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## EMPLOYMENT TRIBUNALS (SCOTLAND)

Case Nos: 4111395/2021, 4112313/2021

Public Final Hearing held in Dundee by Cloud Based Video Platform  
(CVP) on 22 March 2022

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Employment Judge Tinnion

Ms. Catriona Pattullo

Claimant  
Mr. Malloy (partner)

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A&R Robertson & Black

1<sup>st</sup> Respondent  
Mr. John Paterson Gray

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Mr. John Paterson Gray

2<sup>nd</sup> Respondent  
In person

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### RESERVED JUDGMENT

1. The Claimant's claims for a statutory redundancy payment and unpaid annual leave pay arrears against the 2<sup>nd</sup> Respondent are well-founded.
- 30 2. The 2<sup>nd</sup> Respondent shall pay the Claimant the following sums totalling £8,052.80:
  - a. statutory redundancy payment in sum of £6,545 (17.5 weeks x £374 gross/week);
  - b. holiday pay in sum of £1,507.80 (103.7 hours x £14.54 net/hour).
- 35 3. The 1<sup>st</sup> Respondent is a trading name of the 2<sup>nd</sup> Respondent's solicitors practice and lacks legal personality separate and distinct from the 2<sup>nd</sup> Respondent. For

that reason, the Claimant's claim against the 1<sup>st</sup> Respondent is not well founded and is dismissed.

## REASONS

### 5 Claims

1. By an ET1 presented on 16 September 2021 under Case No: 4111395/2021, Claimant Ms. Catriona Pattullo ("**Ms. Pattullo**") presented a claim against the Respondents for unpaid holiday pay "*for non-payment of holiday pay while I was on Adoption Leave during 2020-2021.*" By separate ET3s the Respondents denied the claim.  
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2. By an ET1 presented on 4 November 2021 under Case No: 4112313/2021, the Claimant presented a further complaint for a statutory redundancy payment. By separate ET3s, the Respondents also denied that claim.
3. By a Case Management Order dated 31 January 2022, EJ Whitcombe  
15 ordered the two claims to be heard together.

### Evidence

4. On 22 March 2022, the final hearing ("**Final Hearing**") of the two claims was held via video/CVP. The Claimant and witness Mrs. Avril Storey (the 1<sup>st</sup> Respondent's former Office Manager) gave evidence. The 2<sup>nd</sup> Respondent gave evidence on behalf of the Respondents.  
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5. The documentary evidence at the Final Hearing case consisted of a Claimant's production of 50 pages of documents (the individual pages were not paginated so this is an approximation). At the commencement of the Final Hearing the 2<sup>nd</sup> Respondent sought permission to rely on what he stated were approximately 30 pages of documents. The Tribunal denied that application because (i) he had not provided those documents to the Claimant at least 28 days before the Final Hearing, as required under EJ Whitcombe's other Case Management Order dated 31 January 2022 (ii) Mr. Gray accepted he had those documents in his possession by 20 March 2022 but waited 2 days  
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before making this application (iii) Mr. Gray provided no satisfactory explanation of why those documents had come into his possession so late in the day (iv) Mr. Gray had not provided copies of those documents to either the Tribunal or the Claimant even though he had 2 days to do so (v) Mr. Gray had failed to conduct basic due diligence to check the Claimant's production to see whether his documents were already included there or not.

Findings of fact

6. The Tribunal makes the following findings of fact, including those in its Discussion/Conclusions section, on the balance of probabilities.
7. 2<sup>nd</sup> Respondent Mr. John Paterson Gray is now a retired solicitor. Between at least 2006 and 31 March 2021, Mr. Gray had a solicitors practice which traded under the name 'A&R Robertson & Black' from premises situate at Whitehall Chambers, 7 Bank Street, Perth. By 2020, Mr. Mr. Gray was the sole solicitor in that practice. The 1<sup>st</sup> Respondent 'A&R Robertson & Black' is and was no more than the trading name for Mr. Gray's solicitors practice, and had no legal personality separate and distinct from him. In addition to that solicitors practice, the 2<sup>nd</sup> Respondent also operated an estate agents business.
8. In February 2006, the Claimant began working for A&R Robertson and Black as a qualified conveyancer. She is not a solicitor.
9. By 2020, the Claimant had a contractual right to 6 weeks paid annual leave a year plus bank holidays (this finding is based on Mrs. Storey's evidence). A copy of the Claimant employment contract, or a written statement of the terms and conditions of her employment, was not however put before the Tribunal.
10. In June 2020, the Claimant and her partner adopted a baby girl. Immediately prior to her adoption leave period she was on furlough following the onset of the Covid-19 pandemic.
11. The Claimant's period of adoption leave commenced on 17 June 2020 and on 19 June 2020 her adopted daughter was placed with her. Mrs. Storey

confirmed that the Claimant continued to accrue contractual holiday leave entitlement during her period of adoption leave.

12. The Claimant remained on adoption leave from then until 19 April 2021. The Claimant took no annual leave between 17 June 2020 and 19 April 2021 (a period of 43 weeks, 6 days).
13. Either on – or with effect from – 1 April 2021, the Law Society of Scotland removed Mr. Gray’s practicing certificate. Without it, Mr. Gray was no longer able to practice as a solicitor. At that point on, all legal work by those who had returned from furlough to work at A&R Robertson & Black ceased.
14. The Claimant (who was on adoption leave) was not informed of the closure of the 2<sup>nd</sup> Respondent’s legal practice until 19 April 2021. On 19 April, the 1<sup>st</sup> Respondent notified the Claimant of its closure by email as follows: *“I am sorry to report that Robertson & Black ceased to exist as of 1<sup>st</sup> April 2021.”*
15. Although that email did not state she was dismissed, the Claimant reasonably believed her employment had been terminated on that date because that was the date on which the email informed her that there was no job for her to come back to. The Tribunal finds that the Respondent’s 19 April 2021 email to the Claimant constituted a dismissal of the Claimant without notice. The 2<sup>nd</sup> Respondent did not dispute that the Claimant’s employment terminated on 19 April 2021.
16. The Tribunal makes a further finding that there was a genuine redundancy situation at the 1<sup>st</sup> Respondent from 1 April 2021 because from that date on the 1<sup>st</sup> Respondent no longer had any need for legal staff (the 2<sup>nd</sup> Respondent’s estate agency business was unaffected by the removal of the 2<sup>nd</sup> Respondent’s practice certificate, and continued to trade).
17. The Tribunal makes the further finding that the Claimant’s dismissal on 19 April 2021 was wholly attributable to the genuine redundancy situation which prevailed at the 1<sup>st</sup> Respondent since 1 April 2021.

18. By emails to the 1<sup>st</sup> Respondent on 20 April 2021 and 12 May 2021, the Claimant chased her unpaid holiday pay without success. Her 12 May 2021 email also requested a redundancy payment.
19. By an email to the 2<sup>nd</sup> Respondent on 24 May 2021, the Claimant stated:  
5        “*please accept this as formal notification that I am resigning from my position as a conveyancing paralegal with A&R Robertson & Black. My last day will be 1 June 2021.*” As noted above, the Tribunal has already found that the Claimant’s employment terminated by dismissal with effect from 19 April 2021. The Claimant sent this email because there was some ambiguity about  
10        whether she had remained in employment following certain emails sent to her.
20. Immediately prior to her period of adoption leave, the Claimant worked 22 hours per week at £17/hour (gross). Her gross salary was £1,620.67 per month and her take home pay was approximately £1,354.22 a month (so the Claimant received 83.5% of her gross pay after deductions). The Claimant  
15        was paid (after deductions) an average of £14.54 (net)/hour.

### Relevant law

#### *Redundancy*

21. A qualifying employee dismissed on grounds of redundancy has a statutory right to a redundancy payment calculated in accordance with s.162 of ERA  
20        1996. Section 163(1) of ERA 1996 provides that any question as to (a) the right of an employee to a redundancy payment, or (b) the amount of a redundancy payment, shall be referred to and determined by an employment tribunal. Section 163(2) of ERA 1996 provides that for the purpose of any such  
25        reference, an employee dismissed by his employer shall, unless the contrary is proved, be presumed to have been so dismissed by reason of redundancy.
22. Section 139(1) of ERA 1996 states (in relevant part) that for the purpose of that Act an employee who is dismissed shall be taken to be dismissed by reason of redundancy if the dismissal is wholly or mainly attributable to (a) the fact that his employer has ceased or intends to cease (i) to carry on the  
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(ii) to carry on that business in the place where the employee was so employed, or (b) the fact that the requirements of that business (i) for employees to carry out work of a particular kind, or (ii) for employees to carry out work of a particular kind in the place where the employee was employed  
5 by the employer, have ceased or diminished or are expected to cease or diminish.

Statutory Redundancy Payment - Discussion / Conclusions

23. Further to the Claimant's referral of the question to the Tribunal under s.163 of the Employment Rights Act 1996, the Tribunal concludes that the Claimant was  
10 entitled to a statutory redundancy payment in the sum of £6,545 which she has not been paid. The Tribunal reaches that conclusion on the following grounds:

24. First, the Claimant was dismissed on 19 April 2021 – see paras. 14-15 above. Her dismissal was wholly attributable to a genuine redundancy situation, namely,  
15 the Respondents' lack of any need to continue employing any employees providing legal services after 1 April 2021 following the Law Society's removal of the 2<sup>nd</sup> Respondent's practicing certificate – see paras. 13-17 above.

25. Second, the Claimant has exercised her statutory right under s.163 of the  
20 Employment Rights Act 1996 to have the question of her right to a statutory redundancy payment and the amount of that payment referred to an Employment Tribunal for determination. Having done so, under s.163(2) of the Employment Rights Act 1996 for the purpose of any such reference an employee who is dismissed by their employer shall, unless the contrary is proved, be presumed to  
25 have been so dismissed by reason of redundancy.

26. The 2<sup>nd</sup> Respondent has not proved the Claimant was not dismissed by reason of redundancy. Indeed, the 2<sup>nd</sup> Respondent made no attempt to suggest in either his questions to the Claimant, his oral evidence, or his closing submissions to  
30 the Tribunal, that the Claimant was not dismissed by reason of redundancy. The 2<sup>nd</sup> Respondent did not canvass any reason for the Claimant's dismissal other than her redundancy. It is clear and obvious in this case that the Claimant's employment was terminated because of a genuine redundancy situation.

27. Third, the Tribunal is satisfied the Claimant's claim for a statutory redundancy payment was presented in time. The Claimant had 6 months from 19 April 2021 (her effective date of termination) to present an ET1 seeking a redundancy payment, ie, until 19 October 2021. The Claimant contacted ACAS on 27 July 2021 (Day A). ACAS issued its certificate on 7 September 2021 (Day B). Under s.207B of the Employment Rights Act 1996, in working out when the time limit for presenting her claim for a redundancy payment expires, the period beginning with the day after Day A (28 July 2021) and ending with Day B (7 September 2021) is not to be counted. If the 41 day period beginning 28 July 2021 ending 7 September 2021 is not counted, the Claimant had an additional 41 days from 19 October 2021 – ie, until 29 November 2021 – to timely present her ET1. The Claimant presented her ET1 seeking a statutory redundancy payment on 4 November 2021, more than 3 weeks before the ET1 presentation deadline.

28. Fourth, the Claimant is entitled to a statutory redundancy payment in the sum of £6,545. The Claimant was 46 at the time of her dismissal on 19 April 2021. On 19 April 2021, the Claimant had been in the Respondents' continuous employment for 15 years. Her weekly gross pay was £374 (22 hours x £17/hour). The Claimant was entitled to 17.5 weeks gross pay.

Holiday Pay Claim - Discussion / Conclusions

29. First, the Tribunal is not satisfied that the Claimant has a meritorious claim for breach of contract against the 2<sup>nd</sup> Respondent in relation to unpaid holiday pay. The Tribunal accepts the Claimant had a contractual right to 6 weeks annual leave in addition to bank holidays. However, in order to found a breach of contract claim, the Tribunal must also be satisfied that there was a term in her employment contract giving her a contractual right, on termination of that contract, to be paid for any accrued untaken annual leave. The Tribunal is not satisfied the Claimant has established she had that right: (i) her employment contract/written statement of terms and conditions has not been provided to the Tribunal, so there is no documentary evidence before the Tribunal which shows she had that right (ii) neither the Claimant nor Mrs. Storey stated in their oral evidence that the Claimant had a contractual right to be paid for any accrued

untaken annual leave on termination of her employment contract (iii) it was not suggested to the Tribunal in closing submissions that there was an implied term in the Claimant's employment contract to that effect (iv) the Tribunal is not satisfied an implied term to that effect is necessary to give her employment contract business efficacy or to state the parties' common unstated intentions.

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30. Second, the Tribunal is satisfied the Claimant has a meritorious claim against the 2<sup>nd</sup> Respondent under reg 14(2) of the Working Time Regulations 1998 and s.13 of the Employment Rights Act 1996 to be paid for her annual leave entitlement which she accrued during her period of adoption leave (17 June 2020 – 19 April 2021). As a matter of law, the Claimant continued to accrue an entitlement to statutory annual leave during her adoption leave (the 2<sup>nd</sup> Respondent did not suggest otherwise). In the period 17 June 2020 – 19 April 2021, the Claimant accrued an entitlement to 103.7 hours paid annual leave (based on her working 22 hours per week prior to the start of that leave). The Claimant took no annual leave in the period 17 June 2020 – 19 April 2021. The value as of 19 April 2021 of the Claimant's accrued untaken annual leave entitlement was £1,507.80 (103.7 hours x £14.54/hour). The 2<sup>nd</sup> Respondent has not paid this sum (or any part thereof) to the Claimant.

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31. The Tribunal accepts the 2<sup>nd</sup> Respondent's evidence that the 1<sup>st</sup> Respondent's holiday period ran from 1 April to 31 March the following year. It is therefore correct that the Claimant's holiday pay claim covers annual leave entitlement accrued in two separate holiday years, one actual, one notional (1 April 2020 – 31 March 2021, 1 April 2021 – 31 May 22). In Smith v Pimlico Plumbers [2022] EWCA Civ 70, Lady Justice Simler stated: "*Although domestic legislation can provide for the loss of the right at the end of each leave year, to lose it, the worker must actually have had the opportunity to exercise the right conferred by the WTD. A worker can only lose the right to take leave at the end of the leave year (in a case where the right is disputed and the employer refuses to remunerate it) when the employer can meet the burden of showing it specifically and transparently gave the worker the opportunity to take paid annual leave, encouraged the worker to take paid annual leave and informed the worker that*



*the right would be lost at the end of the leave year. If the employer cannot meet that burden, the right does not lapse but carries over and accumulates until termination of the contract.”*

5 32. The Tribunal emailed a copy of the Smith v Pimlico Plumbers judgment to the parties at approximately 11.30am on 22 March 2022, and the 2<sup>nd</sup> Respondent had a physical copy of that judgment in his hand at the hearing. The 2<sup>nd</sup> Respondent did not put to the Claimant in cross-examination, or claim in his own oral evidence, or suggest to the Tribunal in closing submissions, that he gave the  
10 Claimant the opportunity to take annual leave during her period of adoption leave, or encouraged her to take paid annual leave during her period of adoption leave, or informed her that her right to annual leave which she was accruing during her period of adoption leave would be lost at the end of the 2020/2021 holiday year.

15 33. On that basis, the Tribunal finds that the Claimant’s right to annual leave which she accrued in the period 17 June 2021 – 31 March 2021 during the 2020/2021 holiday year did not lapse, carried over, and continued to accumulate until her employment contract terminated on 19 April 2021, at which point she was entitled  
20 to a payment in respect of her untaken leave accrued during the 2020/2021 holiday year as well as the leave she accrued in the period 1-19 April 2021 during the 2021/2022 holiday year.

25 34. The Tribunal is satisfied the Claimant’s holiday pay claimed was presented in time. The Claimant said – and the Tribunal accepts – she would have expected any outstanding monies owed to her to be paid at the end of April 2021 (ie, 30 April 2021) (the 2<sup>nd</sup> Respondent did not dispute this). It is therefore from that date that the ‘clock’ started running for limitation purposes. On 27 July 2021 – 2 days before the 29 July 2021 deadline for timely presenting a holiday pay claim  
30 – the Claimant contacted ACAS. At that point, the ‘clock’ stopped running. On 7 September 2021 ACAS issued its certificate. The Claimant had at least a month from 7 September 2021 to present a holiday pay claim, and in the event did so on a timely basis on 16 September 2021.

5 **Employment Judge: A Tinnion**  
**Date of Judgement: 23 March 2022**  
**Date Sent To Parties: 23 March 2022**