

3. The parties presented documents to the Tribunal upon which they relied during the Hearing. The claimant gave evidence on his own account. No evidence was given for the respondent
4. Based on the evidence led and the information presented the Tribunal found the following facts admitted or proved.

Findings in Fact

5. The respondent is a limited company. Ms Hunt is Managing Director. The respondent employed the claimant from 11 April 2016 as a Customer Service Adviser.

6. Following his appointment, the claimant was provided with a statement of terms of employment which he and Ms Hunt signed on 28 April 2016 (the Statement) (production 44).

7. Clause 6 of the Statement states (production 45):

"It is specifically agreed and understood that for the first three months of employment you are on a probationary status. At any time prior to the expiry of the said three months the Company may discharge you with or without notice to take effect immediately. Where necessary the Company reserves the right to extend your probationary period beyond the initial three-months period, particularly when excessive absence occurs.

Beyond the probationary period, where the Company terminates your employment a minimum of one month's notice will be given except in cases of gross misconduct. Should you wish to terminate your employment with the Company at any time you are required to give one month's notice in writing. Failure to provide adequate notice to the Company is considered a breach of contract and therefore any monies owing will be held by the Company or recompense sought through the appropriate channels based on the daily salary paid to you at the time multiplied by the number of days you have failed to work."

8. On 28 April 2016 the claimant was also provided with the Employee Handbook which includes the following (the Handbook) (production 43).

“Terms of Employment

Terms for termination of employment are as outlined in the Employee Contract of Employment. Employees should be aware of failure to give adequate notice to the Company of their termination will result in a breach of contract and as such the Company will withhold any monies owing to the employee or will seek legal redress of recovery of monies owing to the Company.”

9. Salary was paid into the claimant’s bank account each month. The claimant received salary on 28 April 2016 (production 33); on 27 May 2016 (production 31); and 28 June 2016 (Production 29). He took four days’ annual leave in June 2016 following the birth of his child.

10. On 1 July 2016, the claimant requested an advance of salary from the respondent. The respondent refused.

11. On 22 July 2016, the claimant did not appear for work.

12. The claimant was offered new employment on 25 July 2016. The claimant sent an email to the respondent on 26 July 2016 advising that he was resigning. The claimant telephoned the respondent that day and advised that he had new employment and was scheduled to start on 29 July 2016.

13. On 27 July 2016 Ms Hunt wrote to the claimant and included the following (production 18):

“As you are aware from your contract of employment and the accompanying Employee Handbook which forms part of your contract you are required to serve notice if you no longer wish to work for the company. In addition within the aforementioned contract it clearly states ‘failure to provide adequate notice to the Company is considered a breach of contract and therefore any monies owing will be held by the Company or recompense sought through

the appropriate legal channels, based on the daily salary rate paid to you at the time multiplied by the number of days you have failed to work'.

5 *On this contractual basis the Company will calculate the amount of compensation due to the Company once any outstanding holidays not taken and the existing monies held have been taken into account and will forward details to you by the end of the week. If there are monies owing to you a cheque will be posted or if monies are owed due to lack of notice an invoice will be sent by the end of this week along with the P45 as relevant."*

10 14. The claimant was scheduled to receive salary amounting to £771.81 along with the payment in lieu of holidays accrued but not taken at termination amounting to £229.64. The total amount was £1,001.45. The claimant did not receive payment.

15 15. As a result of not receiving his salary the claimant received bank charges totaling, £24.60 (production 37).

Submissions

16. For the claimant Mr McLaughlin argued that there was no legal justification for the respondent not to pay amounts due to the claimant on 28 July 2016.

20 17. While the respondent referred to a contractual right to make deductions that process had not been followed and it conflicts with the claimant's statutory rights.

18. The Tribunal was referred to Section 230 of the Employment Rights Act 1996 and reminded that parties were not entitled to exclude statutory rights.

25 19. There was no evidence that the respondent was entitled to make an unauthorised deduction. There was no evidence as to how this was calculated. There was no legal defence to the claim.

20. For the respondent Ms Hunt referred to the documentation which she said had been prepared professionally. She also said that the claimant was aware of the contractual provisions and the requirement to give appropriate

notice. The deduction would only be made if the employee did not follow in terms of the contract. It would be the same for the employer if appropriate notice was not given on termination. Employment law had to work both ways.

- 5 21. The amount which the respondent was entitled to withhold exceeded the amount which was due to the claimant. The respondent was entitled to withhold the daily rate of £59.52 for one month. While no invoice had been issued for the shortfall that was because of the ongoing proceedings. The respondent reserved the right to do so at a later stage.

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Relevant Law

22. Section 13(3) of the ERA provides that: 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 wages properly payable by him to the worker on that occasion (after deductions) the amount of 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.

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23. Section 13(1) of the ERA states that an employer must not make a deduction from a worker's wages unless a deduction is required or authorised to be made by virtue of a statutory provision or a relevant provision of the worker's contract (Section 13(1)(a)) or the worker has previously signified in writing his or her agreement to the deduction (Section 13(1)(b)).

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Discussion and Decision

24. In this case there was agreement that when the claimant's employment terminated there were wages due to him in respect of the work undertaken in July and for holidays that had accrued but had not been taken on termination. It was also accepted that this money was not paid to the claimant.

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25. The Tribunal was satisfied that the Statement and Handbook were issued to the claimant before the deduction and that he was aware of them.

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26. The Tribunal therefore focused on whether the respondent was authorised to make that deduction. The respondent relied upon the provisions in the Statement and Handbook. The Tribunal therefore considered the contractual terms to ascertain whether they authorised the deduction in question.
27. The claimant knew from the Statement that regardless of his length of service he required to give the respondent one-months notice in writing of termination. If he did not give “*adequate notice*” any monies owing would be “*held*” by the respondent based on the daily salary rate multiplied by the number of days that the claimant failed to work.
28. From the Handbook the claimant knew that failure to give “*adequate notice*” would result in a breach of contract and the respondent would “*withhold*” monies owing to the employee.
29. The Tribunal considered that to make a deduction under section 13(1) respondent had to have authority to make a “*deduction from wages*”. In the Tribunal’s view the Statement provided that the claimant would be liable to the respondent for “*compensation*” for the claimant’s failure to give notice. It fell short in saying that the respondent had a right to recover that money by deducting it from the claimant’s pay.
30. In reaching that conclusion the Tribunal noted that Ms Hunt said that the documents had been prepared professionally. There was ambiguity in that the Statement referred to the claimant requiring to give one month- notice of termination in writing. However, the Statement and Handbook referred to failure to give “*adequate*”, rather than “*contractual*” or “*one months*” notice, being a breach of contract. Further neither document specifically stated that the amount calculated by the respondent could be deducted from wages. It was not necessary to imply a right to do so for the contract to work. The contract worked if having ascertained in number of days what was “*adequate*” notice to compensate the respondent for the failure to give less than contractual notice multiplied by the daily rate the respondent sent an invoice and required payment.

31. The Tribunal was not satisfied that there was a contractual provision authorising the deduction in question.
32. The Tribunal considered that the complaint under section 23(1) of the ERA was well founded and ordered the respondent to pay the claim £1,001.45.
- 5 33. The Tribunal also ordered the respondent to pay £24.60 to compensate the claimant for the financial loss (bank charges) sustained by him because he did not receive his salary.

Employment Judge: Shona MacLean
Date of Judgment: 02 May 2017
10 Entered in the register: 03 May 2017
and copied to parties