

EMPLOYMENT TRIBUNALS (SCOTLAND)

PRELIMINARY HEARING

Case No: S/4100012/2017

Held in Glasgow on 22 March 2017

Employment Judge: Mary Kearns

Mr J Gallagher

**Claimant
In Person**

**Advocate General for Scotland
Representing Ministry of Defence**

**Respondent
Represented by:
Mrs P Macaulay
Solicitor**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The Tribunal does not have jurisdiction to hear the claimant's claim made under section 23 Employment Rights Act 1996 for repayment of the sum of £617.14 deducted from his wages.

ORDERS OF THE EMPLOYMENT TRIBUNAL

In respect of the remaining claim for holiday pay, the Tribunal makes the following case management Order under Schedule 1 of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013 ("the Tribunal Rules"):-

Further Preliminary Hearing

- (1) A further Preliminary Hearing will take place on **Wednesday 3 May 2017** to determine the following issue: whether the Tribunal has jurisdiction to consider the claimant's remaining claim(s).

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NOTE

1. Some discussion took place at the beginning of today's Preliminary Hearing to clarify the precise nature of the claimant's claims. The claimant confirmed that he is not making a claim of disability discrimination. He mentioned that he intends to make a civil court claim in respect of that in due course. With regard to his claim for the sum of £617.14, the claimant explained that this related to a financial retention incentive payment. The facts regarding this payment were agreed to be as follows and I therefore make findings in fact accordingly:-

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2. The claimant's term as a member of the Armed Forces was due to end in or about July 2015. In or about October 2015 he received a financial retention incentive payment of £12,716.99 net of tax and National Insurance. That payment fell to be repaid to the MOD in the event that the claimant elected to leave before the end of the further term of three years to which it applied (July 2018). The claimant left the Armed Forces in November 2016, prior to the end of the term. He was sent a demand for repayment of the erroneous sum of £12,176.99, which he duly repaid. The error was eventually noticed by MOD and it resulted in the further sum of £617.14 being deducted from the claimant's final salary in November 2016. This caused the claimant financial difficulties and he complained about it to the Head of Military Personnel. By letter dated 8 March 2017 (C1) from MT Baines, the MOD informed the claimant that, as the balance owed to them had arisen through no fault of his own they had decided to write it off and refund the sum of £617.14 to him electronically.

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3. The claimant said he was minded to reject the sum offered but I did not understand that he had done so. In any event, his position was that he was

seeking compensation for the inconvenience involved in corresponding with the MOD about the matter between November 2016 and March 2017.

4. As Mrs Macaulay submitted, on the basis of the above facts it is difficult to
5 see how section 13 Employment Rights Act 1996 (“ERA”) would apply even
were this a non Armed Forces case since the right not to suffer deductions
arises where the total amount of wages paid on any occasion is less than
the total amount of wages properly payable. It did not seem to be in dispute
that an error had been made and that as a result, the claimant had not
10 repaid the whole amount of the retention payment due by him. As I
understood it the claimant’s main complaint was firstly that he had not
realised that the deduction would be made from his final pay and it therefore
left him short; and secondly that there were delays and frustrations involved
in his subsequent correspondence about it.

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5. However, the claimant was a member of the Armed Forces and his
November salary from which the deduction was made was a payment to him
in respect of his service with them. Mrs Macaulay referred me to paragraph
16 of Schedule 2 to the Employment Rights Act 1996 (“ERA”) which is in the
20 following terms:

*“16 (1) If section 31 of the Trade Union Reform and Employment Rights
Act 1993 has not come into force before the commencement of this Act,
this Act shall have effect until the relevant commencement date as if for
25 section 192 there were substituted –*

“192 Armed Forces

(1) Section 191 –

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*(a) does not apply to service as a member of the naval,
military or air forces of the Crown, but*

(b) does apply to employment by an association established for the purposes of Part XI of the Reserve Forces Act 1996.”

5 (2) *The reference in sub-paragraph (1) to the relevant commencement date is a reference –*

10 (a) *If an order has been made before the commencement of this Act appointing a day after that commencement as the day on which section 31 of the Trade Union Reform and Employment Rights Act 1993 is to come into force, to the day so appointed, and*

 (b) *Otherwise, to such day as the Secretary of State may by order appoint.”*

15 6. The provisions of ERA giving the right to claim for unlawful deductions from wages are in Part II of the Act (ERA). Section 191 of ERA gives Crown employees the right to claim under *inter alia* Parts I to III of the Act. The version of section 192 in the body of ERA, which would apply section 191 to members of the Armed Forces has not yet been brought into force. Thus, the current situation is (as set out above) that members of the Armed Forces cannot make claims under Part II of ERA and this Tribunal has no jurisdiction to consider the claimant’s claim for unlawful deductions from wages. For this reason, the Judgment above has been issued.

25 7. With regard to the claimant’s claim for holiday pay, he cannot make that claim under Part II of ERA. He may, however be able to make it (or part of it) under the Working Time Regulations 1998. I was not addressed on that because the claim is currently under consideration by the MOD as a service complaint. Mrs Macaulay had checked with the relevant officials and they had advised that an outcome was expected by 27 April 2017. The issue of whether the Tribunal has jurisdiction to consider the claimant’s claim for holiday pay is therefore continued to a further Preliminary Hearing on

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Wednesday 3 May 2017. Parties are requested to advise the Tribunal if the matter is resolved in the meantime.

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10 Employment Judge: Mary Kearns
Date of Judgment: 24 March 2017
Entered in register: 24 March 2017
and copied to parties

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