



# EMPLOYMENT TRIBUNALS

**Claimant:** Mr L Burgess  
**Respondent:** Handtrans Ltd

**Heard at:** Nottingham  
**On:** Thursday 25 July 2019  
**Before:** Employment Judge Victoria Butler (sitting alone)

## Representation

**Claimant:** In person  
**Respondent:** Alan Broughton (Director)

**JUDGMENT** having been sent to the parties on 29 August 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:

## JUDGMENT

The Employment Judge gives judgment as follows:

1. The Claimant's claim for wrongful dismissal succeeds and the Respondent is ordered to pay damages to the Claimant in the sum of £416.50.
2. The Respondent has made an unauthorised deduction from the Claimant's wages and is ordered to pay the Claimant the sum of £500.
2. The Respondent failed to pay the Claimant's holiday entitlement and is ordered to pay the Claimant the sum of £400.
3. The Respondent's counter-claim fails.

# REASONS

## Background to this claim

1. This claim was originated by way of a Claim Form from the Claimant issued on 15 October 2018. He claims wrongful dismissal and unauthorised deductions from his wages in respect of a week's pay and outstanding holiday pay. The Respondent submitted its Response to the claim on 10 December 2018 denying the claim. It submitted that it was entitled to withhold the Claimant's final two weeks' pay and issued a counterclaim in the amount of £9,491.00.
2. On 19 January 2019, the Tribunal wrote to the Claimant notifying him of the counterclaim and allowing him 28 days to reply. The Claimant failed to respond. He told me that he had not received the letter and was in and out of hospital for some time with testicular cancer. The Claimant confirmed that he wanted to make an application to extend the time limit to present a Response and I granted the application after hearing both parties' submissions. In granting the application, I considered the fact that the Claimant had been hospitalised due to cancer and would be put to significant prejudice if he were barred from defending a substantial claim against him. The prejudice to the Respondent was negligible as it was in a no less favourable position that when it first submitted the claim.

## The claims and counterclaim

3. The Claimant claims for his final two week's pay comprising a week's pay and a week's notice pay, and unauthorised deductions from his wages in respect of four days' holiday pay. The Claimant was issued with payslips for his final two weeks of employment but was not paid the amounts itemised in them. The two payslips are dated 5 October 2018 ("payslip one") and 12 October 2018 ("payslip two") and were identified as documents 24 and 25 in the bundle. Payslip one amounted to £525 (gross) and payslip two £600 (gross), including four days of holiday pay. The Claimant claims that three days' pay were unlawfully deducted from his notice pay in payslip two. The Respondent submitted that the Claimant was not entitled to payment for these days because he was absent due to illness. It also submitted that it was entitled to withhold the last two weeks' pay in accordance with the Claimant's contract of employment.
4. The counterclaim had four elements to it arising out of damage to vehicles that the Respondent alleged were caused by the Claimant. Three out of four relate to an insurance excess and the fourth is for the cost of the recovery of a vehicle, which was not insurable. In respect of the 'excess' claims the Respondent paid

for the repairs itself and was claiming the insurance excesses that it *would* have had to pay had it submitted the claims to the insurers.

5. The four elements of the counter-claim were as follows:

*The 'excess' claims:*

Damage to bumper on 26.07.18 - insurance excess	£1,000
Damage to vehicle on 03.08.19 – insurance excess	£1,000
Damage to vehicle on 13.08.18 – insurance excess	£1,000

*The 'recovery' claim:*

Recovery of vehicle on 02.08.18	£6,491
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The total amount claimed:	<u>£9,491.00</u>
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**The issues**

6. The issues that I had to decide were as follows:

- Did the Respondent make unauthorised deductions from the Claimant's wages in accordance with Employment Rights Act ("ERA") section 13 and, if so, how much was deducted?
- To how much notice pay was the Claimant entitled?
- When the claimant's employment came to an end, was he paid all the compensation he was entitled to under regulation 14 of the Working Time Regulations 1998?
- Is the Respondent entitled to counterclaim against the Claimant for alleged damage to its vehicles?

**The evidence**

7. The parties represented themselves at the hearing. I heard evidence from the Claimant and, for the Respondent, from Mr Broughton, Director.
8. Mr Broughton provided a bundle of relevant documents which he sent to the claimant prior to the hearing.
9. The Claimant did not provide a witness statement and I relied on his oral evidence. Mr Broughton relied on a written statement. Where there was a

dispute in the evidence, I preferred the evidence of the Claimant who was consistent and credible. The Respondent's case was not credible.

10. During the hearing, the Claimant told me that Mr Broughton was mouthing unpleasant language at him whilst I was writing notes of evidence. I reminded the parties to be polite and courteous to one another and, thereafter, I was satisfied that a fair hearing took place. There were no further incidents.

### **The facts**

11. The Claimant was employed by the Respondent as an HGV class II driver from 16 July 2018 until 28 September 2018. He was issued with a contract of employment which he signed on 31 July 2018 and was paid two weeks' in arrears. He was in his probationary period when he resigned and was obliged to give a week's notice.

12. Clause 15 of the Claimant's contract of employment states:

*"If at any time during or on termination of your employment you owe your employer any money under this contract or otherwise you agree and authorise your employer to deduct the sum or sums owed from any payment due to you from your employer whether wages or salary or payment of any other kind. For example this will cover deductions from your salary of overpayments of salary, or expenses, repayments of loans, the cost of damage caused by you or any other money due from you to your employer. Any claim that can be made to the Company's insurance policy will not be deducted. However, there is a £1,000 excess on all motor policies which will be deducted where applicable".*

13. Clause 30 which is headed "Your Employer's Vehicles" of his contract states:

*"Your employer may similarly deduct or charge to you the amount of any insurance excess or other reasonable costs should a vehicle be involved in a road traffic accident or damaged in any other way while being driven by you or in your care and you are at fault (my emphasis). In this case, deduction will be via your wages over a period of time whilst being an employee but if employment is terminated, a lump sum deduction from wages"*

14. The Claimant had three minor accidents whilst in the Respondent's employment on 26 July 2018, 3 August 2018 and 13 August 2018. The Respondent was able to make claims to its insurers in respect of the 'excess' claims. However, it chose not to because of the likely effect on the premium which had already increased from £184,000 to £250,000. In an industry in which there are 'lots of bumps and scrapes' no formal investigation was undertaken and there was no finding of fault on the part of the Claimant.

15. On 2 August 2018, the Claimant was driving a company vehicle which became stuck on rough ground, following which the vehicle had to be recovered by a third-party company. He had been told by the Respondent that he had to take that particular route and was following its instruction.
16. On returning to the depot, the Claimant provided a written statement setting out what had occurred. The Transport Manager, Mr Hand, undertook a verbal investigation as to what happened. Thereafter, the Claimant did not hear anything further, nor was he advised that the Respondent was seeking to recover any payment. No formal investigation was undertaken into what had happened, nor was there a determinative finding of fault. In the absence of a formal investigation or any evidence presented at the hearing before me to demonstrate fault, I find that the Claimant was not responsible for the vehicle becoming stuck.
17. The 'recovery' claim was not insurable because there was no damage to the vehicle. Accordingly, the Respondent paid for the cost of recovering it.
18. The Claimant gave a weeks' notice on Friday 21 September 2018 confirming that his last working day would be 28 September 2018. He attended work on Monday 24 and Tuesday, 25 September 2018 and was absent from work due to illness for the remaining three days of his notice period. It was during this time that he was diagnosed with cancer.
19. He received payslips one and two, but was not paid the monies itemised in them. The Respondent withheld his final two weeks' pay to offset the cost of the 'excess' claims and the 'recovery claim'.

## **20. The law**

### *Breach of contract*

- 20.1 Article 3 of The Employment Tribunals Extension of Jurisdiction Order 1994 ("the Order") provides that proceedings for breach of contract may be brought before a Tribunal in respect of a claim for damages or any other sum (other than a claim for personal injuries and other excluded claims) where the claim arises or is outstanding on the termination of the employee's employment.
- 20.2 A claim for notice pay is a claim for breach of contract; Delaney v Staples 1992 ICR 483 HL.
- 20.3 If an employee brings a breach of contract claim, the employer is permitted to counterclaim against the employee - article 4 of the Order.

## **20.4 Deductions from wages**

*Section 13 Employment Rights Act 1996 (“ERA”)*

*13 Right not to suffer unauthorised deductions.*

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

*(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*

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

*(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.*

## **20.5 Payment during the notice period – ERA 1996**

*86 Rights of employer and employee to minimum notice.*

*1) The notice required to be given by an employer to terminate the contract of employment of a person who has been continuously employed for one month or more—*

*(a) is not less than one week’s notice if his period of continuous employment is less than two years,*

*(b) is not less than one week’s notice for each year of continuous employment if his period of continuous employment is two years or more but less than twelve years, and*

*(c) is not less than twelve weeks’ notice if his period of continuous employment is twelve years or more.*

*(2) The notice required to be given by an employee who has been continuously employed for one month or more to terminate his contract of employment is not less than one week.*

**87 Rights of employee in period of notice.**

*(1) If an employer gives notice to terminate the contract of employment of a person who has been continuously employed for one month or more, the provisions of sections 88 to 91 have effect as respects the liability of the employer for the period of notice required by section 86(1).*

*(2) If an employee who has been continuously employed for one month or more gives notice to terminate his contract of employment, the provisions of sections 88 to 91 have effect as respects the liability of the employer for the period of notice required by section 86(2).*

*(3) In sections 88 to 91 “period of notice” means—*

*(a) where notice is given by an employer, the period of notice required by section 86(1), and*

*(b) where notice is given by an employee, the period of notice required by section 86(2).*

*(4) This section does not apply in relation to a notice given by the employer or the employee if the notice to be given by the employer to terminate the contract must be at least one week more than the notice required by section 86(1).*

**Section 88 Employment Rights Act 1996:**

**88 Employments with normal working hours.**

*(1) If an employee has normal working hours under the contract of employment in force during the period of notice and during any part of those normal working hours—*

*(a) the employee is ready and willing to work but no work is provided for him by his employer,*

*(b) the employee is incapable of work because of sickness or injury,*

*(c) the employee is absent from work wholly or partly because of pregnancy or childbirth or on adoption leave, shared parental leave, parental leave or paternity leave, or*

*(d) the employee is absent from work in accordance with the terms of his employment relating to holidays, the employer is liable to pay the employee for the part of normal working hours covered by any of paragraphs (a), (b), (c) and (d) a sum not less than the amount of*

*remuneration for that part of normal working hours calculated at the average hourly rate of remuneration produced by dividing a week's pay by the number of normal working hours.*

*(3) Where notice was given by the employee, the employer's liability under this section does not arise unless and until the employee leaves the service of the employer in pursuance of the notice.*

## My conclusions

21. It was of help that the amounts in dispute were agreed, being the amounts listed in payslips one and two, plus three day's pay deducted from the Claimant's notice period.
22. I am satisfied that the Claimant was ill for the final three days of his notice period, and I am satisfied that it was related to the subsequent diagnosis of cancer.
23. The Claimant gave the Respondent a week's notice as required by s.86(2) ERA. Consequently, he is afforded the benefit of the provisions set out in s.88 ERA which means that he is entitled to full pay as opposed to statutory sick pay or any other provision in that period – or in the Claimant's case no payment at all. I am satisfied that the Claimant should be paid for those three days.
24. The next question is whether the Respondent was entitled to withhold the Claimant's final two weeks' pay? The Respondent relies on clause 15 of his contract of employment which I have set out above. The key part of the clause is that the Respondent is entitled to *"make deductions including the cost of damage caused by you or any other money due from you to your employer. Any claim that can be made to the Company's insurance policy will not be deducted (my emphasis). However, there is a £1,000 excess on all motor policies which will be deducted where applicable".*
25. So, if the Respondent *can* make a claim, then it cannot recoup the cost of the damage, only the insurance excess. The decision not to claim for the 'excess claims' was a commercial decision on the part of the Respondent. However, clause 15 does not allow it to counterclaim for an excess that was never actually payable, nor is it possible to read into this clause that the Respondent can recover a notional excess. As such, the 'excess claims' element of the counterclaim cannot succeed.
26. Turning to the second element of the counterclaim, the cost of recovering the Claimant's vehicle on 2 August 2018 was not covered under the insurance terms. Again, the Respondent relies on clause 15. However, this needs to be read in conjunction with clause 30:



*“Your employer may similarly deduct or charge to you the amount of any insurance excess or other reasonable costs should a vehicle be involved in a road traffic accident or damaged in any other way while being driven by you or in your care and you are at fault (my emphasis).....”*

27. I am satisfied that the Respondent could only deduct the cost of recovering the vehicle from the Claimant if it established that the Claimant was at fault. The burden of proof is on the Respondent to establish that he was at fault and, consequently, that it was entitled to recoup the monies. There was no formal investigation or allegation of fault put to the Claimant in order that he could respond. There was simply no evidence that would enable me to have any confidence that the Claimant was at fault and that the Respondent could rely on his contract of employment to deduct those monies. In the absence of that evidence, I find that the Respondent was not entitled to recover payment from the Claimant and that element of the counterclaim also fails.

28. The Claimant's claims for breach of contract, unauthorised deductions from wages and holiday pay succeed and the Respondent's counterclaim fails.

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Employment Judge Victoria Butler

Date 20 November 2019

JUDGMENT SENT TO THE PARTIES ON

FOR THE TRIBUNAL OFFICE

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