in fact paid. The claimant told Mr Noor that he believed he was due £11.74 which was payment for two hours worked
15 in December 2018. He also told him that he was due £114.94 for the period January, February and April. Eventually Mr Noor paid the claimant what he calculated as his holiday entitlement for which was contained within the pay which the claimant received on 30 April 2019. The claimant considered that this pay was £10.26 short. It also did not address the other
20 shortages.

5. The claimant telephoned ACAS for advice. They suggested that he put his grievance to Mr Noor in writing. On 30 April the claimant sent an e-mail to Mr Noor. This e-mail was lodged (C22). It is probably as well to set it out in length.

25 "As you are aware I continue to dispute several areas of my employment, greatest of which is holiday entitlement and shortages in wages paid.

I have spoken to ACAS this morning regarding my concerns.

Following their advice, I now understand my leave year to have
30 commenced on 11th December 2018 and end 10th December 2019 – as you failed to issue my conditions of service, within two months of the start of my employment. ACAS suggest this is a fair interpretation. If we cannot agree this matter ACAS further suggests referring matters to an Employment Tribunal to resolve any dispute.

Furthermore, ACAS pointed out that legally holidays are time off with pay – the operative phrase being ‘time off’. As you have paid me, twenty-seven (27) hours holiday pay on my 30th April 2019 pay advice I will need to take twenty-seven (27) hours off. I suggest, as the monies have already been paid, I should take the following days off: 3rd May (6 hours); 4th May (6.5 hours) 5th May (8 hours); 11th May (6.5 hours) 2019. This will ‘balance the books’ to date, so to speak – as long as there is an adjustment to the hourly rate, in line with current legislation.

ACAS further agree that the use of the Government’s Holiday calculator for irregular or casual hours is the most appropriate tool. Whatever method is used 12.07% of hours worked is the statutory requirement. In addition, the rate of pay you have entered on my April 30th 2019 pay advice, for holidays, is in breach of the minimum wage legislation – it should be paid at the current rate.

Holiday entitlement to date: hours worked 534 hours, holiday entitlement at 12.07% of hours worked equals: 64 hours and 27 minutes. Balance outstanding, as of 30th April 2019, is therefore: 37 hours and 27 minutes.

Regarding the short fall of pay there are still £11.74 outstanding for period December 2018, January 2019, February 2019 and £114.94 for April 2019 and £10.26 for the shortfall in pay rate for holidays taken to date to meet current legislation. Total outstanding to date:- £136.94 I have also been in communication with HMRC, and find that the Tax Code you have stated on my April 30th 2019 is incorrect. Furthermore, you have deducted £69.00 – HMRC project no tax payable, by me, for 2019/20, on current earnings level. I would like you to address this matter with some urgency.

Finally, it would appear that Lawhill Services Ltd did not inform HMRC that I was working for you in the tax year 2018/19 – at least there is no record of such. As RTI has been in operation since 6th April 2013, I am somewhat surprised that you have not informed them. This would also suggest that contributions for NI have been taken from my wages, but not passed on to HMRC. As I need NI contributions for my State Pension, unless you can offer evidence that my contributions have

been passed to HMRC, I will need to ask HMRC to investigate the matter more fully.

5 I am saddened that these matters have had to be solved via consultation with third parties. I had felt that we were both honourable men and therefore we could have been able to sort matters without resorting to external institutions. However, the law is the law and we all must abide by it.”

6. The following day at 10:52 the claimant received a text from Mr Noor. The text was lodged (C27).

10 “Hi Richard, I was going to speak with you yesterday morning about but I was in hurry to drop my daughter to train station, as you know road work outside of my shop killing me, I am very quite as normal, so I decided to work myself and giving you one week notice to find another job.

15 Regarding your email, just spoken to ACAS about your last year holidays, you're not entitled to take days off for last year period, because I already paid you for that, ACAS says hourly rate for your holiday up to 31st March will be same which I paid you, from 1st April will be new rate, only dispute left to work out your holidays, they told
20 me calculation now, so I'll work it out, I already agreed hours you told me up to 31st March, we calculate hours from 1st of April to your last day of work 7th of May, whatever balance left to pay according to law, you'll get paid.

25 Another matter you raise about your PAYE payments I pay to HMRC every month and I am up to date with my payment, I got all record, I asked my accountant for P60, when I'll receive it you'll get it.”

7. Subsequently it was agreed that the claimant would work as normal until 7 May.

8. Following this exchange the claimant noticed an advert for a Customer
30 Service Adviser in Anstruther on the Indeed job site. This advert was lodged (C4-5). I accepted on the balance of probabilities that this was an advert for the claimant's job. In addition to this whilst the claimant was

working his final shifts the claimant became aware that Mr Noor was interviewing candidates for his job in the shop.

9. Since his dismissal the claimant has applied for other jobs. He is not eligible for jobseeker's allowance. He requires to find part time work while he is trying to develop a photography business. He is prepared to work at minimum wage and has applied for various jobs within reasonable travel distance of his home. He was successful in obtaining two interviews. One of these was as a cleaner with Fife Council the other was as a laundry worker on an estate. He was not successful at either interview. He has registered with a number of agencies but so far has been unsuccessful.
10. Whilst he was employed by the respondent the claimant's hours varied. He lodged his monthly pay slips and a P60 which he received (C12-C20). Latterly the claimant was working 34.5 hours per week. During the final 13 weeks of his employment the claimant worked an average of 31.97 hours per week. He was entitled to be remunerated for this at the rate of the National Minimum Wage (£8.21 per hour) and his gross average weekly wage was therefore £262.06. The claimant's annual earnings were such that he was not a tax payer. I consider his net pay would have been £262.06 per week.

20 **Matters arising from the evidence**

11. I had no doubt that the claimant was a truthful and reliable witness. He gave his evidence in a patently straightforward and honest manner and did not try to gild the lily in any way. In addition his evidence was entirely in keeping with the contemporary evidence and in particular the copy e-mail he had sent to Mr Noor together with Mr Noor's response.

Discussion and decision

Issues

12. The claimant claims automatic unfair dismissal in terms of Section 104 of the Employment Rights Act. He also claimed that the respondent had unlawfully withheld wages from him in terms of section 13. He claimed that he was due a sum in respect of holiday pay which I understood to be a claim under section 14 of the Working Time Regulations 1998.

Decision

Automatic unfair dismissal

13. Section 104 of the Employment Rights Act 1996 states

5 “(1) An employee who is dismissed shall be regarded for the purposes of this Part as unfairly dismissed if the reason (or, if more than one, the principal reason) for the dismissal is that the employee –

- (a) brought proceedings against the employer to enforce a right of his which is a relevant statutory right, or
 - (b) alleged that the employer had infringed a right of his which is
- 10 a relevant statutory right.

(2) It is immaterial for the purposes of subsection (1) –

- (a) whether or not the employee has the right, or
- (b) whether or not the right has been infringed;

15 but, for that subsection to apply, the claim to the right and that it has been infringed must be made in good faith.

(3) It is sufficient for subsection (1) to apply that the employee, without specifying the right, made it reasonably clear to the employer what the right claimed to have been infringed was.”

20 Subsection 4 goes on to specify the relevant statutory rights and I note that subsection 4(a) provides that this includes

“any right conferred by this Act for which the remedy for its infringement is by way of a complaint or reference to an employment tribunal.”

25 I also observe that section 108 of the Employment Rights Act 1996 which provides for a qualifying period of employment of two years does not apply if subsection 1 of section 104 (read with subsections (2) and (3)) applies. (Section 102(3)(g)).

30 14. It is clear to me that in his e-mail and in the oral conversations with Mr Noor which took place prior to this the claimant alleged that the respondent had infringed a right of his which was a relevant statutory right. The rights in question were the right not to suffer unauthorised deduction of wages which is contained in section 13 of the Employment Rights Act 1996 and

the right to holiday pay which I took to be a claim in terms of regulation 14 of the Working Time Regulations 1998. I note that section 104(d) includes the rights conferred by the Working Time Regulations 1998 under the definition of a relevant statutory right. I was therefore satisfied, given the terms of the e-mail and oral discussions, that the claimant had alleged that the employer had infringed a right of his which was a relevant statutory right. It also appeared to me that the claimant was correct in stating that he did have these rights and that he was correct in stating that his right had been infringed. In any event, even if I am not correct in this I was entirely satisfied that the claim to the right and that it had been infringed was made by the claimant in good faith.

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15. Having established that the terms of section 104 could have application I therefore had to decide whether the reason or, if more than one, the principal reason for the dismissal was that the claimant had alleged that the employer had infringed a right of his which was a relevant statutory right. I note that the text sent by Mr Noor was sent the day after the claimant sent his e-mail. I accept that the text gives a different reason for dismissing the claimant however I consider that in such circumstances I am entitled to draw the inference that the reason given by an employer may not be the correct reason I imagine there will be no cases where an employer will state that they are dismissing an employee for reasons which are automatically unfair. In this case the message was sent the following day. The text gives the impression that Mr Noor will himself be taking over the claimant's shifts but I accepted the claimant's evidence that Mr Noor went on to advertise the claimant's job two days later. I also accepted the claimant's evidence that Mr Noor started interviewing potential new employees before the claimant had left. In those circumstances I was satisfied on the balance of probabilities that the reason for the claimant's dismissal was that he had alleged that the employer had infringed a statutory right in terms of section 104. Accordingly, I was satisfied that his dismissal was automatically unfair in terms of that section.

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16. With regard to remedy the claimant remains unemployed as at the date of the Tribunal. This is some 24 weeks after his dismissal. It appears to me

that he is making genuine attempts to find other work and I accept that perhaps his age is against him. That having been said I would expect him to find other work soon. I consider that taking everything into account it would be appropriate to award the claimant his full loss up to the date of Tribunal together with his wage loss for a further six weeks. This amounts to 30 weeks' pay. As above I have calculated the claimant's week's pay in terms of section 20-26 of the Employment Rights Act 1996 to be £262.06. I therefore considered the claimant is entitled to a compensatory award of £7861.80. There is no basic award.

10 *Section 13 claim*

17. I was satisfied on the basis of the evidence that the claimant was indeed due the sums he claimed. These were essentially for hours he had worked and not been paid. I award the claimant £126.68 under this head.

Holiday pay claim

15 18. The basis for this claim was that the claimant's position was that he had received a payment of holiday pay on or about 30 April. This was paid on the basis of the minimum wage which was in force up until 5 April. It was the claimant's position it ought to have been paid on the basis of the minimum wage at the time at which it had been paid.

20 19. It appears to me that the claimant is correct in what he states.

20. I would agree with him that generally speaking, payment of holiday pay in terms of the Working Time Regulations is paid in relation to time off. There is no provision for an employer to pay a sum in lieu of holiday pay to an employee without giving that employee the time off. The only exception is where an employee has left and is due holiday pay under regulation 14. In this case the payment was made on 30 April whilst the claimant was still an employee. It could only be paid in association with time off which had to be taken after 30 April. In my view it therefore ought to have been paid based on the amount of the national minimum wage then current. It would appear that following the payment the claimant made this point to the respondent and suggested various days he could take off. As it happens I understand these days were not in fact taken off. The payment

however had been made and in my view given that it could only relate to a payment for holidays to be taken after 5 April 2019 then it required to be paid at the then current rate of the claimant which was based on the minimum wage in force after 5 April 2019. The fact that the entitlement had accrued at an earlier period in my view made no difference. The claimant is correct in stating that the holiday year ran from 11 December when he started until 10 December the following year.

21. I therefore agree with the claimant that there was a shortfall. This became payable in terms of regulation 14 once the claimant left. I therefore considered he is entitled to the sum of £10.26 under this head.

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Employment Judge:
Date of Judgment:
Date sent to parties:

Ian McFatridge
29 October 2019
29 October 2019

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