EMPLOYMENT TRIBUNALS

Claimant: Mr C Rogers

Respondent: A.M. Norris Limited

Heard at: Leicester

On: 18 & 19 June 2018

Before: Employment Judge K Ayre (sitting alone)

Representation
Claimant: Mr Rogers (father) – lay representative
Respondent: Ms D Gilbert, Counsel

JUDGMENT having been sent to the parties on 12 July 2018 and written reasons having been requested in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided:

REASONS

Background

1. By Claim form dated 26 December 2017 the Claimant brought a claim for constructive unfair dismissal. That claim was resisted by the Respondent and listed for a 2-day hearing.

2. During the course of the hearing the Tribunal heard evidence from the Claimant and, for the Respondent, from Mr Paul Norris, Director, and Mr Chris Metcalfe, Contracts Manager.

3. There was a joint bundle of documents running to 351 pages. The Claimant also prepared his own bundle which comprised mainly the same documents as were in the joint bundle, but with the Claimant's comments added. There were also some different versions of letters in the Claimant's bundle. By consent the joint bundle (JB) was used as the primary bundle during the hearing but the Claimant was permitted to refer to the Claimant's bundle (CB) where he wished to do so.

4. During the course of the hearing it became apparent that the Respondent and Claimant had two different versions of the joint bundle, possibly due to a recent change in the Respondent's Representative. The Parties were

able to resolve the issue of differences in the bundle between them and the Tribunal is grateful for this.

Issues

5. The issues that fell to be determined at the hearing were helpfully set out in a list of issues prepared by the Respondent and with which the Claimant agreed. In relation to liability the issues were:

5.1 Did the Respondent:

a. Tell the Claimant he was liable for £2,500 insurance excess for damages caused by faulty work, without providing him with evidence; and

b. Deny the Claimant an appeal process in relation to his alleged liability?

5.2 If the answer to (1) above is yes:

a. Did the Respondent have an express or implied contractual right to claim the loss from the Claimant?

b. If there was an express contractual right to claim the loss, was that term an unenforceable penalty clause?

c. In so doing did the Respondent commit a repudiatory breach of contract (namely of the implied term of trust and confidence) entitling the Claimant to resign and treat himself as having been dismissed?

5.3 If the Respondent did commit a repudiatory breach of contract, did the Claimant resign in response to the alleged breach or breaches?

5.4 If yes, did the Claimant waive the alleged breach or breaches?

5.5 If so, was the Claimant unfairly constructively dismissed?

6. No potentially fair reason for dismissal was advanced by the Respondent.

Findings of Fact

7. The Claimant was employed by the Respondent as a plumber from 22 July 2013 until 3 September 2017 when his employment terminated by reason of his resignation. The Claimant was employed in accordance with the terms of a contract of employment dated 24 March 2016. That contract, which the Claimant accepted in evidence that he had read and understood before signing, contained the following relevant provisions:

7.1 A clause authorising deductions from salary under the Employment Rights Act 1996 of any sums due to the Respondent by the Claimant.

7.2 A clause providing that funds due to the Respondent by the Claimant could be deducted from outstanding wages and/or what the Respondent calls a “Retention Fund”.

7.3 Appendix 1 which states that in certain circumstances the Respondent may deduct money from wages and/or the Claimant's Retention Fund.

7.4 Appendix 1 also contains a list of the circumstances in which deductions can be made, which includes:-

7.4.1 poor workmanship; and

7.4.2 damage to a company vehicle where the employee has failed to report such damage or the accident has been reported but is caused by the employee's negligence.

7.5 The contract also asks the employee to confirm that he has read the document and received a copy of the company handbook, and incorporates the handbook into the contract itself.

7.6 The contract then contains a further provision in which the employee signs to agree that a proportion of his fees are repayable to the company and that he company has the right to make deductions from his wages, holiday pay or notice pay.

8. The Respondent puts in place a Retention Fund in relation to each of the plumbers that it employs. To create the Retention Fund, £50 a week is deducted from the plumber's wages until the sum of £500 is reached. That sum is retained by the Respondent and used in the event that the plumber leaves the Respondent and the Respondent incurs costs is a result of negligent work by the plumber.

9. The Respondent also has an employee handbook which is incorporated into the contract of employment. That handbook contains details of a grievance procedure and also a section headed "Contra Charges" in which it is stated "plumbers are expected to maintain a consistently high standard of workmanship without incurring damage or leaving the work area in a state of disrepair. If incidents occur which result in a need for rectification work to be carried out this should be arranged between trades at site level. Where this does not occur and an insurance claim has to be made in order that the necessary rectification work is carried out, the relevant plumber will be liable for the insurance excess".

10. There is no mention in the contract or in the handbook of the amount of the insurance excess which at the relevant time was £2,500.

11. The Claimant was paid a basic salary of £14.10 an hour. He had the opportunity to earn more by working quickly. The reason for this was that the Respondent allocated a set amount of time to each task. For example: 2 hours for fitting a wash basin, and 2 hours for fitting a toilet. If the Claimant or indeed any other plumber was able to do the work more quickly than the allocated time (e.g. within an hour), they could still claim 2 hours pay for the work. There was therefore a financial incentive for plumbers to work quickly so that they could earn more money. This extra pay was known as bonus.

12. The Respondent holds its plumbers responsible for mistakes they make in the course of their work. Foe employed plumbers such as the Claimant

the practice is to deduct the cost of rectifying mistakes from the plumber's wages, unless a plumber is able to fix the mistakes him or herself.

13. There are some mistakes which will not come to the attention of the Respondent's central management team because they are picked up by the site management team on the site where the plumber is working and the plumber is able to fix the mistakes before a formal complaint or reports is made to the Respondent's central management.

14. If a plumber makes a mistake in his work there are a number of options for resolving the problem:-

    14.1 the plumber can fix the mistake himself; or

    14.2 another plumber can be asked to do the work and a deduction in respect of the second plumber's costs for the repair is made from the first plumber's wages.

15. If a charge is incurred by the Respondent as a result of a plumber's mistake, or somebody else has to come in and fix the mistake, what is known as a 'stoppage' is made from the plumber's wages to cover that cost.

16. If the Respondent is proposing to make a stoppage, the plumber is given notice of the proposed deduction from wages and of the amount of that stoppage. The plumber then has 3 weeks to sort the problem out – i.e. fix it themselves, or to challenge either the amount of the stoppage or the fact that a stoppage is being made at all. If there is a challenge then the Respondent will investigate and decide whether the stoppage should still be made.

17. The Claimant gave evidence that the Respondent had made stoppages from his wages on previous occasions, and that on one occasion a stoppage in excess of £700 had been made. The Claimant also gave evidence that he had previously challenged a stoppage notice and had a reduction in the amount 'stopped' as a result.

18. The Claimant was therefore aware of and familiar with the Respondent's policy and approach to stoppages and knew that he could challenge them.

19. The Respondent also had a grievance policy which plumbers can use to challenge decisions that they are unhappy with.

20. The Respondent has in place an insurance policy which protects it against faulty work. There is an excess on that policy which at the relevant time was £2,500. The Respondent has on occasion asked plumbers to pay the excess where their work is faulty and has resulted in damage worth more than £2,500. The Respondent's approach is to deduct the £2,500 from the plumber's wages at the rate of £25 a week. The deduction is made from the bonus element of the plumber's pay only, so that there is no deduction from the basic pay of £14.10 an hour.

21. In 2017 the Claimant was assigned to work at a Bovis Homes development. He was the main plumber on site and this was the first time

that he had been the main plumber on one of the Respondent's sites. The Claimant was responsible for installing bathrooms and toilets in new build houses on the site.

22. The first house that was moved in to by a customer was known as plot 2, and the customer was due to move into that house on 18 August 2017. The Claimant installed the plumbing in that property.

23. On 17 August Mick Bowley, the Site Supervisor, was called to plot 2 by the foreman on the site. The foreman told him that there was a push button mechanism in one of the toilets that was not working.

24. Mick Bowley went to the house, checked the push button plate, realised it was not working and swapped it for one which was working. Whilst he was in the house he saw a damp spot on the wall between the downstairs cloakroom and the kitchen. Chris Martin the Site Manager told him that the damp spot had 'come through again' implying that a damp spot had been seen on a previous occasion also. Mr Martin asked Mick Bowley to investigate but without disrupting the property too much because the customer was due to move in the next day.

25. Mick Bowley took the bath panel off, found the bath tap to be leaking, refitted it and also tightened up the bath legs. He then checked the bath blending valve and found it to be damp but with no visible leak.

26. The following day, 18 August, there was a leak from the blending valve that had got considerably worse and there was water all down the wall. The Claimant was working on another site 2 hours away that day, so a maintenance plumber Elliott Toon went to site. He checked the blending valve and noticed it had been leaking badly. Elliot Toon also took photos of the property on 18 August.

27. In a report about the damage to plot 2 that was subsequently prepared by Mick Bowley, Mick Bowley recorded that "possibly with me tightening the bath legs up to the correct height this could have caused it to leak more, but if it was pasted, fitted correctly and tightened adequately it would not have leaked at all". Mick Bowley also said in his report that when he spoke to the Claimant about it, the Claimant could not understand why it had not leaked on test but only a month later. Mick Bowley's response to that was that it was not fitted correctly so there could really be no argument.

28. On 30 August Mick Bowley got another call from Bovis Homes reporting another, and this time major, leak at the property. The leak was from the sewer pipe which took waste material from the toilet and bathroom sink and bath to the sewers. The leak had caused damage to the plaster board, walls, kitchen units and work surfaces which subsequently had to be removed from the property.

29. The Claimant was on site that day, went back into the property and tried to apply a temporary fix to the sewer pipe using glue and mastic. The reason he did this was because it was 4pm and the customer didn't want workers in the house late on in the afternoon. The mastic that the Claimant used

to do the repair with was not the correct material and should not have been used.

30. Mick Bowley went on to site the following day (31 August) and asked the Claimant about the mastic. The Claimant initially denied using it and said that he had used glue instead. The Claimant subsequently accepted however that he had used white mastic. The Claimant replaced the pipe and there were no further leaks. There was however significant damage to the property as a result of the leak.

31. Later that day, the Claimant asked Mick Bowley for his opinion on whether he would be charged for any of the damage caused to the house and if so how much. In answer to the Claimant's question Mick Bowley said that unfortunately yes the Claimant could be charged and he believed the excess on the insurance to be up to £2,500.

32. The Claimant alleged in his statement that during this conversation Mick Bowley told him that Mr Norris would be visiting him the next day to tell him that he was going to be fined by the company around £2,000 for damage caused by the leaking joint. The Tribunal does not accept that evidence. Instead the Tribunal prefers the evidence of Mr Norris that he did not discuss the excess with Mr Bowley until after he had been on site and spoken to the Claimant himself on 1st September.

33. On 1st September Mr Norris, at the request of Bovis Homes, visited the site together with Chris Metcalfe. The purpose of their visit was to see the customer. Having seen the customer in her home, Mr Norris and Mr Metcalfe came out of the house and saw the Claimant who was in his van on site. They went over to the Claimant to talk to him.

34. Mr Norris told the Claimant that he had to be more careful when he was doing a job and couldn't do jobs which caused such devastation. He told the Claimant that in a case as bad as this a plumber could be liable for the excess on the insurance. When the Claimant asked what the excess was, Mr Norris replied £2,500. He told the Claimant not to worry about it however because in previous cases where the excess had been deducted from the plumber, the amount had been deducted at approximately £25 a week.

35. Whilst he was talking to the Claimant, Mr Norris noticed scratches on the Claimant's company van which was brand new having been issued to him only a few weeks' previously. Mr Norris asked the Claimant how the scratches had occurred and the Claimant replied that the damage had been caused on site.

36. The Respondent operates a rule that damage to a company van must be immediately reported to the yard. Mr Norris asked the Claimant if he had reported the damage and the Claimant said that he had not. Mr Norris told the Claimant to report the damage as soon as possible to avoid being charged for the damage himself. The reason for this is that the Respondent's policy is to assume that a driver is responsible for damage if it is not reported, and to seek to recover the cost of that damage from them.

37. The conversation between Mr Norris and the Claimant on that day was not a long one and lasted 4 or 5 minutes at most. Mr Norris did not say to the Claimant that he would be charged for £2,500, and nor did the Claimant during that conversation ask for an appeal. The discussion on that day was about a potential liability.

38. The Tribunal finds that Mr Rogers was not told on that day that a deduction would be made in relation to the cost of the damage to the van, he was merely warned that if he didn't report it, that was a potential consequence.

39. The Claimant went home after the conversation with Mr Norris, understandably concerned about the potential £2,500 liability and the potential charge for the van. He took advice from his father and on 3 September 2017 he resigned by letter in which he said he was resigning because he had been placed in a situation that amounted to constructive dismissal.

40. The Claimant gave evidence to the Tribunal, which the Tribunal accepts, that up until the conversation that day he had been happy at work. The conversation on 1 September was the only incident relied upon by the Claimant in support of his constructive dismissal claim.

The Law

41. In a constructive dismissal claim the relevant Law is set out in the leading case of **Western Excavating (ECC) Ltd v Sharp [1978] ICR 221.** The questions which the Tribunal has to consider are:

41.1 Was there a breach of contract by the employer?

41.2 If so, was that breach of a fundamental term of the contract of employment?

41.3 Did the Claimant resign in response to the breach?

41.4 Did the Claimant waive his right to resign by delaying in resigning?

42. The Employment Rights Act 1996 gives an employer the right to make deductions from an employee's wages, but is subject to an implied common law term that such a right will not be used so as to impose penalties on employees.

43. I was referred by Ms Gilbert to the case of **Cavendish Square Holding BV v El Makdessi and Parking Eye Ltd v Barry Beavis [2016] 2 All England Reports 519.** In that decision of the Supreme Court concerning penalty clauses, the Supreme Court held that the true test of whether a clause was a penalty was whether the relevant provision was a secondary obligation which imposed a detriment on the contract breaker out of all proportion to any legitimate interest of the innocent party in the enforcement of the primary obligation. Deterrence is not penal if there is a legitimate interest and influence in the conduct of the contracting party

which was not satisfied by the mere right to recover damages for breach of contract.

Conclusions

44. In relation to the issues raised by the Parties:

44.1 I find that the Respondent did not tell the Claimant he was liable for the insurance excess of £2,500, but merely that he could potentially be liable. It is understandable that the Claimant was upset when he was told of this potential liability, the size of which had not been flagged to him previously. This is particularly so given that the Claimant had been paid just £7.05 for fitting the sewer pipe, but was being faced with a potential charge of £2,500. It is entirely reasonable in my view that the Claimant reacted in this way, but nonetheless I find that the Respondent did not tell the Claimant he would be liable. I also find that the Claimant was aware that he had the right to challenge any stoppages that the Respondent proposed to impose on him, as he had done so previously.

44.2 In relation to the second issue: Did the Respondent deny the Claimant the right of appeal? I find that the Respondent did not. The Claimant did not, on his own evidence, ask for an appeal on 1st September, or indeed on a later date. The Claimant knew that he had the right to challenge stoppages and had done so in the past. I find that there was no action on behalf of the Respondent that denied the Claimant an appeal.

44.3 The third issue was whether the Respondent had an express or implied right to claim the insurance excess from the Claimant. I find that the provisions of the contract are clear, as is the wording in the handbook which specifically referred to a contra charge in relation to the insurance excess.

44.4 There was, therefore, an express right in the Claimant's contract of employment for the Respondent to make a deduction. Whilst I have every sympathy with the Claimant's argument that it was unfair to impose such a charge, particularly given the small amount paid to the Claimant for the work in question, I cannot say that the Respondent was in breach of contract by referring to a potential charge to the Claimant. The Respondent had an express contractual right to impose the charge, and whilst I accept that express contractual rights must be exercised reasonably, I do not find that the Respondent acted unreasonably by informing the Claimant that he could potentially be charged up to £2,500 at the rate of £25 a week.

44.5 I have considered whether the clause in question was a penalty clause, and I find that it was not for the following reasons. Firstly, it was not a clause that was designed to apply if there was a breach of contract by the Claimant. Secondly and in any event the clause was in my view designed to recover costs which were incurred by the Respondent. It was not seeking to impose a fine for breach of contract, but it was merely seeking to recover the cost of an insurance excess incurred by the Respondent.

44.6 I have considered also whether the telling the Claimant that he could be liable for £2,500 amounts to a breach of the implied term of trust and confidence. On balance I find that it does not. Considering the question set out by Lord Steyn in **Malik and another v BCCI SA (in compulsory liquidation) [1988] AC 20,** I have considered whether the Respondent "without reasonable and proper cause" conducted itself "in a manner calculated and likely to destroy or seriously damage the relationship of trust and confidence between employer and employee".

44.7 I find that the Respondent did not conduct itself in such a way. The Respondent was merely pointing out to the Claimant the potential consequences of his mistakes. It did not seek to impose any penalty on the Claimant at that stage.

44.8 I find that the Claimant did resign in response to the comments that were made on 1 September, and did not waive the breach.

45. For the above reasons I find that the Claimant was not constructively dismissed by the Respondent and his claim fails.

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Employment Judge Ayre

Date 19 July 2018

REASONS SENT TO THE PARTIES ON

24 July 2018

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FOR THE TRIBUNAL OFFICE