



EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4111329/2019

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Held in Glasgow on 6 January 2020

Employment Judge R King

10 **Mr B Owoh**

**Claimant
In Person**

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Resolvecall Limited

**Respondent
Represented by:
Mr S Robertson -
Solicitor**

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JUDGMENT OF THE EMPLOYMENT TRIBUNAL

25 The judgment of the tribunal is that (1) the respondent made an unauthorised deduction from the claimant's wages and is ordered to pay the claimant the sum of £200 in respect of that deduction and (2) the respondent dismissed the claimant in breach of his contract and he is entitled to notice pay in the gross sum of £75.15 in respect of that breach.

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REASONS

1. The claimant has made claims for notice pay, holiday pay, arrears of pay that he claimed had been deducted unlawfully and for recovery of postage and packaging expenses he had incurred for which he sought reimbursement. Although he ticked the box at section 8.1 of the ET1 to indicate he was also making a claim of unfair dismissal, the tribunal did not accept that claim as he had insufficient qualifying service.

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E.T. Z4 (WR)

2. During the course of the hearing, the claimant gave evidence on his own behalf and the respondent led evidence from its chief operations officer, Anne McVicker. A joint bundle of documents was lodged.

Findings in fact

- 5 3. The respondent is a credit management company that works on behalf of a range of companies from the banking, utilities and debt purchasing sectors to “reconnect” those companies with customers with whom they have lost touch over time. It has its head office in Glasgow from where it employs field agents throughout the United Kingdom, all of whom work from home.
- 10 4. The respondent employed the claimant as a field agent between 22 July 2019 and 11 September 2019. During the first week of the claimant’s employment he was issued with a written contract of employment setting out his terms and conditions of employment.
- 15 5. So far as relevant to these proceedings, the claimant’s contract of employment provided as follows:

“3 **SALARY**

Your basic salary is £18,000 per annum (or such other sum as shall be agreed from time to time) payable in 12 equal monthly instalments, on the last working day of the month and payable by direct bank transfer. For the purposes of payment of your salary, the first week of your payment will be regarded as “lying time/time in hand”. Payment due in respect of this period of “lying time/time in hand” will be retained by the Company and shall be paid to you as part of your final salary payment on termination of your employment.

For the purposes of the Employment Rights Act 1996, sections 13 - 17, you hereby authorise the Company to deduct from your salary under this agreement (including any amount payable in respect of “lying time/time in hand”), any sums due from you to the Company including, without limitation, your pension contributions (if any) and any overpayments, loans or advances made to you by the company. This may include:

(i) any salary and/or fees paid during training courses provided and/or paid for by the Company, should such courses have been undertaken in the 12 months prior to your leaving date;

5 (ii) any sums due in respect of a failure by you to return any Company property in good working order; and

(iii) any sums due in respect of "set up costs" (to the amount of £200.00) if you terminate your employment with the Company within your probationary period and/or, if the prior written notice required from you to terminate your employment with the Company is not exercised.
10 Please also see clause 12.

....

8 **PROBATIONARY PERIOD**

Your appointment is subject to a probationary period of 13 weeks, during which your performance will be carefully appraised and monitored. The
15 company, at its reasonable discretion, may extend your probationary period, should this be considered necessary for any reason. During your probationary period, this agreement may be terminated by either yourself or the Company, giving the other party 1 weeks' notice, except in the case of dismissal for gross misconduct, and/or where you have less than one month's
20 service, where there is no entitlement to notice or payment in lieu.

9 **HOLIDAY ENTITLEMENT**

Your annual paid holiday entitlement is 28 days per annum. This is inclusive of such public holidays as recognised by the Company in the holiday year and which are amalgamated with your annual entitlement. This entitlement
25 is pro-rated for employees working part time hours.

The holiday year runs from 1st April until 31st March. Annual leave not taken by 31st March may not be transferred to the following holiday year and will be forfeited without payment in lieu. Annual leave may not be taken in advance from the entitlement for the following year.

If your employment commences part way through the holiday year, you will be entitled to a proportion of your annual holiday entitlement calculated on a pro rata basis.

5 *Requests for annual leave are granted at the discretion of your Manager and subject to business requirements. At certain periods during the year, the company may require you to retain holiday entitlement accrued for periods of closure or less than normal activity. Your entitlement should be utilised throughout the year on a pro rata basis so that you have leave proportionate throughout the year.*

10 *Upon termination of your employment, you will be entitled to receive pay in lieu for any unused holiday entitlement, assessed on a pro rata basis. The Company may require you to take unused holidays during your notice period. Deductions will be made from your final salary payment to recover any overpayment made as a result of excess holidays taken.”*

15 6. Between 22 and 28 July 2019, the claimant attended a training course in Glasgow for which the respondent paid his travel and accommodation expenses, which amounted to approximately £700.

7. On 25 July 2019, whilst in training, the claimant emailed the respondent in the following terms:

20 *“I am a new employee in training and I forgot to mention in my interview that I have a holiday booked next week from 29/07/19 to 07/08/2019.*

I mentioned it to my trainer who has given me this email address to make the request before I am allocated jobs on the system.

If any issues, please get in touch.”

25 8. The claimant subsequently took eight days paid annual leave between 29 July and 7 August 2019.

9. The claimant returned to work on 8 August 2019 and worked his normal duties until 23 August. On 24 August, he had trouble with his car, which he needed in order to fulfil his duties, and was unable to work that day. In the

circumstances he telephoned his manager Robin Jenkins to inform him of his situation. On 26 August, he had a further day's paid holiday. On 27, 28 and 29 August he was again unable to fulfil his duties because his car was still off the road. He returned to work on 30 and 31 August 2019 and then had a further day's paid annual leave on Monday 2 September, which was a bank holiday.

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10. On 3 September 2019, the claimant did not attend for work and he did not contact the respondent, as he was required to do by its absence reporting procedures. That same day, Robin Jenkins attempted to contact the claimant by telephone on his work and personal phone numbers, but without success.

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11. As a result, on 5 September 2019, the respondent wrote to the claimant, by recorded delivery post, in the following terms:

"Dear Bryant,

Absent without leave

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It has been highlighted to HR that you have been absent from work since Tuesday 3rd September 2019 and you have failed to follow the company's absence reporting procedures.

Robin Jenkins, Senior Performance Team Leader, has tried to contact you via your mobile with no response as well as contacting your emergency contact.

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I am writing to advise that the situation is critical, as you are now deemed as absent without leave (AWOL). I ask that you please call your line manager no later than 9 September 2019. If we do not hear from you by this date, we will be left with no alternative but to accept your one week's notice of resignation."

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12. The claimant did not contact the respondent in response to its letter of 5 September 2019. In the circumstances, the respondent wrote to him on 10 September 2019 in the following terms: -

“Dear Bryant,

TERMINATION OF CONTRACT OF EMPLOYMENT

I write to confirm the termination of your contract of employment as Field Agent with ResolveCall, effective from today’s date (10th September 2019) due to being absent without leave since Tuesday 3rd September 2019. Since you have not followed absence-reporting procedures and we have had no contact from you, we have no choice but to accept this as your one week’s notice.

*You have gone over your holiday entitlement by 6 days and this will be deducted from your final salary payment. Please be advised that all company equipment must be returned via recorded delivery within **TEN** working days of receipt of this letter, as per the asset receipt form you signed. Your final salary will be held until this time and the cost of any equipment not returned within this timeframe will be deducted from your final salary.”*

13. The respondent concluded that the claimant had resigned from his post with notice on 3 September 2019 in circumstances where he had provided no response to its letter of 5 September 2019, which it considered to be in clear terms.
14. The claimant received the respondent’s 10 September 2019 letter on 11 September 2019. He did not contact the respondent in response to that letter.
15. Although the claimant had accrued only four days paid annual leave entitlement during his employment, he had in fact taken ten days paid leave.
16. In due course the respondent issued the claimant with a pay slip dated 30 September 2019, which set out the monies due to him and the deductions that it was making from his September salary.
17. According to his pay slip, the claimant was due £450 gross basic pay for the days in September when he had been in the respondent’s employment, together with his week’s lying time of £346.15 gross.
18. However, the payslip also confirmed that the respondent was making certain deductions from his pay. These deductions were (1) £428.48 gross in respect

of "Absence Hours", which were the six and a half days when the respondent considered the claimant to have gone AWOL (29 August, 3 to 6, 7 (half day) and 9 September 2019); (2) £415.38 gross in respect of the six days annual leave that the claimant had taken over and above the four days annual leave he had accrued up to the date of the termination of his employment; (3) A "Start Up Fee Deduction" of £200, which represented a share of the travel and accommodation costs associated with the claimant's training week in Glasgow; and (4) £20 for "Equipment Lost".

19. According to his payslip the claimant was due £796.15 for his week's lying time and for his September pay but owed the respondent £1,063.46. In the circumstances the respondent did not pay the claimant anything by way of final pay; although nor has it pursued from him the £267.71 that it claimed he owed it.

20. The claimant's wage slip made no mention of notice pay because the respondent's position was that he had worked his week's notice between 3 and 10 September 2019.

London Ambulance Centre

21. Between 3 and 11 September 2019, the claimant was carrying out paid work at a contact centre run by the London Ambulance Centre. He had taken on this job temporarily until his vehicle was repaired and he could return to field duties for the respondent. The relevant part of the claimant's contract of employment provides as follows:

"21 – CONFLICT OF INTERESTS

During your employment with the Company you must not (except with the prior written consent of the company) directly or indirectly engage in any other business, trade or occupation, unless you have gained authorisation from a Company Director. Such authorisation shall not be unreasonably withheld. This is to prevent activities that give rise to, or may give rise to, a conflict of interest with the Company. Failure to do so may be deemed as a serious breach of contract."

22. The claimant did not inform the respondent that he was working with the London Ambulance Service. The respondent had no knowledge of this until the claimant admitted it in his evidence and therefore it could not have given him the necessary authority. The claimant had therefore worked for the London Ambulance Service in breach of his contract of employment. The claimant's contract of employment did not entitle the respondent to withhold his pay in circumstances such as this or where he was absent without leave for any other reason.

Submissions

10 *Claimant's submission*

23. In the first instance, the claimant conceded that he was no longer pursuing a claim in relation to posting and packaging costs of £20.70 which he admitted the respondent had paid him after he had raised his claim.

15 24. In respect of holiday pay, the claimant's position was that the respondent had acted unlawfully by deducting six days pay from his final salary in circumstances where it had not informed him that he had exceeded his holiday entitlement.

20 25. In relation to the termination of his employment the claimant had understood that once his car issues were sorted there would still be a job for him. He denied that the respondent had made any attempt to contact him in early September when it had claimed he was AWOL. He was adamant that he had notified Robin Jenkins of his car trouble on the day when his vehicle had broken down and that he had told him he could not guarantee he would be able to work until his car was on the road because of the cost of replacing his vehicle with a rental vehicle.

25 26. He had not received the respondent's letter of 5 September 2019 and he speculated that was perhaps because he was living with someone at the time whom he believed may have disposed of it without showing him it. In any event he believed the respondent had acted on a number of wrong assumptions.

Respondent's submission

27. On behalf of the respondent, Mr Robertson submitted that there was a lack of structure in the claimant's claim. He had inadequate recall of the material events that were relevant to his claim and no cogent arguments. For example, while his claim included a claim for notice pay, the claimant had provided no evidence at all that he was entitled to it.

28. Mr Robertson submitted that the dispute between the parties was fairly narrow in circumstances where the dates of employment were agreed as were the amounts that were being contested. The dispute arose in respect of the respondent's entitlement to deduct the sums that it had taken from the claimant's final salary.

29. The respondent's position was that the claimant's contract of employment entitled the respondent to make the deductions that it had made.

Holiday pay

30. In relation to the holiday pay deduction, the claimant's accrued paid annual leave entitlement for the duration of his employment had been four days but he had taken ten days paid leave. In those circumstances, paragraph 9 of the claimant's contract of employment entitled the respondent to deduct the six days excess holidays the claimant had taken over and above his accrued entitlement

Absence hours

31. In relation to the deduction for "absence hours", the respondent accepted the claimant had contacted it on 24 August 2019 to say he had car trouble and would be unable to work that day. However, the only day he had worked thereafter and prior to his dismissal had been 30 August 2019. The respondent had attempted without success to contact the claimant by telephone when he had not returned to work on 3 September 2019 and it had then followed up with its letter of 5 September 2019.

32. Mr Robertson invited the tribunal to take into account that the claimant had admitted in his evidence that he had carried out paid work for the London Ambulance Service during the week commencing 2 September 2019, which he had done without authorisation and in breach of his contract. The claimant therefore had good reason not to make contact with the respondent during that week and this pointed to the respondent's account that he had not made contact, being the more reliable and credible account.

33. Mr Robertson described the claimant's conduct as unusual and unsatisfactory. He had failed to attend for work without good cause and without authority and another employer was paying him for his time. He should not be entitled to pursue a claim in respect of the monies deducted from his final salary for those days when he was AWOL and working for another employer.

'Start up' fee deduction

34. The deduction in relation to the 'Start up' fee was permitted by paragraph 3(iii) of the claimant's contract of employment, (albeit the contract referred to 'set up' costs).

Resignation

35. In circumstances where it had no contact from the claimant on 3 September 2019, the respondent had gone through its usual process of attempting to make contact by telephone, sending a letter by way of a warning when telephone contact was unsuccessful and then finally sending a termination letter. That was the respondent's normal process in such a scenario and it had been adopted in this particular situation.

36. The respondent's letter of 5 September 2019 had made its position perfectly clear should the claimant fail to get in touch with it and yet the claimant had failed to make contact. Having regard to the clear terms of the respondent's letter of 5 September, the respondent had no alternative but to consider the claimant to have resigned, as he had indicated no desire to work with it any longer in response to that letter.

37. Mr Robertson invited the tribunal to dismiss all of the claims.

The relevant law

Unauthorised deductions from wages

38. Section 13 of the Employment Rights Act 1996 provides as follows:

5 **“13 Right not to suffer unauthorised deductions.**

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

10 (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—*

15 (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*

20 (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.”*

39. Section 27 (1)(a) of the 1996 Act provides that wages includes –

25 *“any fee, bonus, commission, holiday pay or other emolument referable to his employment, whether payable under his contract or otherwise”.*

Notice of termination of a contract of employment

40. In order to terminate a contract of employment lawfully, notice is normally required. Notice of termination should be clear and should be unambiguous – **Morton Sundour Fabrics v Shaw (1966) 2 KIR 1, Doble v Firestone Tyre and Rubber Co Ltd (1981) IRLR 300, Rai v Somerfield Stores (2004) IRLR 124.**

41. An unauthorised absence with no explanation may amount to a fundamental breach of contract, which could bring the contract to an end. However, following the decision of the Supreme Court in **Societe Generale, London Branch v Geys 2013 IRLR 122**, it is clear that a repudiatory breach does not automatically terminate an employment contract. The contract is not terminated until the innocent party elects to accept the breach.

'Absence hours' - should no work mean no pay?

42. Case law has long provided that work and wages are co-dependent. In **Miles v Wakefield Metropolitan District Council (1987) IRLR 193**, Lord Templeman held that –

"In a contract of employment wages and work go together. The employer pays for work and the worker works for his wages. If the employer declines to pay, the worker need not work. If the worker declines to work, the employer need not pay. In an action by a worker to recover his pay he must allege and be ready that he worked or was willing to work"

43. However, that analysis was subsequently criticised as being too simplistic and a clearer statement of the law was provided by Lord Justice Coulson in **North West Anglia NHS Foundation Trust v Gregg (2019) IRLR 570**, who stated that –

"I consider that the starting point for any analysis of [whether the employer is entitled to withhold pay] must be the contract itself ... Was a decision to deduct pay for the period [in question] in accordance with the express or implied terms of the contract? If the contract did not permit deduction then... the related question is whether the decision to deduct pay for the period ... was

in accordance with custom and practice. If the answer to both these questions is in the negative, then the common law principle – the “ready, willing and able” analysis... falls to be considered.”

Discussion and decision

5 *Holiday pay deduction*

44. As the claimant had taken ten days paid annual leave, but had only accrued entitlement to four days paid leave, the tribunal was satisfied that clause 9 of the claimant’s contract of employment entitled the respondent to deduct the overpayment of six days holiday pay in the sum of £415.38. Such a deduction
10 was clearly authorised by the claimant’s contract of employment, as required by section 13 (1) (a) of the Employment Rights Act 1996.

Start up fee deduction

45. The claimant’s contract of employment states that it is entitled to deduct from salary:
15 *“(iii) Any sums due in respect of “set up costs” (to the amount of £200) if you terminate your employment within your probationary period and/or, if the prior written notice required from you to terminate your employment with the company is not exercised.”*

It is clear that this clause only entitled the respondent to deduct set up costs
20 in circumstances where the claimant had terminated his employment.

46. The tribunal did not accept the respondent’s submission that the claimant had terminated his employment. While the respondent was entitled to be concerned about his absence without leave, it could not assume that he had resigned in circumstances where he had not responded to its letter of 5
25 September 2019. He did not give the respondent clear and unambiguous notice of his resignation. He merely failed to respond to the respondent’s letter in circumstances where the respondent could not be certain that he had read that letter. In the circumstances the respondent was not entitled to conclude that he had resigned from his employment.

47. The tribunal finds that the claimant did not resign from his employment. Rather the respondent terminated his employment without notice by its letter of 10 September 2019, which he received the following day. His last day of employment was therefore 11 September 2019.

5 48. As the claimant did not terminate his employment, the respondent could not rely on paragraph 3 (iii) of his contract of employment and it was not entitled by section 13(1)(a) of the Employment Rights Act 1996 to withhold the £200 start up/set up costs. This deduction was therefore unauthorised.

Notice pay

10 49. As the claimant was dismissed during his probationary period, paragraph 8 of his contract entitled him to be paid one week's notice unless he was dismissed for gross misconduct. As the respondent did not dismiss the claimant for gross misconduct, its failure to pay him his notice was in breach of his contract and he is therefore entitled to be paid his week's notice pay in the sum of
15 £346.15 gross.

Absence days/London Ambulance Service

50. Between 27 and 29 August 2019 the claimant's car had broken down and he was unable to fulfil his duties and between 3 and 11 September 2019, while absent without leave, the claimant was doing paid work elsewhere without
20 authority and in breach of his contract.

51. The claimant's contract did not permit the respondent to made deductions from his wages in either of those situations and nor was there evidence that the respondent's custom and practice permitted deductions in such circumstances.

25 52. However the tribunal finds that between 27 and 29 August and between 3 and 11 September the claimant was self evidently not ready, willing and able to work for the respondent. In the circumstances, the respondent was not required to pay him in respect of those 'absence days'. As a result, there was no deduction from his wages when it withheld his pay.

Award

53. According to his final pay slip the claimant owed the respondent £271 after all the deductions made had been taken off. His total award of £546.15 must therefore be offset against the sum he owed, leaving a balance due to him of
5 £275.15.

54. The claimant is therefore awarded the sum of £275.15; the first £200 should be paid as a net payment as it represents repayment of the 'set up' costs that were unlawfully deducted; the remaining £75.15, which represents an element of his notice pay, should be paid gross, subject to appropriate
10 deductions for tax and national insurance.

Employment Judge : R King

Date of Judgment : 4 February 2020

Date sent to parties : 6 February 2020

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