EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: S4104542/2017

Held in Glasgow on 24 and 28 November 2017

Employment Judge: F Jane Garvie

Mr James MacMillan	**Claimant** **Represented by:-** **Ms M Dalziel – Solicitor**
Jordan Electrics Limited	**Respondent** **Represented by:-** **Mr Keys – Solicitor**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The Judgment of the Tribunal is that:-

(1) the claimant suffered unlawful deductions from wages;

(2) the respondent is ordered to pay to the claimant the sum of £1,300 which is the gross amount due to the claimant and it is accepted that he is therefore liable to account directly to HMRC for any tax and national insurance contributions that are payable in relation to this sum of £1,300 and

(3) the parties agreed there was an entitlement to holiday pay which was outstanding and due to the claimant and has to be paid to the claimant by the respondent within seven days of the Final Hearing commencing on 24 November 2017 and since the Tribunal understands that this has now been

paid to the claimant no award is made in respect of outstanding holiday pay entitlement on termination of the claimant's employment.

REASONS

Background

1. In his claim presented on 8 September 2017 the claimant alleges that the respondent unlawfully deducted the sum of £1,694 from his wages, contrary to Section 13 of the Employment Rights Act 1996, (referred to as the 1996 Act).

2. The respondent lodged a response in which they admit the said sum was deducted from the claimant's wages but maintain that they were entitled to do so in terms of the claimant's Statement of Employment Terms and Condition, (referred to as the SETC) and with reference to an Employee Handbook, (referred to as the EH) on the basis that they allege the EH formed part of the claimant's contract of employment. They made reference to a provision for deduction from wages in the EH as follows:-

> "**Deductions from Wages**
>
> As a condition of your employment, the Company has a right to make deductions from your wages to recover;
>
> 1. Overpayment of holiday pay entitlement taken
> 2. Cash or stock shortages through your dishonesty
> 3. Cost of repairs or loss as a result of your blatant negligence."

The Final Hearing

3. The parties were informed that a Final Hearing would take place on 24 November 2017 by Notices dated 12 September 2017. Originally, it was listed for three hours. This was extended on the instructions of Judge Robert Gall to one day. It became apparent on 24 November 2017 that it would not be possible to complete the evidence and the submissions and accordingly the case was continued to 28 November 2017.

4. The claimant gave evidence on his own behalf. Evidence was given on behalf of the respondent by Mr Stephen Jordan who is a Director of the respondent company. Evidence was also given on behalf of the respondent by Mr Greig Dyet who is a Contracts Manager with the respondent.

5. Both parties lodged productions.

Findings of Fact

6. The Tribunal found the following essential facts to have been established or agreed.

7. The claimant commenced employment with the respondent on 14 June 2010. On Friday,16 June 2017 he tendered his resignation with notice. Mr Jordan advised the claimant that he did not require him to work his notice which was agreed to be one week and instead he would be paid pay in lieu of notice.

8. On Thursday, 15 June 2017 the claimant was aware that there was 79 electrical certificates sitting on the respondent's electronic server waiting to be checked, and then issued by a Qualified Supervisor, (referred to as a QS). The claimant is such a QS and he handled most of the signing off of electrical certificates although his colleague, Mr Greg Dyet is also a QS. The National Inspection Council for Electrical Installation Contracting, (NICEIC) is the relevant governing body.

9. In the past, Mr Stephen Jordan had done such work as a QS but this was when the respondent still operated partly with a paper system rather than the electronic system. Mr Jordan stopped doing this when the electronic system came into effect and so he was no longer involved in such work from January 2017 onwards.

10. The claimant was very clear that when he checked the electronic system on Thursday, 15 June 2017 there were 79 certificates waiting to be actioned. He took a screenshot on 14 June 2017, (C46) which shows there were 79 certificates. According to the claimant's screenshot this shows a grey bar at the foot of the screen which meant, so far as he was concerned, that that was the end of the list of certificates awaiting completion.

11. On Thursday, 15 June 2017 Mr Dyet e-mailed the claimant, (C47) confirming details of a meeting they had on that date. In his e-mail he indicated that he wanted the claimant to continue to sign off certificates as the QS while he would work out what should happen with another employee taking over the signing off of certificates going forward. Mr Dyet had agreed that he would take over the QS duties from Monday, 19 June and so the claimant was to continue to certify the certificates on the server until 18 June 2017. While he did not expect the claimant to be able to complete all of those by 18 June he expected them to be done by 30 June. In addition, it was agreed that the claimant would also be dealing with the diary for employees for the week commencing Monday, 19 June. This was a change as the claimant had indicated that he no longer wanted to carry out the work as the QS but preferred instead to revert to being an electrical tester. So far as the claimant was concerned, the fact there were 79 certificates outstanding was not unusual as there would always be a number of certificates waiting in line to be checked.

12. The respondent acts for a variety of customers. Some are domestic customers. Others are large scale house builders. They also work for various local authorities and housing associations such as Falkirk Council, Clydesdale Housing Association and Maryhill Housing Association.

13. Mr Dyet became a QS in April 2016 but he was mainly involved in other work and so, from the date when he became qualified, most of the certificates were still being completed or "mastered" by the claimant.

14. The claimant understood that his final salary together with outstanding holiday pay would be paid on 23 June 2017. In terms of the letter sent to the claimant on 16 June 2017, (C54) he was advised that he would be paid his wages which were paid weekly in arrears and which to 16 June 2017 amounted to £700. In agreeing with the respondent that he would no longer act as the QS the claimant had accepted that his pay would decrease from £700 per week to £600 per week. The letter of 16 June confirmed that the payment for pay in lieu would be at the lower rate, namely £600 and accordingly the total wages due to the claimant would be £1,300 plus any holiday pay due to him.

15. The claimant understood that he was entitled to £985.39 by way of accrued but untaken holiday pay giving a total payment due from the respondent to him of £2,285.39.

16. The claimant was not paid on 23 June 2017 as he had expected. Instead, he was paid the sum of £591.39 on 12 August 2017. Accordingly, £1,694 was deducted from the claimant's wages. The respondent's position was that they had made these deductions as they allege that the claimant's "blatant negligence" in not having signed off all the outstanding electrical certificates prior to termination of his employment entitled them to do so.

17. Section 13 of the 1996 Act specifies that an employer is not authorised to deduct any sums from an employee's wages unless:-

- the deduction is required or authorised to be made by virtue of a statutory provision or a relevant provision of a worker's contract or

- the worker has previously signified in writing his agreement for the sums to be deducted.

18. The claimant disputed that the respondent was entitled to deduct the amount of £1,694.

19. The STEC which the claimant signed on 9 June 2011 has a clause set out as Number 22 although there are, in fact, two separate clauses both numbered 22, (both on page C26). The first clause 22 which is at the top of that page reads as follows:-

> "22. As a condition of your employment, the Company has a right to make deductions from your wages to recover overpayment of any holiday pay entitlement taken."

20. The claimant's position was that, in terms of that SETC, the respondent was not entitled to deduct the sums as it had done. The claimant's further position was that there was no other specification in the SETC apart from the reference to the holiday pay entitlement overpayment which meant that the respondent could not deduct the wages as they had done.

21. The claimant was aware that the respondent maintains that they have an EH which is said to have contractual effect. The claimant denied ever having seen a copy of the EH. Mr Dyet, in contrast, did receive a copy of the EH when he joined the respondent in 2001. Mr Jordan also said that employees would always have an induction course at which they would be given an STEC and also a copy of the EH which is a short booklet running to a number of pages.

22. The respondent had updated the SETC while the claimant was employed by them. They did not retain the original SETC which the claimant had signed. The only SETC signed by the claimant was that set out at pages C25 and 26 which was signed by the claimant on 9 June and by Mr Brian Jordan who is the Managing Director of the respondent on 31 May 2011. That document bears a reference at the foot of page C26 to "Issue May 2011".

23. The respondent's EH has a clause entitled," Deductions from Wages", (page C29) which reads as follows:-

"**Deductions from Wages**

As a condition of your employment, the Company has a right to make deductions from your wages to recover;

1. Overpayment of holiday entitlement taken

2. Cash or stock shortages through your dishonesty

3. Cost of repairs or loss as a result of your blatant negligence."

24. Much of this case centres on whether or not the claimant had received the said EH. As indicated, both Mr Jordan and Mr Dyet maintained that this EH was given to all employees, including the claimant. On the balance of probabilities, the Tribunal concluded that it was more likely that the claimant had indeed received a copy or at least had sight of one rather than that he had never seen such an EH. His signature on the SETC is below where he is stated to have accepted receipt of both the SETC and the EH, (page C24).

25. There was a great deal of evidence given as to how the electrical certificates are completed. It is essential to note that this case is not concerned with how these certificates were completed nor was there any suggestion either by the respondent or the claimant that, at any time, these certificates had been incorrectly completed.

26. In completing the certificates, the QS has to check the information set out in each certificate by the electrical tester. The tester is a qualified electrician whose role is to check the electrical works carried out by another qualified electrician at the customer's site. A copy of a document was provided, (C48/53) which is dated 3 June 2017 and was signed by Mr Dyet, (page 48).

27. This document then sets out a Schedule of Items that had been inspected, on that occasion, by Mr Dyet. Once completed it is then placed on the respondent's electronic server. It is the QS supervisor who checks and confirms it has been properly completed. In terms of the NICEIC

requirements, 10% of all certificates issued have to be checked in the sense that the QS then has to carry out a physical check at the premises in question. The certificates can either be for new build properties or, alternatively, where re-wiring and other electrical works are carried out for local authorities, then the certificates will be in relation to such properties.

28. In checking each certificate, the QS is looking to see that all the correct boxes are ticked or where applicable the initials, "N/A" appear and that this is marked up. If there any doubts as to what is set out in the certificate then this has to be checked with the original tester to clarify why a box has or has not been ticked. On occasions, the QS will have to check drawings to ensure that what has been installed, particularly in new build houses, complies with what has been specified.

29. The claimant frequently worked in the evenings at home completing this certificate checking which he could do using a laptop as he had access to the respondent's server in which the certificates are held. The claimant estimated that, in the last few weeks of his employment, he had been working continuously over a period of 25 or 26 days. The respondent disputed this but only by one day. It was therefore not in dispute that the claimant had been working long days as well as working in the evenings carrying out this certificate checking which is known as "mastering" certificates.

30. There was no explanation before the Tribunal as to why it appears that there were 279 certificates unmastered certificates as at 16 or 19 June 2017.

31. As indicated above, the claimant was aware that there were 79 outstanding on Thursday, 16 June and he did not appear to dispute that the figure of 140 test sheets provided in the letter of 16 June 2017 might be accurate. It may be that these additional 60 certificates had come online late at the end of that week but the Tribunal's understanding was that, in general, all certificates should be completed on a weekly basis and that by a Friday none should be waiting on the system.

32. There was also no explanation why there now appeared to be 279 certificates according to Mr Dyet whose explanation was that this was the number he found outstanding in the week commencing 25 June 2017.

33. During that week and the following week, Mr Dyet spent a considerable amount of time working on the outstanding certificates. He was provided with some assistance by a colleague, Mr Mark Cox who works as a Contracts Manager mainly on local authority work undertaken by the respondent. Mr Dyet provided copies of timesheets for the week commencing 25 June, (R4) and the week ending 2 July 2017, (R5). There was also a timesheet for Mr Cox although this is undated (R6).

34. In terms of the time spent by Mr Dyet he appeared to have worked in the week 25 June 2017 on these certificates on the Monday through Friday and then on Saturday as well as on three evenings at home. He is paid a gross weekly pay of £770 and he claimed £154 for the work done in the evenings. For the following week ending 2 July 2017 he worked on these certificates on the Tuesday, Wednesday, Friday and Saturday. Once again, the figure shown is £770 for the weekdays and a further sum of £154 appears against various nights during the week when he was also working on the certificates as he was then going on holiday.

35. Mr Cox's timesheet showed that he assisted on these certificates with Mr Dyet on the Wednesday, Thursday and Friday. His time is charged at £154 for Wednesday, Thursday and Friday. His timesheet also records price work for other pieces of work that he did for the respondent on the Monday, Tuesday and Wednesday at various sites. Employees such as Mr Cox are paid a price per piece of work carried out. His daily rate is the same, £154 as that paid to both the claimant and Mr Dyet.

36. The respondent produced a document called a Non Conformance Report from Falkirk Council which is dated 19 June 2017, (page R3). Under the section, "Details of Non- Conformance" it reads as follows:-

> "See attached sheet for works issued to Jordan Electrical

> Non Completion of works as required by quick quote number JAN 270782.
>
> None of any completed works have had any certification handed in.
>
> EICRS should have been delivered by 21st April as per attached email but they have still not been sent.
>
> Leaving property in an unsafe condition (127 – 137 David's Loan rear light)
>
> Lack of communication and updates of work carried out."

37. The e-mail referred to was not attached as part of the respondent's productions. What was attached were two pages listing various properties which presumably are owned by the local authority. For the majority of these the sheets refer to, "Work Finished No EICR/Installations Certs." Against a few properties, the words "No Work Done" appear.

38. There was no explanation before the Tribunal as to when Falkirk Council had first contacted the respondent although it would appear that this must have been before 19 June nor why there did not appear to have been any investigation as to the reason for the Non Completion of these certificates.

39. It is also important to note that none of this information was before the claimant since he had ceased employment with the respondent on Friday, 16 June having agreed, after tendering his resignation, that he would accept pay in lieu notice. There was no attempt made by the respondent to contact the claimant and indicate that, instead of paying him his pay in lieu of notice, he was required to work so as to complete or master as many of the outstanding certificates as could during his notice period.

40. Mr Dyet estimated that it took approximately 11 working days to complete the certification work on the outstanding certificates.

41. Mr Jordan had dictated a letter to the claimant dated 16 June 2017 which reads as follows:-

> "Further to your e-mail dated 16/06/17, we accept your resignation from today's date.
>
> We have offered you a week's wage in leiu (*sic*) of your notice but as you are aware you have over 140 test sheets on the server to be signed off which should have been mastered. We shall allocate a manager to complete these certificates and any cost associated with this process will be deducted from your final wage.
>
> To confirm, we calculate that this week's wage at £700.00 and 1 week at £600.00 is £1,300.00 plus any holiday pay due.
>
> Should you require any further information regarding the above please do not hesitate to contact the writer."

42. It was signed on Mr Jordan's behalf as he had gone on holiday on 19 June.

43. As indicated, Mr Dyet carried out the work involved in signing off or mastering the various certificates and this was done during weeks ending 25 June and 2 July 2017. The input that he had from Mr Cox was by way of assistance but since Mr Cox is not a QS he was not signing off certificates but was giving answers to questions raised by Mr Dyet as he was going through the various certificates. It would appear that many of these may have been in relation to the local authority work although there was no further information to assist the Tribunal on this point.

44. The claimant believed he could have completed the outstanding 79 certificates within a period approximately 4 hours. He seemed to think it would take approximately 5 minutes per certificate. Mr Jordan disputed this as did Mr Dyet. They each thought it would take a minimum of 10 to 15 and possibly 25 minutes, depending on the complexity and whether there were queries raised prior to the certificates being issued.

45. Again, it is important for the avoidance of doubt, to make it clear that there is no suggestion whatsoever before this Tribunal that the claimant negligently or indeed incorrectly completed any of electrical certificates. It was never suggested that this was the case. Nor was it suggested that the respondent at any time provided certificates that had been improperly completed for any of their clients.

46. It is also important to emphasise that it was never suggested that there was a breach of contract claim brought by the claimant against the respondent and there was no counter claim submitted on their behalf. Given there was no breach of contract claim any employment contract counter claim would have been rejected had it been received.

47. The issue for consideration by the Tribunal is set out under the Deliberation and Determination section. There is also in relation to Observation on the Witnesses, (see below). The representatives each provided oral submissions and these are set out below.

48. On 24 November 2017 it was agreed by the respondents that the claimant was entitled to his holiday pay amounting to £394. It was confirmed on 28 November 2017 that arrangements were being put in place for this payment to be made and Ms Dalziel undertook to e-mail the Tribunal to confirm by no later than 1 December 2017 that this payment had been paid to the claimant by way of a payment in his favour being sent to Ms Dalziel either directly by the respondent or through Mr Keys.

Claimant's Submission

49. Under Section 13 of the Employment Rights Act 1996, (the 1996 Act) the claimant's position is as set out in the claim, (the ET1) that the respondent unlawfully deducted payments due to him from his wages. The sum sought was £1,694 which has now been agreed to be the sum of £1,300 as it has been accepted by the respondent that the claimant is due a payment of £394 in relation to holiday pay. As indicated above, it was agreed that this would be paid direct to the claimant by the respondent.

50. There was no dispute between the parties that £1,300 has been deducted from the claimant's wages. The only issue in dispute is that the respondent maintains that it is entitled to deduct the wages while the claimant says they are not.

51. The evidence before the Tribunal confirmed that the respondent did not have authority to deduct £1,300 and the Tribunal was invited to make a finding to that effect.

52. Ms Dalziel's principal submission was that the respondent did not have the claimant's authority to deduct from his wages. In terms of Section 13 an employer is not authorised to deduct anything unless (a) there is some overpayment which is not the position here or (b) the contract of employment allows the deductions to be made or, alternatively, (c) there is otherwise a separate agreement signifying agreement in writing to the deduction.

53. Ms Dalziel was conscious that the respondent maintains they have a contractual entitlement to deduct but Ms Dalziel says they do not have for the following reason.

54. The Tribunal had seen the SETC dated 2011. In that there is a clause marked as number 22 (there are two clauses 22) but this is the clause at the top of that page which reads as follows:-

> "22. As a condition of your employment, the Company has a right to make deductions from your wages to recover overpayment of any holiday pay entitlement taken."

That is only in relation to holiday pay entitlement.

55. It is in the EH, (page 29) that there is a clause entitled, "Deductions from Wages". This reads as follows:-

> "As a condition of your employment, the Company has a right to make deductions from your wages to recover;

1. Overpayment of holiday pay entitlement taken.
2. Cash or stock shortages through your dishonesty.
3. Cost of repairs or loss as a result of your blatant negligence."

56. So, in relation to the SETC there is no entitlement for the respondent to deduct as they have done from wages.

57. Ms Dalziel's position is that the respondent is not entitled to utilise the EH as it purports to have done as it is only the SETC that the claimant accepts he agreed to. The claimant's position was that the EH was never provided at any time to him and because that is so, it is not possible for the claimant to have given consent to its terms.

58. The respondent's evidence is that they handed the EH to the claimant when he signed the SETC. The claimant says that is not the case. He never saw the EH. He received the SETC and he signed for that but he did not receive a copy of the EH. Ms Dalziel invited the Tribunal to accept the position as set out by the claimant.

59. The claimant was fully reliable as a witness and that is his case that the EH is not dated and there is no evidence as to when it was given to the claimant. There are differences between what is set out in the terms in the EH and the SETC.

60. Notably, there is no reference to deductions from wages in the SETC. The EH tends to support absolutely the respondent's entitlement to deduct where there is "blatant negligence or loss from blatant negligence". That, however, in Ms Dalziel's submission is not something that occurred here.

61. Her position is that the EH was not in place when the claimant signed the SETC and therefore there is no evidence for the Tribunal reasonably to conclude that it was in place and given to the claimant and so it did not have contractual effect.

62. Therefore, Ms Dalziel says the respondent cannot have agreed to a contractual entitlement to the respondent for this deduction of wages which is what they did. If the Tribunal is with Ms Dalziel, then she is "home and dry" as there was no authorisation entitling the deduction of wages.

63. In the alternative, she had two *esto* positions to set out.

64. The first is that, even if the respondent had been authorised to make deductions, then there was no "blatant negligence" on the claimant's part thereby entitling the respondent to make such deductions in the way that it did. Ms Dalziel says that the evidence supports that there was no "blatant negligence". The Tribunal had heard a lot of evidence from Mr Jordan and the claimant. Mr Jordan accepted there were no rules as to how long it would take to complete certificates and no rules as to how long these certificates would sit on the electronic system. There was no correspondence and dialogue with the claimant about how long the certificates could wait on the system to be mastered. There was nothing like that.

65. In Ms Dalziel's alternative submission, there was no evidence before the Tribunal capable of being accepted that there were 279 unmastered certificates. There was considerable variance between the numbered suggested by the claimant, (79) on the Friday, 16 June and then the letter saying that there 140 outstanding on 16 June 2017.

66. The claimant says there were only 79 outstanding and his evidence was that that number was acceptable to the respondent. Thereafter, Mr Jordan says that the Managing Director, (his brother) found 140 but the claimant was not aware of there being 140 and then subsequently the figure of 279 came to light. In Ms Dalziel's submission, both figures cannot be correct. There was no evidence led as to where the 279 had come from. There was nothing whatsoever. It seems to have moved from 79 to 140.

67. Mr Jordan had admitted that he took a unilateral decision to deduct money from the claimant's wages and he had no conversation with the claimant about the outstanding certificates or how many there were or how long they

had been sitting in the system or what jobs they related to. He did not seek an explanation or have a discussion with the claimant until 15 June. There was a summary deduction of wages. Ms Dalziel submitted this was unlawful in circumstances where there was no basis to say there was blatant negligence and nothing to entitle the respondent to discharge its obligation to show that there was "blatant negligence".

68. In relation to "blatant negligence", Mr Jordan was unable to define it. He could not distinguish between "blatant negligence" and "negligence" and what would be acceptable and what would be unacceptable. At the very best, it was "blurry" so if Mr Jordan was not able to explain what was "blatant negligence" then Ms Dalziel suggested it was well-nigh impossible for the claimant to understand what amounted to "blatant negligence".

69. Ms Dalziel's position was that the claimant did not act in a way that was "blatant negligent" and because that was not so and there was no "blatant negligence" there is no entitlement on the respondent's part to deduct wages in the way that it did.

70. If she was wrong in that and the Tribunal believed there was a contractual entitlement to deduct wages, there would have to be evidence of "blatant negligence" on the claimant's part.

71. Ms Dalziel's second *esto* or alternative position was that there was no loss of £1,300 capable of being quantified as to justify the deduction of that amount of money.

72. Mr Jordan's explanation seemed to be because he had utilised the existing staff of Mr Dyet and Mr Cox to carry out the work on the certificates that entitled him to deduct wages from the claimant's pay.

73. In the response, (the ET3) there is reference at paragraphs 12 and 13 at C23 to the respondent requiring to make overtime payments to Mr Dyet but, in Ms Dalziel's submission, this was not overtime but rather he was paid in the way that was commensurate for any other work that he would do on any week,

month or year for the respondent and, accordingly, there was no loss. It was incorrect to suggest that there was loss. There may have been some kind of loss of opportunity on other contracts because staff were moved from other contracts to deal with the certificate work but there was nothing to show that the respondent was entitled to deduct the sum of £1,300 from the claimant's wages. There was no confirmation of the cost of the loss of the alleged opportunity and so, in her submission, there being no loss the respondent was not entitled to deduct wages. It had simply paid to the other employees what it would have done on any other week, month or year. It may be that Mr Dyet was employed in completing/mastering the certificates when he might have been engaged in other work but that does not justify the respondent deducting £1,300 from the claimant's wages. Accordingly, Ms Dalziel invited the Tribunal to reject the respondent's defence that they were entitled to deduct wages from the claimant in terms of Section 13. In her submission, there was no basis for the respondent to having done so and, accordingly, she invited the Tribunal to uphold the claim in respect of unlawful deduction of £1,300 from the claimant's wages in terms of Section 13 of the 1996 Act.

Respondent's Submission

74. Mr Keys provided a copy of page 476 from McBride on Contract, the chapter and on Damages, Part 6 "Assessment of Damages".

He confirmed that it is accepted by the respondent that there is no complaint of breach of contract nor was there an employer's counter claim accepted. It is also accepted by the respondent that the amount at large is £1,300 and the relevant legislation is Section 13 of the 1996 Act. There is no dispute that that amount had been deducted. There are three points:-

(1) Was the respondent was entitled to deduct in terms of the contractual provision?

(2) Was there a blatant negligence?

(3) Was there a loss resulting?

75. Mr Keys referred to Section 13(1)(a) and submitted that there is no relevant statutory provision. Section 13(1) (b) is then relevant as it is the respondent's position that the EH gives them the entitlement to deduct wages. Section 13(2)(b) is notification of entitlement with reference to the SETC and also the EH and, in particular, clause 3 set out at page C25 as well as pages 26 and 29. The respondent says the EH was incorporated into the claimant's contractual terms. There was no inconsistency between what is set out in the SETC and the EH regarding deductions. Page C29 refers to "Deduction from Wages" and specifically, point 3 to "Cost of repairs or loss as a result of your blatant negligence."

76. Dealing with the first issue, if the Tribunal accepted that the claimant received a copy of the EH, as explained by Mr Jordan, in terms of the claimant's induction and his evidence that all employees go through this induction process then the EH forms a part of the claimant's employment terms. Also, the claimant had recorded in writing in May 2011 his agreement by signing on June 2011 the SETC as well as Mr Jordan's evidence that there was a further copy provided when the SETC was updated to include disciplinary matters. It is accepted that there is no written note from the claimant but there is his signature in the SETC.

77. The Tribunal therefore had evidence of an invariable employment practice as spoken to by Mr Dyet. He went through a similar induction process and he recalls being given a copy of the EH in 2001. There was therefore evidence before the Tribunal of an invariable practice that was applied for all employees, including the claimant.

78. Mr Dyet was clearly aware of the terms of the EH and, in Mr Keys' submission, there was more than sufficient evidence for the Tribunal to hold that the claimant was given the EH at the same time when he first joined the respondent and again when he signed the new SETC.

79. That is the respondent's primary position.

80. If the Tribunal was not convinced, then consideration should be given to Section 13(2)(b) where notification is given and this was in the SETC rather than the EH.

81. The claimant has agreed that he signed it and there is clear notification there. If he did not receive a copy he could have asked for one but he did not do so because he had been given a copy.

82. If this was not correct, then the respondent would rely on Section 13(2)(b), the incorporation of a contractual agreement.

83. The claimant should be liable for the costs as a result of "blatant negligence". Negligence should have its ordinary meaning of a lack of proper care and attention. He gave the example of professional negligence and the standard which should apply in the case a solicitor being that of a reasonably competent solicitor. Here, it would apply to someone as the claimant was who worked as a QS.

84. It was confirmed that there was no suggestion made by the respondent that the claimant was at any time negligent in the way he went about completing the certificates nor indeed is there any suggestion that there was any negligence by either the claimant or Mr Dyet in relation to the completion of such certificates. What appeared to be said to be "blatant negligence" was that there was a considerable backlog of certificates to be completed or "mastered".

85. Mr Keys invited the Tribunal to find that both the claimant and Mr Dyet from April 2016 were qualified to carry out the "mastering" of the certificates. Mr Jordan did some of this on the paper based system until January 2017. Thereafter, it was only the claimant who was using the electronic system, albeit Mr Dyet was qualified from April 2016. It remained, however, the claimant's responsibility until he resigned in June 2017 to process or "master" the certificates on the electronic system. The respondent's position is that the claimant left 279 uncompleted certificates on the system. The best evidence in this regard was from Mr Dyet. His evidence was also

corroborated by the timesheets for him and his colleague Mr Cox as set out in the respondent's bundle at R4 and R5.

86. There was a considerable backlog to be cleared and there was also the Non-Conformance Report, (R3) from Falkirk Council. The attachment to R3 details about 50 properties which did not have completion certificates. This apparently backed up over a number of months. That Non Conformance Report was provided to the respondent with a date of 19 June 2017.

87. The respondent's position is that the claimant caused them to be left in breach of contract with a number of clients such as Falkirk Council, Clydesdale Housing Association and Maryhill Housing Association. There was evidence of negligence which existed because these had not been completed. Mr Dyet had made it clear that there were 279 outstanding on the system and this indicated the claimant was not doing his job. He was not doing it in a reasonably competent manner.

88. When asked what was the explanation for this was, Mr Keys appeared to accept that what was flagged up was in terms of the Non-Conformance Report from Falkirk Council of 19 June 2017 and which was, of course, provided after the claimant had tendered his resignation was that there were outstanding certificates. In Mr Keys submission this amounted to "blatant negligence" by the claimant. It was superfluous to use the word "blatant" although "blatant" should be given the meaning of "clear and obvious" or something so "clearly obvious" as to be negligent.

89. Turning finally to the question of whether there was a loss, in this regard he referred to the Judgments cited at page 476 ***in McBride, Govan Rope and Sail CO Ltd v Weir and Co*** **[1897] 24R. 368 at pp 370, 371,** per Lord Ordinary and the following set out at page 476 on McBride:-

> "The principle which governs the whole law on the subject, namely, that the party observing the contract is to be put as nearly as possible in the same position as he would have been if the contract had been performed."

90. It was therefore the respondent's position that the loss arose as a result of negligence on the part of the claimant. Both Mr Dyet and Mr Cox were taken off allocated jobs elsewhere to address the backlog. Therefore, there was loss to the respondent as a result of two employees being engaged in this alternative work.

91. The quantification was set out as being shown on the timesheets, Mr Dyet for a total of £2,772 and Mr Cox for £924 amounting in total to about 11 days at £154 per day as the daily rate for each individual.

92. That was a reasonable way of assessing the loss and that was what the respondent was claiming in reaching the view that it should deduct what was originally £1,694 but is now accepted to be £1,300.

93. In Mr Keys' submission this was a conservative and reasonable amount to claim and there was clear evidence of "blatant negligence", albeit this was not formally defined but it did not require to be. It was his submission that the respondent had lost at least £1,300 and that is why £1,300 was deducted from the claimant's wages.

94. He had nothing further to add and invited the Tribunal to dismiss the application.

The Law

Employment Rights Act 1996 Section 13

95. **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 deductions required are 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 expressed or implied and, if expressed, 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.

Section 27

"**Meaning of "wages" etc.**

(1) In this Part "wages", in relation to a worker, means any sums payable to the worker in connection with his employment, including:-

(a) any fee, bonus, commission, holiday pay or other emolument preferable to his employment, whether payable under his contract or otherwise."

Observation on the Witnesses

96. The claimant gave his evidence clearly and succinctly. He did not recall receiving a copy of the EH although he accepted that he did sign the SETC, (page C26) where his signature and the date clearly appear as 9 June 2011 and above that it states:-

> "29. I acknowledge this written statement and the Employee Handbook as my terms and contract of employment and agreed to be bound by these terms and conditions."

97. Against his evidence that he did not receive the EH Mr Dyet was clear that he did receive an EH. It was accepted that the EH is as set out at pages C27 through to C31 and so is a relatively short document. The Tribunal did not understand it to be set out as a bound document but if it was then a copy was not provided as an original. Page 27 states, "This booklet is exclusively for the use, guidance and advice of Jordan Electrics and its employees."

98. On the issue of whether the claimant must have received a copy of the EH the Tribunal noted that he disputed having done so and that against this Mr Dyet was clear that he had received a copy when he joined the respondent and then again a further copy when the new contracts were provided in 2011. Mr Jordan was also very specific that there was an induction course and that copies of the booklet were provided to employees. On the balance of probabilities the Tribunal concluded it was more likely than not that the claimant had received a copy of the EH. It was never suggested that he asked for a copy and this, it was suggested, supported the contention that he must have received one and therefore there would be no reason for him to ask about it.

Deliberation and Determination

99. The issue here is in short compass. If, as the Tribunal has indicated above, on balance the claimant did receive a copy of the EH then that does set out at page C29 reference to "Deductions from Wages" and, in particular, the

reference at point 3 thereof to "Cost of repairs or loss as a result of your blatant negligence" below the phrase, "As a condition of your employment, the Company has a right to make deductions from your wages to recover."

100. However, the Tribunal was not persuaded by Mr Keys' argument that that is where the matter rests, namely that because the claimant should be taken to know that the employer was entitled to make deductions for losses arising as a result of his (the claimant's) "blatant negligence".

101. There was no evidence before the Tribunal as to how the 279 certificates which were alleged to have been sitting on the electronic system came to be sitting without the respondent realising that there was such a large number still incomplete. The only indication given in relation to the local authority was the Non-Conformance Report from Falkirk Council dated 19 June 2017 which was, of course, after the claimant had resigned. The claimant accepted that as at 15 June 2017 there were 79 certificates outstanding and that appears to have been discussed with the respondent. It seems then to have moved to 140 test sheets in terms of the letter of 16 June 2017 from Mr Jordan which was dictated by him and signed on his absence, (C54).

102. That letter states:-

"We shall allocate a manager to complete these certificates and any costs associated with this process will be deducted from your final wage."

103. As indicated above, the final wage had already been calculated at £700 being the weekly amount due and, in addition, one week's lieu of notice at £600, the claimant having accepted that the respondent was reducing his weekly pay of £700 to £600 on the basis that he was no longer wanting to carry out the role of a QS but would revert to work as an Electrical Tester.

104. While the respondent provided copies of the timesheets completed by Mr Dyet and Mr Cox these are only timesheets for the amount of time spent by both men, for Mr Dyet and the two weeks ending 25 June and 2 July 2017 and for Mr Cox for weekending 2 June 2017.

105. It is not in dispute that this test certificates work was carried out nor is it in dispute that it was Mr Dyet who completed them albeit with some assistance from Mr Cox who was the Contracts Manager on site at the local authority. It was not suggested that Mr Cox signed the certificates rather it was Mr Dyet's responsibility to do so and what Mr Dyet appeared to be doing was carrying out work and assisting him in that task by giving him information as and when he requested it.

106. The respondent therefore incurred the costs involved in those two individuals working/assisting on these certificates but what was paid to them was, as the Tribunal understood it, their normal weekly pay. In the case of Mr Dyet this was £770 and, in the case of Mr, Cox the same amount at least on a daily rate basis of £154 for his three days' work assisting on these certificates which was separate from additional work carried out by Mr Cox's piece work or price work which seems to have been done by him on the Monday and Tuesday, (R6).

107. The Tribunal concluded that it could not be satisfied that there was, as the respondent, contends "blatant negligence" on the part of the claimant. There is no evidence before the Tribunal as why it was that these certificates were building up in such large numbers. As indicated, the claimant accepted that on the last day of his employment there were 79 outstanding on the system. This appears to have increased to 140 by 16 June, (see page C54) being the letter to the claimant of that date but the figure then increased again to 279. It appears that this may be as a result of the Non-Conformance Report from Falkirk Council but even so there is no clear explanation before the Tribunal as to why such a large number of certificates were outstanding at this point in the latter part of June 2017.

108. The claimant gave evidence and the Tribunal had no reason to doubt his evidence that he had worked throughout the period prior to his resignation and he had worked a considerable number of days. He said 25 or 26 days without a break. The respondent appeared to accept that he had been working on a more or less back to back basis without breaks for at least a

period of 25 days. It therefore seems self-evident to the Tribunal that the claimant must have been working under considerable pressure if he had this amount of work to do given it had no reason to doubt his evidence that he was frequently working on the certificates at home in the evenings that is in his own time after completing a day's work albeit he was to be paid for doing so by the respondent.

109. On that basis, it was unclear to the Tribunal how it could be said to be that there was "blatant negligence" on the claimant's part by failing to complete all the outstanding certificates. What remains a puzzle was why no one looked at the question of what number of certificates were outstanding in the system. The Tribunal noted that Mr Jordan was going on holiday as of 19 June and the letter of 16 June 2107 was dictated by him prior to his departure on holiday. The work was then carried out by Mr Dyet with assistance from Mr Cox in Mr Jordan's absence. Mr Jordan's brother is, as indicated above, the Managing Director but there was no indication of what involvement, if any, he had during Mr Jordan's absence on holiday.

110. It does not seem to be in dispute that given the number of certificates that were outstanding it would have taken about 11 days to complete or "master" them. This appears to be the number of days worked on the certificates by Mr Dyet with Mr Cox's assistance given Mr Cox was only providing assistance he was never completing the certificates since he was not in a position to do so as he did not have the requisite qualification to do so.

111. The question then for the Tribunal is whether the respondent has, as it alleges, incurred loss and, if so, whether was then entitled to off-set this against the claimant's wages for work that he had properly done up to and including 16 June 2017 when he resigned from the respondent's employment. As indicated above, the claimant was due to be paid one week's pay in lieu of notice at £600 while for the work already done he was due to be paid £700. The claimant had accepted that his pay in lieu of notice would be on the reduced amount of £600 and not £700.

112. The Tribunal was not satisfied that the respondent did incur the loss it maintains occurred as it had given there is no clear specification of what loss there was this and whether it was loss of profits or the opportunity to earn profits. What the respondent has done is offset the costs of its two employees carrying out work on the certificates. Again the Tribunal emphasises that the certificates were completed or "mastered" by Mr Dyet who alone had authority to do so but with assistance/input from Mr Cox. That meant that they were re-allocated from other duties. They were still the respondent's employees and so they were due to be paid for their work.

113. The Tribunal has difficulty in understanding how it can then be said that this amounts to a loss in the sense of a loss of profit or loss of opportunity to make profits, thereby entitling the respondent to off-set that alleged loss of profits which has never been quantified from the claimant's outstanding wages.

114. In all these circumstances, the Tribunal was not satisfied (a) that there was "blatant negligence" on the part of the claimant nor (b) was it satisfied that the respondent has shown that it has a quantifiable loss of profits or opportunity to make profits, thereby entitling it to deduct the sum of £1,300 from the claimant's wages.

115. Accordingly, applying the law to the above Findings of Fact, the Tribunal concluded that the respondent did unlawfully deduct the sum of £1,300 from the claimant's wages in contravention of Section 13 of the 1996 Act.

116. The Tribunal therefore orders the respondent to pay to the claimant the sum of £1,300 being the amount of the unlawful deductions which were withheld from the claimant.

Employment Judge: F Jane Garvie
Date of Judgment: 21 December 2017
Entered in register: 28 December 2017
and copied to parties