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EMPLOYMENT TRIBUNALS

BETWEEN

CLAIMANT		**RESPONDENT**
MR C MCLAREN	**V**	**OAKWOOD LEISURE LTD**

HELD AT: CARMARTHEN ON: 4 JUNE 2018

EMPLOYMENT JUDGE N W BEARD (SITTING ALONE)

REPRESENTATION:

FOR THE CLAIMANT - In Person

FOR THE RESPONDENT - Ms Wray (Solicitor)

JUDGMENT

The judgment of the tribunal is that the claimant's claim that the respondent unlawfully deducted the claimant's wages pursuant to section 13 of the Employment Rights Act 1996 is not well founded and is dismissed.

REASONS

PRELIMINARIES

1. The claimant represented himself the respondent was represented by Ms Wray a solicitor. The claimant's claim is the respondent failed to pay him his final wages following his resignation. The respondent contends that the claimant failed to give sufficient notice pursuant to his contract of employment and that under the terms of the claimant's contract it was entitled to make deductions of the cost incurred in replacing the claimant's services during the remainder of the contractual notice period. The claimant contends that, if he is wrong about the notice period that the respondent incurred no extra costs and therefore were not entitled to make the deduction.

2. I was provided with a bundle of documents of 110 pages by the respondent and the claimant provided me with loose leaf documents which, in the main, duplicated those within the bundle. The claimant gave oral evidence and asked me to take account of two witness statements from his former line manager Mark Mitchinson and Stephen Le Breton from a company that supplied contract engineers to the respondent; the respondent called two witnesses to give oral evidence Janeen Yates who dealt with HR for the respondent and Mr Verbinnen the general manager at Oakwood.

THE FACTS

3. The claimant commenced employment on 7 September 2015 there is a dispute as to when his employment ended. The respondent is an organisation which operates theme parks. The claimant was engaged as an engineer who, as part of team, would carry out installation, inspection and maintenance of attractions at the Oakwood Theme Park in Pembrokeshire.

4. The claimant was sent an offer of employment letter dated 28 August 2015 which, amongst other terms, set out the following relevant terms of offer:

> *"Your employment will be subject to a 6-month probationary period after which performance will be reviewed"*
> *"Your starting salary will be £20,000 per annum payable monthly in arrears payable by credit transfer. Following 6 months service and providing the company is satisfied that you have achieved the full requirements of an Oakwood Engineer, your salary will increase to £21,000 per annum."*

The letter also required the claimant to confirm acceptance of the offer of employment by signing copies of a contract of employment and in addition to confirm that he had accessed the staff portal and read and understood the company handbook by signing a further document. That further document indicates that the staff handbook forms part of the claimant's contractual terms. The claimant signed as asked.

5. The contract of employment document might better be described as a statement of main terms and conditions. It refers to a probationary period in clause 2 of the document as follows:

> *"Your employment with the Company is subject to a probationary period of 6 months. During this period your performance will be reviewed and if you complete the period satisfactorily you will be confirmed as a permanent member of staff. If during the probationary period the Company is dissatisfied with your performance, the company may terminate your employment by giving you one week's notice, or the probationary period may be extended at the Company's discretion for the better assessment of your performance"*

At clause 19 it deals with termination of employment as follows:

> *"19.1 During your probationary period, you must give, and are entitled to receive, one week's written notice. 19.2 Following successful completion of your probationary period you must give the company one month's written notice to terminate your employment. 19.3 Following successful completion of your probationary period, you are entitled to receive the*

> *greater of either your contractual or statutory notice. Your contractual notice is one month's notice."*

Clause 22 deals with changes to terms of employment as follows:

> *"The Company reserves the right to make reasonable changes to any of your terms and conditions of employment for the better operation of the Company's business and following statutory procedures. You will be notified of minor changes of detail by way of a general notice to all employees and any such changes will take effect from the date of the notice. You will be given reasonable written notice of any significant changes, which may be given by way of an individual notice or a general notice to all employees."*

6. The staff handbook also deals with the probationary period setting out that all permanent employees are subject to a 6-month probationary period, but that any extension to the probationary period would be limited to a maximum period of 40 weeks. The February 2015 version of the staff handbook contains the following Clause at paragraph 2.27.2:

> *"If you terminate your employment without giving the required period of notice, your pay will be stopped immediately and you will be liable to refund to the Company the additional cost of covering your duties for the full duration of, your notice period as applicable. You agree to the Company deducting the sums under this clause from your final salary or any other outstanding payments due to you"*

7. In November of 2015 Janeen Yates, on behalf of the respondent, made a presentation to engineering staff introducing a new accreditation system. The claimant argues that this system was in line with the offer letter; I cannot accept the claimant's reading of that table (p.76). The new system required the individual in question to carry out specific work and courses (some of which were only available at specific times) and to complete a document which would be countersigned by a manager and prove that the work and courses had been undertaken successfully. This undermines the claimant's suggestion that the table demonstrates that immediately after probation was concluded the claimant would have completed accreditation at level one and be paid at the higher salary. In my judgement it is more probable than not that the expectation was that an employee would spend six months on probation and then work for a further six months towards accreditation. In my judgement the new system set out in the table meant, effectively, that instead of being able to move up to a salary of £21,000 after the conclusion of six months, the claimant would have to spend some further time attempting to complete the level one accreditation requirements. The new scheme was not introduced as a change to contractual terms either by general announcement or by individual letters to those affected.

8. The claimant regularly asked his line manager to clarify his status after he had worked for the respondent for six months as set out in the offer letter. There was no

clarification given to the claimant on those issues at any stage before the end of his employment. The claimant did not raise any formal grievance about this. The evidence I heard was that Mr Mitchison, the line manager, was absent on long term sickness from some point in 2016, the claimant did not raise his complaints with others after this.

9. The claimant completed most of the work specific requirements necessary for him to achieve level one accreditation and therefore move to a higher salary. The claimant provided proof to his manager in the form of the standard documents he had been supplied with. The respondent denied that this had happened. Janeen Yates indicated that she had been chasing the documentation and had been told by the claimant's manager that the claimant had not provided it. I found no reason to doubt the credibility of either of these witnesses. In my judgment, for some reason, the claimant's manager did not send on the documentation that the claimant had given him. I am not in position to state what that reason is, although it may have had some relationship with a dissatisfaction with the new accreditation scheme amongst the engineering staff as described in evidence by Mr Verbinner. What I am clear about is that the claimant was working satisfactorily, in the opinion of his line manager, by the time he had concluded six months work with the respondent.

10. The claimant wrote a resignation letter on 31 May 2017 giving one week's notice. Agreement was reached between the claimant and local management that he should work on Sunday 4 June (a rostered rest day) instead of the 6 June which would be his last day working under a week's notice. Discussions were engaged between the claimant and Janeen Yates, the latter insisting that the claimant was required to work a month's notice under the terms of his contract. The claimant disagreed but was warned that if he left earlier that deductions could be made from his final wages. This disagreement was carried forward to a telephone conversation on Sunday 4 June which, on any account, was not cordial. The respondent contends that following this conversation the claimant walked out, the claimant contends that his manager sent him home on "garden leave". I have heard no evidence from the manager in question and I have no reason to doubt the claimant's account of events that day. I consider the claimant was instructed to leave by his manager. On that basis the claimant worked his notice up to 6 June 2017.

11. The respondent needed to replace the claimant's services. The claimant contended that the respondent had not done so. The basis of this argument was that the agency supplied workers that were in place at the time of the claimant's resignation were the only workers in place after his resignation. Mr Verbinner told me, and there was no basis arising from documents or cross examination upon which I could reject his evidence, that the individuals were required to carry out work that would have been carried out by the claimant. On that basis I concluded that the respondent had incurred costs in employing these individuals. The cost of doing so was at £28 per hour in comparison with the £12 an hour (or thereabouts if the respondent's contributions to national insurance and pensions are taken account of) that it cost to employ the claimant. The claimant would have been required to work 120 hours which the respondent has demonstrated it was entitled and did cover. That this resulted in costs of £3360.00 against which must be set the cost that would have been incurred in employing the claimant of £1,440.00 a difference of £1,920.00. Even with claimant being correct about wages and holiday pay that the claimant

argued he had not been paid the resulting sum exceeds the £1660.42 claimed by the claimant.

THE LAW

12. Section 13 of the Employment Rights Act 1996 which, so far as is relevant, provides:

> *(1) An employer shall not make a deduction from wages of a worker employed by him unless—*
> *(a) the deduction is ---- authorised to be made by virtue of ------ a relevant provision of the worker's contract, or*
> *----------*
> *(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.*

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13. Section 13 of the Employment Rights Act 1996 which, so far as is relevant, provides:

14. The respondent referred me to ***Przybylska v Modus Telecom Ltd UKEAT 0566_06_0602.*** In that case the employee was given an express 3-month probationary period during which she had a right to 1 week's notice; thereafter she was entitled to 3 months' notice. The contract demonstrated that the employer had an express right to extend the probationary period however it had not done so. After 3 months had elapsed, the employer carried out a review as if the period had not concluded and dismissed the employee giving only 1 week's notice. The Employment Tribunal dismissed the employee's claim to 3 months' notice pay on the basis of an implied term that the employer could carry out such a review within a reasonable time after 3 months had elapsed. The Employment Appeal Tribunal held that implication of a such a term was not necessary. The

implication of the term would give the employer a new right which was additional to that expressly provided by the contract.

15. The respondent contended that ***Przybylska*** was authority, binding on the tribunal, that demonstrated where an express term giving the right to extend probation was not exercised by an employer it meant that probation had come to an end. The respondent argued any consequent changes in the contract terms which were collateral to the end of probation (here the notice periods) came into effect automatically when probation ended.

16. The claimant argued that there was a means to distinguish this authority because the end of probation was linked, ineluctably, to a performance review leading to an increase in salary. His argument was that it was to be implied that if there was no performance review and no communication of the end of probation that probation should be considered to be continuing. The claimant argued that the respondent did not carry out the performance review and therefore that probation continued.

17. I cannot accept the claimant's interpretation of the case. In ***Przybylska*** itself there was an opportunity for the employer to carry out a performance review under the terms of the contract, it did not do so, that did not prevent the EAT from concluding that probation had ended. The basis of the ***Przybylska*** decision is, in my judgment, that where express terms of a contract provides for a set of circumstances it is not necessary to imply further terms. The EAT concluded that where an opportunity to extend probation is met by an express term it is to be expected that if that opportunity is not taken up probation will be considered to be ended. The EAT expressly rejected the first instance decision that there would be an expectation of communication of the end of probation automatically.

18. There is an element of construction of the contractual terms required to resolve this case. That are competing authorities in the EAT dealing with the tribunal's jurisdiction to construct contracts for the purpose of deciding what is properly payable under section 13 ERA 1996: in ***Agarwal v Cardiff University UKEAT/0210/16*** it was held that the tribunal did not have such jurisdiction whilst a short time later in ***Weatherilt v Cathay Pacific Airways Ltd UKEAT/0333/16*** a differently constituted EAT panel came to the opposite conclusion. I prefer the latter decision, not because it is the more recent decision but because in it HHJ Richardson persuasively argues that the earlier decision was made without reference to relevant Court of Appeal authorities which indicate that the employment tribunal does have such jurisdiction: (Note this issue has been resolved in the Court of Appeal in ***Agarwal*** and supports my conclusion).

19. Having decided that I have jurisdiction to construe terms and that construction is necessary where the contractual terms are to be found distributed amongst a number of documents I should set out the law I apply to construing the terms of the claimant's contract of employment. The leading authority on construing contracts is set out in ***Investors Compensation Scheme Limited V. West***

Bromwich Building Society and Others ***[1997] UKHL 28,, 1 WLR 896,, 1 All ER 98*** where Lord Hoffman gave the opinion that:

> *(1) Interpretation is the ascertainment of the meaning which the document would convey to a reasonable person having all the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of the contract.*
>
> *(2) The background was famously referred to by Lord Wilberforce as the "matrix of fact," but this phrase is, if anything, an understated description of what the background may include. Subject to the requirement that it should have been reasonably available to the parties and to the exception to be mentioned next, it includes absolutely anything which would have affected the way in which the language of the document would have been understood by a reasonable man.*
>
> *(3) The law excludes from the admissible background the previous negotiations of the parties and their declarations of subjective intent. They are admissible only in an action for rectification. The law makes this distinction for reasons of practical policy and, in this respect only, legal interpretation differs from the way we would interpret utterances in ordinary life. The boundaries of this exception are in some respects unclear. But this is not the occasion on which to explore them.*
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> *(4) The meaning which a document (or any other utterance) would convey to a reasonable man is not the same thing as the meaning of its words. The meaning of words is a matter of dictionaries and grammars; the meaning of the document is what the parties using those words against the relevant background would reasonably have been understood to mean. The background may not merely enable the reasonable man to choose between the possible meanings of words which are ambiguous but even (as occasionally happens in ordinary life) to conclude that the parties must, for whatever reason, have used the wrong words or syntax. (**see Mannai Investments Co. Ltd. v. Eagle Star Life Assurance Co. Ltd. [1997] 2 WLR 945***
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> *(5) The "rule" that words should be given their "natural and ordinary meaning" reflects the common sense proposition that we do not easily accept that people have made linguistic mistakes, particularly in formal documents. On the other hand, if one would nevertheless conclude from the background that something must have gone wrong with the language,*

> *the law does not require judges to attribute to the parties an intention which they plainly could not have had. Lord Diplock made this point more vigorously when he said in* ***The Antaios Compania Neviera S.A. v. Salen Rederierna A.B. 19851 A.C. 191, 201:*** *". . . if detailed semantic and syntactical analysis of words in a commercial contract is going to lead to a conclusion that flouts business commonsense, it must be made to yield to business commonsense."*

Analysis

20. Whilst I agree with the claimant that there is a clear connection between review of performance and the end of probation in the contractual terms, I am not persuaded that the term indicating that there will be a performance review means that the end of probation is delayed until such a review takes place. The common sense reading of the requirement for a performance review is that it takes place to establish two things. Firstly, that probation should not be continued (within limited circumstances) and, secondly, that the claimant has achieved sufficient proficiency move the claimant from one salary level to another. On that basis I consider whilst the respondent has a power to arrange a performance review it does not have an obligation to do so. However, if the employer does not exercise that power it must be on the basis that it is accepted that performance is sufficient so that there will be no extension to the probation period and the salary increase should be put in place. In my judgment it is to be implied (on the officious bystander test) that the discretion not to grant an increase in salary on the grounds of performance cannot be exercised capriciously. The claimant was performing appropriately and on that basis a performance decision should have recognised this. The claimant was not given a pay rise in breach of that term. Even if I am wrong about this, by the end of 2016, the claimant had provided the necessary material under the accreditation scheme to achieve the higher rate of pay. Once again, this scheme (if it amounted to a contractual term), should result in a salary increase based on rational and not capricious decision making. On that basis even if not breached earlier it would have been breached by that stage.

21. That conclusion means that the respondent breached the term of the claimant's contract and did so within a short time after the expiry of his first six months of employment. That conclusion means, in turn, that I should consider the question of what terms of agreement the claimant was working under after this breach. Did the claimant affirm the contract after the breach? The claimant continued working for the respondent for more than a year after this breach. He was raising issues with his manager and this related to his status. Those issues must connect with the wage to some extent. However, the claimant told me that he had only complained to his direct line manager Mr Mitchinson about this, those complaints stopped when Mr Mitchinson was absent due to sickness in 2016. That means that the claimant must have worked for a number of months no longer making the protests about these matters. It appears to me that the claimant cannot be considered to be working under protest at the breach after this as he does not raise the matter further. It seems to me therefore that by, at the latest, the beginning of 2017 the claimant had affirmed the contract despite the breach.

22. The claimant was aware of the terms that he agreed to at the outset of employment. This included the terms of notice to be given by either party. The claimant contended that he was still on probation and therefore notice was limited to a week. On my findings the claimant was no longer on probation. Therefore, the claimant was subject to the notice period of one month set out in the contractual terms. On my findings the cost to the respondent of covering the claimant's duties exceeded the sums owed to the claimant as a final salary. Section 13 ERA 1996 requires a deduction to be authorised by a relevant provision of the contract where the provision is in written terms and which the employer has given the employee a copy prior to the deduction being made. There is a written term of the contract, which the claimant has had in writing from the outset of his employment. That permits the respondent, specifically, to make a deduction for costs incurred as a result of the claimant failing to work the correct period of notice. On that basis the deduction is one which the respondent was entitled to make pursuant to the contract of employment.

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Employment Judge Beard
15 June 2018

Order sent to Parties on

……2 July 2018……

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