EMPLOYMENT TRIBUNALS

Claimant: Mr J Howarth

Respondent: Bancroft Amenities Limited

HELD AT: Manchester **ON:** 21 March 2019

BEFORE: Employment Judge B Hodgson

REPRESENTATION

Claimant: Ms L McKee, Partner

Respondent: Miss L Kaye, Counsel

JUDGMENT having been sent to the parties on 3 April 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

Background

1. The claimant makes two claims herein, firstly alleging that he was not been paid the correct pay due to him up to the date of termination for the hours he had worked and, secondly, that the respondent had made an unlawful deduction of wages from his final pay arising from the cost of a training course he had earlier attended. The respondent contests both claims

Issues

2. The issues were discussed at the outset of the hearing and the following were agreed:

   2.1. Whether or not, upon termination of his employment, the claimant had been paid all moneys due to him, in accordance with the terms of his contract of employment

   2.2. Whether the respondent had made a valid or an unlawful deduction of wages in respect of the cost of a training course attended by the claimant, it being agreed that the deduction had been made, the respondent relying upon a document said to amount to consent on the part of the claimant

Facts

3. The parties produced an agreed bundle of documents and reference to numbered pages within this judgment are to pages as numbered within that bundle

4. The claimant gave evidence on his own behalf. The respondent called to give evidence Mr S Thompson, Director, and Ms M Simpson, Accounts and Pay-roll Administrator

5. The Tribunal reached its conclusions on the facts on the balance of probabilities having considered all of the evidence, both oral and documentary, and the submissions of the representatives. In the event, there was little material difference between the parties as to the actual relevant facts

6. The claimant was employed by the respondent in the position of Sportsground/Groundworks Contractor commencing on 18 March 2013. His employment ended by his resignation which was originally intended to be effective as at 4 May 2018 (see page 43) but, by agreement, was extended to 28 August 2018 (see page 51)

7. The claimant and the respondent signed a "Statement of Terms of Employment" dated 15 March 2013 (see pages 38 – 40) which includes the following terms

Pay	*£365.38 per week*
Hours of Work	*36 weeks at 50 hours per week – Summer*
	16 weeks at 36 hours per week – Winter
	(dates to be decided by the Company)

8. The reason for the pattern of hours to be worked is that the nature of the claimant's role was seasonal

9. An amended Statement of Terms of Employment was produced by the respondent dated 17 July 2018 (see pages 44 – 50). It was agreed between the parties that the terms of this document were brought into force in respect of the claimant, albeit not signed given the circumstances, in respect of both rate of pay and working hours

10. The material changes were to state the claimant's salary as being £441.81 per week (clause 8) and amending the working time for the Summer months to 36 weeks at 47.5 hours per week (clause 5)

11. It further states (at clause 8) that "Your salary has been calculated on an annual basis and is paid to you Weekly. This amount is spread evenly over the year although your hours differ in Summer and Winter." This reflects what had been happening in practice

12. At the request of the respondent, the claimant attended an HGV Training Course on 13 February 2015. There was no prior discussion regarding potential repayment of the cost involved

13. On 8 April 2015, the claimant was presented with a document (page 41) which states as follows:

HGV Lessons and test fees

Pay Back Agreement From Passing (£1225.00)

First 12 months	*100%*
1 – 2 years	*75%*
2 – 3 years	*50%*
3 – 4 years	*25%*
After 4 years	*0%*

All time off for lessons and test is paid time

14. The document was signed by both parties. The claimant claims that he felt pressurised into signing the document. The claimant accepts however that he did not, at the time or at any point subsequently, raise any complaint or grievance, formal or informal, surrounding his being asked to sign the document. Having heard the evidence, the Tribunal concludes that the claimant may have felt a degree of pressure, in that it was clear that the respondent was looking to have the document signed, but not such as to amount to duress in any legal meaning of the word. The Tribunal however has no reason not to accept the claimant's evidence that had he known he would be asked to sign the document, he would not have attended the course which he saw more as benefitting the respondent than himself.

15. Evidence was given to the Tribunal that other members of staff, including in fact the claimant at a prior period of employment with the respondent, had signed such an agreement in similar circumstances. The Tribunal does not attach any material significance to this evidence in determining the specific claim before it

16. Further, evidence was given that the respondent had agreed to waive repayment, to which it may otherwise have been entitled, in respect of another employee in similar circumstances. Again, the Tribunal does not attach any material significance to this evidence in determining the specific claim before it

17. Up to the termination of his employment, the claimant was paid his flat salary at his then agreed weekly rate of £441.81

18. Given the time of year, the claimant calculates that he had worked additional hours beyond those for which he had been paid as follows (see pages 52 and 56):

    £441.81 x 52 = £22,974.12 per annum

The claimant worked	8 weeks @ 36 hours
	19 weeks @ 50 hours
	7.4 weeks @ 47.5 hours

    This gives a total of 1589.5 which is 68.1% of the total hours to be worked in a year (2333.5 hours) but the claimant has been paid the total sum of £15,198 26 which is 66.1% of the claimant's annual pay. The claimant accordingly calculates the shortfall claimed to be in the sum of £447.11

19. The respondent does not disagree with this calculation but believes it has paid the claimant strictly in accordance with his contractual entitlement. This is the first issue to be determined by the Tribunal

20. The respondent deducted the sum of £306.25 from the claimant's final pay on the basis that it was authorised to do so by the document signed by the claimant referred to above (page 41). This is calculated at the rate of 25% of the total sum (given the claimant's length of service since attending the course). In turn, the claimant does not disagree with this calculation but does not accept that the deduction can validly be made by the respondent. This is the second issue to be determined by the Tribunal

Law

21. Section 13 of the Employment Rights Act 1996 ("the ERA") states

    (1) An employer shall not make a deduction from wages of a worker employed by him unless -

        (a) …

(b) the worker has previously signified in writing his agreement or consent to the making of the deduction

…

(6) 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

Submissions

22. The respondent's Counsel produced written submissions to which she spoke

23. In respect of the first issue, the claimant had been paid precisely in accordance with his contractual terms. There is no provision within those terms for the claimant to be paid for actual hours worked on termination of his employment or otherwise. Referring to the case of Ali & others v Christian Salveson Food Services Limited [1997] 1 All ER 721, no term should be implied to that effect and it would in any event be impossible properly to formulate any such implied term given the potential range

24. In respect of the second issue, the claimant had signed his agreement to the deduction. Even were this to be a discretionary power, there was nothing to suggest that it had not been exercised reasonably. With regard to section 13(6) of the ERA, the correct interpretation of this provision is that agreement needs to be signified only prior to the deduction being made

25. The claimant's representative made oral submissions arguing that the terms of employment included no provision for hours worked to be forfeited in the event of termination part way through the year.

26. In respect of the second issue, any agreement as to repayment should have been entered into before attending the training in order to enable the employee to decide whether or not to go on the course

Conclusions

27. The Tribunal finds that the relevant terms of the claimant's contract of employment are clear and unambiguous in terms of rate of pay and hours to be worked. Parties are entitled to reach whatever agreement they freely choose subject to statutory protection which is not breached by the terms in question in this matter. There is no need to imply any term into this contract for business efficacy or otherwise. The claimant has been paid in accordance with those terms

28. It is an inevitable consequence of the terms of the contract that there will be potentially 'winners' and 'losers' when an employee leaves their employment,

dependent upon the time of year. The respondent accepts that this can work both ways

29. In the circumstances, the Tribunal is satisfied that the claimant has been paid the sums to which he is contractually entitled and the first claim must therefore fail.

30. In respect of the second claim, the timing is that the claimant attended the course, subsequently signed an agreement to repay the cost on a sliding scale and then resigned his employment at a later date.

31. The Tribunal looked at the timing in the context of section 13(6) of the ERA. The event in question is a combination of attending the course and leaving employment such that, in the Tribunal's view, any agreement in order to be valid will have had to have been signed in advance of attending the course – this would appear also to be consistent with the spirit of the provision in that it would give the claimant the opportunity to decide whether or not to go on the course and thus potentially expose himself to full or part repayment

32. Further, the legal requirement is for any consent not merely to provide for repayment of the relevant sum but specifically for it to be deducted from wages. The terms of this consent are set out fully above and, whether expressly or even by implication, make no reference whatsoever to potential deduction from wages, the relevant wording simply being "Pay Back Agreement"

33. In the circumstances, the Tribunal finds that there has been an unlawful deduction from the claimant's wages in the sum of £306.25

Employment Judge B Hodgson

Date 17 May 2019

REASONS SENT TO THE PARTIES ON

4 July 2019

FOR THE TRIBUNAL OFFICE