



EMPLOYMENT TRIBUNALS (SCOTLAND)

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**Case No: 4111961/2021 Hearing by Cloud Video Platform (CVP) on 21 March
2022**

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Employment Judge: M A Macleod

Colin Dunsmore

**Claimant
In Person**

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Smartpay Payment Solutions

**Respondent
Not Present and
Not Represented**

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JUDGMENT OF THE EMPLOYMENT TRIBUNAL

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**The Judgment of the Employment Tribunal is that the claimant's claims
succeed, and that the respondent is ordered to pay to the claimant the
following sums:**

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- 1. £29.12 in respect of unpaid notice pay;**
- 2. £706.38 in respect of pay relating to annual leave accrued but untaken
as at the date of termination of employment;**
- 3. £1,432.45 in respect of arrears of pay; and**
- 4. £2,820.56 (gross) in respect of arrears of pay based on the
respondent's failure to pay the claimant's pay rise from 3 November
2020. This payment must be made subject to deduction of tax and
national insurance.**

REASONS

1. The claimant presented a claim to the Employment Tribunal on 22 October 2021 in which he complained that he had been unlawfully deprived of notice pay, holiday pay, arrears of pay and other payments.
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2. The respondent did not submit an ET3.
3. A Hearing was fixed to take place by CVP on 21 March 2022. The claimant appeared on his own behalf. The respondent did not appear and was not represented at the Hearing.
- 10 4. Brief findings in fact follow. The claimant gave evidence on his own account, and presented some documents to the Tribunal in support of his claim.
5. The claimant was employed by the respondent as Operations Director, commencing employment on 3 August 2020. He had responsibility for the completion of contracts and report, training of staff once employed and ensuring processes were structured.
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6. The respondent is a business providing business communications and utilities and merchant services to businesses.
7. Scott Feenie, the respondent's director, had contacted the claimant, having done business with him before, to invite him into employment with the respondent.
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8. He was advised that his salary would be £21,000 per annum (gross) from the start of employment, rising, when reviewed at the end of his probation period on 3 November 2020, to £25,000 per annum.
9. The claimant was provided with one payslip during his employment with the respondent, in May 2021. The payslip disclosed that the claimant was paid
25 £1,750 gross for the period 1 to 31 May 2021, with deductions of £254.01 made from that sum in respect of tax and national insurance payments. He was therefore paid £1,495.99 for that month.

10. That sum represents payment in relation to a gross salary of £21,000 per annum.
11. The claimant received no other payslips during his employment with the respondent.
- 5 12. At the end of June 2021, the respondent paid to the claimant the sum of £754.
13. The claimant was absent. He provided two fitness to work statements, one dated 22 June 2021 certifying his absence due to general debility until 6 July 2021, and the second dated 7 July 2021 certifying his absence until 13 July 2021, for the reason that he had suffered a stress reaction.
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14. On 14 July, following a period of certified sickness absence, the claimant attended work, to be met by Mr Feenie who advised him that he was “letting him go”. His employment therefore ended on that date. Mr Feenie said that he would pay the claimant in respect of notice and outstanding holiday pay.
- 15 15. On 1 August 2021, the respondent paid to the claimant the sum of £733. The claimant was unsure how this figure was calculated.
16. On 1 September 2021, the respondent paid to the claimant the sum of £733.87, again without a payslip, and therefore the claimant was unsure as to how this figure was calculation or what it represented.
- 20 17. Following termination of employment, the claimant therefore received from the respondent the total sum of £1,466.87.
18. The claimant’s annual leave year ran from April to March, and he was entitled to 28 days’ leave in that period. He did not take any annual leave during the leave year commencing 1 April 2021 until his employment ended on 13 August 2021 (a date arrived at by adding one month’s notice period to his employment as promised by Mr Feenie).
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Decision

19. The claimant seeks payment in respect of a number of heads of claim.

20. **Notice Pay** – The claimant says that he was promised a payment in respect of four weeks' notice, but that that was not paid to him. His pay should have been at the level of £25,000, he says, but it is clear that whether there was a commitment by the respondent to increase his pay in November 2020 to £25,000, he continued to be paid, and to accept, pay at the level of £21,000 per annum.

21. I have concluded that the claimant's rate of pay as at termination of his employment was £21,000 a year, as a matter of fact, and have calculated the notice payment on that basis. I deal with the issue of arrears of pay issue below.

22. As a result, he should have received notice pay of £1,495.99 on termination. Following termination, he received 2 payments from the respondent amounting to £1,466.87, which require to be taken into account in determining this case.

23. Accordingly, it is my finding that the respondent has made an unlawful deduction of **£29.12**, and must pay this to the claimant.

24. **Holiday Pay** – a pro rata calculation of the claimant's entitlement to holidays in the year April to August 2021 is $19/52 \times 28$, which amounts to 10.23 days.

25. Calculating the claimant's daily rate means taking his net monthly salary (£1,495.99) and multiplying it by 12 (£17,951.88), then dividing it by 52 (£345.23), and then dividing by 5, to reach a daily pay rate of £69.05.

26. $£69.05 \times 10.23$ brings out a figure of **£706.38**.

27. **Arrears of Pay** – I found the claimant to be an entirely believable witness. There are two aspects to this claim, as I understand it.

28. Firstly, the claimant is complaining that he was paid short for a period of 3 months at the end of his employment. I find it difficult to understand why the claimant was not paid in full in respect of each month of his employment.

29. As has been established, the claimant received £754 at the end of June; no pay in July, and then two payments in August and September. The two payments in August and September are, in my judgment, contributions to be taken into account in calculating his notice pay.

5 30. As a result, the claimant is due sums in respect of the balance of his June pay (the shortfall in which is unexplained) and the whole of his pay up to 13 July 2021 (given that thereafter his pay is dealt with under the heading of notice pay).

10 31. In my judgment, therefore, the claimant is entitled to receive £741.99 in relation to June, and 2 weeks' pay in respect of July, amounting to £690.46.

32. In this regard, then, the respondent must pay to the claimant the sum of **£1,432.45**.

15 33. Secondly, the claimant is complaining that he was entitled to be paid at the rate of £25,000 per annum until the termination of his employment, but was only paid at £21,000 per annum.

34. I accept the claimant's evidence on this point, which is not challenged by the respondent in this undefended claim.

20 35. As a result, the claimant is entitled to receive the difference between £25,000 and £21,000 in respect of the 8 months to the end of July, together with 13 days pay in relation to August 2021, at the termination of his employment.

25 36. I do not have net figures available to me in relation to this calculation, and accordingly, I make an award which is gross in terms, and in respect of which the claimant must account to Her Majesty's Revenue and Customs in order to ensure that the appropriate amount of tax is paid on this sum.

37. £25,000 divided by 12 brings out a monthly gross figure of £2,083.33. The claimant received £1,750 gross per month from the respondent. Accordingly, the monthly difference between the amount he was paid and

the amount he should have been paid based on the contractual pay rise agreed by Mr Feenie is £333.33; multiplied by 8, that comes to **£2,666.64**.

38. In addition, the claimant is due 2 weeks' pay for July, and the difference between what he should have been paid and what he was paid for that period must be calculated slightly differently. £25,000 divided by 52 brings out a weekly gross figure of £480.77; £21,000 divided by 52 amounts to £403.81. The weekly difference is £76.96, which, multiplied by 2, brings out a further figure of **£153.92**.

39. In respect of arrears of pay, therefore, the respondent must pay to the claimant the total sum of **£2,820.56**.

40. **Failure to provide payslips** – section 8 of the Employment Rights Act 1996 (ERA) provides that an employer must provide to an employee an itemised pay statement setting out the details of payments and deductions made. Section 11 of ERA provides that where the employer does not give such a statement to the employee, the employee may make a reference to an Employment Tribunal in order to obtain a declaration as to what should have been in the pay statement.

41. Under section 12 of ERA, the Tribunal is empowered to require the employer to make payment to the employee a sum not exceeding the aggregate of unnotified deductions made.

42. I am not satisfied that this is a case in which a further award should be made. The claimant did receive one payslip which made clear the sums paid and deductions made. Although there were months in which no payslip was provided, the claimant's pay was stable (or should have been), and I am of the view that the interests of justice are met in this case by awarding the claimant the sums above in respect of actual deductions made from his pay.

43. The claimant's claims therefore succeed to the extent set out above.

5 **Employment Judge: M Macleod**
 Date of Judgment: 13 April 2022
 Entered in register: 14 April 2022
 and copied to parties