EMPLOYMENT TRIBUNALS

Claimant: Mr D Wilson

Respondent: Stephen Charles Landscapes Limited

Heard at: Croydon Employment Tribunal (by Cloud Video Platform)

On: 16 January 2023

Before: Employment Judge Nash

Representation
Claimant: In person
Respondent: Ms J Veimou, Employment Consultant

JUDGMENT

1. The respondent made an unlawful deduction of £2789.00 (gross of statutory deductions) from the claimant's wages contrary to section 13 Employment Rights Act 1996 by failing to pay his final salary and annual leave.

2. The respondent breached the claimant's contract of employment by failing to pay expenses lawfully and properly incurred in the sum of £349.76.

3. Accordingly, the respondent shall pay to the claimant the total sum of £3,138.76 under this judgment.

REASONS

1. Following ACAS Early Conciliation from 31 May to 12 July 2022, the claimant presented his claim to the Tribunal on 10 August 2022.

2. At this hearing the Tribunal heard from the claimant on his own behalf. The claimant was unable to have his witness, Mr Shane Maguire, join the Tribunal. He nevertheless relied on Mr Maguire's statement.

3. The respondent's only witness was Ms Michelle O'Callaghan, a Director.

4. The Tribunal had sight of an agreed bundle to 154 pages. The respondent, after most of the evidence had been heard, applied to put in fresh documents.

5. In determining the application, the Tribunal applied the overriding objective. This hearing had been listed in September 2022 when directions were made including to exchange documents. The Tribunal was satisfied that the parties had every chance to comply with this direction timeously. This hearing, which was originally listed for two hours, took considerably longer for the reasons set out below. The Tribunal considered that it was not proportionate to further extend the hearing in order for late disclosed documents to be sent and considered.

6. The listing proved short. There were communication difficulties from both parties which were happily resolved later in the morning. Further, it took a very long time for the parties and the Tribunal to identify and agree the issues. There was a notable lack of clarity from both sides as to what was their case. Although the Tribunal had sought to case manage this matter in advance, this had not been effective.

The Claims

7. The two claims before the Tribunal were:-

    a. unlawful deductions from wages under section 13 of the Employment Rights Act 1996 and
    b. breach of contract.

The Issues

8. It took considerable time to identify and agree the issues as follows.

Section 13 Employment Rights Act

9. It was agreed that the respondent had made a deduction of the claimant's final month's wages. This deduction was of his final week's salary (served whilst on notice) and accrued holiday pay.

10. The respondent contended that the deduction was authorised by a written contract of employment, which referred to a written policy on deductions. The claimant denied receiving either document. Accordingly, the Tribunal had to determine: -

    a. Was there a written provision of the claimant's contract authorising the deductions?
    b. Had the claimant previously signified his agreement or consent to the deductions in writing?
    c. If so, were the deductions made in line with the contract/ written agreement?

Breach of Contract

11. Were the expenses sought by the claimant lawfully and properly incurred in the carrying out of his duties?

12. The respondent also relied on a defense of equitable set-off. It contended that it overpaid the claimant.

The Facts

13. The respondent is a garden design, maintenance and landscaping company which provides services to the general public.

14. The claimant first worked for the respondent as a team leader in around January 2020 and left a short time later. In respect of this employment, he received an offer letter which was in the Employment Tribunal bundle.

15. The claimant started work for the respondent again as an operations manager from 3 May 2021. He resigned on 1 April 2022.

16. The respondent's case was essentially that it had sent the claimant an offer letter at page 65 on 17 May 2021 in respect of this second employment. The letter at page 65-8 set out terms and conditions.

17. The claimant's signature appeared at page 68 accepting the May 2021 offer. The respondent said that the claimant provided to them the signed May 2021 offer letter. Ms O'Callaghan, who was the respondent's only witness was not office manager at the time and could not give direct evidence on this point. She said that she could not see why someone would forge such a letter.

18. The claimant's case was that he had never received the May 2021 letter. He had first seen it a few days before the Tribunal hearing. He did not sign the document at page 68. He said that he had asked Ms Megan Randall-Charles, a director for a written contract on many occasions but, despite promises, never received one. He said that the respondent had extracted his signature from his January 2020 offer letter and added or "photoshopped" it onto the May 2021 letter.

19. The May 2021 letter was in a very different format to its January 2020 offer letter. Whilst the January 2020 offer letter was formatted as a conventional contract of employment, the May 2021 was in a narrative format.

20. The claimant passed his probation as shown by a signed probation form completed on 23 August 2021. The claimant said that he was not sure if he signed this. The tribunal accepted that the form was genuine as the parties agreed there had been a probation meeting and the form was consistent with what was agreed.

21. About one month before the employment terminated, the respondent held a meeting with all employees, including the claimant, where it introduced a new deductions from wages policy. This policy essentially clarified the respondent's right to recoup monies from an employee's wages when, because of poor performance, described as "messing up", the respondent was forced to spend money putting a job right. The relevant provisions were as follows: -

Failure (to inform their line manager of any concerns with any projects) with (sic) ensure that all employees, whether in a position as team leader or otherwise, will bear the cost for any project mess ups that are not rectified to the Directors and picked up through our quality checks…

Any person who is in charge of any team under this policy who is working on a project which becomes messed up and needs corrective work, while they are in charge of the team will responsible for that charge and must either pay that charge or have the charge taken out of their next pay. Where extra costs are obtained the employee will also be responsible for these…

There were exceptions if an employee informed the Directors within a day of any problems.

22. There was a list of those who had signed which was blank and so did not include the claimant's signature. He was present when the policy was announced, and he did not object because he supported the policy and thought it was a good idea.

23. Generally, the working relationship between the claimant and the respondent was not happy, and both made significant complaints about how the other behaved.

24. The claimant resigned and served his one week's notice by taking annual leave.

25. Further disputes then arose. There was some delay due to the respondent's financial problems in paying the claimant the monies owed. Then the respondent wrote to the claimant on 6 May 2022 to say that there had been problems with his work which it needed to clarify and quantify.

26. The claimant wrote back on 9 May asking for a copy of the contract to which the respondent referred. The respondent did not provide that contract but referred to the offer letter and probationary documents.

27. It was clear to the Tribunal that relations had completely broken down by this point with one of the directors, saying that she might scream at the claimant if they had a conversation.

28. Further discussions by email occurred culminated in a letter at page 116 dated 22 June 2022 from the managing director to the claimant. In effect, this letter set out the respondent's case as to why it was making deductions. There was a reference to damage to a van. In respect of traffic violations, it was said under the driving policy,

'you are responsible for any tickets and charges that you have not followed that policy on. We have so far received notice of £120 to you personally and £8623 for tickets when you have scheduled work and failed to notify us of ULEZ (the low emissions zone)'.

29. In respect of having to put poor work right, the respondent stated as follows:-

'it appears from recent jobs that you have intentionally dug ground preparations too deep, deeper than necessary against our usual process causing unnecessary waste costs and material costs not quoted for which the company has to bear, laid pathways in ways that the client ascetically hates the end look, purchased materials unnecessary for the jobs or not listed in job specification, left work uncompleted whilst informing us that the job was complete, not following the roles and responsibilities document as to the process of paying for things.'

The letter referred to losses as follows:-

client 1 - £1,623.66,
client 2 - £1,819.64,
client 3 - £503.86 and
client 4 - £323.12.

30. In effect the respondent said that it was not paying the claimant his final monthly salary as a result of this.

31. The respondent's evidence was that the claimant was solely in charge of running projects. There was a reference to a job in Boreham Wood, according to Ms O'Callaghan, when the claimant had told the respondent that the work was finished but it was not, so they had to go back and redo it. Ms O'Callaghan, said that she was not sure if the Tribunal had all the information on this. There was another reference to a client whose paving had been laid but had to be redone.

32. Most of the evidence before the Tribunal referred to a client named Ian. The respondent told the Tribunal that there were multiple problems with this job on which the claimant was the lead. The Tribunal saw a picture of a circular patio.

33. The claimant said that he had seen this customer since and there were no difficulties. He denied that there were any such difficulties and said that the respondent was simply seeking to avoid paying him what was owed.

34. The Tribunal found that the claimant was reluctant to admit that he was the lead on the project but after questioning, he admitted that he was responsible for ordering materials and seeing it through until the end. Accordingly, the standard and quality of work was his responsibility.

35. A further dispute arose between the parties post termination about expenses.

36. After very considerable discussion during the hearing, the parties agreed what expenses had and had not been paid. They finally agreed that they were in dispute over seven expenses as set out on page 154 of the bundle, which the respondent agreed that it had not paid.

37. The respondent's expenses system worked as follows as far as it is relevant to this case. The respondent operated trade accounts with a number of suppliers. However, if an employee wanted to buy material from a supplier with whom the respondent did not have an account, they used the PLEO card

system. This was a prepaid respondent payment card given out to a number of employees, including the claimant, to pay suppliers. It was uploaded with money or automatically topped up. It was agreed that this was a commonly used system in the sector.

38. The claimant's evidence was that the card was frequently not topped up and therefore he would go to a supplier to attempt to buy, for instance, a bag of sand for a job, but find that there was no money on the card. Ms O'Callaghan broadly agreed with this account although she said that the claimant could have checked the PLEO account in advance. However, both parties broadly agreed that once it was clear that there was insufficient money on the PLEO card, it could take between two hours and two days to get the money onto the card, during which it was not possible to use the card to pay suppliers.

39. Ms O'Callaghan referred to the system as a 'bit of a free for all' in that, essentially, whoever got money out of the PLEO account first would be able to buy the supplies they needed. The claimant said that once there was no money left on the PLEO card, he would use his own credit card and claim the money back, having received confirmation from one of the directors. Ms O'Callaghan told the Tribunal that she was not privy to the claimant's conversations with this director so could not know if any expenses were authorised or not. She said that she did not think that employees usually used their own money in this way. According to the statement of Mr Maguire, employees did use their own money in these circumstances and were later reimbursed.

40. According to the claimant, the monies were usually paid, not through the pay slips but by bank transfer. He relied on a number of till receipts relating to such expenses.

41. The respondent contended that it had overpaid the claimant overtime during his employment. Its explanation was that its Zero accounting package essentially got the claimant's hourly rate wrong and, therefore, overpaid his overtime.

42. However, it was very difficult for the Tribunal to ascertain the respondent's case on this issue. Its evidence was fundamentally confused. The respondent told the Tribunal that the claimant was supposed to work twelve Saturdays a year, but did not do so, and so the overtime rate was wrong. The tribunal understood that there was in effect a dispute between the parties about how many Saturdays the claimant worked. Whilst all parties' evidence was unclear, the Tribunal understood the claimant to be saying that he worked more Saturdays and the respondent claiming that he had worked less.

43. There was an account in her witness statement referring to a calculation about annual salary divided by hours, but Ms O'Callaghan could not explain this to the tribunal. She frankly told the Tribunal that she did not understand the overpayments, but had been told this by the accountants. She referred to this as a "grey area". There was reference to the claimant thinking that he had an hourly rate of £16.10 but, again, the parties were unsure.

The Law

44. The law is set out at section 13 of the Employment Rights Act in respect of unauthorised deductions from wages as follows:

> (1)An employer shall not make a deduction from wages of a worker employed by him unless—
>
> (a)the deduction is required or authorised to be made by virtue of a statutory provision or a relevant provision of the worker's contract, or
>
> (b)the worker has previously signified in writing his agreement or consent to the making of the deduction.
>
> (2)In this section "relevant provision", in relation to a worker's contract, means a provision of the contract comprised—
>
> (a)in one or more written terms of the contract of which the employer has given the worker a copy on an occasion prior to the employer making the deduction in question, or
>
> (b)in one or more terms of the contract (whether express or implied and, if express, whether oral or in writing) the existence and effect, or combined effect, of which in relation to the worker the employer has notified to the worker in writing on such an occasion.
>
> (3)Where the total amount of wages paid on any occasion by an employer to a worker employed by him is less than the total amount of the wages properly payable by him to the worker on that occasion (after deductions), the amount of the deficiency shall be treated for the purposes of this Part as a deduction made by the employer from the worker's wages on that occasion.
>
> (4)Subsection (3) does not apply in so far as the deficiency is attributable to an error of any description on the part of the employer affecting the computation by him of the gross amount of the wages properly payable by him to the worker on that occasion.
>
> (5)For the purposes of this section a relevant provision of a worker's contract having effect by virtue of a variation of the contract does not operate to authorise the making of a deduction on account of any conduct of the worker, or any other event occurring, before the variation took effect.
>
> (6)For the purposes of this section an agreement or consent signified by a worker does not operate to authorise the making of a deduction on account of any conduct of the worker, or any other event occurring, before the agreement or consent was signified…

45. The Tribunal has jurisdiction in respect of a breach of contract claim if the breach is outstanding on termination.

Submissions

46. The Tribunal had very brief oral submissions from both parties.

Applying the law to the facts.

Unauthorised deductions from wages

47. As Ms Veimou, for the respondent, agreed, the respondent's defense to this claim was not that the monies were not properly payable, but that it had made an authorised deduction. Essentially, the respondent sought to rely on section 13(1)(a) or (b).

48. The tribunal firstly considered if there was any provision of a written contract of employment which authorized the deduction under section 13(1)(a).

49. According to s13(2), a deduction can only be authorized under section 13(1)(a) if the relevant provision of the contract is in writing. For a deduction to be authorised, it must be contained: -

    (a) in one or more written terms of the contract of which the employer has given the worker a copy on an occasion prior to the employer making the deduction in question, or

    (b) in one or more terms of the contract (whether express or implied and, if express, whether oral or in writing) the existence and effect, or combined effect, of which in relation to the worker the employer has notified to the worker in writing on such an occasion.

50. The Tribunal firstly considered whether the claimant had a written contract, that is, had he received the offer letter or not. The Tribunal took the following into account in reaching its decision.

51. The claimant had given direct evidence on this point and Ms O'Callaghan had not. The Tribunal accepted the respondent's submission that there was no obvious motive for the employer to falsify this document. There was no evidence or explanation from the claimant's as to how his signature might have been forged on this document. The offer letter did not appear professionally drafted. It was in narrative form and was discursive. The respondent had, on a previous occasion, relatively recently, provided the claimant with a written offer letter. Finally, the employer had carried out a probationary meeting and kept a record. This was not an employer with no HR function at all.

52. Accordingly, on the balance of probabilities, the Tribunal found it more likely than not that the employer did give the claimant the offer letter. He received the offer letter and he worked to it during his employment.

53. The relevant provisions of the offer letter on which the respondent sought to rely as terms of the contract were found at pages 67 and 68 as follows: -

    'We are authorised to deduct any sums from your wages as per relevant company policies. Examples include training courses at the agreed rate, purchases via the tool club, where you are responsible for driving and have obtained a ticket for incorrect parking, illegal parking, not obtaining a ticket, speeding tickets, tickets for driving in a bus lane, etc…Where you have been in charge on site, the company deduction from wages policy states that we can make lawful deductions from wages for costs that arise to put that work right.'

54. The Tribunal accepted that that this formed part of the claimant's contract of employment. He received it, he did not object and he worked for the respondent after receiving it.

55. The Tribunal directed itself in line with the case of *Fairfield Ltd v Skinner 1992 ICR 836, EAT*. A Tribunal must ask itself: -

'were the deductions that had been made such as were authorised to be made by virtue of any relevant provision of the worker's contract. The Tribunal's jurisdiction does not stop short at merely determining whether the employer's professed reasons for making deductions fall within the law, rather section 13 of the act contemplates that where there is a dispute as to the justification of the deduction, the Tribunal must embark upon a resolution of that dispute'.

56. The Tribunal also reminded itself of the rule of law : whoever asserts must prove. Therefore, it was for the respondent to prove the factual justification for the deductions.

57. The Tribunal was satisfied that it was a clear and unambiguous term in the contract that the claimant was responsible for any traffic violations. However, the difficulty for the respondent was that there was very little evidence going to this, as Ms O'Callaghan frankly and honestly accepted. The respondent did not have the details of the alleged infringements. Ms O'Callaghan told the Tribunal that the respondent was unable to get any further information from the authorities. The tribunal also took into account that the figure referred to in the letter, over £8600, was a remarkably high sum.

58. Accordingly, a bare assertion from the respondent that the claimant was responsible for a remarkably expensive amount of traffic violations, without any further evidence, was not sufficient for the respondent to show a factual justification for the traffic violation deductions.

59. The Tribunal went on to consider the deductions for damage/poor work. The authorisation in the original contract referred to a deduction from wages policy in force at the time. There was no indication of such a policy and the respondent relied on the policy introduced later.

60. The tribunal therefore went on to consider if this later Deduction from Wage Policy was a relevant provision of the contract. (The Policy could not come within s13(1)(b) because the claimant had not signified his agreement in writing.)

61. The written contract, signed by the claimant, sought to incorporate "relevant company policies". In effect the respondent's case was that the Policy was such a relevant company policy and therefore incorporated into the contract.

62. In the view of the Tribunal, it was arguable that the Policy did form part of the contract. Although the claimant did not sign the Policy, he was provided with a copy in writing, and he did not object to it – because he supported the Policy. Therefore, the Policy would come within s13(1)(a).

63. In the event, the tribunal found that nothing turned on the question of whether the Policy formed part of the contract. The tribunal found that there was insufficient evidence to establish an authorized deduction, whether under the offer letter or the Policy for the following reasons.

64. The Tribunal looked to the respondent for evidence, firstly that the damage had occurred and secondly, what costs were incurred to put it right.

65. Whilst the claimant, in the view of the tribunal, was reluctant to admit his responsibility, the tribunal found that he did have ownership of certain jobs and was in effect in charge on the site.

66. The email from the managing director made references to a number of wrong-doings, such purchasing unnecessary materials. The was a separate list of sums against four clients. There was no linkage between the two. Ms O'Callaghan in her evidence tried to put a little more flesh on the bones. The claimant denied that he was responsible for any losses. There was insufficient evidence for the Tribunal to find that the damage had occurred and to work out what were the costs of rectifying any such damage. Therefore, the tribunal had no choice but to find that the employer had failed to discharge the burden upon it and accordingly, that there was no lawful deduction.

67. The Tribunal found that the respondent could not rely on equitable set-off in respect of any overpayment because, applying *Asif v Key People Ltd EAT 0264/07* and *Murray v Strathclyde Regional Council 1992 IRLR 396, EAT*, this is not available under section 13.

Breach of contract - expenses

68. The Tribunal was satisfied that there was an implied term in the employee's contact that, where expenses were properly and lawfully occurred in the carrying out of the claimant's duties, he would be reimbursed. The tribunal was satisfied that this was custom and practice in the sector. There was no real dispute as to this; the respondent concentrated its defence on the fact that the expenses were not properly incurred.

69. The PLEO system was only used where the respondent had no trade contract with a supplier. It was used, it appeared from the evidence before the Tribunal, for only relatively small sums. The witnesses agreed that the PLEO might have insufficient funds. Even if it was checked in advance, it could take up to two days to be rectified.

70. Accordingly, the Tribunal found that that employees did, as the claimant contended, pay money out of their own pockets to cover expenses in this situation. The tribunal found this likely when employees needed to get the job done and it was the only way that they could get the materials that they needed. The Tribunal noted that Mr Maguire had said that people paid out of their own pockets at times.

71. The tribunal considered if the claimant had received authorisation before incurring each expense. The claimant gave evidence that he had done so, whereas Ms O'Callaghan was unable to do so as she was not the person, who authorised the payments. The Tribunal found that on the balance of probabilities, it was more likely than not that he did get authorisation. The claimant had kept meticulous receipts which he was more likely to do if he was entitled to be repaid.

72. Accordingly, the Tribunal found that the respondent had breached the claimant's contract by failing to reimburse him for the material expenses.

73. It went on to consider the question of whether the respondent could equitably set off any overpayment of wages.

74. There was no dispute that any overpayment was essentially the fault of the respondent, and the claimant knew nothing about it at the time. The difficulty for the respondent was that there was insufficient evidence to show that there had been overpayments. The respondent's only witness was relying essentially on what she had been told by the accountant and both the respondent witnesses and the representative frankly admitted that they were unclear as to the respondent's case as to overtime.

75. Further, any such defence needs to be understandable and coherent. Both Ms O'Callaghan the respondent representative frankly and honestly admitted that they were far from exactly clear as to the respondent's case. Therefore, the tribunal found that the respondent had failed to prove that it had overpaid the claimant and there could be no equitable off-set.

Remedy

76. According to the pay slip dated 20 April 2022, the gross wage was £2789. Without prejudice to their positions on liability, the parties agreed that this was the correct sum for the s13 claim.

77. The parties also agreed that the correct sum for the breach of contract claim was as set out at page 154 being £349.76. No statutory deductions were applicable.

78. For clarity, the tribunal confirmed that there was no increase to the award under s38 Employment Act 2002 (applying s1 Employment Rights Act 1996) because the respondent provided a written contract of employment.

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Employment Judge Nash
Date: 31 January 2023

Sent to the parties on
Date: 2 February 2023