# EMPLOYMENT TRIBUNALS

**Claimant:** Mr M Wilson

**Respondent:** C P Hood Mechanical Limited

**HELD AT:** Liverpool **ON:** 9 January 2020

**BEFORE:** Employment Judge Aspinall

**REPRESENTATION:**

**Claimant:** Mr George Wilson, claimant's father
**Respondent:** Mr Griffin, representative

**JUDGMENT** having been sent to the parties on 22 January 2020 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:

# REASONS

**Chronology of the proceedings and request for Reasons**

1. On 5 February 2020 Mr George Wilson contacted the tribunal saying he wished to appeal and would need written reasons. I saw those correspondences on 26 February 2020 and also saw that the respondent had been trying to make payment to the claimant. I directed that the tribunal write to the claimant to acknowledge that correspondence and ask the claimant to provide his bank details to the respondent. That letter went out on 28 February 2020. In the interests of justice and having regard to the overriding objective and proportionate use of judicial resource, a second letter was sent to the claimant that same day asking the claimant to say whether his request for reasons and indication of intention to appeal was because he had not been paid, or not. I also directed that the clerk telephone the claimant to seek that information. No response was forthcoming.

2. I reviewed the file on 25 March 2020 and wrote again to the claimant seeking his response with a deadline of 8 April 2020. On 30 March the respondent's advisers informed the tribunal that the claimant had been paid. I wrote on 11 June

2020 to the claimant enclosing all previous correspondence and advising the claimant that as no response had been received from him the tribunal would now close the file.

3. The file next came to me on 7 September 2020 and contained a telephone note of a call from Mr George Wilson on 6 August 2020 chasing up Reasons. He said he had not received any of the correspondence above though it was posted to his correct postal address and sent to his correct email account. The file also showed correspondence with the Employment Appeal Tribunal.

4. It is apparent Reasons are required and are now produced urgently with apologies to the parties and Employment Appeal Tribunal for delay.

## Background to the claim

5. By a claim form dated 23 September 2019 the claimant brought claims that the respondent had made unlawful deductions from his pay and had failed to pay him holiday pay due to him on the termination of his employment. The claimant had achieved an ACAS early conciliation certificate on 13 September 2019. The respondent defended those claims in its response form received on 7 November 2019.

## The recusal application

6. The hearing began today with a recusal application made by the respondent. The claimant had informed the Employment Tribunal clerk prior to the hearing that my name was known to them. The claimant's name and address were not known to me. I made enquiry via my clerk into the facts as to how the claimant says he knows my name. The claimant's father said that he thinks he knows my father, my sister and my brother-in-law from his workplace at Widnes Market.

7. On a practical level I checked the cause list and there was no easy swap with another judge today. I opened the hearing and said that the claimant has brought to the attention of my clerk that he knows my family from Widnes Market. The claimant confirmed the facts as stated to my clerk.

## My disclosure

8. I disclosed that I have never met the claimant. So far as I can recall, I have never met the claimant's father either. My father, sister and brother-in-law trade as Aspinall's Carpets at Widnes Market. I do not work there and have never worked there but I visit, maybe once per year. So far as I can recall my last visit was in summer 2019.

## The relevant law on bias

9. I summarised the law in Jones v DAS Legal Expenses Insurance Co ltd and others 2004 [IRLR] 218 and Locabail (UK) Ltd v Bayfield Properties Limited 2000

IRLR 96 CA for the parties. I asked them to imagine a neutral person, a fair minded objective observer, coming into the back of our courtroom. This person knows that my father, sister and brother-in-law work at the same place as the claimant's father. The question is: would that person think that I, having never met the claimant or his father, would deal impartially with this case today or would they perceive a real possibility of bias. I told them it was my intention to adjourn to allow the respondent's representative time to discuss this with his clients, and for the claimant and his father to discuss this matter and that I would then hear from them.

10. The claimant's father said that he and the claimant agree that they have never met me. They just knew that George Aspinall's daughter was a judge. They saw my name and thought I might be his daughter.

11. For the respondent Mr Griffin said that he was happy with my disclosure but that he did wish to take instructions. At this point the respondent asked had I seen any documents from the respondent. I confirmed that no documents had been passed to me from the respondent that morning. I said that in any event I was not going to read any more of the documents in this case until we are clear if I can hear it or not. I told them I was going to adjourn to consider the bias issue first. The respondent asked me what I had already read. I had read the ET1 and ET3 on the tribunal file. I had a bundle via my clerk from the claimant but not looked into it yet. The respondent and claimant had each seen the other's documents. The respondent then said that it has a paginated bundle and that it would like me to read its bundle whilst I was out of the room. I said that I was considering the bias issue first. I asked the respondent to pass the bundle to the clerk as soon as possible.

12. The respondent said that it thinks I have already read the claimant's documents and not its documents. That was not the case. I adjourned for them to consider their positions on me hearing the case.

**Adjournment and Arguments on recusal**

13. The hearing was resumed at 10.35am when I heard first from Mr Wilson senior for the claimant. The claimant confirmed that he was content to carry on. He said that he would be disadvantaged if I did not carry on. He said that "there has been enough delay in this case and that this needs to be dealt with today". The claimant has been under enormous pressure and does not want another six months like the last.

14. Mr Griffin for the respondent said that the respondent "vigorously objects to the continuation of this Judge in this case". I asked him for the basis on which the respondent has formed that view. Mr Griffin said that the respondent wished to submit that the objection was about the reading and that the Judge rejected reading its documents even though the Judge had already seen/read the other party's documents. Mr Griffin added that Widnes market is a very close-knit community and the respondent feels a lack of confidence in the Judge's ability to deal with this case because of the close-knit nature of Widnes Market community. Mr Griffin repeated that the main reason they do not have confidence in me is because I declined to read their documents when I have already had the claimant's documents.

15. I read back the notes of each of their arguments on recusal. The parties agreed they had been given time and opportunity to put their positions on recusal to me. I adjourned to make my decision.

**Decision on recusal**

16. I do not recuse myself in this case. A fair minded objective observer would conclude that I am able to hear the case impartially, justly and fairly. There is no real possibility of a perception of bias in this case.

**Reasons for non recusal**

17. If I had used my married name the issue would not have arisen. It is only the use of the name "Aspinall" that has alerted the claimant. The claimant quite properly brought this to everyone's attention, and it has been aired. I have never met the claimant and never met the claimant's father so far as I can recall. I do not know if a close-knit community exists amongst the traders at Widnes market. If it does, I do not belong to it. I have not looked at the claimant's bundle yet, only the tribunal file but even if I had looked at documents from one side or the other, the order of reading does not make me partial.

18. I considered the claimant's argument on delay and pressure. I considered that within the overriding objective it would not be a proportionate response or a good use of judicial resource to adjourn this case.

19. On the documents issue, I explained that it is common in Employment Tribunal proceedings for documents to arrive at different times. Today the claimant's documents arrived at my chambers earlier than the respondent's. I noted that the respondent's documents have still yet to be handed to the clerk in this case. I told the parties that what matters is not the point at which the documents arrive but that the documents are fully and fairly considered before a decision is reached. I will look at both bundles during the course of the hearing and my deliberations, and that equal attention will be given to consideration of the claimant's and respondent's documents.

20. I moved on to open the substantive hearing; identifying the issues, listing the issues and timetabling the case in the usual way. The case began at 10am. It was listed for two hours. The recusal issue took us until after 11am. I heard oral evidence in the substantive hearing and submissions and adjourned to make my substantive decision at 3.45pm having checked with both parties representatives that they had said all that they wanted to say. I gave oral judgment later the same day. A short form judgment was promulgated on 22 January 2020. The respondent contacted the tribunal on 23 January 2020 to say that it had been trying to make payment to the claimant but did not have its bank details. Reasons were requested on 5 February and are provided now for the reasons set out at paragraphs 1 – 4 above.

**Evidence in the substantive hearing**

21. I heard evidence today from the claimant, who was represented by his father, Mr George Wilson. The claimant had not prepared a witness statement so evidence in chief was taken from him by his father with support from me (with agreement from Mr Griffin) in directing the evidence in chief questioning to the relevant claims in the claim form. The claimant was cross examined by Mr Griffin, who did not want a break before cross examining the claimant.

22. I heard evidence from Mr Morrison, an employee of the respondent company and Mr Alex Wilson. Mr George Wilson cross-examined Mr Morrison and was supported by me to do so, so as to ensure points in conflict were put to the witness. Mr George Wilson cross-examined Mr Alex Wilson, again supported by me in ensuring points of conflict were put to the witness.

23. All the witnesses I heard from gave their evidence in a straightforward way.

24. Mr Matthew Wilson (the claimant) is the son of Mr George Wilson, his representative father, and Mr Alex Wilson who works for the respondent is the first cousin of Mr Matthew Wilson, the claimant. Although there was little factual dispute between the parties, there was much emotion in this case. The claimant accused the respondent of calling him a liar and a coward.

## Findings of Fact

25. The claimant worked for the respondent from 16 October 2017 until 26 July 2019. He worked as a plumber and gas engineer. He worked approximately 40 hours per week and his take home pay was £560 per week.

26. The claimant signed a contract of employment. I saw a document at page 39 of the respondent's bundle signed by the claimant. The claimant and Mr Alex Wilson on behalf of the respondent accepted that there was a binding employment contract between them. Attached to that document was a repayment of training expenses agreement which provided for the repayment of part of training expenses incurred on termination of employment. The parties agreed that it was a binding agreement that formed part of the contract.

<u>What the contract said about deductions for insurance excess</u>

27. The contract provided for deductions. At page 43 of the respondent's bundle, under "Authority to make deductions from wages". It says:

> "If damage results in a claim on the insurance we reserve the right to require you to pay any insurance excess that may accrue."

<u>What the training expenses agreement said about deductions for training expenses</u>

28. The training expenses agreement said on page 41 of the respondent's bundle:

> "If an employee has between 19 and 24 months of service at the date on which he leaves then the proportion of training costs to be repaid is only 25%."

The verbal agreement about the gas course

29. The claimant attended a course to keep his gas certification up to date. The respondent and claimed made a verbal agreement about the training course. They agreed that they would go "50:50" on the costs and time involved; so that the claimant would take half the time as annual leave and half as working time and the respondent would pay half the cost of the course up front for the claimant and the claimant would pay the other half himself.

30. The claimant was involved in a collision in the company van. He was parked and was looking in his mirror. He pulled out and clipped another vehicle. He accepted it was his fault. He reported the incident to his employer and provided a drawing, via screenshot on his mobile phone, of what had happened. The claimant knew and accepted that he would have to meet the excess on the claim and continued to work happily for the respondent after the incident but was shocked, upon termination of his employment, at the amount of the excess (£600)

31. On the whole there was a good working relationship between the respondent and the claimant. The claimant's letter of resignation at page 55 of the bundle recorded the amicable terms on which they parted. This was written prior to any deductions being made from the claimant's final pay.

32. In July 2019 the claimant gave notice of his resignation. He worked one week's notice until 26 July 2019. Mr Alex Wilson on behalf of the respondent told the claimant that he was invited to a leaver's meeting and that there would be deductions to be made regarding the van and the training course. He did not give any figures at that time and he may not have used the word "deductions", but he made it clear that there was a conversation to be had about apportioning payments to be due on termination of employment.

33. The claimant posted the van keys through a letterbox to the respondent on 24 July 2019.

34. The claimant did not attend work on the last day of employment, 26 July 2019. He did not put his timesheet in as he would ordinarily have done. He did not attend the leavers meeting that he had been asked to attend. He provided the data that was needed for the timesheet to the respondent on 29 July 2019. Mr Morrison on behalf of the respondent then processed the claimant's last pay. Mr Morrison calculated that £475.98 was due to the claimant for his last week's pay. Mr Morrison then turned to the employment contract and, using the provisions in that contract, decided that there were deductions to be made. Mr Morrison calculated the following deductions: £600 by way of deduction in respect of the excess on the insurance for the van and £327.50 by way of recoupment of its half of the cost of the gas certification course that it had paid. These calculations meant that the respondent said the claimant owed it £451.52.

35. The respondent's position at tribunal was that it was being wrongly accused of treating the claimant unfairly when it had invited him to a leaver's meeting and would have resolved the outstanding pay issues then, if only he had attended. On that point I find that the respondent's Mr Alex Wilson was not credible, as at that time it would still have deducted £600 and £327.50 from the claimant's pay even if he had attended a leavers meeting on Friday 26 July. I find this not to have been credible because when the respondent found out that it had itself been reimbursed some of the insurance excess (£600) it did not voluntarily reimburse the claimant that money.

36. At Tribunal the respondent accepted that the actual cost of the excess was £250 and that therefore it ought to reimburse the claimant £350 of the (£600) deduction it had made.

37. The respondent volunteered at tribunal that it had in its calculation of annual leave miscalculated the leave due to the claimant. In preparation for these proceedings Mr Morrison had looked at the figures and informed the Tribunal that the claimant was due an extra day's pay, which he calculated to be £112.

## The Law

38. Section 13 Employment Rights Act 1996 provides the right not to suffer unauthorised deductions. It states that an employer must not make a deduction from the wages of a worker *unless*

> **(1)(a) the deduction is required or authorised to be made by virtue of the statutory provision or a relevant provision of the workers contract, or**
>
> **(1)(b) the worker has previously signified in writing his or her agreement to the deduction**

39. The agreement in which the worker signifies his consent to the deduction must identify what will be deducted from the wages. It should not be ambiguous.

40. A worker may bring a complaint to an employment tribunal if his employer breaches these provisions. Where a tribunal finds that a complaint is well founded it may make a declaration to that effect and will order the employer to pay to the worker the amount of the unlawful deduction. The tribunal may order the employer to pay the amount of the deduction made together with "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".

## Submissions

41. I had a bundle of documents from the claimant and a bundle of documents from the respondent.

42. The claimant says that the deductions have been made unlawfully. The claimant admits that he signed a contract with a deductions clause contained in it, but through his father submits that it is unlawful in any event, ever, for a respondent

to make a deduction in respect of insurance excess. He submits that the 50:50 agreement on the gas course superseded the contractual provisions for recovering the training expenses.

43. Mr Wilson (senior) in representing his son referred at the end of his closing submissions to a European Court of Justice decision. He was not able to provide the full title or case reference for that case or a copy of the case but he suggested that that it was authority for the proposition that it is unlawful to deduct an insurance excess from an employee under any circumstances. He thinks it is called "Castillignaro".

44. The respondent says that the deductions were lawful but that it accepts it needs to reimburse the claimant the difference between the £ 600 originally charged and the £250 it eventually had to pay. It accepts that it owes one day's annual leave. It claims the right to retain all of the gas course deduction being 50% of the cost of the course and reflecting the 50:50 agreement that was reached.

**Applying the law to the facts**

45. There is a clause in the contract of employment signed by the claimant, I refer to page 43 of the respondent's bundle, under "Authority to make deductions from wages". It says:

> "If damage results in a claim on the insurance we reserve the right to require you to pay any insurance excess that may accrue."

46. The respondent had the contractual right to make a deduction from the claimant's wages in respect of insurance excess. In applying Section 13 the claimant had previously signed his agreement to this clause. As at the date of deduction it was lawfully made in the sum of £600. It subsequently became unlawful when the respondent failed to reimburse the claimant £ 350. That is because the respondent was only permitted by the clause to deduct the amount of the excess that it had to pay. The claimant is due £ 350.00

47. Turning then to the gas certification course. There is no factual dispute about the time to be taken for the course. The parties agreed that the respondent would pay half the upfront costs of the training and allow half the time to be taken as working time and half taken as annual leave. In the event the certification course took three days, so 1.5 days would be the respondent's working time and 1.5 days the claimant would take as annual leave. I accept the claimant's oral evidence which was not challenged by the respondent that he has only had credit for one of those days. I find the claimant is due another half day's pay of £56.

48. The parties disagreed as to whether or not there would be any authorised deduction by way of recovery of the training cost should the claimant leave the respondent's employment. The claimant says he should not have to repay any of the training cost contribution made by the respondent as they had the "50:50" agreement. Mr Alex Wilson on behalf of the respondent says that the 50:50 agreement he made verbally was related to the payment of the course upfront and the time taken and did not extend into superseding the express contractual term for

deduction in the contract of employment and the training agreement should the claimant leave. I accept his evidence. When he spoke about the business he spoke about all of its employees, and he struck me as someone who was keen to apply the terms of the contract fairly to all workers, irrespective of any family relationships. I do not accept that he made an oral agreement, the 50:50 agreement, that would vary the express written agreement that the claimant had signed. The respondent is entitled to recover its training costs as set out in the contract and training expenses agreement.

49. At page 41 of the bundle I saw the scale of percentage reduction to be applied to training costs on termination of employment. At the time the claimant left the business he had 21 months' service. The clause on page 41 provides that:

> "If an employee has between 19 and 24 months of service at the date on which he leaves then the proportion of training costs to be repaid is only 25%."

50. I find the respondent to be bound by the terms of that express written agreement. It should not have deducted 50% of the total cost of the course, it should only have deducted 25% *of its contribution*. It sought to recover its full contribution of £327.50. The proportion that it could legally deduct on termination was 25% of its contribution, which amounts to £81.88.

## Conclusion

51. The amount of lawful deductions that the respondent could have made from the final week's pay of £475.98 was £250 by way of insurance excess and £81.88 by way of recovered training costs. That means that the amount due to the claimant would have been £144.10 at the end of his last week of work.

52. To that I add the one day's holiday pay that the respondent concedes is due to the claimant of £112, and the half day holiday pay that I find it owes the claimant in respect of the fair apportionment of the gas certification course training time of £56.

53. The claimant's claim for unauthorised deductions and outstanding annual leave payment succeeds. The respondent is ordered to pay to the claimant £144.10 plus £112 plus £56 giving a total of £312.10 to be paid within 14 days of the date upon which the judgment is sent to the parties. The claimant is to provide the respondent with bank details to enable payment to be made quickly in the hope that the parties can restore good family relationships.

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Employment Judge Aspinall

Date: 9 September 2020

REASONS SENT TO THE PARTIES ON

10 September 2020

FOR THE TRIBUNAL OFFICE

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