Case No: 2601189/2017

EMPLOYMENT TRIBUNALS

Claimant:	Mr L Massam
Respondent:	AJP Building and Joinery Ltd
Heard at:	Lincoln
On:	Monday 19 March 2018, Monday 16 April 2018
Before:	Employment Judge Blackwell (Sitting Alone)

Representation

Claimant:	Mr Paul Massam (Claimant's father)
Respondent:	Miss Laura Halsall

RESERVED JUDGMENT

The Claimant's Claims

1. The Claimant's claim of a breach of contract in relation to an alleged agreement to meet the running costs of the Claimant's vehicle, fails and is dismissed.

2. The Claimant's claim of wrongful dismissal, also fails and is dismissed.

3. The claim of an unlawful deduction from wages in respect of training costs, succeeds and the Respondent is ordered to pay to the Claimant the sum of £295.

The Respondent's Contract Claims

1. The claim in respect of the non-return of tools and consumables still held by the Claimant is stayed for a period of 21 days, to enable the Claimant to return all items in his possession which are the property of the Respondents.

2. The Respondents claim, in respect of alleged failure to carry out work with due care and skill in the sum of £160, fails and is dismissed.

3. The claim, in respect of extra costs incurred by reason of the Claimant's failure to work during his contractual notice period, fails and is dismissed.

4. The claim, in respect of the sum of £180, being the cost of obtaining replacement CORGI paperwork, fails and is dismissed.

5. The claim in respect of the reimbursement of training fees in the sum of £508, fails and is dismissed.

RESERVED REASONS

1. Mr Paul Massam, the Claimant's father, represented the Claimant and called the Claimant to give evidence. Miss Halsall represented the Respondents and she called Ms S Venn, a director, to give evidence. There was an agreed bundle of documents, in reference these are to page numbers in that bundle. Because it was impossible to complete the hearing within the day allotted, written submissions were made on behalf of both parties, and both parties have commented upon their opponent's submissions. Mr Paul Massam sought to introduce new evidence as to the allegation that other employees had similar treatment from the Respondent in his submissions, but I have taken no account of that evidence because it was submitted too late.

Introduction

2. This has been a difficult claim to deal with, principally because of the attitude of the parties to each other. Neither party has assisted the Tribunal as they should have done and, in particular, the lack of relevant documentary evidence has hampered the Tribunal. In October 2017 I urged the parties to come to terms. This was always a case which should have been settled, but as with so many family disputes, reason and economic reality appear to have gone out of the window.

The Claimant's Claims

Vehicle Maintenance Agreement

3. The Claimant's claim is that shortly before he took up employment on 4th July 2016, he had a discussion with Peter Venn, a director of the Respondents', and Dean Massam, the Respondents' manager, in which it was agreed that the Respondents would pay 50% of all the running costs of the van which the Claimant would use both for his personal use and for carrying out his duties as a plumber for the Respondents. In evidence the Claimant described that agreement as "a blanket agreement". In other words - 'covering everything' including for example, running costs, tax, MOT, and insurance. He also alleged that other employees had the same arrangement but I heard no evidence from any employee.

4. The Respondents case was that there was no such agreement with Mr Venn and Mr Massam, but there was an agreement with Ms Venn, also a director of the Respondent, who was responsible for financial and administration matters. Her evidence, which was not always entirely consistent, was that there was an agreement to make a reasonable

contribution towards 'wear & tear' of the vehicle, but such did not extend to what one might term 'fixed costs' such as MOT, tax and insurance. It is common ground that the terms of the alleged agreement were never set down in writing. The relevant facts are as follows:

4.1. Mr Massam worked for the Respondents as a plumber from 4th July 2016 to 7th April 2017;

4.2. Up until some point between the end of February and March 2017, no approach had been made to the Respondents to bear a proportion of the cost of the insurance and road fund tax of Mr Massam's van;

4.3. Ms Venn had met 50% of the cost of three sets of repairs to the vehicle, all of which appear to satisfy the definition of wear & tear;

4.4. On 20th February 2017 the vehicle insurance covering Mr Massam's van required renewal. It is clear from page 139 that up to that point, the registered owner and main driver of the vehicle was the Claimant's father, Mr Paul Massam. It was a comprehensive insurance which covered Mr Massam senior and Mr Massam junior as a named driver. It however only covered "own goods" and was therefore ineffective to cover the use by Mr Massam junior whilst undertaking his duties as an employee of the Respondents. Thus, it appears that both Massam's were committing a criminal offence because the van was without the correct insurance;

4.5. I accept Ms Venn's evidence that it was not until she saw that document that she was aware that the van was not effectively insured. She required the van to be properly insured and accordingly the premium was increased to reflect business use from £804 to £1,580. It is common ground that on the 31st March 2017 the sum of £364 was paid into the Claimant's bank account as a contribution towards that extra cost;

4.6. Also on 31st March the Claimant alleges that he met Ms Venn and Mr Peter Venn to urge them to contribute, not only to the renewal of the insurance, but also the previous year's insurance. His evidence is that they were completely silent on the point. He states that he felt intimidated;

4.7. For the Respondent, Ms Venn says, that in fact what happened was that she suggested to the Claimant that he find out if there could be a reimbursement of the insurance costs, and if so in what sum, and then on the following Monday they would consider what was in effect the most economic choice eg: putting the van on the Respondents insurance, or in the alternative hiring a van for the Claimant's use;

4.8. I prefer Ms Venn's evidence on this point.

5. The evidence as to the alleged agreement is contradictory and confused. In my view it is highly unlikely that anyone on behalf of the Respondents would have agreed a "blanket" cover. The three invoices for repair appear to support Ms Venn's 'wear & tear' approach, and it is arguable that the contribution of £364 is also in line with Ms Venn's approach. However, it seems to me that the parties were never of the same mind in relation to the maintenance of the van. It was very much an 'ad hoc' approach, which

it seems to me was largely at the discretion of the Respondents. I give particular weight to the fact that, apart from the three invoices in respect of repairs, no demand for contribution had been made by the Claimant up to the point the insurance policy required renewal. I therefore conclude that the parties were never of the same mind, that the agreement is so uncertain as to be incapable of further enforcement. The Claimant's claim in this regard therefore fails.

Wrongful dismissal

6. It is common ground that the Claimant resigned by email on 3rd April. In that email he also stated that he understood he had to give a week's notice, but made reference to having picked up a strain in his back arising from the work that he did the week before.

7. As a matter of law, a party to a contract of employment may only terminate the contract without notice if the other party has committed a fundamental breach of contract – ie a repudiatory breach. Is the conduct of the guilty party sufficiently serious to repudiate the contract of employment? As Lord Denning said in the case of **Western Excavating v Sharpe [1978] ICR 221** "If the employer is guilty of conduct which is a significant breach going to the route of the contract of employment, or which shows that the employer no longer intends to be bound by one or more of the essential terms of the contract, then the employee is entitled to treat himself as discharged from any further performance. If he does so, then he terminates the contract by reason of the employers' conduct. He is constructively dismissed."

8. The resignation email above clearly describes the failure to meet the maintenance costs of the van as the reason for resignation, and therefore the repudiatory breach.

9. In evidence, Mr Massam also added health and safety concerns including the alleged injury to his back, but he accepted in cross examination that the reason he resigned was the failure by the Respondents' to meet the maintenance costs of the van.

10. As I have indicated above, this is not borne out by the facts. I accept Ms Venn's evidence that on 31st March options were discussed and the best option was to be decided upon on the following Monday.

11. Given also that Mr Massam was prepared to work his period of notice, I cannot see that there has been, on the facts, a repudiatory breech on the part of the Respondents. The claim for wrongful dismissal must therefore fail and since Mr Massam did not attend work during the period of his notice ie 3rd to 7th April, he is not entitled to pay other than statutory sick pay which I do not have jurisdiction to award given that the Respondent's dispute that Mr Massam was unfit to work during that week. The claim of wrongful dismissal therefore fails.

Unlawful deduction from wages in respect of training costs

12. It is common ground that the sums of £135 and £160 were deducted from Mr Massam's wages.

13. The relevant law is to be found in Section 13(1) of the Employment Rights Act 1996:

Right not to suffer unauthorised deductions.

(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.

14. Miss Halsall relies upon Sub-paragraph (a) of Sub-section 1 and, in particular, the contract of employment which we see at pages 24 to 33. Mr Massam accepts that he has had a copy of this document though he says that he did not receive it until October 2016. I accept that evidence.

15. Miss Halsall also relies on page 43 which purports to be an excerpt from the company's handbook, which paragraph 5 on that page deals with the repayment of training costs.

16. However, in order to be able to rely upon that provision, that provision needs to be incorporated into the contract of employment. There are a number of authorities on this question, and the first point to be considered seems to be whether the provision concerned is apt to be incorporated. I agree with Miss Halsall that this is such a provision which is frequently included within contracts of employment, but in my experience almost always in the actual contract itself rather than the handbook.

17. The second question is whether it was actually incorporated. There is no reference to the handbook in the contract of employment.

18. In the circumstances of this case there are only two methods by which incorporation could have occurred. The first is by signature. It is common ground that Mr Massam did not sign any contractual document. The second is by reasonable notice. Would the reasonable employee expect the handbook to contain contractual provisions. Ms Venn states that as a part of his induction Mr Massam was made aware of the handbook and was offered a copy. Mr Massam denies this. On this point I prefer Mr Massam's evidence.

19. This seems to me to fall short of the requirements of reasonable notice even if I accepted Ms Venn's evidence. The only document he did receive, namely the contract of employment, does not refer to the handbook at all, let alone the provisions about repayment of training fees. As to the handbook itself, I only have an excerpt, and I therefore do not know whether the handbook makes reference to the contract of employment, still less whether it designates particular provisions as being apt for incorporation into the contract of employment. Even taking Ms

Venn's evidence at its highest, this cannot constitute reasonable notice that the handbook is a part of the contract of employment.

20. In my view therefore, the Respondents have not proved that the repayment of training costs provision is incorporated into the contract of employment, and therefore it follows that a deduction from wages was unlawful pursuant to Section 13 above. The Respondent is therefore ordered to pay to the Claimant the sum of £295.

The Respondent's Contract Claims

Tools and Consumables

21. It is common ground that the Claimant is in possession of tools and consumables that belong to the Respondents and that he is required to return. The Respondents claim is put as follows: "The Respondent wishes for the safe return of the tools or, alternatively compensation for the costs incurred in purchasing the tools". The Respondent's claim the value of the tools and consumables retained by the Claimant is £1,546.84. The Claimant in his evidence did not accept that all of the tools and consumables listed in the Respondent's contract claim were ever in his possession or alternatively since had been used in the carrying out of his duties for the Respondent. He acknowledges that he has in his possession equipment to the value of £1,264.38. As to the remaining equipment, I prefer the evidence of the Claimant because he has been able to do a recent check.

22. I am therefore staying this part of the Respondent's contract claim to enable the equipment to be returned to the Respondents. The parties are required to cooperate so as to enable the return to take place. If the hearing has to resume on this point, and I sincerely trust that that will not be the case, then if the fault lies with the Claimant, then I shall enter judgment in the sum of £1,264.38. If on the other hand the fault lies with the Respondent, then the Respondents contract claim in that regard will be struck out.

Negligent Work

23. The claim is for £160, which arises according to the Respondent's claim from work carried out by the Claimant in breach of the implied term of carrying out his services with reasonable skill and care. The claim is based upon the document at page 116, which so far as I understand it, indicates a number of faults in an installation that the Claimant accepts he worked on but in conjunction with others. Only one of the faults is a plumbing fault. Ms Venn is not an expert in the field and could only rely upon the documentation and the cost of putting it right.

24. Mr Massam, who however is a qualified plumber, in evidence suggested that there were a number of alternative explanations including that the brickwork could have been made good after the installation of the flue. I also bear in mind that the manufacturer of the boiler signed off the flue at a time which considerably predated the document at page 116.

25. On the balance of probability, the Respondents have not proved that the Claimant failed to act in accordance with the implied term. That part of the claim is therefore dismissed.

Extra Costs incurred as a consequence of the Claimant failing to work his notice

26. The first issue here is - what is that notice period? The contract of employment is clear. At clause 4.2 on page 25 it requires that the employee to give one month's written notice. I am also satisfied that that provision is a part of the contract of employment and has been since October 2016.

27. However, the matter does not end there.

28. I have already referred to the resignation email of 3rd April at page 44 in which Mr Massam said as follows:

> "I understand that I have to work a week's notice but have picked up a strain in my back from my work last week and need to go to the doctors, I hope that some painkillers will solve the problem."

29. That email was at 08:08 on 3rd April, and Ms Venn replied to it at 15:43 on the same date, and in her opening paragraph she said as follows:

> "I am sorry to read that you wish to terminate your employment with us but accept your resignation as per your email below."

30. As a matter of law it seems to me that Ms Venn's communication is either accepting a variation to clause 4.2 of the contract of employment, or accepting that Mr Massam's one week's notice is a breach of that contract and therefore affirming that breach by responding as she did. In my view either interpretation has the consequence that the Respondents cannot hold Mr Massam to the contractual period of notice and have therefore accepted that the correct period of notice is one week.

31. It is common ground that Mr Massam did not work at all between the 3rd and 7th April. Mr Massam's evidence as to why he did not work was far from clear, and he did not produce a doctor's certificate, nor did he even visit his GP.

32. The Respondents rely on 4.4 of the contract of employment on page 26. They claim in pursuance of that clause that they have calculated the additional costs of employing a replacement, namely Lovedon Plumbing & Heating and these invoices are at pages 110, 111, 112 and 113, and add up to the sum of £1,560. Unfortunately for the Respondents there is no evidence as to when that work was carried out. Ms Venn's evidence was to the effect that some of it must have been carried out within the period of the 3rd to 7th April, but she had no evidence to support that contention. This seems unlikely given that it was not clear whether the Claimant would return to work after 3rd April.

33. Thus, the position is that the Respondents can only rely on clause 4.4 to the extent at one week, and are unable to prove that any of the additional

cost was incurred in that week. This part of the claim is therefore dismissed.

Call out sheets/CORGI

34. All the Respondents have is Ms Venn's evidence that a further £180 was expended in obtaining the necessary evidence to enable payments to be obtained from CORGI. There is no supporting invoice.

35. Again, on the balance of probabilities, the Respondents have not made out their case, and notwithstanding the Claimant's petty behaviour, this part of the claim is dismissed.

Training costs

36. For the same reasons advanced above in connection with the Claimant's claim for unlawful deduction from wages in respect of training fees, the Respondents' contract claim in respect of a further £508 must also fail.

37. This disposes of all of the issues brought before me, with the exception of the tools and consumables. I trust that, at long last, the parties will cooperate to deal with that issue, if not the hearing will have to resume and I have set out above the two likely outcomes'.

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Employment Judge Blackwell

Date: 23 April 2018

RESERVED JUDGMENT & REASONS SENT TO THE PARTIES ON

24 April 2018

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FOR EMPLOYMENT TRIBUNALS