EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Mr A Ananjevs	**v**	Onyx Building Products Ltd

Heard at: Bury St Edmunds (CVP) **On:** 10 December 2020

Before: Employment Judge S Moore

Appearances
For the Claimant: In person
For the Respondent: Elena Donaldson, Counsel

RECONSIDERATION JUDGMENT

The judgment of 13 August 2020 is varied in the following respects:

(1) The claim for unlawful deduction from wages succeeds in the sum of £1,430.00 gross (£1,280.00 + £150.00); and

(2) The claim for compensation for untaken annual leave succeeds in the sum of £104.61 gross.

(3) The claim therefore succeeds in the total sum of £1,534.61.

The Claimant is responsible for paying any tax due on these sums.

REASONS

1. This is a reconsideration of the judgment of 13 August 2020 in which I found the Respondent had unlawfully deducted £150 from the Claimant's wages. It was necessary to reconsider this judgment in the interests of justice because, for reasons previously set out in correspondence with the parties, the Claimant had not pursed at the previous hearing his claim of unlawful deduction from wages for August 2019 and compensation for untaken annual leave.

2. The background to the claim is set out in the judgment of 13 August 2020. As before, the Claimant gave evidence with the assistance of a Russian interpreter. For the Respondent I heard evidence from Mr A Kalnins and Mr M Kotur, and I was referred to a statement from Ms V Kosmaca.

3. At this hearing the Respondent accepted it had not paid the Claimant his wages for August 2019. The Claimant had already been advanced a payment of wages of £250. Further, the Respondent was entitled not to pay the Claimant his wages because the employment contract allowed deductions to be made for various relevant matters (the deductions clause) and/or to cover the cost of covering the Claimant's duties during his notice period if he resigned without giving notice (the lack of notice clause). The Respondent also submitted it had paid all of the Claimant's holiday entitlement.

4. As regards the deductions clause, the judgment of 13 August 2020 records that at that hearing I was provided with 2 copies of the Claimant's contract. Although both contracts are signed and dated 14 April 2019 the deductions clause in the Claimant's version of the contract required the Claimant to be notified in writing of the total amount of any deduction to be made from his salary, whereas the one produced by the Respondent did not. I found the version that had been provided by the Respondent had been falsified.

5. Today Ms Donaldson submitted I should reconsider that finding. She relied on a statement from Ms Veronica Kosmaca who stated she was in the office with the Claimant when he signed his contract and they agreed to amend the contract to remove the words "and in writing". Unfortunately, she says, she must have provided the Claimant with the unamended version of the contract. Ms Donaldson further submitted that that conversation had taken place and the employment contract had been signed on 3 August 2019 and been backdated to 14 April 2019, (3 August 2019 being the date when the Respondent had paid the penalty charge that precipitated this dispute, and also the date on which the Claimant provided the Respondent with certain employee information). Ms Kosmaca was not at the hearing to give evidence.

6. Ms Donaldson submitted that the deductions clause entitled the Respondent to deduct from the Claimant's pay the cost of three rental payments, which she submitted the Respondent had paid on behalf of the Claimant in May-July 2019.

7. The Claimant disputed he had ever had a conversation with Ms Kosmaca about the deductions clause. Further, Mr Kalnins, giving evidence for the Respondent, said the Claimant had signed the employment contract on 14 April 2019 and it had not been changed after that date. The Claimant also disputed that the Respondent had ever paid his rent. He stated that he had stayed in a property belonging to the Respondent for less than two weeks for which he paid £320 cash.

8. In the light of the above I reject the submission that the Claimant ever agreed verbally or in writing to the Respondent's version of the deductions

clause and/or to the removal of the words "and in writing". Accordingly, as recorded in the judgment of 13 August 2020, the true version of deductions clause was the one produced by the Claimant at the hearing on 13 August 2020 which contained the words "and in writing". The requirement to notify the Claimant in writing in advance of making any deduction was an essential component of the Respondent's contractual procedure for making deductions. It follows that even if the Respondent paid the Claimant's rent for a period of time (and I make no findings about this) it was not entitled to deduct those sums from the Claimant's wages because the Claimant had not been notified in advance, and in writing, of any such deduction as required by this employment contract,

9. As regards the lack of notice clause, this provides:

"If you terminate your employment without giving notice or working the required period of notice you will have an amount equal to any additional cost of covering your duties during the notice period not worked deducted from any termination pay due to you. You will also forfeit any contractual accrued holiday pay due to you over and above your statutory holiday pay if you fail to give or work the required period of notice."

10. Ms Donaldson submitted that since the Claimant resigned without notice the Respondent was entitled to withhold his wages for August 2019 to cover the cost of covering his duties during his one month's contractual notice period. She further submitted that the Claimant was informed on 8th August 2019 that the cost of the PCN was being deducted from his pay (in increments of £150). Mr Kalnins gave evidence to the effect that the Claimant agreed to the deductions and further that the reason the Claimant resigned on 26 August 2020 was because he wanted to travel to see his family.

11. The Claimant disputed all of this. He said he never agreed to pay the PCN (indeed he denied driving the truck on the date in question). He further relies on his resignation email to the Respondent dated 26 August 2019 (sent shortly before midnight) which states:

"Due to the failure to comply with the UK labour code and the terms of the contract, namely the deduction of funds from the salary in the amount of £150 by the employer (08/08/2019) without good reason, appropriate notice and my personal consent. I inform that I terminate the contract (labour relationship) unilaterally and declare the contract is not valid from the moment of not fulfilling the requirements of the labour code and contract."

12. In the judgment of 13 August 2020 I found that the Respondent's withholding of £150 from the Claimant's pay for July 2019 amounted to an unlawful deduction of wages, and this judgment maintains that finding. Accordingly the Respondent committed a repudiatory breach of the Claimant's employment contract, which the Claimant was entitled to accept by resigning without notice. Further, his resignation email is evidence that his resignation was in response to that breach. For the avoidance of doubt, I do not accept Ms Donaldson's submission (or Mr Kalnins' evidence) that the Claimant

accepted or agreed that he would have to pay the PCN and/or that he waived or affirmed the Respondent's breach of contract.

13. It therefore follows that the Claimant did not terminate the contract without giving notice, or the required notice, within the meaning of the lack of notice clause, and the Respondent was not entitled to deduct the cost of covering the Claimant's duties during what would have been his one-month notice period.

14. The claim for unlawful deduction of wages therefore succeeds. According to his contract the Claimant worked 8.5 hrs per day Monday-Friday for which he was paid £10/hr. Accordingly, between 1-26 August he worked 18 days (153 hours) for which he is owed gross wages of £1,530. Although there is provision in his contract for the payment of overtime and the Claimant says he worked overtime during August, since the Claimant did not have any record of the overtime he worked I cannot make any award in respect of overtime hours. Further the Claimant accepts he was paid an advance payment of wages of £250. Accordingly, he is owed gross wages for August 2019 of £1,280

15. As regards the claim for holiday pay, the period of the Claimant's employment was 19 weeks and both under his contract and under the Working Time Regulations 1998 the Claimant was entitled to 28 days annual leave per anum. He therefore generated the right to 10.23 days leave during his employment, which amounts to gross pay of £869.61. It was agreed the Claimant took 2 weeks leave in May 2019. He stated this was unpaid, however the Respondent said the Claimant was advanced £765 holiday pay at that time and has produced spreadsheets showing the breakdown of the Claimant's monthly pay to support this. Further although the Claimant's payslip for May 2019 does not itemise holiday pay, the amount of pay he received is commensurate with the pay he received in other months (despite him having taken leave). I therefore find that the Claimant was paid £765 holiday pay, which means he is owed £104.61 holiday pay.

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Employment Judge S Moore

Date: 16/12/2020

Sent to the parties on: 30/12/2020
T Henry-Yeo
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For the Tribunal Office