



## EMPLOYMENT TRIBUNALS

Claimant

**Mr M Davies**

v

Respondent

**Changing climates Ltd**

### PRELIMINARY HEARING

Heard at: **Leeds**

On: **17 December 2019**

Before: **Employment Judge O'Neill**

Appearance:

For the Claimant: **In Person**

For the Respondent: **Mr Berrison of Counsel**

### RESERVED JUDGMENT

The claim for unlawful deduction of wages by way of failure to pay wages properly payable (the bonus) is dismissed.

The claim for unlawful deduction of wages in respect of the alleged non return of tools, succeeds and the claimant is awarded compensation of £115

### REASONS

#### The claims

1. The claimant confirmed that his claims were limited to unlawful deduction of wages in respect of the respondent's failure to pay bonus in the sum of £1000 and the specific deduction from final salary of £115 in respect of tools allegedly not returned.

#### Relevant legislation

2. Employment Rights Act 1996 sections 13 & 27

3. The respondent referred me to the case of *New Century Cleaning Company Ltd v Church 2000 IRLR 27*

### **The evidence**

4. I heard from the claimant and from Mr David Keyl Director of the respondent. Mr Keyl also produced a written statement.
5. The respondent produced a bundle of documents which included a copy of the contract of employment, the handbook, various emails between the parties.
6. Counsel for the respondent made a submission, the claimant also responded and I reserved my decision because there was insufficient time to deliberate on the day.

### **The facts**

7. Having considered all of the evidence both oral and documentary the Tribunal makes the following findings of fact on the balance of probabilities which are relevant to the issues to be determined. Where I heard or read evidence on matters on which I make no finding or do not make a finding to the same level of detail as the evidence presented to me that reflects the extent to which I consider the particular matter assisted in determining the issues. Some of my findings are also set out in the conclusions below in an attempt to avoid unnecessary repetition. Conversely, some of the conclusions are set out in the findings of fact adjacent to those findings.
8. The respondent company is a relatively small business which installs air-conditioning systems. It employs about five or six engineers. Mr David Keyl is the director.
9. The claimant was employed as an engineer from 3 April 2018 to 30 August 2019 and ended when he gave notice.
10. At the start of his employment he had been issued with a contract of employment which he signed and accepted before starting work. Both that contract and the company handbook is completely silent on the matter of bonus payments'
11. the contract and the handbook specifically authorised deduction from wages in the event that tools are lost or damaged or not returned. The claimant accepts that this was a term of his contract which he had signed for.
12. Engineers are provided with the band for their personal use in the course of work and a set of essential tools. There is a factual dispute between the claimant and Mr Keyl as to whether the claimant was ever provided with a dot laser and a purging tool. These are the tools which were not returned at the end of the contract in respect of which a deduction of £115 was made from the claimant's final salary. Mr Keyl insists that these tools were provided but the claimant is equally sure that his toolkit did not include these items.

There is no inventory recording the tools entrusted to the claimant. However Mr Keyl gave evidence in chief that he recalls handing over the van to the appellant together with a standard set of tools which would have included these items as they are essential to do the work. The claimant insists that these tools were not included in his standard toolkit and he managed without them by using equipment from the central store.

13. In cross examination and in answer to my questions Mr Keyl became less sure of the details of the handover at the beginning of the claimant's employment and could not recall whether the tool safe was already fitted in the van or whether that had to be installed by the claimant. The claimant is sure that when he started with the respondent the van was not ready and the tools were not installed because there was no tool safe to put them in. He recalls it being his first job to install the safe. Mr Keyl conceded that that might have been the case i.e. that the van was not ready and the claimant had to install the tool safe.
14. Mr Keyl had initially said that the engineer's job could not be done without a dot laser and a line laser of the sort borrowed by the claimant from the central store is no substitute. He was challenged about this in cross examination and agreed on reflection that the job could be done with the line laser but that was a less efficient way of going about it.
15. Although I find Mr Keyl to be an honest witness I find his evidence as to what happened at the beginning of the claimant's employment to be less reliable than the claimant.
16. In respect of the tools the respondent has clearly made a deduction of £115 which is accepted by the respondent. Counsel for the respondent accepts that, the claimant having shown the deduction, the burden of proof falls to the respondent to show that this is a deduction it was entitled to make.
17. The contract certainly allows for such a deduction to be made (and the signed authority for it complies with the statutory requirements) provided that the circumstances in which the deduction can be lawfully made under the contract are satisfied. Therefore, the question arises as to whether there was a failure to return the tools or whether the claimant is to be believed when he says that he was never provided with such tools.
18. In the circumstances I find that Mr Keyl is a less reliable witness on that specific matter than the claimant. I find that the respondent has not shown on the balance of probability that the claimant was issued with those tools and therefore the respondent has failed to show that the claimant has not returned them. The deduction could only be justified under the contract if the respondent could show the Claimants failed to return the tools. Because the respondent cannot do so I find the deduction made on account of the claimant's failure to return the tools to be unauthorised.
19. The burden of proof is on the claimant to show a legal entitlement to the bonus and therefore by not paying it the respondent has failed to pay wages properly payable. The failure to pay wages properly payable is capable of being a deduction under section 13 (3) ERA. Wages include bonus payments by virtue of section 27.
20. The contractual documents are completely silent as the bonus. The claimant secured the job through a recruitment agency but none of the recruiting material has been produced. He says he was told at his interview that his salary was likely to be boosted by a bonus but does not go so far as to say

that he was told it would be guaranteed and/or of a specific amount. He says he was told that the salary would be £26,000 but with bonuses he could expect more.

21. The claimant conceded that the bonus was not guaranteed but depended on a number of factors including in his own words 'loyalty, his own work and how well the company was doing'.
22. There is no evidence of any bonus being promised to the claimant in or about August 2019 and no claim is made to that effect. The bonus was not declared or paid until September 2019 at a point when the claimant was no longer working for the company. Mr Keyl confirmed that the engineers have been paid a bonus in September 2019 but have been given different amounts and he could not recall exactly who had been paid what, some had more than £1000 some had less he thought.
23. Mr Keyl broadly agreed the factors identified by the claimant as the basis for a bonus payment. The claimant had been with the company for only 16 months, Mr Keyl was building a small business in which he remained working as a theatre alongside the engineers. He was sharing his experience, his expertise and his contacts. It was important to him that he built up a reliable team who would be loyal to the business and stay with him committed to building it up. And changing personnel is disruptive to such a business. Mr Keyl took the view that loyalty and commitment were not quality shown by the claimant who had handed in his notice at the beginning of August after only 16 months. In addition, Mr Keyl told us that the claimant had a number of recalls during the year which was another factor upon which bonus was based and which was not disputed by the claimant.

## **Conclusions**

24. Given my findings above I conclude that this was not a contractually guaranteed bonus but is a discretionary bonus and given the claimant's service record and intentions to leave the company it was not unreasonable for the respondent not to pay him a bonus. Therefore, the claimant has failed to show that he had a legal entitlement to the bonus and has failed to show that by not awarding him a bonus the respondent has made an unlawful deduction of wages by failing to pay the sums properly payable to him. In the circumstances his claim fails and is dismissed.
25. Given my findings above I conclude that claim for unlawful deduction from wages in the sum of £115 for tools allegedly not returned, succeeds. It is accepted that the deduction was made. The question is whether such a deduction is an authorised deduction under the terms of the contract. I find that Mr Keyl to be an honest but a less reliable witness than the claimant on the specific matter of what was issued. I find that the respondent has not shown on the balance of probability that the claimant was issued with those tools and therefore the respondent has failed to show that the claimant has not returned them. The deduction can only be justified under the contract if the respondent can show that the claimant has failed to return the tools and that depends on the respondent being able to show that the claimant was issued with such tools in the first place. Because the respondent has not done so on the balance of probability, I find the deduction made on account of the claimant's failure to return the tools to be unauthorised. In the

circumstances the claim succeeds and the claimant is entitled to compensation in the sum of £115.

17 December 2019

**Employment Judge O'Neill**