EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: S/4120665/2018 & S/4122615/2018

Held in Edinburgh on 21 December 2018

Employment Judge: Mel Sangster (sitting alone)

Mr J Arbuckle	**Claimant**
Purves Haulage Limited	**Respondent**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The Judgment of the Tribunal that

a. the sum of £227.58 was unlawfully deducted from the claimant's wages on the termination of his employment, contrary to section 13 of the Employment Rights Act 1996; and
b. the respondent acted in breach of contract and the claimant is entitled to damages in the sum of £270 as a result.

REASONS

Introduction

1. The claimant presented a complaint of unlawful deductions from wages and breach of contract. The respondent denied that sums were unlawfully deducted from the claimant's wages, or that he was contractually entitled to any further sums. They asserted that all sums due to the claimant had been paid to him. The respondent intimated an employer's contract claim within their ET3. This was accepted on 9 November 2018. Both claims were heard, together, by the Tribunal.

2. The claimant gave evidence on his own behalf. The respondent led evidence from Marshall Purves (**MP**), Director. The claimant lodged productions in advance of the Hearing. Both parties lodged further documents at the commencement of the Hearing and the respondent lodged copy payslips during the course of the Hearing.

Issues to be Determined

3. Was the claimant entitled to additional payments from the respondent in respect any of the following:

   a. Payment for time worked;
   b. Notice pay; and/or
   c. Holiday pay.

4. If so, what sums were due to the claimant?

5. Was there an unauthorised deduction from the claimant's wages, or was the respondent entitled to make a deduction from wages otherwise due to the claimant?

6. Is the respondent entitled to damages for breach of contract from the claimant?

Findings in Fact

7. The Tribunal found the following facts, relevant to the issues to be determined, to be admitted or proven.

8. The respondent is a haulage company, employing approximately 4 people. The company is owned by MP and MP is also the sole director.

9. The claimant commenced employment with the respondent on 10 July 2017. He was employed as an Operations/Contracts Manager. He worked 5 days per week. He was paid weekly, receiving a gross weekly wage of £568.82, which resulted in net take home pay of £450 per week. The first payment he received, following the commencement of his employment, was on 14 July 2017. He did not receive a contract of employment or any statement detailing his terms and conditions of employment.

10. The respondent worked to a holiday year of 1 April to 30 March annually. This was not however written down and there was no way that the claimant would have known this. MP did not discuss this with him.

11. The respondent has no rules or procedures in relation to employees working for other organisations outwith their working hours for the respondent and did not object to employees doing so.

12. The claimant was provided with a vehicle, a transit van, to use in the course of his duties. He took that vehicle home each evening and at weekends and, with the knowledge of his employer, used the van for personal issues such as collecting his children from school. The van was fitted with a tracker.

13. The claimant took a period of annual leave from 2 to 13 July 2018 inclusive, returning to work on Monday 16 July 2018. Prior to his holiday he had indicated to MP that, for personal reasons, he may require to look for work elsewhere. MP responded to say that the claimant should do what was best for him. On his return from annual leave, having reflected on matters and having received an offer of alternative employment commencing 1 August

2018, the claimant intimated his resignation to MP. He indicated that he would work for the remainder of that week and the following week. He therefore envisaged that his employment would terminate on Friday 27 July 2018.

14. On 24 July 2018, MP discovered that the claimant had conducted some work for a former customer of the respondent, APC. MP had recently determined that the respondent would not work for APC going forward. The claimant had personally conducted the work for APC, being paid for his services through an agency he was registered with. The work which the claimant conducted was undertaken when he would not otherwise have been working for the respondent, namely on Saturday 21 July 2018 and from 4am to 6am on Tuesday 24 July 2018.

15. On Tuesday 24 July 2018 the claimant used his company vehicle to travel to APC's site, as he was starting work for the respondent immediately thereafter in the immediate vicinity. MP saw from the tracker details in the vehicle that the claimant had travelled to APC's site. MP considered that the use, by the claimant, of his company vehicle to do so was gross misconduct. MP telephoned the claimant to challenge him about this. There followed a very heated discussion, during which MP expressed his dissatisfaction at the claimant working for APC without his knowledge and using his company vehicle to travel there. He informed the claimant that he should return his company vehicle and finish up. MP then sent a text to the claimant confirming his instruction to return the company vehicle. The claimant did so.

16. The claimant was paid his normal wage on Friday 20 July 2018, but received no further payment from the respondent.

17. On or around 31 July 2018, MP wrote to the claimant seeking payment of £575 in respect of the claimant's use of his vehicle when travelling to undertake work for APC. There was no basis for this figure – MP stated in

evidence that he *'plucked the figure out the top of [his] head'* and decided to charge the claimant for this '*because [he] was angry with him.*'

18. On 31 July 2018, the claimant wrote to the respondent. His letter included the following *'I gave verbal notice on Wednesday 18th July that my last day of work would be Friday 27th July due to personal issues which I explained previously to you and again on Wednesday 18th July 2018.*' He requested sums due to him in terms of outstanding wages and holiday pay and then stated '*Following on from your statement I received on Tuesday 31st July, Purves Haulage Ltd did not have any written agreement with myself on second jobs or using the vehicle out with normal working hours.'*

Observations on evidence

19. There was a dispute as to whether the claimant had actually intimated his resignation to MP at any point. The claimant stated in evidence that he did so on 17 July 2018. The respondent however stated that the claimant had merely indicated that he may need to look for alternative work at some stage. The Tribunal find that the claimant did intimate his resignation to MP. The Tribunal find however that he did so on 18 July 2018. The Tribunal notes that, by 18 July 2018, the claimant had been offered another job, which was due to commence on 1 August 2018 and that he did in fact commence alternative employment on that day. Given these circumstances, the Tribunal find it more likely than not that the claimant would have intimated his resignation to MP, as he asserts. The terms of the letter which the claimant wrote to the respondent on 31 July 2018, also support this position that verbal notice was given to MP and that he indicated he would work until the end of the following week. That letter however indicates that verbal notice was given on 18 July 2018. Given that that letter was written within 2 weeks of the resignation, the Tribunal find that this correctly stated the date of the discussion.

20. There was a further dispute between the parties as to whether the claimant was summarily dismissed by the respondent on 24 July 2018. The claimant stated that he was, but MP stated that it was the claimant's decision to finish up that day. The Tribunal preferred the claimant's evidence for the following reasons:

- MP accepted in evidence that he felt the claimant's actions constituted gross misconduct;
- he stated that the conversation which he had with the claimant on the telephone was extremely heated – stating it was a 'blazing row'; and
- MP initially stated in evidence in chief that he had not told the claimant he was fired or told him to return the vehicle, stating that it was the claimant's choice alone to return the vehicle and not to return to work. He then however accepted in cross examination that he had sent the claimant a text message instructing him to return the vehicle. This undermined his previous evidence.

Relevant Law

21. Section 13 of the Employment Rights Act 1996 provides that an employer shall not make a deduction from a worker's wages unless:

a. The deduction is required or authorised by statute or a provision in the worker's contract; or
b. The worker has given their prior written consent to the deduction.

22. A deduction occurs where the total wages paid on any occasion by an employer to a worker is less than the net amount of the wages properly payable on that occasion. Wages are properly payable where a worker has a contractual or legal entitlement to them (***New Century Cleaning Co Limited v Church [2000] IRLR 27***).

23. The Employment Tribunals Extension of Jurisdiction (Scotland) Order 1994 gives the Tribunal jurisdiction to consider breach of contract claims where the

claim *'arises or is outstanding on the termination of the employee's employment'* (Regulation 3). It also provides that an employer may counterclaim against the employee where that claim '*arises or is outstanding on the termination of the employment of the employee against whom it is made'* (Regulation 4).

Submissions

24. Parties were given the opportunity to make closing submissions, but declined to do so.

Discussion & Decision

25. The Tribunal initially considered which sums the claimant had a legal or contractual entitlement to:

a. **Arrears of pay:** The claimant claimed that he was entitled to payment for 16-24 July 2018. He claimed that, following the commencement of his employment on 10 July 2017, the first payment he received was on Friday 21 July 2017. On that basis, payment for week commencing 16 July 2018 was due to be paid to him on 27 July 2018. The claimant produced his bank statement covering the period 24-27 July 2017 only, which showed that he received a payment from the respondent on 24 July 2017. He stated that was the first payment he received from the respondent. The respondent produced a payslip dated 14 July 2017 and bank statements demonstrating that a payment of £500 was made to the claimant on 14 July 2017. In light of the documents produced by the respondent, the Tribunal found that the claimant was paid on the Friday 14 July 2017. Thereafter he was paid on Friday each week, for work conducted up to and including that day. The payment received by the claimant on 20 July 2018 accordingly covered the working week from 16 to 20 July 2018 inclusive. The claimant did not however receive any further sums following that date. He worked 23 & 24 July 2018. He did not receive

payment for these days. He was contractually entitled to payment for these days.

b. **Notice pay:** The claimant resigned on 18 July 2018, confirming that his last day of work would be Friday 27 July 2018. On 24 July 2018 he was asked to leave immediately and return his company vehicle. He was not paid for the remainder of his notice period – namely the period 25-27 July 2018 inclusive. Whether he is entitled to payment for the period from 25-27 July 2018 inclusive depends upon whether he had committed gross misconduct, which would justify summary dismissal. The Tribunal find that he had not. MP's evidence was that the claimant could do what he wanted when he was not working for the respondent. It was the fact that he drove to APC in the company vehicle which MP found objectionable and stated amounted to gross misconduct. It is clear however that there were no written rules in relation to the use of the company vehicle outwith normal working hours and the claimant was permitted to take the vehicle home in the evenings and at weekends. With the knowledge of his employer, he used the vehicle for personal journeys, such as to pick up his children from school. He was not challenged for doing so. He therefore reasonably believed that personal use was permitted. On 24 July 2018 he took the van to APC, as he required to conduct work for the respondent in the immediate vicinity immediately thereafter. The work at APC was accordingly conducted while on his way to his place of work. Using the vehicle to travel to APC could not, in these circumstances, be classed as gross misconduct. As the claimant had not committed gross misconduct, he was contractually entitled to receive payment for the remainder of his notice period.

c. **Holiday pay:** The respondent's position was that the holiday year ran from 1 April to 30 March. The claimant asserted that the holiday year was the calendar year, but could not provide any explanation as to why he believed that to be the case. Both parties accepted that the claimant had taken two weeks holiday from 2-13 July 2018 inclusive. Under the

Working Time Regulations 1998 a leave year commences on the date set out in a relevant agreement. A relevant agreement must, for the purposes of the Working Time Regulations 1998, be set out in writing. This could be in a contract of employment or a collective or workforce agreement. There was no such relevant agreement in place in this case. In the absence of a relevant agreement setting out the leave year, the Working Time Regulations 1998 (Regulation 13(3)) specify that the leave year begins on the date an employee's employment commenced, and each anniversary of that date thereafter. The appropriate leave year for the claimant accordingly commenced on 10 July each year. At best he worked for 17 days following the commencement of the leave year commencing 10 July 2018. He received 3 days' holiday pay during that period. He has no legal entitlement to any further sums.

26. The Tribunal was not persuaded that the respondent was entitled to make any deductions from any sums due to the claimant, or that the employer's contract claim, for damages for loss incurred by the respondent in respect of alleged breach of contract by the claimant, should succeed. The Tribunal find, for the reasons stated, that the claimant had not committed gross misconduct and was not in breach of contract – the respondent had permitted personal use of the vehicle outwith working hours, which is what the claimant was doing. Even that were not the case however, there was no evidence of any loss incurred by the respondent as a result of the claimant's actions – no additional mileage on the vehicle was incurred, as the work for APC was undertaken on the claimant's way to work. No sums are due to the respondent, by the claimant, as a result.

27. In light of the above, the Tribunal find that

a. the sum of £227.58 (representing 2 days' gross pay for days worked by the claimant on 23 & 24 July 2018) was unlawfully deducted from the claimant's wages on the termination of his employment, contrary to section 13 of the Employment Rights Act 1996; and

b. the respondent acted in breach of contract by failing to pay the remainder of the claimant's notice period, being the period from 25-27 July 2018 inclusive. The claimant is entitled to damages in the sum of £270 as a result (representing 3 days' net pay for 25-27 July 2018 inclusive).

Employment Judge: Sangster
Date of Judgment: 07 January 2019
Entered into the register: 10 January 2019
And Copied to Parties