



EMPLOYMENT TRIBUNALS

SITTING AT: LONDON SOUTH

BEFORE: EMPLOYMENT JUDGE F SPENCER

BETWEEN: MR P ZEWI CLAIMANT

AND

MITCHELLS AND BUTLER PLC RESPONDENT

ON: 22nd February 2017

Appearances

For the Claimant: In person

For the Respondent: Mr Wade, Retail Business Manger

REASONS FOR THE TRIBUNAL'S JUDGMENT

These written reasons are given at the request of the Respondent following an oral Judgment with reasons given on 22nd February 2017.

The issue for the Tribunal

1. In this case the Claimant claims unpaid wages. It is not disputed that the Respondent withheld the Claimant's pay for a 4 week period (16th October to 12th November 2016) and withheld monies due in respect of holiday accrued but not taken on termination of employment.
2. It is the Respondent's case that the monies were lawfully withheld and authorised by the Claimant's contract. The issue is therefore whether the deduction had been authorised by the Claimant's contract.

Evidence

3. I had a bundle of documents of about 260 pages and heard evidence from the Claimant. For the Respondent I heard from Mr Wade, the Claimant's line manager and from Mr Apps, Operational Practices manager. (The Respondent had attended today with 5 witnesses and 2 additional witness

statements. Given the hearing had been listed for one hour this was optimistic. In the event however, given the narrowness of the issue it was not necessary to hear from all the witnesses.)

The Law

4. Section 13 of the Employment Rights Act 1996 provides that:

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 employee making that 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."

Relevant facts.

5. The Claimant was appointed as a new General Manager for the Respondent working at its Harvester West Green pub on 3rd July 2016. (He had experience in this field and had previously been turned down for the role as the Respondent felt that he was too experienced for a small site with low volume.) The Claimant was trained during the first 5 weeks of his employment. He spent 3 weeks at the Harvester George in Morden and was inducted into the Respondent's processes. He also spent a week at the Harvester Hawth Park and a week at head office. I accept that he was properly trained in the Respondent's policies and in their expectations of him in his role as General Manager.
6. Clause 16 of the Claimant's contract provides as follows:

"Deductions from Wages

On termination of employment for whatever reason, any losses sustained to the stock or monies of the Company, caused through the Manager's negligence, carelessness, recklessness, dishonesty or through breach of the Company's rules or procedures, will be made good by the Manager. By entering into this agreement, the employee authorises the Company to accomplish this by deductions from wages or any other method acceptable to the Company.

By entering into this agreement, the Manager is also authorising the Company during employment, to make deductions from his/her wages in the following circumstances:

- (a) Damage to Company property.
 - (b) To reimburse the Company for any costs associated with non-payment of private telephone bills.
 - (c) To reimburse the Company for any costs associated with non-payment of council tax.
 - (d) To make good any overpayment of remuneration or any other payments made by mistake or through any misrepresentation or otherwise.
7. Clause 15 of the Claimant's contract provided that the Claimant, as Manager, was responsible for the safekeeping and banking of cash in accordance with the instructions of the Company and that day-to-day responsibility for the prevention and detection of fraud lay with the Manager who was responsible for identifying and managing risks, maintaining effective controls to prevent and detect fraud, ensuring that the controls were complied with, and ensuring that all employees were aware of the Respondent's "Anti-Fraud Policy".
8. By Clause 2 of the Claimant's contract the Claimant was accountable for implementing the processes and disciplines outlined in the Respondent's policies and for ensuring staff were trained to comply with the standards. He was required to act as one of a number of key holders and to ensure the security of the premises.
9. At Harvester West Green cash was collected 3 times a week by G4S. Prior to collection the Claimant or another employee would prepare the "banking". This requires the cash receipts to be placed in a bag with the completed banking slip. There are 3 copies of the banking slip. The top white copy is placed into the bag with the cash and sealed ready for collection, the pink slip is retained in the weekly envelope together with the collection receipt and the yellow slip is left in the banking book. When G4S arrived they would collect the money and leave a receipt. Although it was usually the Manager that dealt with the G4S collection this was not necessary and if the Manager was on a break, or otherwise unavailable another individual with access to the safe could hand the money over to G4S.
10. On 17th September 2016 the Claimant made up the banking for collection. He completed the banking slip by entering the total and denominations of the cash, signed and dated it. He told the Tribunal that he left the cash receipts and the money for collection in the sealed bag in the safe ready for collection. The Claimant gave evidence that he was aware that there were 3 keys to the safe. He had a key as did 2 other employees, Joanna and Oran. He was not aware who had the 4th key.
11. On 26 September at 9 a.m. the Claimant resigned giving the required 4 weeks' notice. He said that he had been working an average working week

of 70 hours and could not continue. He said he was opting back into the 48 hour week with immediate effect and asked for new shift patterns to be sent. I accept Mr Wade's evidence that after his resignation, the Claimant became increasingly difficult to contact on the telephone and seemed uninterested in running the business during his notice period.

12. Later that day the Claimant received an email that the banking for the 17th September 2016 was outstanding. At that stage head office assumed that the banking had been collected. The Claimant was asked to send a picture of the G4S banking seal number and a picture of the slip and receipt. The Claimant did not do this and a chasing email was sent on 4th October. The Claimant responded that he had he thought that had been dealt with but he would dig it out and send the information asap. Nonetheless by 10th October the information had still not been sent, the Claimant suggesting to Mr Wade that he had trouble finding the banking book. On 11th October the Claimant responded saying he could not find the slip.
13. On 12th October the Respondent contacted G4S who stated that on 17th September G4S had been turned away from the site. G4S provided a copy of their internal records which stated that the service had not been completed as "customer not ready/refusal."(255) The same day the Respondent also contacted the pub directly. The Claimant was not on duty. However the Team Leader was able to provide copies of the banking book and the banking slip. No collection receipt was attached to the banking slip from which it appeared that it had not been collected by G4S. As the money was not at site or added to the banking for the subsequent collection it was then apparent that the money had gone missing.
14. The same day Mr Wade contacted payroll and instructed them to make a deduction from the Claimant's salary as his investigation indicated that the loss of cash was due to the Claimant's breach of policies and procedures and lack of investigation. He was also concerned that the Respondent's policy provides that money which is not collected during the day should be moved back to the anti-hold up safe. This had not been done. The Claimant appeared not even to have been aware that the money was missing.
15. Mr Wade emailed the Claimant on 13th October to say that he had asked payroll to withhold the whole of his salary from the pay due to be paid on 14th October. The Claimant was very upset, tried unsuccessfully a number of times to contact Mr Wade and then contacted the Employee Relations Manager. When Mr Wade did speak to the Claimant he was clearly upset and the following day he emailed Mr Wade to say that he felt victimised by the illegal withholding of his wages and that in the circumstances he would not work out the remainder of his notice and would leave immediately. He also submitted a grievance to the Employee Relations Manager in relation to the withholding of his wages saying he was not the only keyholder on site and no investigation or disciplinary had been completed. (There was a grievance hearing on 8th November but I am not concerned with that.)

16. When the Claimant left his employment he had taken 4 days paid holiday and had accrued an additional 3 days.

Submissions and Conclusions

17. The Claimant's case is straightforward. He says that the contract entitles the Respondent to deduct money from wages where any losses have been caused through his "negligence, carelessness, recklessness dishonesty or through breach of the Company's rules or procedures." He says that it was not his negligence that caused the money to go missing. He had placed the money in the safe ready for collection. It had gone missing, but at the time it went missing he had followed company procedures. He assumed G4S had collected the money and he did not accept that G4S had been sent away. When he had been told the cash had not arrived he had checked the CCTV on site and did not see them attending for collection. If they had attended the site they would have left a slip saying there had been zero collection and no such slip had been left.
18. The Respondent says, on the other hand, that the Claimant's sloppiness caused a significant delay in identifying that there had been a cash loss. The Claimant must have been aware that the banking had not been collected as this would have been shown as a prompt on the system. He should then have started an investigation into the missing money. He had delayed in sending a copy of the banking book when requested on the 26th September, 4th and 10th October and inferred that he was unable to find it - whereas his team leader had been able to find it immediately when asked. While others could have attended to G4S when they came to collect, the Claimant was the manager and, if he had not attended to G4S himself he should have made appropriate enquiries to find out if they had attended and the money had been safely collected. In any event enquiries with G4S indicated that they had been sent away on 17th September.
19. The Respondent relies on clause 16 of the Claimant's contract of employment (set out above) as providing contractual authorisation for the deduction which it has made.
20. In this case, while I accept that the Claimant was negligent after the loss had occurred in failing properly to investigate the matter, I do not accept that the Respondent was able to say, without further investigation, that the loss of the money was caused by the Claimant's negligence. There were other possibilities. Another employee might have taken it. No enquiries were made. Mr Wade's focus was on the Claimant's actions after he had been asked to provide a copy of the banking slip but it has not been suggested that the Claimant stole the money. (If that is what the Respondent thought - not suggested here—then this should have been put to him squarely so that he had a chance to defend his position.) The Respondent simply says that the money has not been traced and they do not know what happened to it and at that the Claimant, as the Manager, was responsible for it. This falls short of establishing that the Claimant caused the loss.

21. Moreover and additionally, clause 16 also provides that such deduction should also only be made “on termination of employment”. At the time that the deduction was made to the Claimant was still in employment. Deductions that can be made during employment are separately identified and do not include loss of stock or monies.
22. Terms allowing employers to deduct money from wages earned by their workers are subject to considerable degree of scrutiny because of the disparity in economic power between employer and employee and because it is the employer that has drafted and dictates the terms of the contract. In *Yorkshire Maintenance Company Limited – v – Farr EAT 0084/09* Pugsley HH J cautioned employers against acting as a judge and jury when requiring an employee to repay costs and expenses. The evidence available to Mr Wade did not establish, without more, that the loss of money was caused by the Claimant. The Claimant was not asked for his account before the money was deducted. In this case the relevant term did not allow a deduction in these circumstances.
23. I therefore award the Claimant the amount of the deduction being £2051.64 (his net wages for the 4 weeks from 16th October to 12th November 2016) and £289.40 in respect of 3 days holiday accrued but not taken.

Employment Judge Frances Spencer
20th April 2017