EMPLOYMENT TRIBUNALS

Claimant: N Norman

Respondent: Pebbles of Salcombe Ltd

Heard at: **Exeter** **On:** **03 August 2018**

Before: **Employment Judge Housego**

Representation
Claimant: In person
Respondent: J Bax, of Counsel

RESERVED JUDGMENT

The claim for unlawful deductions from wages is dismissed.

REASONS

1. The claimant was employed by the respondent from 18 September 2017. On 24 January 2018 she resigned, giving one month's notice. Her last day was 23 February 2018. From her last pay £1,548.62 was deducted, leaving a final amount paid to her of £148.90. The reason given was that this was in connection with her company car, acquired on lease, and in respect of which she had signed a document relating to such a deduction. She claims this was a deduction contrary to S13 of the Employment Rights Act 1996, and contrary to the National Minimum Wage (NMW) Regulations 2015. The respondent denies this.

2. On 01 August 2017 the claimant accepted the offer of employment of the respondent, to start on 18 September 2017. The company provided some documentation to the claimant. Amongst it was the company car scheme. Point 7 stated:

   "If you leave the company's employment for any reason, the company reserves the right to deduct up to 25% of the monthly lease charge for the remaining period of the lease agreement, from your final wage payment."

3. By email of 17 August 2017 the claimant raised some questions of Mr Spencer (MD of the respondent). Mr Spencer replied on 18 August 2017 by interpolating text into the questions. The relevant ones were:

Question: *"Regarding the company car scheme… I will have use of a company vehicle for the duration of my employment with Pebbles?"* Answer *"Yes.… You are expected to have the use of a company vehicle for the duration of your employment with the company."*

Question: *"Within the company car scheme, no 7 states that the company will deduct up to 25% of the monthly lease charge for the remaining period of the lease agreement from my final salary stop please would you confirm that this provision comes into effect only once any employment probationary period is over and if the amount of the proposed deductions exceeds the final salary owed, that there is no debt incurred to myself."* Answer *"Yes"*.

4. On 21 August 2017 the claimant wrote to Mr Spencer. She wrote:

   "… please find enclosed duly signed the contract, the amendment and the signed acknowledgement of the company car scheme together with acceptance of terms relating to it."

5. The contract of employment contained at clause 6.4:

   "We reserve the right in our absolute discretion to deduct from your pay (e.g. salary, commission, bonus) any money which you may owe to us including, without limitation, any overpayments or loans made to you or losses suffered by us as a result of your negligence or breach of contract. You agree to this."

   The claimant signed this contract (on 21 August 2017).

6. The respondent organised a new Volkswagen Polo hatchback for the claimant, ordered on 15 November 2017. The order for the car was signed by Mr Spencer on 20 November 2017. Its cost was £16,035. The car was taken on a contract hire basis, and that agreement was signed by Mr Spencer on 01 December 2017. It was a 36 month/30,000 mile hire contract with an initial payment of £546.57 (three monthly payments) and then £182.19 commencing in month 2 and then monthly for 35 months, with VAT in addition. The car was to be returned at the end of the 36 month period, with no additional charge provided the mileage was not exceeded.

7. On 29 January 2018 the claimant resigned. She had changed her mind about wanting to work with the respondent. The letter acknowledging her resignation sets out that she would be missed. There was no reason other than a change of mind by the claimant for her resignation. It was agreed that her last day of work would be Friday, 23 February 2018. On 22 January 2018 the company's accountant worked out a calculation of her final salary due. The claimant says that she received it much later: no point turns on the date it was sent to her. The relevant part is the deduction for the car, of £1548.62. No issue is taken as to the arithmetic. The figure of 25% was used. That was what the documentation said was the maximum and the respondent saw no reason not to use it. The document had originally been drafted and supplied to the respondent authorising a 50% deduction, but the respondent had thought this too much and substituted 25%.

8. When the claimant left the employment of the respondent the car was retained by the respondent and used as a pool car. They had no one to use it in place of the claimant.

9. There was a minimum 12 month period of hire, after which the car could be returned on payment of half the outstanding amount of rental due for the whole loan period. Accordingly to return the car after a few months would have been very much more expensive than £1,548.62. The respondent will decide what to do with the car once the first year has gone by. If it then surrenders the car it will have to pay 12 months payments, or £2186.28, being half the remaining payments under the agreement.

10. The claimant added a claim that this also breached the National Minimum Wage (NMW) Regulations, and the respondent accepted that this should be argued as a further reason why the deduction was not lawful.

11. S13 of the Employment Rights Act states:

> ***"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.*
>
> *(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.

(7)This section does not affect any other statutory provision by virtue of which a sum payable to a worker by his employer but not constituting "wages" within the meaning of this Part is not to be subject to a deduction at the instance of the employer."

12. The claimant's contract contained a provision authorising deductions, and she signed it. It does not include anything relating to the car policy. The claimant sent the contract and the car policy back to Mr Spencer and wrote, specifically, that she agreed to their terms. Accordingly 13(1)(a) and (b) are both met, provided the money was properly due.

13. The money can only be properly deducted if it is properly due – money cannot be deducted even if the employee has signed to approve a deduction unless the employer is entitled to the money deducted.

14. The claimant asserts that there was no contractual right to deduct money, as the company car policy is not in the contract of employment, but in the separate car policy. An offer of employment was made and the company car was offered as part of that offer. The claimant accepted the offer of employment with a company car. There is offer and acceptance, and consideration. There is no requirement that the contractual right has to be set out in the written contract of employment. Clause 6.4 authorising deductions specifically covers things not within the contract of employment, such as loans. There was no contractual right to have a loan from the employer, but if one was made (and so was money due to the employer) it could be deducted on the ending of the employment. So with the car.

15. Accordingly I decide that there is a contractual right to recovery of the money, provided it is not a penalty.

16. The claimant asserts that it is a penalty, and that the figure is uncertain as it can be anything from nothing to 25%. The claimant relies on Cleeve Link Ltd v Bryla [2013] UKEAT 0440_12_0810. This sets out (paragraph 20) that the deduction must be a lawful deduction, and that if it is a penalty clause it is not a lawful deduction. It is said to be a penalty both for the reasons above and because the respondent has the use of the car for the remainder of the term of the hire. That paragraph of *Cleeve* also made clear that this Tribunal has jurisdiction to determine that question.

17. Paragraph 23 of that case stated:

"The issue as to whether a particular clause in a contract is unenforceable as a penalty or valid as a genuine pre-estimate of damage is one of construction of the provision with the objective of discerning whether,

when the contract was entered into, the predominant purpose of the provision was to deter breach or compensate for it."

18. The date to consider is the date the contract was entered into. I note also that there would be no liability at all if the claimant had been asked to leave at the end of her probationary period. The maximum deduction was the amount owed to the claimant in pay: she was not liable at all for anything greater.

19. I do not construe this a penalty to deter breach of contract. In fact there was no breach of contract, as the claimant was entitled to give notice to end her contract of employment. While there may be no loss to the respondent if another person replaced the claimant on a like for like basis and took over the car, at the time the contract was entered into that could not possibly be known, and it was not what happened. To factor in a 25% deduction is a realistic assessment of loss. It is not a deterrent. It was a substantial commitment that the respondent was entering into, and the claimant knew that she was to have a new car specifically ordered for her. This is entirely reasonable (as is stated in paragraph 26 of *Cleeve* to be the test). At paragraph 27 is cited another case where Arden LJ's decision is approved:

"… A pre-estimate of damages does not have to be right in order to be reasonable. there must be a substantial discrepancy between the level of damages stipulated in the contract and the level of damages which is likely to be suffered before it can be said that the agreed pre-estimate is unreasonable."

I consider this clause, and this deduction, meet that test.

20. I note also a further quote in that paragraph that Courts are predisposed to uphold contractual terms which fix the level of damages. At paragraph 29 of Cleeve is a further quote, from another case

"… If the court cannot say with some confidence the clause is indeed intended as a deterrent, it appears to be forced back upon finding it to be a genuine pre-estimate of loss.… The expression merely underlines the requirement that the clause should be compensatory rather than deterrent…"

I cannot say with any confidence that this was intended as a deterrent.

21. At clause 33 of *Cleeve* the correct test as to penalty or pre-estimate was set out:

"…if the claimant had resigned the day after her training completed, then the figures would represent the loss to the respondent…"

22. In this case, the claimant resigned soon after getting the car, and the respondent was committed to paying a further sum approaching £7000 in respect of the car, from which it could escape early, but only on payment of a substantial penalty exceeding the deduction suffered by the claimant. There was no certainty that the respondent would have a use for the car, and indeed it did not have such a use. The claimant was protected by two

factors; the maximum deduction was 25% of the outstanding higher cost, and in no case could the deduction exceed money owed to her. (Nor was she liable if asked to leave at the end of her probationary period.) Any shortfall would not be a debt owed by her to the respondent by reason of the contract. This is not penal, but is some reflection of the loss likely to be suffered by the respondent on the claimant leaving so soon after the car hire was taken out. If anything it is an underestimate of loss. It is not penal, it is contractual and so the respondent was entitled to make the deduction.

23. The claimant also relies on the NMW regulations, asserting that the deduction reduced her pay below NMW levels and was not an authorised deduction. She relied on the the National Minimum Wage Regulations 2015 and the respondent relied on Commissioners for Revenue and Customs v Lorne Stewart plc [2015] IRLR 187.

24. Regulation 12:

> ***"Deductions or payments for the employer's own use and benefit***
>
> ***12.****(1) Deductions made by the employer in the pay reference period, or payments due from the worker to the employer in the pay reference period, for the employer's own use and benefit are treated as reductions except as specified in paragraph (2) and regulation 14 (deductions or payments as respects living accommodation).*
>
> *(2) The following deductions and payments are not treated as reductions—*
>
> *(a)deductions, or payments, in respect of the worker's conduct, or any other event, where the worker (whether together with another worker or not) is contractually liable;*
>
> *(b)deductions, or payments, on account of an advance under an agreement for a loan or an advance of wages;*
>
> *(c)deductions, or payments, as respects an accidental overpayment of wages made by the employer to the worker;*
>
> *(d)deductions, or payments, as respects the purchase by the worker of shares, other securities or share options, or of a share in a partnership;*
>
> *(e)payments as respects the purchase by the worker of goods or services from the employer, unless the purchase is made in order to comply with a requirement imposed by the employer in connection with the worker's employment."*

25. The relevant parts of *Lorne Stewart* are at paragraphs 3 and 4, and 12. Paragraphs 3 and 4 set out that the individual in that case had signed a form not dissimilar to that signed by the claimant in this case, save that it included an obligation to pay an extra amount that could have been deducted if the claimant had been due more pay. The Commissioner claimed that the deduction reduced the worker's level of pay below that permitted by the NMW. Paragraph 12 of the decision opined that the word *"conduct"* in

12(2)(a) implied misconduct, but that *"any other event"* did not. A resignation would be within that term. That is the case here. It is arguable that for the claimant to accept a company car and then to resign within a few weeks for no reason other than a change of mind (as was the case here) falls within *"conduct"* but I do not have to decide the point as the circumstances are within the alternative.

26. The claimant also relied on Regulation 13:

> ***"Deductions or payments as respects a worker's expenditure***
>
> ***13.*** *The following deductions and payments are to be treated as reductions if the deduction or payment is paid by or due from the worker in the pay reference period—*
>
> *(a)deductions made by the employer, or payments paid by or due from the worker to the employer, as respects the worker's expenditure in connection with the employment;*
>
> *(b)payments to any person (other than the employer) on account of the worker's expenditure in connection with the employment unless the expenditure is met, or intended to be met, by a payment paid to the worker by the employer."*

27. The regulations do not permit deductions to reduce pay below NMW level unless they come within one of the exceptions. This falls within 12(2)(a). The money was contractually due, and arose through *"any other event";* that is resignation. Accordingly the deduction did not breach the NMW Regulations.

28. The deduction in *Lorne Stewart* was not in breach of the regulations. The claimant asserts that there is a difference, as the benefit of training leaves with the employee, but the car remained with the respondent. The claimant was not required to have a company car. She was using her own car until the car in question arrived. The offer of the car made the job more attractive to her, but she did not have to have one. It was not a car as is used by some estate agents as a mobile advertisement that (I presume) the employee is required to use. It was voluntary on the part of the claimant, and when she opted for it there was a contractual framework in relation to it.

29. Nor is Regulation 13 of assistance to the claimant. The payments to the hire company were not worker's expenditure, either directly or to any other person.

30. I have not accepted the point made by the claimant that there was no loss as the benefit of the car was retained and was equal to the cost of retaining it. It could not have been a penalty if someone else had been allocated the car in place of the claimant because the assessment is to be made at the date the contract is entered into, and 25% allows for the possibility that there might be another user.

31. The maximum of 25% implies a discretion to be exercised at the point of deduction: and had the respondent slotted another employee into the use of the car to make a deduction would be arbitrary or capricious, but I have

accepted the evidence of the respondent that they had no use for the car when she left, and it became a pool car.

32. When a year has passed and the penalty for surrendering it is less the respondent will have to choose whether to give it back or to get rid of another vehicle instead, whichever is less costly to them. There is a real loss to the respondent here, and there is a sum to be deducted in accordance with NMW regulations (as set out above).

33. The claimant also asserts that it cannot be right that there would be no deduction if the claimant had been required to leave at the end of her probationary period, but there is if she resigned the day after. If she were required to leave that might well be within *Lorne Stewart's* provision that redundancy or being required to go to occupational health were reasons that did not fall within *"any other event"* in Regulation 12 (although if it was poor performance arguably not). It is logical (and fair) that there is a deduction if the worker chooses to leave but not if she is required to do so.

34. Finally I deal with the remaing submissions put forward on behalf of the claimant. First it is asserted that the car policy document signed states that "I have read and understand the details in this document" but not that *"I agree"* or *"I consent".* There is nothing in this point as the email from the claimant expressly agreed and consented.

35. Secondly that there was no contractual right to the car, as the respondent said only that it *"was expected"* that she would have the car for the entire employment, not that she had the right to have the car, so that without a contractual right there could be no contractual obligation. This is to miss the point: while the employee had the company car it was on the terms agreed. If she had the car removed, or the employer agreed to take it back, there could be no question of a deduction in respect of it upon a subsequent resignation.

36. Thirdly if the claimant had realised that there would be a deduction of this order she would not have worked her notice period, effectively for nothing. That does not deal with the point that the claimant was contractually obliged to work a month's notice (that a slightly shorter period was agreed is not to the point).

37. Lastly I do not consider the other point made on behalf of the claimant sound: there was not a fixed amount as it was *"up to"* 25%, and so no amount was set to be deducted. There was a discretion, and the employer could not exercise it arbitrarily or capriciously. The respondent did not do so in these circumstances. This was a cap, to the claimant's benefit. The loss to the respondent greatly exceeded the amount deducted from the claimant.

Employment Judge Housego

Date 10 September 2018