



EMPLOYMENT TRIBUNALS (SCOTLAND)

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Case No: 4110846/2021

Hearing Held by Cloud Video Platform (CVP) on 29 October 2021

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Employment Judge Murphy

Ms S Blackhall

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**Claimant
In Person**

Mr A Duncan t/a Hairwayz

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**Respondent
In Person**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The Judgment of the Tribunal is that:

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- (i) the claimant was dismissed on 10 July 2021 by reason of redundancy and is entitled to a statutory redundancy payment. The respondent shall pay to the claimant ONE THOUSAND FIVE HUNDRED AND TWENTY POUNDS STERLING AND TWENTY TWO PENCE (**£1,520.22**), being that part of the statutory redundancy payment which remains unpaid; and

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- (ii) the respondent has failed to provide the claimant with a statement of employment particulars or statements of changes under sections 1(1) and 4(1) of the Employment Rights Act 1996, however, no increase is ordered to the award at paragraph (i).

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REASONS

Introduction

1. This final hearing took place via Cloud Video Platform (CVP), there being no objection to that format.
- 5 2. The claimant was dismissed by the respondent on 10 July 2021. It was not disputed that the reason for her dismissal was redundancy. The parties agreed that the amount of the redundancy payment to which the claimant was entitled was £2,900.21, calculated in accordance with s.162 of the Employment Rights Act 1996 (“ERA”). It is not disputed that the respondent
10 paid the claimant £1,379.99 of this sum on 12 July 2021. Nor is it disputed that the respondent paid the balance of £1,520.22 to Alex M Adamson, a Messenger at Arms and Sheriff Officers, on 12 July 2021, following receipt of a Schedule of Arrestment in Execution under section 73(A)(4) of the Debtors (Scotland) Act 1987 (as amended) from those sheriff officers. The claimant
15 maintains that this deduction from her statutory redundancy payment was not lawful. The respondent maintains that he was entitled, indeed required, to make the deduction.
3. The claimant claims that she was not provided with a written statement of employment particulars on the commencement of her employment or
20 thereafter with written particulars of changes as required by sections 1 and 4 of ERA. She claims compensation under section 38 of the Employment Act 2002.
4. The claimant gave evidence on her own behalf. The respondent, Andrew Duncan, a sole trader, gave evidence on his own behalf and led evidence
25 from Kevin MacKay of Alex M Adamson. Evidence was taken orally from the witnesses. No joint or individual sets of paginated productions were lodged. Multiple documents had been sent by the parties to the Tribunal in advance of the hearing comprising multiple scans attached to numerous emails. However, the relevant documentation was a small subset of that received,

and it proved possible to ensure the parties and witnesses had adequate access to the documents to which they required to refer during the hearing.

Findings in Fact

- 5 5. The following facts were found to be proved on the balance of probabilities.
6. The respondent is a sole trader called Andrew Duncan who trades as Hairwayz, a hair salon. The claimant was employed by the respondent as a stylist from 13 March 2014 to 10 July 2021.
7. Before she began her employment, the respondent sent the claimant a letter
10 which set out her start date, her hours of work and her rate of pay. It did not set out particulars of terms relating to holiday pay, pension, sick pay, notice or otherwise. In the period of her employment changes were made to the claimant's hours of work and rate of pay. The claimant was not always provided with written particulars of any such changes.
- 15 8. Latterly, the claimant worked 31 hours per week and was paid £276.21 per week (gross).
9. In February 2015, the respondent received an instruction for an earnings
arrestment from the claimant's wages from Alex M Adamson, Messenger at Arms and Sheriff Officers. Further instructions were received from time to time
20 throughout the employment and, at the point when the respondent was contemplating her redundancy, he was making regular deductions from her wages pursuant to an outstanding earnings arrestment.
10. On 9 July 2021 Mr Duncan telephoned Alex M Adamson and spoke to an
advisor called David. He disclosed to David that he proposed to make the
25 claimant redundant and that her redundancy payment would be £2,900.21. He asked David what should be done about this sum and whether any deductions should be made. David told him that he didn't know the answer and would need to discuss the matter with his superiors. He returned to Mr

Duncan later that day to say that they were working on it and would return to him on Monday 12 July 2021.

5 11. The claimant was made redundant with effect from 10 July 2021. She had seven complete years of service over the age of forty-one on that date. The statutory redundancy payment to which the claimant was entitled was £2,900.21.

10 12. The respondent did not pay this sum to the claimant on 10 July 2021 but waited until he had received a response from Alex M Adamson on 12 July 2021. On Monday 12 July, Mr Duncan phoned the sheriff officers again and a female advisor informed him that they had been out to the salon (which was closed that day) and had delivered a Schedule of Arrestment in Execution. This document was in the form prescribed by statute. The schedule ran to a page and explained that it arrested in his hands the sum due by him to the claimant:

15 *“all to remain in your hands under arrestment until they are made forthcoming to Falkirk Council or until further order of court (see Note 3 on Automatic Release).”*

13. Note 3 on Automatic Release was in the following terms:

20 *“Automatic release. On the expiry of the period of 14 weeks beginning with the date of service of this schedule you must release to the creditor (or you may release the sum earlier if a mandate authorizes you to do so), the lesser amount of:*

(a) The sum attached by the arrestment

(b) The sum due by you to the debtor

25 *(c) The total of £1,520.22 being the sum calculated in accordance with s.73K(c) of the Debtors (Scotland) Act 1987.*

Automatic release is not required where-

- *You, the debtor or a third party have raised a notice of objection in terms of section 73M of the Debtors (Scotland) act 1987*
- 5 • *The debtor has applied to the sheriff for release of the property where the arrestment is unduly harsh in terms of s.73Q of the Debtors (Scotland) Act 1987*
- *An action of multiple poinding is raised in relation to the funds attached by the arrestment*
- 10 • *The arrestment is recalled restricted or other ceases to have effect [sic]"*

14. The schedule also contained the following text.

"You should not pay any debts to the debtor or hand over any goods or other movables to the debtor without taking legal advice.

15 *IF YOU ARE UNCERTAIN ABOUT THE EFFECT OF THIS DOCUMENT, you should consult a solicitor, Citizens Advice Bureau or other local advice agency or adviser immediately."*

15. Mr Duncan went to the salon and read the document. He did not seek legal advice. He did not speak further with any personnel at Alex M Adamson. He immediately made a bank transfer to the claimant of £1,379.99, and to Alex M Adamson of £1,520.22. He had received no mandate from the claimant authorising him to pay over the funds to Alex M Adamson. At this stage, the claimant had not yet seen the Schedule of Arrestment in Execution. Mr Duncan sent a text message to the claimant on 12 July, informing her of the transfers he had made. He confirmed these again in a letter dated 13 July 2021. With that letter he enclosed an updated account of all payments he had made to Alex M Adamson from the claimant's wages and from her

redundancy payment and enclosed a copy of the Schedule of Arrestment in Execution received by him on 12 July 2021.

Observations on the Evidence

- 5 16. There was no material dispute between the parties. All witness gave their evidence in an honest and straightforward fashion.

Relevant Law

Statutory redundancy payment

- 10 17. Part XI of ERA provides that employees with more than two years' service are entitled to receive a statutory redundancy payment: "An employer shall pay a redundancy payment to any employee of his if the employee – (a) is dismissed by the employer by reason of redundancy..." (s.135(1)). The amount of the redundancy payment falls to be calculated in accordance with
15 section 162 of the Act. Under s.163, questions regarding the right to or the amount of a redundancy payment are to be referred to and determined by an employment tribunal.

Earnings arrestments and other arrestments under the Debtors (Scotland) Act 1987

18. The Debtors (Scotland) Act 1987 (as amended) ("DSA") contains provisions
20 about diligences against earnings known as earning arrestments. These provisions are contained in Part III of the DSA, for the purposes of which Part, "earnings" are defined to exclude redundancy payments within the meaning of ERA (s.73(3)(g)). Earnings arrestments cannot, therefore, attach to statutory redundancy payments.
- 25 19. A separate species of diligence is the subject of Part IIIA of the DSA. This is known as arrestment, and may, if required be followed by an action of furthcoming. An arrestment under Part IIIA can attach to funds or other movable property of a debtor held by an arrestee. There is no exclusion of statutory redundancy payments in defining the funds to which such

arrestments may attach as found in Part III. Part IIIA of the Act is commonly invoked to arrest or, more colloquially, 'freeze' funds in a debtor's bank account(s) but an arrestee need not be a bank or financial institution. The arrestment arrests the funds or property in the hands of the arrestee.

5 20. Under Part IIIA of the DSA, a debtor may challenge the arrestment. A debtor may serve a notice of objection and apply to the sheriff recall the arrestment within 4 weeks the date of service of the schedule on the basis that the summary warrant was invalid or that the arrestment has been incompetently or irregularly executed (s.73M). Additionally / alternatively, a debtor may apply
10 to a sheriff for an order to halt the arrestment on the basis that the arrestment is unduly harsh (s.73Q). Such applications will trigger hearings before the sheriff (ss. 73N and 73R respectively).

21. Where funds have been arrested and no challenge is made by the debtor, the legislation provides that the funds will be automatically released to the
15 creditor 14 weeks after Schedule of Arrestment has been served (s.73J). The debtor may mandate the arrestee to release the funds to the creditor earlier than that (s.73J(2)(b)). However, no funds may be released by the arrestee on the expiry of the 14-week period where the debtor has challenged the arrestment under section 73M or 73Q.

20 22. Under section 73G of DSA, the arrestee has a duty to disclose to the creditor the nature and value of funds attached after the Schedule of Arrestment is served. They must do so within 3 weeks of the date when the arrestment is executed.

23. Under section 73P, where an arrestee releases funds under s.73J(2) in good
25 faith but the warrant is invalid or the arrestment is incompetently or irregularly executed, the arrestee is not liable to the debtor for damages for patrimonial loss caused by the release of funds. S.73J(2) provides for release on the expiry of the 14-week period subject to there being no objection lodged by the debtor.

Failure to provide written employment particulars

24. Section 38 of the Employment Act 2002 provides that where a tribunal finds in favour of a claimant in respect of a claim to which the section applies and the respondent was in breach of his duty when the proceedings were begun to provide a statement of particulars of employment or of changes to the particulars, the Tribunal must increase the award by two weeks' pay and may increase it by four weeks' pay. This requirement applies unless there are exceptional circumstances which would make an award or increase unjust (s.38(5)). Section 38 applies to claims for statutory redundancy payments under section 163 of ERA, among other types of proceedings.

Discussion and Decision

Statutory Redundancy Payment

25. The language of the Employment Rights Act when it comes to the right to a redundancy payment is clear: *An employer shall pay a redundancy payment to any employee... if the employee is dismissed by the employer by reason of redundancy.* There are restrictions on contracting out of the right (s.203 ERA). There is no suggestion here that the parties agreed to exclude or limit the claimant's right to a statutory redundancy payment in a manner permitted by section 203 of ERA or at all. The starting point is, therefore, that the full amount of a statutory redundancy payment ought to be paid to a claimant under ERA unless a respondent, in declining to do so, is acting in a manner authorised and required by legislation.

26. The respondent raised in correspondence to the Tribunal in advance of the hearing an alleged duty of disclosure to Alex M Adamson. The respondent owed no duty under the DSA to disclose the claimant's redundancy or redundancy payment to Alex M Adamson when he did on 9 July 2021. The redundancy payment did not fall to be treated as earnings for the purposes of the extant earnings arrestment and the consequent obligation to provide information about earnings under s.70A(3) of the DSA. No arrestment under

Part IIIA had yet been served on the respondent on 9 July 2021 so no obligation to provide information about the redundancy monies had arisen under Part IIIA of the Act on that date (s.73G).

5 27. In **Dalgleish v Lothian and Borders Police Board** [1991] IRLR 422, the Outer House of the Court of Session granted an interdict preventing the claimant's employers from divulging their names and addresses to the local council which was engaged on pursuing community charge defaulters. There may well be a duty of confidentiality owed by an employer to an employee in relation to a matter such as an impending redundancy and consequent
10 payments which may not have been observed by the respondent in discussing matters with Alex M Adamson on 9th July. However, the present claim is limited to a statutory claim under section 163 of ERA, and in this context, it is unnecessary to make a determination on the lawfulness or otherwise of the respondent's disclosure. The question is restricted to whether the respondent
15 was authorised and required by statute to withhold part of the redundancy payment from the claimant and to pay it to a third party, as he did.

28. In paying over the funds to the claimant's creditor via Alex M Adamson on 12 July 2021, the respondent did not act in accordance with the instructions contained in the Schedule of Arrestment in Execution which had been served
20 upon him, the terms of which reflected the wider legislative framework for this type of diligence. It is true that if he *had* acted in accordance with the Schedule and the DSA then he still would not have paid the disputed funds to the claimant, or at least would not have done so in the absence of an order from the sheriff. Nor, however, would he have paid the disputed funds to Alex M
25 Adamson on 12th July 2021. Those funds belonged to the claimant on 12 July 2021 and ought, by virtue of the arrestment, to have been arrested in the respondent's hands pending further procedure. This might have taken the form of a mandate from the claimant to pay the funds to Alex M Adamson, or it might have been notification of a challenge by the claimant of the arrestment
30 which would require to be heard by a sheriff.

29. In paying the funds over to Alex M Adamson, the respondent was acting in a manner which was not authorised by statute. The consequence was to deprive the claimant of the opportunity of making an objection under section 73M or 73Q of DSA. The monies were not the respondent's to transfer to the creditor or any third party at the time when he did. Had he received a mandate from the claimant in the prescribed form to release her funds to her creditor, then matters would have been different. Had he waited until the expiry of the prescribed 14-week period and noted an absence of challenge to the arrestment by the claimant, then the release would have been authorised by section 73J.

30. In the absence of any statutory authorisation or requirement for the respondent's election to transfer a portion of the redundancy monies owed to the claimant to Alex M Adamson on 12 July 2021, I find that he has breached the claimant's right under section 135 of ERA. I note that section 73P of DSA confers immunity on an arrestee who acts in good faith in releasing funds under section 73(J)(2), even where the summary warrant is invalid or the arrestment is incompetent or irregular. Section 73J(2) is the provision which authorises the arrestee to release funds to the creditor on the expiry of 14 weeks, or earlier if mandated by the debtor to so. It is reasonable to conclude as a matter of statutory interpretation that, if the arrestee releases the funds to the creditor otherwise than in accordance with s.73J(2), then the arrestee benefits from no such immunity. The respondent is therefore ordered to pay the claimant the unpaid balance of the statutory redundancy payment in the amount of £1,520.22.

31. I have not reached this decision lightly and have a degree of sympathy with the respondent's situation. In paying the monies over to Alex M Adamson it appears Mr Duncan genuinely but erroneously considered he was authorised to do so, though his action was carried out with insufficient attention to the terms of the Schedule of Arrestment and the underpinning legislation. It is not a straightforward area for an employer to navigate and it is unfortunate that the respondent appears to have referred to Alex M Adamson as a source of advice and guidance in relation to his duties and responsibilities as an

employer. As Mr MacKay of Alex M Adamson made clear when giving evidence to the Tribunal, that is not the role of the sheriff officer.

Failure to give statement of employment particulars

- 5 32. It was not disputed that the respondent failed to give the claimant a statement of her employment particulars in compliance with his obligations under section 1 of ERA and failed to provide compliant statements of changes thereafter. It is not disputed that on 17 August 2021 when the main proceedings were begun, it remained the case that no such statement had been provided. Under section 38(3) of that Act, the Tribunal must increase the award by the minimum amount of two weeks' pay and may increase the award by four weeks' pay. However, that requirement is subject to subsection (5) of s.38 which provides that the duty on the Tribunal to make the increase "*does not apply if there are exceptional circumstances which would make an award or increase under that subsection unjust or inequitable.*"
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- 15 33. In the unusual circumstances of this case, it would be unjust and inequitable to award the claimant a further two weeks' pay in respect of the respondent's failure to comply with the obligations under sections 1 and 4 of ERA.
- 20 34. The exceptional circumstances are that the respondent has (albeit without legal authority to do so) paid the sum of £1,520.22 to the claimant's creditor and that sum has been applied against her debt to Falkirk Council. I have found that, insodoing, the respondent breached its obligations under Part XI of ERA and made an award in that respect. Nevertheless, it would be unjust not to recognise (i) that the claimant has received benefit from the application to her debts of the sum paid by the respondent to Alex M Adamson on 12 July 25 2021; and (ii) that the respondent's overall liability to the claimant for a redundancy payment has in effect already been doubled in consequence of his unauthorised release of the funds to her creditor. In those circumstances, it would be inequitable to penalise the respondent by increasing the claimant's award. This decision implies no endorsement of the failure to provide a compliant written statement of particulars but recognises the exceptional
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circumstances which pertain on this occasion to the claimant's substantive claim for a redundancy payment.

5 **Employment Judge: L Murphy**
Date of Judgment: 1 November 2021
Entered in register: 5 November 2021
and copied to parties