

JJE



EMPLOYMENT TRIBUNALS

Claimant: Mr A El-Samman
Respondent: Stirling Tactical UK Limited
Heard at: East London Hearing Centre
On: 2 July 2018
Before: Employment Judge C Hyde, Sitting Alone

Representation
Claimant: In Person
Respondent: Did not attend and was not represented

JUDGMENT

The Judgment of the Tribunal is that:

1. The notice pay and holiday pay claims were not well founded and were dismissed.
2. It was declared that the Respondent was not entitled to deduct the sum of £65 in respect of a Penalty Charge Notice from the Claimant's wages. No order for reimbursement was made as no expenditure had been incurred by the Claimant and no actual deduction had been made.
3. It was further declared that the Respondent was not entitled to deduct the sum of £799 in respect of the cost of the Apple mobile phone from the Claimant's wages. No order for reimbursement was made as no actual deduction had been made in relation to this.
4. It was declared that the Respondent unlawfully deducted the sum of **£329.04** in respect of the Claimant's Vodafone mobile phone bills; and the Respondent was ordered to repay that sum to the Claimant forthwith.
5. It was declared that the Respondent unlawfully deducted the sum of **£2100** in respect of the Claimant's pay for March 2018; and the Respondent was ordered to repay that sum forthwith.

6. It was declared that the Respondent unlawfully deducted the sum of **£581.40** in respect of the Claimant's pay for the first week of April 2018; and the Respondent was ordered to repay that sum forthwith.

REASONS

1. Reasons are provided in writing as the Respondent did not attend.
2. Although the Respondent did not attend, the Tribunal explained to Mr El-Samman that when a decision is made in the absence of a party, that party can apply to have a review of the Judgment and if there is a good basis for the Tribunal to allow the case to be reconsidered, then that could be an outcome. There was no reason for the Tribunal not to proceed with the hearing on 2 July 2018.
3. He was employed as a Logistics Manager from 1 February 2017 to 5 April 2018.
4. The Tribunal went through each of the issues that the Claimant asked to be determined. Although the Respondent had provided to the Claimant on 5 May 2018 what purported to be a final pay slip dated 15 March 2018, to the Claimant, no money had been paid to him in relation to it. Thus, where the Respondent purported to make deductions on the pay slip, the Tribunal simply decided in principle whether such deductions could lawfully be made and that affected the assessment of how much was due to the Claimant in respect of the unpaid salary claims.
5. The first claim was for notice pay. He resigned from the Respondent's employment at the beginning of April and the last day he worked was 5 April. He claimed to be entitled to pay for 4 weeks as notice pay. He contended that his resignation should be treated as a dismissal because the Respondent was in fundamental breach of the contract, so he says that the circumstances were such that he was entitled to resign, because of the Respondent's failures to pay him on time.
6. The Claimant agreed, and provided evidence in support, that he was paid late in respect of October 2017, by about two weeks. I saw one payslip and a print out from his bank statement which confirmed this. He also relied on the failure to pay him for March 2018 by the time he submitted his letter of resignation on 8 April 2018.
7. In determining whether the Respondent's actions or omissions constituted a fundamental breach of the contract, I had regard to the relevant circumstances. The contract of employment specified that the payment of salary for each month was to be on the last working day of the month, which is why the payment in respect of October 2017 was described as a delay of a couple of weeks. The emails which Mr El-Samman put before me, did not contain any correspondence complaining about the lateness of these payments until the letter of resignation from Mr El-Samman on 8 April 2018. He said that when he asked the Respondent why he was paid late in October 2017, he was in effect told that it was a cashflow issue. The Tribunal emphasised that the late payment of salaries was not in any way condoned or excused. The duty to pay was a very important part of the employment contract, but I did not consider that these two failures constituted a fundamental breach of the employment contract by the Respondent, evincing an intention not to be bound by the terms of the contract any longer.

8. I also took into account that the Easter public holidays occurred at the end of March and the beginning of April 2018, which might have contributed to the delay.

9. If there was no fundamental breach by the Respondent, the Claimant was not dismissed when he resigned on 8 April 2018, and was therefore not entitled to four weeks' notice pay.

10. The next issue was whether there was any money outstanding in relation to holiday pay. The contract provides that the holiday year is the calendar year. The Claimant calculated that he had accrued 5.5 days' holiday in the last holiday year, which I agreed with, having done the calculations.

11. He also relied on Mr Ghazi having approved the carryover of some 7.5 days annual leave from the previous year. There was no contemporaneous written documentation confirming this. Nor was I shown any document which indicated that the Claimant had subsequently discussed this with Mr Ghazzi. I had regard to the contract which provided that holiday entitlement must be taken in the current leave year otherwise it is effectively lost, unless there is agreement by the employer to the leave being carried over to the next leave year.

12. I was not satisfied on the balance of probabilities that such an agreement had existed. In those circumstances I found that the Claimant took 5 days annual leave around the time when he moved house and therefore, he had effectively used up the annual leave to which he was entitled to up to that point.

13. His understanding of the Respondent's payslip and the adjustments which were made, was that initially the Respondent had deducted pay for 9 days absence, but had then re-calculated the figure on the basis that he gave the Claimant credit for the 5 days holiday and therefore the deduction was in respect of 4 days. If that was right, then it did not appear to me that there was any further sum due to the Claimant in respect of holiday pay on the termination of his employment, and the claim for outstanding holiday pay was not well-founded and was dismissed.

14. The next issue was the PCN notice/parking ticket. A charge of £65 was incurred on 29 March 2018, when the Claimant was engaged on his duties for the employer. I accepted the Claimant's evidence that on a previous occasion when he had incurred a Penalty Charge in the course of his work, the employer had paid that fine. The Claimant had not paid the fine. The final pay slip purported to make a deduction of £65.00 from the Claimant's final salary. I was satisfied that the Respondent was not lawfully entitled to make such a deduction.

15. The next unlawful deduction complaint was in relation to the Claimant's Vodaphone mobile phone bills of £329.04. The Claimant was given an Apple mobile phone for his business use. He said that he was encouraged by the employer to take out the contract in his own name at a cost of £799 approximately and he then paid for the calls. There is nothing in the contract about the mobile phone and nothing written elsewhere, but the Claimant produced a business card which had been issued to him by his employer in which he was described as International Sales Manager and which gave number for the mobile phone which is in issue, as his work mobile phone number. Further, the Respondent had previously reimbursed the Claimant for the cost of the phone.

16. On the balance of probabilities, I was satisfied on the evidence, that Vodaphone bills were incurred because of the Claimant's work-related calls, and that the implied agreement was that the employer would be responsible for that expenditure. The Respondent had failed to do so, and had purported to deduct that sum from the Claimant's final pay.

17. The failure to reimburse the Claimant for this expenditure was unlawful and I ordered the Respondent to repay the sum of **£329.04** to the Claimant forthwith.

18. The Respondent had purported to make a deduction from the Claimant's final pay on the basis that the Claimant had failed to return the mobile phone. There was no documentary evidence confirming the Respondent's entitlement to make such a deduction in those circumstances. In the letter of resignation, the Claimant indicated that he would be returning the company vehicle, which he did. Possibly as a result, the Respondent made no actual or purported deductions in relation to the vehicle.

19. Mr El-Samman indicated that he fully intended to return the phone and he had brought it to the Tribunal in the expectation that the Respondent would be there and could retake possession of it. He offered to leave it with the Tribunal for the Respondent to retrieve later. The Tribunal cannot accept property and hold it on behalf of one party for another. In the absence of the Respondent, and in all the circumstances, I accepted the Claimant's undertaking to return that mobile phone to the Respondent forthwith by a method such as registered post or some other method by which delivery can be independently verified. He undertook to send a copy of that paperwork to the Tribunal as soon as possible. On the basis that such evidence arrived with the Tribunal before the Judgment was sent to the parties, I could see no injustice to the Respondent in declaring that a deduction in respect of the cost of the phone would be unlawful. As no actual deduction had been made, there was no need for an order requiring the Respondent to reimburse this sum to the Claimant.

20. The Claimant had not been paid his March 2018 salary and that comes to **£2100.00**. In addition, the Respondent had not paid the Claimant for his April 2018 employment which is for 5 days, which comes to **£581.40**. The Respondent had unlawfully deducted those sums from the Claimant's wages and was ordered to repay them to the Claimant forthwith.

Employment Judge C Hyde

23 July 2018