



EMPLOYMENT TRIBUNALS (SCOTLAND)

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Case No: 4101438/2022

Final Hearing held by Cloud Video Platform on 12 May 2022

Employment Judge A Kemp

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Mr Graham Breckney

**Claimant
In person**

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X402 Ltd

**Respondent
No appearance**

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JUDGMENT OF THE EMPLOYMENT TRIBUNAL

1. The claimant is awarded the sum of FOUR THOUSAND SIX HUNDRED AND FORTY EIGHT POUNDS SIXTY THREE PENCE (£4,648.63) payable by the respondent, in respect of the following claims:

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(i) A statutory redundancy payment in the sum of THREE THOUSAND TWO HUNDRED AND SIXTY FOUR POUNDS (£3,264) and

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(ii) Payment as an unlawful deduction from wages in respect of accrued annual leave of ONE THOUSAND THREE HUNDRED AND EIGHTY FOUR POUNDS SIXTY THREE PENCE (£1,384.63) subject to any necessary statutory deduction. In the event that the respondent makes a statutory deduction it shall (a) immediately remit the sum deducted to Her Majesty's Customs and Revenue and (b) provide when doing so written evidence of the same to the claimant.

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2. **The Tribunal defers consideration of whether to impose a penalty on the respondent under section 12A of the Employment Tribunals Act 1996 for a period of 14 days from the date on which this Judgment is sent to the respondent to allow the respondent to make written submissions on the matter.**

REASONS

Introduction

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1. This was a Final Hearing held remotely.
 2. The respondent did not provide a Response Form, and the claim has proceeded undefended. Notice of Final Hearing had been sent to the respondent but it again did not appear at the hearing.

Evidence

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3. Evidence was heard from the claimant. The claimant referred to documents when doing so, and sent a number of documents including payslips and email messages by email after the Hearing, as I had permitted him to do under the terms of Rules 2 and 41.

Issue

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4. The sole issue is: to what remedy is the claimant entitled as to (i) a statutory redundancy payment and (ii) holiday pay?

Facts

5. The following facts, material to the issues before the Tribunal, were found by the Tribunal.
- 25 6. The claimant is Mr Graham Breckney. His date of birth is 14 April 1969.
7. The respondent is X402 Ltd.
8. The claimant was employed by the respondent from 1 October 2017 as Head of Quality Assurance.

9. The claimant's gross pay was £769.23 per week, and his net pay was £550.25 per week. He had an entitlement to pension valued at the minimum for auto-enrolment provisions of 3% of gross pay.
10. In the first week of October 2021 the claimant was informed that he was being dismissed for redundancy. It was said that the respondent had cash flow difficulties. He worked that period of notice.
11. The claimant's employment ended on 5 November 2021. The respondent's CEO Mr Simon Tuke promised the claimant to make payment to him of the statutory redundancy payment and pay for annual leave due, and provided an amended payslip with regard to the same which included a statutory redundancy payment of £3,264 and holidays set out below, after which by email dated 3 December 2021 Mr Tuke said that he aimed to get the payment made soon, but the respondent has failed to do so.
12. The claimant had accrued but untaken holidays as at the date of termination of his employment. They were detailed on the said amended payslip sent to him in November 2021 by the respondent, comprising five days of public holidays each stated to be in the sum of £615.38 and further holidays stated to be in the sum of £769.25. The total of those sums is £1,384.63. It has not been paid to him
13. The claimant commenced early conciliation on 20 January 2022. The certificate in relation to that was issued on 7 February 2022.
14. The Claim Form was presented on 2 March 2022.

The law

15. I was satisfied that the Claim had been presented timeously and was within the jurisdiction of the Tribunal.
16. The Employment Rights Act 1996 ("the Act") provides for a right to a redundancy payment by virtue of section 136. Redundancy is defined in section 139. The amount is calculated by reference to section 162, which is based on calculations of a week's pay under sections 212 – 214 of the Act. There is a statutory limit to the figure for purposes of the redundancy

payment under section 136, which at the time of the claimant's dismissal was £544 per week.

17. There is an entitlement to annual leave under the Working Time Regulations 1998. That includes an entitlement to payment for leave accrued but untaken as at the date of termination of employment under Regulation 14. The amount is related to the actual week's pay and is not capped.

Discussion

18. I was satisfied that the claimant was a credible and reliable witness. I have awarded him the following sums.

19. Firstly in respect of the statutory redundancy payment, I was satisfied that the claimant fell within the statutory provisions. He had been told that he was being made redundant, his employment ended for that reason, and although promises to pay redundancy were made they did not take pace. The claimant is over the age of 41 for all his service, which was for four complete years. The payment is 4 years' service multiplied by 1.5 multiplied by £544 (the statutory limit to a week's pay applying as the actual gross pay was higher than that), which is a total of £3,264. It is not taxed. It is the figure given in the amended payslip.

20. Secondly, in respect of annual leave, the amount agreed by the respondent to be due was set out in an amended payslip. It is an unlawful deduction from wages to fail to pay it. It is potentially liable to deduction for income tax.

21. Sums are awarded to the claimant accordingly as set out above.

Potential Penalty

22. It appears clear that the respondent accepted that these sums were properly payable to the claimant, there was an email of 3 December 2021 referring to payment, but no payment has been made. The respondent has not defended the proceedings, and continues to fail to make the payment due.

23. Employment Tribunals have a discretionary power in certain circumstances to order employers to pay a financial penalty to the Secretary of State, under the Employment Tribunals Act 1996 section 12A, which was inserted by section 16 of the Enterprise and Regulatory Reform Act 2013. It has subsequently been amended.

24. The provision is as follows:

“12A Financial penalties

(1) Where an employment tribunal determining a claim involving an employer and a worker—

- (a) concludes that the employer has breached any of the worker's rights to which the claim relates, and
- (b) is of the opinion that the breach has one or more aggravating features,

the tribunal may order the employer to pay a penalty to the Secretary of State (whether or not it also makes a financial award against the employer on the claim).

(2) The tribunal shall have regard to an employer's ability to pay

- (a) in deciding whether to order the employer to pay a penalty under this section;
- (b) (subject to subsections (3) to (7)) in deciding the amount of a penalty.

(3) The amount of a penalty under this section shall be—

- (a) at least £100;
- (b) no more than £20,000.

This subsection does not apply where subsection (5) or (7) applies.

(4) Subsection (5) applies where an employment tribunal—

- (a) makes a financial award against an employer on a claim, and
- (b) also orders the employer to pay a penalty under this section in respect of the claim.

(5) In such a case, the amount of the penalty under this section shall be 50% of the amount of the award, except that—

- (a) if the amount of the financial award is less than £200, the amount of the penalty shall be £100;

(b) if the amount of the financial award is more than £40,000, the amount of the penalty shall be £20,000.

(6) Subsection (7) applies, instead of subsection (5), where an employment tribunal—

5 (a) considers together two or more claims involving different workers but the same employer, and

(b) orders the employer to pay a penalty under this section in respect of any of those claims.

(7) In such a case—

10 (a) the amount of the penalties in total shall be at least £100;

(b) the amount of a penalty in respect of a particular claim shall be—

(i) no more than £20,000, and

(ii) where the tribunal makes a financial award against the employer on the claim, no more than 50% of the amount of the award.

But where the tribunal makes a financial award on any of the claims and the amount awarded is less than £200 in total, the amount of the penalties in total shall be £100 (and paragraphs (a) and (b) shall not apply).

20 (8) Two or more claims in respect of the same act and the same worker shall be treated as a single claim for the purposes of this section

(9) Subsection (5) or (7) does not require or permit an order under subsection (1) (or a failure to make such an order) to be reviewed where the tribunal subsequently awards compensation under—

25 (a) section 140(3) of the Trade Union and Labour Relations (Consolidation) Act 1992 (failure to comply with tribunal's recommendation),

30 (b) section 117 of the Employment Rights Act 1996 (failure to reinstate etc),

(c) section 124(7) of the Equality Act 2010 (failure to comply with tribunal's recommendation), or

35 (d) any other provision empowering the tribunal to award compensation, or further compensation, for a failure to comply

(or to comply fully) with an order or recommendation of the tribunal.

5 (10) An employer's liability to pay a penalty under this section is discharged if 50% of the amount of the penalty is paid no later than 21 days after the day on which notice of the decision to impose the penalty is sent to the employer.

(11) In this section—
“claim”—

10 (a) means anything that is referred to in the relevant legislation as a claim, a complaint or a reference, other than a reference made by virtue of section 122(2) or 128(2) of the Equality Act 2010 (reference by court of question about a non-discrimination or equality rule etc), and

15 (b) also includes an application, under regulations made under section 45 of the Employment Act 2002, for a declaration that a person is a permanent employee;

“employer” has the same meaning as in Part 4A of the Employment Rights Act 1996,

20 “financial award” means an award of a sum of money, but does not including anything payable by virtue of section 13

“worker” has the same meaning as in Part 4A of the Employment Rights Act 1996,

25. This power was granted to tribunals, according to the Explanatory Notes to the 2013 Act by which that amendment was introduced:

25 “to encourage employers to take appropriate steps to ensure that they meet their obligations in respect of their employees, and to reduce deliberate and repeated breaches of employment law”.

26. The Explanatory Notes also comment on the factors that a Tribunal might take into account as follows:

30 “An employment tribunal may be more likely to find that the employer’s behaviour in breaching the law had aggravating features where the action was deliberate or committed with malice, the employer was an organisation with a dedicated human resources team, or where the

employer had repeatedly breached the employment right concerned. The employment tribunal may be less likely to find that the employer's behaviour in breaching the law had aggravating features where an employer has been in operation for only a short period of time, is a micro business, has only a limited human resources function, or the breach was a genuine mistake."

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27. I consider that there was a breach of the claimant's rights which was serious, in that he was dismissed for redundancy without the appropriate payments being made to him, and that there were aggravating features by the actions of the respondent in accepting that the sums were due, but not making payment.

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28. In considering whether to impose a penalty, I require to consider the issue of ability to pay under sub-section 2(a), as well as all the circumstances of the case. I consider that it is appropriate to give the respondent an opportunity to make representations on the issue of a potential penalty within 14 days. The respondent may do so in writing by email or letter to the Tribunal setting out its representations on that issue. I shall then consider it further. One factor that will weigh in the balance is whether or not payment of the sums due has been made.

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Employment Judge: Sandy Kemp
Date of Judgment: 18 May 2022
Entered in register: 18 May 2022
and copied to parties

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