EMPLOYMENT TRIBUNALS

Claimant: **Mr P Marsh**

Respondent: **Andy Bunn Couriers Ltd**

Heard at: **Southampton** **On:** **14 February 2020**

Before: **Employment Judge Rayner**

Representation

Claimant: Mr A Bunn, In person

Respondent: Mr Vatcher, (Counsel)

JUDGMENT

1. The Respondent will pay the Claimant the sum of £1535.54 in respect of outstanding redundancy pay and in respect of an unlawful deduction as follows:

    a. The Claimant was entitled to a redundancy payment from the respondent of £3000. He is now entitled to receive the balance of that payment, being £1135.54 from the respondent, payable forthwith.

    b. The respondent has made an unlawful deduction from the claimant's wages of £400. The respondent will now pay the claimant the sum of £400.00

2. Oral reasons for the decision were given at the end of the hearing. A request for written reasons has now been received and the reasons for this judgment are set out as follows.

REASONS

3. Andrew John Barnes is the director of Andy Bunn Couriers Ltd. The respondent is a private limited company operating the business of carrier and transportation services.

4. The claimant is Mr Paul Marsh who was employed by Andy Bunn Couriers Ltd following a TUPE transfer of the in December 2014. He had previously worked for LH Transport. Therefore, employment with his previous employer counted for the purposes of his continuity of employment.

5. Mr Marsh alleges that he was subject to an unlawful deduction from his wages, when, on being made redundant, sums of money were deducted from his final wages, and from his redundancy payment, in respect of two incidences of damage to vehicles, which had occurred sometime in the past.

6. Mr Marsh stated that the costs of the damage had been waived by agreement by Mr Bunn, Mr Bunn alleged that he remained entitled to recover the money on termination of contract.

7. This was not a claim about redundancy, although Mr Marsh is making claim for a full redundancy payment.

8. Mr Marsh accepted that he was redundant, and after some disagreement, Mr Bunn accepted that Mr Marsh was entitled to a redundancy payment, and did in fact make payment of the full amount to Mr Marsh.

9. However, Mr Bunn deducted monies which he says were owing to him, from the redundancy payment as well as from outstanding wages.

10. There were therefore two key issues for me to determine.

11. Firstly, was Mr Bunn entitled to deduct any money from the redundancy payment ?

12. Second, was Mr Bunn entitled to recover the money in respect of two incidents of damage to company vehicles, cause by Mr Marsh, on termination of the contract?

13. I heard evidence from both Mr Bunn, who was represented by Mr Vatcher of counsel, and on behalf the claimant from Mr Marsh himself from Mrs Jacqueline Marsh, the claimants wife and from Mr C Picton, a fellow worker at Andy Bunn Couriers Ltd.

14. All four witnesses produced witness statements.

15. In addition I was provided with a bundle of documents of some 83 pages.

The contract of employment

16. The documents included a contract for Mr Paul Marsh in the form of a written statement of terms and conditions of employment. The contract states that Mr Marsh was employed as a delivery driver/warehouse operative and at paragraph 5.4 of the contract it states
    a. we shall be entitled to deduct from your salary or other payments due to you any money which you owe the company at any time. This includes (but not limited to):
    b. any previous error of overpayment
    c. holiday or time in lieu taken but not yet accrued
    d. the costs of damage or losses attributable to your negligence or dishonesty
    e. the cost of recovery or replacement of any company property in your possession or control which you failed to return on the termination of employment or at the company request
    f. outstanding loans or petty cash shortages
    g. any paring [sic] speeding or any other driving offence incurred whilst driving a company vehicle;
    h. any insurance excess incurred as a result of an accident whilst driving the company vehicle.

17. It was this term of the contract that lead to the underpayment redundancy the alleged unlawful deduction from the claimants contract, and the present dispute. I have therefore considered the clause of the contract, its effect and

the way it was operated, and arguably varied, by the parties.

Findings of Fact

18. On 11 March 2015, whilst driving a company van the claimant had an accident which damaged the van, leading to a need for a repair the van and an associated cost .

19. The claimant told me and I accept that as soon as he returned to work he told Mr Bunn what had happened and immediately offered to pay the cost of the repair. Mr Bunn told the claimant not to worry about it because accidents were occupational hazards which come with running a delivery business.

20. Mr Bunn did not take any further steps to recover the cost, or to tell Mr arsh what the cost was, or to tell him that the cost would be recovered at some point in the future.

21. I accept that this is what was said to the claimant. H the claimant as been diligent about writing down the detail of every matter in this case and I have also heard evidence from Mrs Marsh which I accept as true . She told me that on day of the accident Mr Marsh told her that Mr Bunn was not going to require him to pay the cost of the repairs and was very relieved about it.

22. Mr Bunn accepts that he did not ask the claimant to pay him at that time but states that he remained entitled to recover it from the claimant at any time subsequently because of the term in the contract.

23. However it was not until the claimant received his final payslip that he was aware that a deduction of £1320.15 had been made from his pay

24. Mr Marsh gave evidence that he believed the company's insurers had contributed £1070.15 and so the real cost of the repair to Mr Bunn was only £250. He argued that it was disingenuous for Mr Bunn to seek to recover this amount four years after the accident, having told him that he would not do so, and alleges that the only reason that Mr Bunn sought to recover it was because the claimant had asserted his statutory right to a redundancy payment.

25. In addition on his final payslip the words *miss-fuel at Sandford* indicated a deduction of £130 would be made. This referred to an incident in August 2017 when the claimant mistakenly put petrol, instead of diesel into the company van at a Texaco petrol station in Sandford.

26. At the time of the incident the claimant told me that he informed Mr Bunn what had happened and again offered to pay the cost of training the fuel. Again, Mr Bunn told the claimant not to worry about it and did not in fact recharge him at that point. Mr Marsh says and I accept that Mr Marsh paid for the diesel with his own card but was subsequently reimbursed by the company for the fuel. Mr Bunn had not sought to recover the cost of the wasted fuel from the claimant

27. Mr Marsh says that Mr Bunn was clearly a very generous employer. He had given all his workers a pay rise and he did not enforce a contractual right to recover payments in respect of accidents. Mr Marsh believed at the time that an agreement had been made on both occasions that he would not be required to repay any money in respect of either incident.

28. On 29 January 2019 shortly after he started work, Mr Marsh was spoken to by Mr Bunn. Mr Bunn stated that he was sorry but TNT had cancelled one of the contracts. The round that Mr Marsh had been doing would be absorbed into the main TNT rounds from 1 March 2019. Mr Marsh understood that Mr Bunn was effectively telling him that he would be redundant.

29. There is no dispute that the claimant was redundant and the claimant raises no issue about any alternative work being offered to him.

30. The claimant and Mr Bunn then spoke with other colleagues. During that discussion Mr Marsh first asked Mr Bunn about redundancy pay. Mr Bunn replied that they were not entitled to redundancy pay. The claimant asked Mr Bunn to seek some clarification about this which Mr Bunn agreed to do. A couple of hours later that day Mr Bunn sent Mr Marsh text message confirming that he was entitled to redundancy pay.

31. The claimant did not receive any written notification of his redundancy and so asked Mr Bunn agaon about this.

32. A few days later on 11 February 2019 he received the letter dated 1 February 2019 which states that the claimant's position with the company is redundant and gives one months notice of termination of the contract by reason of redundancy. It also states that *your statutory redundancy payment will be paid direct to you within 30 days of your last working day*.

33. Mr Marsh subsequently spoke to Mr Bunn and asked how many years of service Mr Bunn was taking into account in calculating redundancy. Mr Bunn told him that he would be taking 4 years into account and Mr Marsh expressed concern and stated that he believed he was entitled to have 5 years take into account .

34. On 17 February 2019 Mr Marsh wrote to Mr Bunn following a discussion on the 12 February 2019 regarding the claimants qualifying length of service resulting from TUPE transfer.

35. He stated that he believed he was entitled to have previous service with LH transport taken into account when calculating his redundancy.

36. On 19 February 2019 Mr Marsh set out in a three-page letter to David pickles from the RBA the events up until that point of time.

37. This letter was written shortly after the events had taken place and we accept that the contents of it are true. In this letter Mr Marsh refers to a conversation that had taken place with Mr Bunn on 19 February 2019. We accept that this letter and the evidence that Mr Marsh has given about this meeting is true.

38. I find that Mr Bunn asked to speak to Mr Marsh privately and made a comment to the effect that he was disappointed with Mr Marsh's attitude. He made reference to the fact that he's been a generous employer and it worked out that staff had been paid £24,000 each more over the past 4 years and they would have worked their previous employer. Mr Marsh accept this was probably right but said he was only seeking what he was entitled to. Mr Bunn then asked Mr

Marsh to consider his own financial position having lost the contract and implied to Mr Marsh that Mr Marsh was being greedy and asked him whether he really did want to do this.

39. Mr Marsh repeated that he was only seeking his legal entitlement and at that point we find that Mr Bunn did say, in that case , he would be recovering all the NEST pension payments he had made to the claimant and also said, did he [the claimant] remember the bump he had in the van at Castle Point in 2015 as he would now be charging him for the repairs to the other vehicle involved.

40. When the claimant received his final pay slip it included one weeks outstanding notice pay of £400 and his statutory redundancy pay of £3000.00. However, 3 deductions had been made from his pay slip which totaled a deduction £1535.54.

41. The first deduction was of the sum of £1320.15 and was in reference to an accident on 11 March 2015; the second was of £130 and referenced the miss-fueling incident at Sandford and a third deduction of £85.39 was made in respect of the NEST overpayment.

42. Mr Bunn does not dispute that payments of these amounts were deducted from the claimant's final salary and does not dispute that they were deducted from the statutory redundancy payment made to Mr Marsh.

43. What he says is that he was entitled to make deductions of this type from the claimant's wages because of section 5 of the employment contract set out above.

44. He told us that he had made a positive decision not to ask for payment in respect of either the accident on 11 March 2015 or the refueling incident in 2017 at the time the events took place and that it was his practice not to charge employees for matters such as this during the course of their employment.

45. He told me that he operated a policy of only charging employees for accidents and damage at the end of their employment and that his reason for doing this

was that he wanted a happy workforce. He was concerned that if he asked employees to pay for damage to their vehicles at the time of the incidents, that they would be disgruntled and that should they have an accident in the future that they would be less likely to tell him of.

46. He therefore chose instead to tell employees that they need not make the payments and then recharge them on termination.

47. He accepted that this had never been discussed with any employee and that his employees were not aware that this was the way he was working.

48. However, Mr Bunn also denies that the words that he said when telling employees that they did not need to pay for damage, would have given the impression to his employee that the money was never to be collected.

49. He denies that the claimant offered to pay for the miss-fueling in 2017 and denies that he had in fact paid or reimbursed the claimant for the diesel.

50. I prefer the evidence of Mr Marsh in this respect and find that the claimant did offer to pay for the miss-fueling; Mr Bunn refused but did reimburse the claimant. I find that Mr Bunn has not been honest about this matter.

51. Whilst there is some evidence that Mr Bunn had waived payments in respect of other employees and whilst Mr Bunn asserts that the reason in other cases was that he could not establish fault, I have seen no evidence of Mr Bunn charging any other employees in respect of accidents which were their fault; where there was an admission and an offer to pay; and a waiver or refusal of that offer to pay coupled with the reassurance that it was just one of those things. There is no evidence to support the suggestion that the employees would have known that they might be required to repay money at a later date despite being told by Mr Bunn that they did not have to pay.

52. In short Mr Bunn has produced no evidence to support the assertion that he operated a policy of only recovering money at the end of employment.

53. What I do have evidence of however is a chronology of events in which there is no suggestion whatsoever that the employer will recover any money in respect of a 4-year-old and 2-year-old accident until the claimant raised and persisted with raising his claim to a redundancy payment and the payment to him of the correct amount of the redundancy payment.

The Relevant Legal Principles

54. Sections 13 (1) a 13(1)b ERA 1996 provide that an employer shall not make a deduction from the wages of a worker employed by him unless the deduction is required or authorised to be made by virtue of the statutory provision or a relevant provision of the worker's contract or the worker has previously signified in writing his agreement or consent to the making of the deduction.

55. Section 27(1) ERA defines 'wages' as 'any sums payable to the worker in connection with his employment'. This includes 'any fee, bonus, commission, holiday pay or other emolument referable to the employment' See S.27(1)(a).

56. Certain payments by employers to workers are specifically excluded from the definition of wages by S.27(2) and (5), including redundancy payments. whether statutory or not. See S.27(2)(d).

57. A contract of employment is a legally binding agreement. Once it is made, both parties are bound by its terms and neither can alter those terms without the agreement of the other. Nevertheless, over the course of an employment relationship, an employee's terms and conditions may be changed or varied.

58. Most changes take place by mutual consent, and at common law a contract can only be changed by mutual consent and unilaterally imposed changes will not be contractually binding unless the other party agrees to them.

59. This means that the terms in individual employment contracts can be changed validly by the employer and employee agreeing a change, or the employee accepting a change by conduct, e.g. by carrying on working under the changed contract without protest. This means that a change notified to an

employee, and accepted by them, will be binding. This does not necessarily have to be reflected in a written agreement, but can be evidenced by the actions of the parties.

60. For example, In ***Simmonds v Dowty Seals Ltd 1978 IRLR 211, EAT*****,** there was an oral agreement that S would change from working on day shifts to working on night shifts. This change was never reflected in his written statement of employment particulars. New management decided that S would have to revert to day shifts, which would entail a loss of money, and S resigned, claiming that he had been unfairly constructively dismissed. The EAT stated that regardless of whether an employee's statutory statement of terms and conditions is altered to reflect the change, whether there has been a consensual variation of the terms of the employment depends on the evidence in the particular case. An agreement to vary the terms of a contract is not required to be in writing to have legal effect. S had proved that there had been a consensual variation of his contract, albeit an informal one, so that he was only required to work on the night shift.

61. Where a variation is to the advantage of a Claimant employee, express agreement may not be required. If an employee knows of the variation and continues to work, it may be implied that he accepts the variation. This is in contrast to cases where the variation is adverse to the employees interests.

62. In ***Lee and ors v GEC Plessey Telecommunications 1993 IRLR 383, QBD*** the court considered the question of consideration in the context of a contract variation. In that case the employer argued that there had been no consideration provided by the employees for enhanced terms in their contracts and thus the employer was not bound by those terms. The High Court stated that 'where, in the context of pay negotiations, increased remuneration is paid and employees continue to work as before, there is plainly consideration for the increase by reason of the settlement of the pay claim and the continuation of the same employee in the same employment'

63. An employer who has agreed to a variation might be 'estopped' (i.e. barred) from asserting at a later date that the variation was unlawful (because it was not supported by proper consideration) if the other party had relied on the agreement to his or her detriment.

Conclusions

64. Mr Marsh was entitled to receive a redundancy payment. The first question is the amount of redundancy pay Mr Marsh was entitled to receive. I conclude, and there is no real dispute, that the amount that he was entitled to receive was £3000.00.

65. Mr Marsh did not receive this amount, and his employer must therefore pay the balance of the redundancy payment.

66. Mr Bunn was not entitled to set off any deduction against a redundancy payment.

67. The next question concerns the contractual right of Mr Bunn to deduct monies from the claimant's contract on termination in respect of the damage to the vehicle in 2015 and the cost of the refuelling incident that took place subsequently.

68. There is no dispute that there was a valid term of Mr Marsh's contract of employment which entitled Mr Bunn to seek to recover payments in respect of damage to vehicles where damage was the fault of the employee.

69. Mr Marsh does not dispute that on each occasion damage was caused and that it was due to his error. In each case he offered to pay then and there for the damage of the cost of repair.

70. In each case I have found that Mr Bunn told Mr Marsh that he did not need to pay for the damage, and I conclude that he therefore waived his right to recover the money under the clause of contract.

71. I conclude that the contract was varied by Mr Bunn on each occasion , in that he made a clear offer not to enforce payment against the claimant which was accepted by the claimant . Applying the legal principles set out above the fact that Mr Marsh continued to work and that no further steps were taken in respect of recovery is sufficient to demonstrate a binding variation of the right to recover the money. I conclude that Mr Bunn did expressly agree with the claimant both on 11 March 2015 and in respect of the refueling incident in August 2017 that the claimant did not need to pay for the damage and that he should not worry about it.

72. I find that this was a clear agreement to waive a debt which the claimant was expecting to pay and which the claimant was offering to pay.

73. Whilst it is right that Mr Bunn was entitled at that point to recover payment from the claimant because of the clause in the contract, he was also entitled to waive his right to recover that money and I find that that is what he did.

74. The agreement was oral agreement but it was one which Mr Marsh accepted. And as he said in his evidence to me, he acted upon this agreement because he did not put money aside to clear the debt nor did he seek any further information about how much he might be required to pay in the future.

75. I also from the evidence that nothing that was said by Mr Bunn communicated to Mr Marsh that he, Mr Bunn, was reserving a right to recover the money at some point in the future at his discretion. On the evidence I have heard he had not varied the contract of employment such that he reserved a discretion to recover any outstanding costs on termination of employment.

76. The only conclusion I can draw from the evidence I have heard is that there was a clear and unequivocal agreement that Mr Bunn would not recover the money from Mr Marsh. put another way that Mr Marsh would not have to pay for the damage to the vehicles either at the time of the conversation or at any other time in the future .

77. I conclude that the only reason Mr Bunn decided to seek payment from Mr Marsh on termination of his employment was because the claimant had insisted on his right to the full amount of the redundancy payment.

78. I therefore conclude that the decision to seek to recover the money was not the result of any policy operated by Mr Bunn but was an attempt to go back on his word and breach an express agreement made with his employee several years before, that he would not recover the money from Mr Marsh.

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Employment Judge Rayner

Date 17 April 2020

Notes

Reasons for the judgment having been given orally at the hearing, written reasons will not be provided unless a request was made by either party at the hearing or a written request is presented by either party within 14 days of the sending of this written record of the decision.

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