EMPLOYMENT TRIBUNALS

Claimant: Mr H Eastham

Respondent: Primo Drinks Merseyside Limited

HELD AT: Liverpool **ON:** 9 January 2019

BEFORE: Employment Judge Horne

REPRESENTATION:

Claimant: In person
Respondent: Ms Elvin, consultant

JUDGMENT having been sent to the parties on 15 January 2019 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

Issues

1. By a claim form presented on 14 August 2018, the claimant brought a single complaint of unlawful deduction from wages contrary to section 13 of the Employment Rights Act 1996 ("ERA"). The claim was based on a series of deductions from the claimant's weekly pay, culminating in the respondent withholding his final pay altogether. It was common ground that the total amount of the deductions was 691.13. The questions for me to decide were:

   1.1. whether or not those deductions were authorised; and

   1.2. if the deductions, or any part of them, were unauthorised, whether I should decline to grant the claimant a remedy on the ground that the respondent would have been authorised to make other deductions.

Evidence

2. The claimant gave oral evidence on his own behalf. I heard evidence from Mr Eastham and from Mr Wright on behalf of the respondent. All witnesses confirmed the truth of their written witness statements and answered questions. I

also considered documents in a helpful bundle prepared on the respondent's behalf.

Facts

3. The claimant was employed by the respondent as a driver. He had two periods of employment. The first was for about five months ending in January 2018. The second period began on either 3 or 7 March 2018, depending on whose version one accepts, and ended on 20 July 2018. Significantly for the purposes of this claim, that second period was less than six months.

4. At the start of the first period of employment, the claimant was provided with a uniform. When he left, he returned his uniform to the respondent. He was not required to make any payment in respect of uniform costs and nothing was deducted from his pay on that account.

5. On 9 March 2018, just after starting his second period of employment, the claimant signed a Deduction from Pay Agreement. Amongst other things the agreement contained these clauses:

> "(13) Where you leave our employment within six months of your start date you will be required to reimburse the company the full cost of the uniform and the cost will be deducted from monies owing to you in the event of the failure to pay. If you leave the company at any time uniforms must be returned and if you fail to do so the cost of the uniform will be deducted from monies owing to you.
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> …
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> (16) If you terminate your employment without giving or working the required period of notice…you will have an amount equal to any additional cost of covering your duties during the notice period not worked deducted from any termination pay due to you…
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> (18) On the termination of your employment any outstanding monies that are owed to the company will be deducted from your final pay.
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> (19) In the event of an at fault accident whilst driving one of our vehicles you may be required to pay the cost of the insurance excess up to a maximum of £1,000, however excess may vary on an annual basis. In the event of failure to pay, such costs will be deducted from your pay.
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> …
>
> I have read and I understand the above terms. I agree that they form part of my Contract of Employment."

6. The respondent bought another uniform and gave it to the claimant to wear. The cost to the respondent was £82.00 plus VAT. The VAT was reclaimed.

7. On 29 March 2018 the claimant was driving one of the respondent's vehicles in the Bromborough area when he was involved in an incident with another vehicle. He drove away straight away. Very shortly afterwards he received a telephone call from the driver of the other vehicle to say that there had been a collision and that it had caused damage. The driver provided a picture of what the driver claimed to be the damage caused by the collision. In the claimant's opinion, the damage appeared to be no more than a couple of scrapes to the other vehicle's bumper.

8. The claimant informed his manager, Mr Kearns, of what had happened. Mr Kearns told him that it would be better to pay for the damage himself than to have to pay the insurance excess on behalf of the company. Acting on Mr Kearns' advice, the claimant made contact with the third party driver and discussed the damage. The driver told the claimant that they had had a previous accident but that the damage had already been repaired. The claimant was not sure whether or not to believe the third party about that.

9. The claimant would have preferred to have continued dealing directly with the third party and negotiate a direct payment for the damage. The third party, however, took matters out of the claimant's hands. He or she contacted the respondent's insurers and made a claim directly to them. As a result the claimant was required by Mr Kearns to complete a motor incident report form. It was obvious from the form itself, and from the context, that the purpose of filling in the form was so it could be forwarded to the respondent's insurance company. In that report form he gave a history of the accident, concluding:

> "I doubt the amount of damage was caused by me but accept I did collide with car as told CCTV shows this even though the loading bay has signs stating 'no parking'."

10. I find as a fact that the claimant did in fact collide with the other vehicle and that the other vehicle was stationary at the time. I have not heard from the owner or driver of the other vehicle, but it seems to me that all the signs point to there having been a collision causing at least some damage. That collision must have been at least partly the fault of Mr Eastham. It may also have been partly the fault of the driver of the other vehicle for parking it in the wrong place, but the claimant cannot escape blame altogether: it would only be in a very rare case that a driver could blamelessly drive their car into collision with a stationary vehicle.

11. The insurance company decided to pay out on the claim. That meant that the respondent was liable to pay an insurance excess of £1,000. Discussions took place between the claimant and Mr Kearns about how the claimant should reimburse that amount to the respondent. Mr Kearns proposed that the sum of £83 should be taken out of the claimant's wages each week. The claimant objected to paying at such a rate, saying that he would not be able to afford it. Following their discussion, the respondent started making deductions of £50 per week from the claimant's pay. There is a dispute as to whether or not the claimant agreed to repay at that rate and when the claimant first realised that the deductions were being made. I did not find it necessary to resolve that dispute.

12. The claimant commenced sick leave in roughly the end of June 2018. On 20 July 2018, without giving any notice, the claimant resigned his employment. He returned his uniform to Mr Kearns. I find as a fact that, when he returned it, Mr Kearns promised the claimant that he would not need to pay for the uniform. On this issue, the claimant's oral evidence is uncontradicted. Mr Kearns did not give evidence.

13. When the claimant announced his resignation, his leaving date was treated as being 20 July 2018 and his pay was processed on the same day. His pay slip provided for £277.44 accrued holiday pay and £36.82 sick pay. It recorded deductions for PAYE and National Insurance of £15.40 and £18.30 respectively. There was a further £9.43 deducted for his pension. His total net pay ought,

therefore, to have been £281.13. In fact, the claimant was paid nothing at all. This is because the respondent made the following deductions from his pay:

13.1. £85.00 was deducted for the cost of the uniform;

13.2. £86.13 was deducted on account of the insurance excess; and

13.3. £100.00 was deducted next to the entry "fuel for cover".

14. The "fuel for cover" deduction at the time was made because the claimant had not given notice of termination. It was wrongly thought that the lack of notice would cause £100 worth of loss to the company. The rationale for making the deduction was that the respondent would have to find a replacement driver each day during the notice period and that the respondent would have to pay that driver's fuel costs for driving to the depot. In fact, the respondent did not incur that cost: there were sufficient drivers already within the depot to cover the workload. In any event, even if the claimant had given his contractual notice, the respondent would have had to cover his absence in any event, because the claimant was too unwell to work.

15. On or about 27 July 2018 when the claimant discovered that his pay had been reduced to zero he queried the deductions from his pay with the respondent's Finance Director, Mr Frost. In turn, Mr Frost contacted Mr Wright. A decision was made by Mr Wright that the £100 "fuel for cover" charge ought to be lifted. The decision did not result in the claimant being paid anything. This is because, at that time, the claimant had still not fully repaid the insurance excess. About £520.00 of the excess remained unpaid. The £100.00 that had been earmarked for "fuel for cover" was instead applied towards repaying the excess. The claimant's final salary payment therefore remained at zero.

Relevant law

16. Section 13 of ERA provides, so far as is relevant:

> "(1) An employer shall not make a deduction from wages of a worker employed by him unless:
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> (a) the deduction is required or authorised to be made by virtue of a statutory provision or a relevant provision of the worker's contract; or
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> (b) the worker has previously signified in writing his agreement or consent to the making of the deduction.
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> …
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> (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, 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 wage on that occasion.
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> …
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> (5) For the purposes of this section an agreement or consent signified by a worker does not operate to authorise the making of a deduction on account of any conduct of the worker, or any other event occurring, before the agreement or consent was signified."

17. For a deduction to be authorised under section 13, it is not enough that there is a contractual provision that *would have* authorised the deduction; the deduction must *actually have been made* under that provision. Thus, where two separate clauses of an employee's contract authorised the withholding of sick pay, and the employer wrongly invoked one clause to forfeit sick pay, the deduction was unlawful and it did not matter that the employer would have been entitled to withhold sick pay under the other clause: *London Underground Ltd v. Jaeger* EAT 805/97.

18. Free from authority, I would, in any event, interpret section 13 as follows:

    18.1. The question of whether a deduction was authorised or not falls to be determined at the time of the *occasion* on which the deduction was made. An unauthorised deduction cannot be transformed into an authorised one by subsequent events.

    18.2. In my view deduction that was unauthorised at the time it was made does not become authorised merely because the employer would have been authorised to make a different deduction. Had Parliament intended that result, I would expect it to have been made plain in section 25, which places other limitations on the sums that are to be treated as having been deducted.

    18.3. To my mind, the question is: to what did the employer attribute the deduction and was the employer authorised to attribute the deduction in that way on that occasion?

19. Where contracts purporting to authorise deductions are drafted by the employer, any ambiguities are to be interpreted *contra proferentem* (that is, against the person who seeks to rely on it), but only where the terms are truly ambiguous. Where the meaning is clear, there is no room for *contra proferentem* interpretation: *Key Recruitment UK Ltd v. Lear* EAT 0597/07.

20. Section 23(1)(a) confers jurisdiction on employment tribunals to consider complaints of unauthorised deductions from wages. By section 24(1), where a tribunal finds a complaint under section 23 well-founded,

> "it shall make a declaration to that effect and shall order the employer…(a) in the case of a complaint under section 23(1)(a), to pay to the worker the amount of any deduction made in contravention of section 13."

21. Section 24(2) provides that a tribunal "may" additionally order the employer to pay the worker "such amount as the tribunal considers appropriate" in respect of consequential losses.

22. It is important to contrast the word "shall" in section 24(1)(a) with "may" in section 24(2). Whereas awards for consequential losses are discretionary, the tribunal has no choice but to order payment of the full amount of the deduction.

23. Section 25(1) provides:

> "Where, in the case of any complaint under section 23(1)(a), a tribunal finds that, although neither of the conditions set out in section 13(1)(a) and (b) was satisfied with respect to the whole amount of the deduction, one of those conditions was satisfied with respect to any lesser amount, the amount of the deduction shall … be treated as reduced by the amount with respect to which that condition was satisfied."

Conclusions

Deductions for the policy excess

24. I consider first the deductions from the claimant's pay in respect of the policy excess. In my view those deductions were authorised. The Deduction from Pay Agreement formed part of the claimant's contract (section 13(1)(a)) and, in any event, signified the claimant's written consent under section 13(1)(b). The consent and/or provision of the contract pre-dated the events that gave rise to the making of the deduction.

25. The Deduction from Pay Agreement authorised the respondent to make a deduction from the claimant's wages in the event of the claimant driving a vehicle and, owing to his fault, causing the respondent to incur an insurance excess. Those criteria were satisfied. At least partly due to his fault, the claimant drove a vehicle into collision with another vehicle. The collision caused the third party driver to make a claim against the respondent, which the respondent's insurers satisfied. Under the terms of the respondent's insurance policy, the respondent was consequently liable to pay a £1,000.00 policy excess. The respondent was therefore entitled to make a deduction of the amount of the excess from the claimant's wages.

26. The claimant argues that this is not an end to the matter. He points to the phrase, "failure to pay" in clause 19. His contention is that the authorisation to make a deduction only came into effect in the event of a "failure to pay", and that there could be no "failure" unless he had first been given a reasonable opportunity to make a payment.

27. In my opinion this argument does not assist the claimant, for the following reasons:

    27.1. My first reason is based on what the parties to the Deduction from Pay Agreement can sensibly be taken to have intended. Did they intend to require the respondent, as a pre-condition of authorisation to deduct pay, to give the claimant a chance to make a *payment*, such as a BACS transfer, to the respondent? I do not see what reason the parties would have had for inserting such a pre-condition. It would not be of any benefit to the claimant. It is clear from section 15 of ERA that a worker faced with having to make payments to his employer is thought to need just as much protection as a worker facing deductions being made from his wages. Making a payment to the employer out of the worker's net pay, if anything, is likely to put the worker in a worse position than if the payment is deducted from the worker's gross pay.

    27.2. My second reason is based on the ordinary meaning of "failure to pay". In my view, it means "non-payment", as opposed to a failure to take advantage of a particular opportunity to pay. By the time the respondent started making deductions from the claimant's wages, the claimant had not paid the amount of the policy excess to the respondent.

    27.3. My third reason is that in any event, the claimant was given a reasonable opportunity to pay the policy excess. Mr Kearns suggested that it was paid in instalments, with the money being taken out of his wages. The claimant rejected that suggestion.

28. The respondent was therefore authorised to make the series of £50.00 deductions from the claimant's wages and was also authorised to deduct £86.13 from the claimant's final pay.

Fuel for cover

29. The next question is whether the claimant authorised the respondent to make the deduction designated as "fuel for cover". In my view there was no authority to make that deduction. In the language of clause 16 of the Deduction from Pay Agreement, the company had not incurred any "additional cost of covering" the claimant's duties during the notice period.

30. The fact that there was a subsequent decision to re-categorise that deduction cannot change the nature of the deduction at the time that it was made. Nor can the fact that the respondent would have been authorised to make a different deduction in respect of the policy excess. The £100.00 deduction for "fuel for cover" was therefore unauthorised.

Uniform cost

31. Clause 13 of the Deductions from Pay Agreement initially authorised the respondent to make a deduction for the cost of the claimant's uniform. I find, however, that clause 13 was orally varied in the conversation in the conversation between the claimant and Mr Kearns. The claimant provided consideration by returning the uniform, presumably in good enough condition for it to be re-used by another driver. The surrounding circumstances: a discussion of money at a time of a terminating employment relationship, demonstrate an intention to create legal relations at the time that promise was made. Mr Kearns demonstrated a clear intention on behalf of the respondent to waive any entitlement that the respondent had to make any deductions from the claimant's wages to cover the cost.

32. The deduction of £85.00 for the uniform was therefore unauthorised.

33. If my conclusion in this respect is wrong, I would nevertheless hold that there had been an unauthorised deduction, albeit in a much smaller amount. This is because of my interpretation of clause 13 as originally agreed. The "full cost of the uniform" must mean the cost to the respondent. As conceded by the respondent, the VAT did not form part of the cost because the respondent was able to reclaim it. The cost without VAT was £82.00. That was the limit of the respondent's authorisation. The amount of the unlawful deduction would have been £3.00.

34. The respondent argues that, had it not made any deduction for uniform, it could have made further authorised deductions in respect of the policy excess. In my analysis of the law I have already directed myself that this argument cannot transform an unauthorised deduction into an authorised one.

Remedy

35. Section 24(1) gives me no discretion. Where the deduction has been made, I must order payment of the full amount of the deduction. It does not help the respondent to argue that it could lawfully have made a different deduction. Section 25(1) does not help the respondent here (although it would do so if my primary conclusion in respect of the uniform was wrong: the £85.00 would be reduced to £3.00). This is because the amount of "the deduction" is only treated as being reduced if one of the conditions in section 13(1) applied in respect of a

lesser amount “of the deduction”. It does not apply where one of the conditions would have been satisfied in respect of a different deduction.

36. The respondent must therefore pay the claimant the full amount of both unlawful deductions, which is £185.00.

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Employment Judge Horne

Date: 18 March 2019

REASONS SENT TO THE PARTIES ON

21 March 2019

FOR THE TRIBUNAL OFFICE

NOTICE

THE EMPLOYMENT TRIBUNALS (INTEREST) ORDER 1990

Tribunal case number(s): **2414529/2018**

Name of case(s): **Mr H Eastham** v **Primo Drinks (Merseyside) Ltd**

The Employment Tribunals (Interest) Order 1990 provides that sums of money payable as a result of a judgment of an Employment Tribunal (excluding sums representing costs or expenses), shall carry interest where the full amount is not paid within 14 days after the day that the document containing the tribunal's written judgment is recorded as having been sent to parties. That day is known as "*the relevant decision day*". The date from which interest starts to accrue is called "*the calculation day*" and is the day immediately following the relevant decision day.

The rate of interest payable is that specified in section 17 of the Judgments Act 1838 on the relevant decision day. This is known as "the stipulated rate of interest" and the rate applicable in your case is set out below.

The following information in respect of this case is provided by the Secretary of the Tribunals in accordance with the requirements of Article 12 of the Order:-

"the relevant decision day" is: 15 January 2019

"the calculation day" is: 16 January 2019

"the stipulated rate of interest" is: 8%

MISS H KRUSZYNA
For the Employment Tribunal Office

INTEREST ON TRIBUNAL AWARDS

GUIDANCE NOTE

1. This guidance note should be read in conjunction with the booklet, 'The Judgment' which can be found on our website at **www.gov.uk/government/publications/employment-tribunal-hearings-judgment-guide-t426**

If you do not have access to the internet, paper copies can be obtained by telephoning the tribunal office dealing with the claim.

2. The Employment Tribunals (Interest) Order 1990 provides for interest to be paid on employment tribunal awards (excluding sums representing costs or expenses) if they remain wholly or partly unpaid more than 14 days after the date on which the Tribunal's judgment is recorded as having been sent to the parties, which is known as "the relevant decision day".

3. The date from which interest starts to accrue is the day immediately following the relevant decision day and is called "the calculation day". The dates of both the relevant decision day and the calculation day that apply in your case are recorded on the Notice attached to the judgment. If you have received a judgment and subsequently request reasons (see 'The Judgment' booklet) the date of the relevant judgment day will remain unchanged.

4. "Interest" means simple interest accruing from day to day on such part of the sum of money awarded by the tribunal for the time being remaining unpaid. Interest does not accrue on deductions such as Tax and/or National Insurance Contributions that are to be paid to the appropriate authorities. Neither does interest accrue on any sums which the Secretary of State has claimed in a recoupment notice (see 'The Judgment' booklet).

5. Where the sum awarded is varied upon a review of the judgment by the Employment Tribunal or upon appeal to the Employment Appeal Tribunal or a higher appellate court, then interest will accrue in the same way (from "the calculation day"), but on the award as varied by the higher court and not on the sum originally awarded by the Tribunal.

6. 'The Judgment' booklet explains how employment tribunal awards are enforced. The interest element of an award is enforced in the same way.