EMPLOYMENT TRIBUNALS

Claimant:		**Respondent:**
Mr S K Salter	**v**	D & P Coaches Limited

Heard at: Reading **On:** 10 March 2020

Before: Employment Judge Milner-Moore (sitting alone)

Observers (newly-appointed non-legal members):
Ms C Bailey

Appearances
For the Claimant: Ms Salter (Claimant's sister)
For the Respondent: Mr Prais

RESERVED JUDGMENT

1. The respondent made an unauthorised deduction from the claimant's wages contrary to section 13 of the Employment Rights Act 1996.

2. The respondent is ordered to pay the gross sum of £2,054.75 to the claimant (which sum is subject to appropriate deductions for tax and national insurance).

3. The claim under regulation 14(2) of the Working Time Regulations 1998 succeeds and the respondent is ordered to pay the gross sum of £81.27 (subject to appropriate deductions for tax and national insurance).

REASONS

CLAIMS AND ISSUES

1. The claimant brings a complaint of unlawful deduction from wages. It is agreed between the parties that the claimant's last month's salary was £2,054.75 gross but that he received no such payment. This was because deductions were made by the respondent of the entire amount in reparation for damage caused to the respondent's coaches. It is an agreed fact that the claimant was driving the coaches in question when the damage occurred. The claimant also advances a claim for unpaid annual leave. It is not disputed that the claimant had accrued entitlement to 3.7 days leave in the

leave year in which his employment terminated. There is a dispute as to the amount of leave that the claimant had taken by the time his employment terminated and whether any payment regarding untaken leave is due.

2. The following issues arise for determination:-

1.1 Was the respondent entitled to make deductions from the claimant's final salary because the deductions made were either "*in accordance with a relevant provision of his contract"*, or were made in circumstances where the worker had '*previously signified in writing his agreement or consent to the making of the deduction*"? (S13 Employment Rights Act 1996).

1.2 If so, has the respondent shown that any right to make deductions had been triggered in the particular factual circumstances of the case, such that the deductions were authorised under the relevant contractual provision/written agreement?

1.3 Had the claimant taken less than his accrued annual leave at the time that his employment terminated and, if so, what compensation is due?

The hearing

2 The case had been listed for a one hour full merits hearing and directions had been made for advance provision of disclosure, bundles and witness statements. Bundles and statements were provided late by the respondent but the claimant and his representative had read most of the documents in the bundle over the weekend preceding the hearing. A few further documents were added to the bundle and the claimant and his representative were given time to read these. Most of the key documents in the bundle would already have been familiar to the claimant. Many of the additional documents which had been produced by the respondent were directed at proving that the claimant had been driving the vehicles in question at the relevant times. However, this was not disputed by the claimant. On that basis, I considered that the hearing could proceed without unfairness to the claimant, despite the late provision of documents by the respondent.

3 I heard evidence from the claimant and from two witnesses for the respondent, Mr Chennell (the Operations Manager) and Ms Westbrook (a manager of the respondent company). The respondent's representative attempted to augment the written statements produced by the witnesses by putting supplementary questions to his witnesses. The questions did not relate to new matters arising from the claimant's witness statement and so I did not consider this to be a legitimate use of the supplementary questions process. I did not therefore allow this.

Facts

4 The respondent is a coach hire company which provides services to customers, including schools and other organisations. The claimant began working for the respondent on 3 September 2108 as a coach driver. Before

he started work he was provided with a document described as a "Procedure List". This document did not purport to be a contract between the individual and the employer. It was essentially a guide produced by the employer setting out the manner in which the employees should perform their duties, a cross between a job description and standards of conduct. It covered a host of matters including pre journey vehicle checks, dress code, time keeping, obligations to leave vehicles clean and fuelled after use etc. Under "Accidents" it stated "*Any fault accidents may be charged to the driver, this could be the insurance excess or the cost of the repair (whichever is the lowest). We have the right to deduct these costs from your wages either at the time of the incident or upon leaving the company*". Although the claimant accepts that he saw the Procedure List he did not sign anything or provide any written indication to indicate that he agreed that it would form the basis on which deductions could be made from his wages. The claimant was not supplied with any other document which purported to be a contract or employment.

5 In November 2018, the respondent updated its contract and policies and the drivers, including the claimant signed a new statement of main terms of employment. It records that the claimant's contract was for 45 hours per week minimum 56 hours a week maximum. The statement provided that its terms, "*together with the Employee Handbook*" formed the claimant's contract of employment. The Employee Handbook included a deduction from wages agreement which the claimant signed on 22 November 2018. That agreement stated:

"Any damage to the vehicles, stock or property that is the result of your carelessness, negligence or deliberate vandalism will render you liable to pay the full or part of the cost of repair or replacement.

Any loss to us that is the result of your failure to observe rules, procedures or instruction, or is as a result of your negligent behaviour or your unsatisfactory standards of work will render you liable to reimburse to the full or part of the cost of the loss; and

In the event of an at fault accident whilst driving one of our vehicles you may be required to pay the cost of the insurance excess.

In the event of failure to pay, we have the contractual right to deduct such sums from your pay".

6 During his employment with the respondent, four incidents occurred whilst the claimant was driving its coaches as a result of which they were damaged:

6.1 On 23 October 2018, the hit the rear of a coach (registration number YN18 SSV) whilst reversing. The claimant completed an incident notification form although it contained no detail about how the incident occurred. In his evidence, the claimant said that the incident occurred whilst he was being assist to reverse by a banksman

employed by National Rail, the banksman accepted that he was at fault in the incident and it was for that reason that he had completed the form. The respondent put forward no evidence to contradict this account. The damage caused to the coach on that occasion cost the respondent £737 (excluding VAT) to repair.

6.2 On 17 November 2018, the claimant was driving the coach and a tree branch hit a window shattering it. The respondent claimed under its insurance but had to bear the £250 excess.

6.3 On 29 November 2018, the claimant was driving the coach when the mirror arm was injured. The cost of the repair was £663.83 excluding VAT.

6.4 On 15 December 2018, the claimant was reversing and hit the rear of the coach causing damage. The claimant sent a text to the respondent with some pictures of the damage saying "Sorry". The invoices produced by the respondent show that the costs of repair were £600.

7 The respondent did not tell the claimant, at the time of the incidents, that it would be recovering the repair costs from him or ask him to make payment for those costs. The respondent did not conduct any contemporaneous investigation of the incidents, nor did it ask the claimant to provide any detailed explanation of what had happened, nor offer the claimant an opportunity to comment on whether any damage had been caused in circumstances that either the provisions of the Procedure List or the "Deduction from pay agreement" would be engaged.

8 The statements produced by the respondent's witnesses did not contain any detail about how the incidents occurred or set out the factual grounds on which the respondent considered that it was empowered, under either the Procedure List or under the Deduction from Pay Agreement to make deductions from the claimant's wages. In oral evidence, the respondent's witnesses maintained that the claimant must necessarily have been at fault in these incidents, because no third party or other vehicle was involved. The respondent's coaches are fitted with various aids to assist the driver, including mirrors and rear marker lights and a rear view camera and monitor which is engaged when the coach is reversing. The respondent's position was that, had the claimant taken proper care and made proper use of the mirrors and cameras, then no damage could have occurred.

9 The claimant resigned from his employment in writing on 8th February 2019 giving a week's notice. On 11th February 2019, the respondent wrote agreeing to a last day of service of 15th February 2019 and stating that his final pay would be paid on 22nd February 2019 and his P45 would then be issued to him. The letter concluded by thanking him for his work and wishing him all the best for the future. In fact, the claimant did not work on the 15th February 2019. The respondent's letter did not state that the respondent considered him liable to reimburse it for the repair costs incurred in these four incidents nor did it request him to make payment for those costs. The respondent never at any time during which employment asked the claimant to make any payment in relation to the repair costs, it simply made

deductions from his final salary without any warning whatsoever. The claimant received no terminal pay on 22 February 2019, because the respondent's deductions extinguished his final salary payment.

10 The respondent's holiday year runs from January to December each year and the claimant was entitled to 28 days including public holidays The parties agree that the claimant had accrued entitlement to 3.7 days annual leave at the time of the termination of his employment. In her witness statement, Ms Westbrook asserted that the claimant had taken 5 days leave during January. However, the only documentary evidence put forward by the respondent to evidence the annual leave taken by the claimant in January 2019 was a document headed "Working Time Summary for Current Reference Period" which shows that the claimant took a number of "rest days" during January but only 3 days marked as "Annual leave". There was no evidence from the respondent to explain why this document should not be treated as an accurate record of the claimant's annual leave during January. On that basis, I concluded that the claimant had taken only 3 days leave during January. I do not have precise figures to enable me to calculate the claimant's average pay over the 12 weeks before his employment terminated as I only have monthly pay slips and these are not broken down by week. However, in the period from the beginning of November 2018 to 15 February 2019, (15.2 weeks) the claimant earned £8,721.25 gross and worked 780.25 hours. That translates to an average hourly rate of £11.17 gross. The claimant's average weekly hours over this period were 52 hours per week. This generates an average daily rate of £116.18 gross by reference to the average weekly hours.

11 The claimant claims £1,800 in respect of the deductions from his final salary and that he was placed in arrears with his bills such that he considers he should be awarded interest at 0.8%. However, the claimant provided no specific evidence as to any interest charges, or bank, or credit card charges incurred as a result of the non payment of his wages.

Law

12 Section 13 of the Employment Rights Act 1996 states

> *"13(1) An employer shall not make a deduction from the 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 on relation to the worker the employer has notified to the worker on such an occasion.

(5) For the purposes of this section, a relevant provision of a worker's contract having effect by virtue of a variation of the contract 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 variation took effect.

(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."

13 Where a complaint of unlawful deduction from wages succeeds, section 24 of the Employment Rights Act 1996 provides that:

"(1) Where a Tribunal finds a complaint under section 23 well-founded, it shall make a declaration to that effect and shall order the employer-

(a) In the case of a complaint under section 23(1)(a) to pay to the worker the amount of any deduction made under section 13.

…..

(2) Where a Tribunal makes a declaration under subsection (1), it may order the employer to pay to the worker (in addition to any amount to be paid under that subsection) such amount as the tribunal considers appropriate in all the circumstances to compensate the worker for any financial loss sustained by him which is attributable to the matter complained of."

14 Where there is a dispute as to whether any deductions were authorised by the provisions of the contract, i.e. whether the factual conditions necessary for an authorised deduction were made out, that is a matter that a Tribunal can and should resolve (**Fairfield Ltd v Skinner** [1992] ICR 836).

15 Under regulation 14 of the Working Time Regulations 1998, where a worker's employment terminates part way through the leave year and he has at that time taken less than his accrued entitlement to annual leave, he is entitled to a payment in lieu in respect of the untaken leave. The worker is entitled to be paid at the rate of a week's pay for each week's leave and a week's pay is to be calculated in the manner set out at sections 221-224 of the Employment Rights Act 1996. Where remuneration varies according to the hours of work section 222 of the Employment Rights Act 1996, provides that the last 12 weeks of employment should be used as a

reference period to calculate a week's pay by reference to the average weekly hours and applying the average hourly rate during that period to those hours.

Conclusion

Was the respondent entitled to make deductions from the claimant's final salary because the deductions made were either "*in accordance with a relevant provision of his contract"*, or where the worker had '*previously signified in writing his agreement or consent to the making of the deduction*"? If so, has the respondent shown that the deductions in question were authorised under the relevant contractual provision/written agreement?

16 I have concluded that the deductions made were unauthorised.

17 The respondent relies on the provisions of the Procedure List as authorising the deductions in respect of the incidents on 23 October and 17 November. However, the Procedure List was not a contract and the claimant had not signified in writing that he accepted that deductions could be made under the Procedure List. Even if I am incorrect in concluding that the Procedure List was not a contract, I do not consider, for the reasons set out below, that the respondent has shown that the claimant was at fault in causing the damage in question.

18 Nor could the deductions be treated as authorised under the provisions of the deduction from wages agreement signed by the claimant on 22 November 2018. Subsections 13(5) and (6) of the Employment Rights Act 1996, provide that any contract or written agreement cannot authorise deductions in respect of events which predate the contract or written agreement. Accordingly, I have concluded that the deductions relating to incidents on 23 October and 17 November were not authorised under either subsections 13(1)(a) or (b) of the Employment Rights Act 1996.

19 After the claimant signed the deduction from wages agreement on 22 November 2018, the respondent had a right to make deductions from wages provided that the deductions were made in accordance with the terms of the agreement. The agreement provided that

"Any damage to the vehicles, stock or property that is the result of your carelessness, negligence or deliberate vandalism will render you liable to pay the full or part of the cost of repair or replacement.

Any loss to us that is the result of your failure to observe rules, procedures or instruction, or is as a result of your negligent behaviour or your unsatisfactory standards of work will render you liable to reimburse to the full or part of the cost of the loss; and

In the event of an at fault accident whilst driving one of our vehicles you may be required to pay the cost of the insurance excess.

In the event of failure to pay, we have the contractual right to deduct such sums from your pay".

20 The respondent therefore had to show two things in order to demonstrate that any deduction was authorised under the terms of its deduction from wages agreement. First, it had to show that the damage was the result of carelessness, negligence, failure to observe rules, procedures or standards, or was the claimant's fault so that there was a potential liability to pay. Second, it had to show that the claimant had failed to pay in order to to trigger the contractual right to deduct from wages. I consider that the respondent has failed to establish either of these matters.

21 The respondent conducted no investigations in to the circumstances of the incidents at the time and it has put forward no evidence to show how they occurred. There is no evidence to suggest that the damage resulted from any breach of rules, procedures or standards. I am asked to infer, because no other vehicle was involved and because the coaches are fitted with mirrors and cameras, that any damage must necessarily have been the result of negligence, or carelessness, or fault on the part of the claimant. However, mirrors may have blind spots, as may cameras and sometimes individuals who are doing their best to exercise care may make a mistake. It does not therefore necessarily follow from the fact that an incident has occurred that the claimant was at fault.

22 The respondent has also not established that the claimant had "failed to pay" the repair costs such that it was authorised in making a deduction from his wages. The claimant received no notice before the deduction was made that the respondent expected him to reimburse it for the repair costs nor was he given any opportunity to pay the amounts that were subsequently deducted. He cannot therefore be said to have failed to pay the amounts deducted and the respondent's right to make any deductions under the agreement is contingent on such failure.

Annual leave

23 I have found that the claimant was entitled to 3.7 days leave but had taken only 3 days' leave when his employment terminated. I have calculated his average gross daily rate of pay at the relevant time to be £116.18. 0.7 of this gross daily rate is £81.27.

Consequential financial loss – section 24(2) Employment Rights Act 1996

24 The claimant had put forward no evidence as to the specific amount of any financial loss suffered as a consequence of the unauthorised deduction from wages. I therefore considered that it would be inappropriate for me to award any sum to compensate for such loss.

Employment Judge Milner-Moore

Date: 17 May 2020

Judgment and Reasons

Sent to the parties on: ..01.06.202.....

.....
For the Tribunal Office

Public access to employment tribunal decisions:
All judgments and reasons for the judgments are published, in full, online at *www.gov.uk/employment-tribunal-decisions* shortly after a copy has been sent to the claimant(s) and respondent(s) in a case.