



EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4105988/2022

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Held in Edinburgh on 19 January 2023

Employment Judge Murphy

Mr G Cunningham

Claimant

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In person

Mr K Penman

Respondent

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**Not present and
not represented**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

20 The Judgment of the Employment Tribunal is that:

- (i) the claim for a statutory redundancy payment is dismissed pursuant to Rule 52 of the Employment Tribunal Rules 2013, the claimant having withdrawn this claim in the course of the hearing on 19 January 2023.
- (ii) the claim for alleged unpaid pension contributions is dismissed pursuant to Rule 52 of the Employment Tribunal Rules 2013, the claimant having withdrawn this claim in the course of the hearing on 19 January 2023.
- (iii) the claim for unauthorised deductions from wages in respect of alleged unpaid furlough payments in the period from 1 to 16 May 2021 is dismissed. The Tribunal, having determined that the claimant lodged this complaint out of time and not being satisfied that it was not reasonably practicable to lodge it in time, has no jurisdiction to hear the complaint.
- (iv) The Respondent has made an unauthorised deduction from wages contrary to section 13 of the Employment Rights Act 1996 and the Respondent is ordered to pay to the Claimant the sum of £323 in respect of unpaid wages in respect of the period from 19 to 26 June 2022.

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- (v) The Respondent is ordered to pay to the Claimant the further sum of £35 to compensate the Claimant for financial loss sustained by him attributable to the Respondents unauthorised deduction in (iv) above.
- (vi) The Respondent has made an unauthorised deduction from wages contrary to section 13 of the Employment Rights Act 1996 and the Respondent is ordered to pay to the Claimant the sum of £782.04 in respect of untaken annual leave accrued in the leave year commencing 1 January 2022 which was outstanding on the termination of the claimants employment.
- (vii) The sums awarded in items (iv) and (vi) above are expressed gross of tax and national insurance. It is for the respondent to make any deductions lawfully required to account to HMRC for any tax and national insurance due on the sums, if applicable.

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REASONS

1. A final hearing was fixed for 19 January 2023 at the Edinburgh Tribunal. The hearing was convened pursuant to Rule 21 of the Employment Tribunal Rules 2013, the respondent not having entered a response to the claim. The claimant's claim is part of a multiple along with that of Mrs K Cunningham, the claimant's wife. Mrs Cunningham failed to attend or be represented at the hearing. This judgment is concerned only with Mr Cunningham's complaints. A separate judgment has been issued in respect of Mrs Cunningham. Mr K Penman is the sole respondent. The claim originally named two respondents but the claim against the second respondent was rejected in the absence of any Early Conciliation certificate which named that prospective respondent.
2. A Notice of Claim and Hearing was sent to the respondent on 16 November 2022. It was sent to the address of the Bridge Inn pub, where the claimant worked. Although the claimant is aware that the pub closed in December 2022, he believes that the respondent was the leaseholder of the pub at the time the claim was presented and that he continues to be so at the time of this

hearing. Notwithstanding the closure of the pub for trade, the claimant believes the respondent still regularly accesses the premises. The respondent was not in attendance and was not represented at the hearing.

3. During the preliminary discussion, the claimant confirmed that he was not made redundant and that he wished to withdraw his claim for a statutory redundancy payment. He likewise indicated that he wished to withdraw his complaint in relation to pension contributions, a matter he is pursuing separately with the Pensions Regulator.
4. The claimant continues to pursue his claims for payment in lieu of accrued untaken holiday outstanding on the termination of his employment, alleged unpaid furlough payments relating to the period from 1 to 16 May 2021 and unpaid wages referable to the week from 19 to 26 June 2022.
5. The issues for determination by the Tribunal were as follows:
 - (i) Given the date the claim form was presented and the dates of early conciliation, anything that happened before the 18 May 2022 may not have been brought in time. Was the unauthorised deductions complaint related to the alleged non payment of furlough pay for 1-16 May 2021 made within the time limit in section 23 of the Employment Rights Act 1999 ("ERA")? The Tribunal will decide:
 - a. Was the claim made within three months (plus Early Conciliation extension, if applicable) of the date of payment of the wages from which the deduction is alleged to have been made? The claimant was paid weekly at the material time.
 - b. If not, was there a series of deductions and was the claim made to the Tribunal within three months (plus any applicable extension) of the last one?
 - c. If not, was it reasonably practicable for the claim to be made within the time limit?
 - d. if it was not reasonably practicable for the claim to be made to the Tribunal within the time limit, was it made within a reasonable period?

- (ii) Subject to time bar, did the respondent make unauthorised deductions from the claimant's wages in respect of the period of furlough leave from 1-16 May 2021? if so, how much?
- (iii) Did the respondent fail to pay the claimant for annual leave the claimant had accrued but not taken when their employment ended?
- (iv) Did the respondent make unauthorised deductions from the claimant's wages in respect of the week from 19 to 26 June 2022?
6. The claimant gave evidence on his own behalf. He produced no documentary evidence to the Tribunal. He advised he had never received wage slips, a P45 or a P60.

Findings in Fact

7. Having considered the evidence, I have made the following findings in fact on the balance of probabilities.
8. The claimant was employed by the respondent from 8 June 2020 until he resigned on 26 June 2022. The respondent was a sole trader who carried on the business of a public house called the Bridge Inn in Galashiels. The respondent leased this pub and employed staff to run the operation. When the claimant began his employment, the claimant's daughter was employed by the respondent to manage the bar. She arranged the job for the claimant. The claimant was employed as a barman. He was given no employment contract or other documentation in connection with his employment.
9. He was paid weekly into his bank account. The payments showed as received from 'Perch Leisure'. This was a trading name of the respondent which was used not only in connection with the business carried on at the Bridge Inn, but also in connection with other business ventures of the respondent including a restaurant business and a cafe business in Galashiels. He received no payslips in connection with his employment. Nor did he receive any P60s or a P45 when his employment concluded. He noted that deductions were made from his gross weekly payments, however, and believed that tax was deducted by the respondent at source.

- 10 The claimant worked variable hours. On average he worked approximately 30 hours per week though he sometimes worked longer or shorter hours. He was paid £9.50 per hour gross. He normally worked 5 days per week but occasionally he worked more days.
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11. The claimant's annual leave year ran from 1 January each year. He was told by the respondent that he was entitled to 4 weeks' holiday per year.
12. The pub was closed due to Covid restrictions from 25 December 2020 until 17 May 10 2021. The claimant was placed on furlough leave. He was paid throughout that time at the reduced rate of 80% of his wages other than the period from 1 to 16 May 2021. He received no payment for this period. He asked his daughter to chase this with the respondent. She texted the respondent who suggested the payment would be coming but it never was. The claimant also asked the respondent about payment for 15 this period soon after returning to work on 17 May 2021. Again, the respondent suggested he would 'get it sorted out' but he did not.
13. The claimant did not bring a complaint to the Tribunal within three months of the date he ought to have been paid for that period of furlough leave or for many months 20 thereafter because he was still working for the respondent during this period and did not want to enter litigation with him while he was still employed. The claimant gave up on the payment. He did not raise it again with the respondent.
14. The claimant took a week's annual leave in the annual leave year 2021. He did not 25 try to take any further annual leave because he had been off on furlough leave for a significant portion of that year.
15. The claimant took no annual leave in the annual leave year commencing 1 January 30 2022.
16. The claimant noticed that he was often being paid late in or around May / June 2022. This was causing him problems in meeting his outgoings. He raised it with the respondent and advised him that if he wasn't going to be paid on time, he would just leave. The respondent had a meeting with the claimant and reassured him it would 35 be fine.
17. The respondent did not pay the claimant for the week commencing 16 June 2022. The claimant decided to resign on 26 June 2022 because of his concerns over

payment of his wages. The claimant phoned and texted the respondent to chase his wages for the week commencing 19 June 2022. He had worked 34 hours that week and was owed £323 (gross) by the respondent. The respondent did not reply to the claimant's messages or answer his calls.

18. The claimant incurred bank charges in the amount of £35 as a result of the cash flow difficulties caused by the respondent's failure to pay him for his work in June 2022. He borrowed money from friends and family. They did not charge him interest on the loans. He drew down pension benefits from an NHS pension scheme earlier than he had planned. This affected his lump sum and the amount of his monthly benefit. To date, he has carried out no calculation to identify whether there is an overall loss arising from the early drawdown. He has no figures to show he is worse off when the additional two years of benefits are offset against what would have been received had he delayed drawing benefits for a further two years.

19. The claimant initiated the Early Conciliation process with ACAS on 17 August 2022. He received an Early Conciliation certificate on 28 September 2022. He lodged a claim with the Tribunal on 11 November 2022.

20. The Bridge inn closed in or about the week before Christmas in 2022. The claimant vacated the premises.

Relevant law

Time limits:

21. The law relating to time limits in respect of unauthorised deductions from wages is set out in the Employment Rights Act 1996 ("ERA"), Part II. Section 23, so far as relevant, provides as follows:

(2) Subject to subsection 4, an Employment Tribunal shall not consider a complaint under this section unless it is presented before the end of the period of three months beginning with -

(a) In the case of a complaint relating to a deduction by the employer, the date of payment of the wages from which the deduction was made, or ...

ib) ...

(3)-.-

(3A) Section 207B (extension of time limits to facilitate conciliation before institution of proceedings) applies for the purposes of subsection (2)

5 *(4) Where the employment tribunal is satisfied that it was not reasonably practicable for a complaint under this section to be presented before the end of the relevant period of three months, the tribunal may consider the complaint if it is presented within such further period as the tribunal considers reasonable.*

io 22. S.207B of ERA provides for an extension to the three-month time limit in certain circumstances. In effect, s.207B(3) of ERA ‘stops the clock’ during the period in which the parties are undertaking early conciliation and extends the time limit by the number of days between ‘day A’ and ‘Day B’ as defined in the legislation. This ‘stop the clock’ provision only has effect if the early conciliation process is commenced before the expiry of the statutory time limit.
15 Where a limitation period has already expired before the conciliation commences, there is no extension (*Pearce v Bank of America Merrill Lynch* UKCAT/0067/19).

20 23. Where a claim has been lodged outwith the three-month time limit, the Tribunal must determine whether it was not reasonably practicable for the claimant to present the claim in time. The burden of proof lies with the claimant. If the claimant succeeds in showing that it was not reasonably practicable, then the Tribunal must determine whether the further period within which the claim was brought was reasonable.

25 24. In *Lowri Beck Services Ltd v Brophy* 2019 EWCA Civ 2490, the Court of Appeal summarised the approach along the following lines.

1. The test should be given a liberal interpretation in favour of the employee”.

2. The statutory language is not to be taken only as referring to physical impracticability and might be paraphrased as to whether it was “reasonably feasible” for that reason.
3. If an employee misses the time limit because he or she is ignorant about the existence of the time limit, or mistaken about when it expires in their case, the question is whether that ignorance or mistake is reasonable. If it is, then it will not have been reasonably practicable for them to bring the claim in time. Importantly, in assessing whether ignorance or mistake are reasonable, it is necessary to take into account enquiries which the claimant or their adviser should have made.
4. If the employee retains a skilled adviser, any unreasonable ignorance or mistake on the part of the adviser is attributed to the employee (*Dedman v British Building and Engineering Appliances Ltd* [1974] ICR 53).
5. The test of reasonable practicability is one of fact and not of law (*Palmer and Saunders v Southend-on-Sea Borough Council* [1984] IRLR 119).

Deductions from Wages

25. Under the section 13 of the Employment Rights Act 1996 (“ERA”), a worker has the right not to suffer unauthorised deductions from her wages. Under section 23 of ERA, a worker may complain to an employment tribunal that an employer has made a deduction from her wages in contravention of section 13. Where a Tribunal finds such a complaint well founded, it shall make a declaration to that effect and order the employer to pay the amount of the deduction (section 24 ERA). It may additionally order the employer to pay the worker such amount as the Tribunal considers appropriate in all the circumstances to compensate the worker for any financial loss sustained by him which is attributable to the matter complained of.

Annual Leave (WTR)

26. The Working Time Directive 2003/88/EC (WTD) was adopted in 1993 as a health and safety measure. The domestic implementation, the Working Time Regulations 1998 (WTR) came into effect in 1998. Under the WTR, workers are entitled to 5.6 weeks' annual leave.
27. Under the WTR, employees are entitled to accrued untaken holiday outstanding at the date of termination. A failure to pay in lieu of annual leave which has accrued on termination can be enforced by way of a claim for an unauthorized deduction from wages under section 13 of ERA.
28. Those parts of the WTR which are of most relevance to the issues are reproduced:

Reg 13: Entitlement to annual leave

(1) *Subject to paragraph (5), a worker is entitled to four weeks' annual leave in each leave year.*

(3) *A worker's leave year, for the purposes of this regulation, begins—*

(a) *on such date during the calendar year as may be provided for in a relevant agreement; or*

(b) *where there are no provisions of a relevant agreement which apply—*

(ii) *if the worker's employment begins after 1st October 1998, on the date on which that employment begins and each subsequent anniversary of that date.*

(5) *Where the date on which a worker's employment begins is later than the date on which (by virtue of a relevant agreement) his first leave year begins, the leave to which he is entitled in that leave year is a proportion of the period applicable under paragraph (1) equal to the proportion of that leave year remaining on the date on which his employment begins.*

(9) *Leave to which a worker is entitled under this regulation may be taken in instalments, but—*

(a) *subject to the exception in paragraphs (10) and (11),] it may only be taken in the leave year in respect of which it is due, and*

(b) *it may not be replaced by a payment in lieu except where the worker's employment is terminated.*

(10) Where in any leave year it was not reasonably practicable for a worker to take some or all of the leave to which the worker was entitled under this regulation as a result of the effects of coronavirus (including on the worker, the employer or the wider economy or society), the worker shall be entitled to carry forward such untaken leave as provided for in paragraph (11).

(11) Leave to which paragraph (10) applies may be carried forward and taken in the two leave years immediately following the leave year in respect of which it was due.

The employer may only require a worker not to take leave to which paragraph (10) applies on particular days as provided for in regulation 15(2) where the employer has good reason to do so.

13A: Entitlement to additional annual leave

(1) Subject to regulation 26A and paragraphs (3) and (5), a worker is entitled in each leave year to a period of additional leave determined in accordance with paragraph (2).

(2) The period of additional leave to which a worker is entitled under paragraph (1) is—

(i) in any leave year beginning on or after 1st April 2009, 1.6 weeks.

(j) The aggregate entitlement provided for in paragraph (2) and regulation 13(1) is subject to a maximum of 28 days.

(4) A worker's leave year begins for the purposes of this regulation on the same date as the worker's leave year begins for the purposes of regulation 13.

(5) Where the date on which a worker's employment begins is later than the date on which his first leave year begins, the additional leave to which he is entitled in that leave year is a proportion of the period applicable under paragraph (2) equal to the proportion of that leave year remaining on the date on which his employment begins.

(6) Leave to which a worker is entitled under this regulation may be taken in instalments, but it may not be replaced by a payment in lieu except where—

(a) the worker's employment is terminated; or

(b) the leave is an entitlement that arises under paragraph (2)(a), (b) or (c); or

(7) A relevant agreement may provide for any leave to which a worker is entitled under this regulation to be carried forward into the leave year immediately following the leave year in respect of which it is due.

Reg 14: Compensation related to entitlement to leave

(1) *Paragraphs (1) to (4) of this regulation apply where —*

(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 and regulation 13A differs from the proportion of the leave year which has expired.*

(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).*

(3) *The payment due under paragraph (2) shall be—*

(a) *such sum as may be provided for the purposes of this regulation in a relevant agreement, or*

(b) *where there are no provisions of a relevant agreement which apply, a sum equal to the amount that would be due to the worker under regulation 16 in respect of a period of leave determined according to the formula—*

(A x B) - C

where—

A is the period of leave to which the worker is entitled under [regulation 13] [and regulation 13A];

B is the proportion of the worker's leave year which expired before the termination date, and

C is the period of leave taken by the worker between the start of the leave year and the termination date.

*Discussion and decision**Unauthorised deduction: Furlough monies*

29. The claimant did not bring his claim for the furlough payment within three months of the date of payment of the wages from which the deduction was made. The claimant was paid weekly. The latest date when the furlough money could have been due for the period to 16 May 2021 was 23 May 2021.

30. This deduction was not one in a series of deductions. There was no series of deductions. One other deduction is complained of. It was made over a year later over a year later and relates not to furlough leave but to normal wages.

31. The normal time limit for complaining about the deducted furlough monies expired by 22 August 2021 at the latest. The claimant had neither sought to present a claim in the Tribunal by then nor to initiate Early Conciliation in respect of his complaint. The time limit is not, therefore, extended by any subsequent period of conciliation (Pearce).
32. The claimant did not initiate early conciliation until some considerable time later, around a year after the three-month time limit had expired.
33. The claimant has not discharged the burden of proving it was not reasonably practicable for him to present his complaint on time. The only reason given was that he remained employed by the respondent during that period. While a claim may have caused tensions in the working relationship, it would, nonetheless have been reasonably practicable for the claimant to present his one (or initiate early conciliation) within three months of the date of pay from which the furlough wages were deducted.
34. Accordingly, the Tribunal lacks jurisdiction to hear this complaint which is dismissed.

Unauthorised deduction: Annual Leave

35. In the leave year in which his employment terminated, the claimant took no annual leave. His annual entitlement was to 5.6 weeks' annual leave pursuant to the WTR Regs 13 and 13A. He was entitled under Regulation 14(1)(b) to be paid in lieu of leave which had accrued in that leave year and remained untaken. The calculation is prescribed by the legislation as follows:

$$(A \times B) - C$$

where—

A is the period of leave to which the worker is entitled under [regulation 13] [and regulation 13A];

B is the proportion of the worker's leave year which expired before the termination date, and

C is the period of leave taken by the worker between the start of the leave year and the termination date.

36. in the claimant's case, applying the formula, the figures are:

5 (5.6 weeks x 0.49) - 0 = 2.744 weeks.

The claimant's average weekly pay was £285 (gross)

2. 447 x £285 = £782.04

10 37. The respondent has made an unauthorised deduction of wages in the sum of £782.04 in respect of accrued untaken annual leave owing on the termination of the claimant's employment.

Unauthorised deduction: 19-26 June 2022

15 38. The claimant worked for the respondent in the period from 19 to 26 June 2022. During this time, he worked 34 hours. He was entitled to be paid 34 x £9.50 = £323 (gross). The respondent did not pay the claimant for this period of employment.

20 39. The respondent has made an unauthorised deduction of wages in the sum of £323 in respect of the period from 19 to 26 June 2022.

2.5 40. The claimant suffered financial loss attributable to the deduction in the amount of £35, namely bank charges for his overdraft facility. The claimant has not proved on the balance of probabilities an additional loss as a result of the decision to draw down his pension two years earlier than previously envisaged.

- 4i. I consider it appropriate in all the circumstances to compensate the claimant for the financial loss of £35 sustained by him attributable to the respondent's deduction in June 2022.

Employment Judge: L Murphy
Date of Judgment: 19 January 2023
Entered in register: 23 January 2023
and copied to parties