EMPLOYMENT TRIBUNALS

Claimant: Mr A Jones

Respondent: Conduit Construction Limited

HELD AT: Newcastle; by video **ON:** 29 September 2020

BEFORE: Employment Judge Aspden

REPRESENTATION:

Claimant: In person
Respondent: Mr P Collyer, consultant

JUDGMENT having been sent to the parties 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

Claims and issues

1. This case concerns the claimant's complaint that the respondent made deductions from his wages in contravention of section 13 of the Employment Rights Act 1996 when it sent him home from work without pay on 1 May 2020 and kept him off work without pay for six days in total (the original claim was for 11 days' pay but the claimant confirmed at the hearing that he was in fact owed 6 not 11 days' pay).

2. The issues for me to determine are:

   (a) whether the total amount of wages paid to the claimant for the days in question was less than the total amount of the wages properly payable;

(b) If so, whether the deduction was authorised to be made by a relevant provision of the claimant's contract of employment. In this regard the respondent's case is that the deduction was authorised by paragraph G in the section of the respondent's Employee Handbook entitled 'Health, Safety, Welfare and Hygiene' which, the respondent submits, formed part of the claimant's terms and conditions of employment.

Evidence and facts

3. I heard evidence from the claimant and, for the respondent, from Mr Brodie, who is employed by the respondent as Procurement and Planning Manager. I was also referred to documents in a bundle prepared for this hearing by the respondent.

4. I made the following findings of fact.

5. The respondent company manufactures door-sets, screens and ironmongery from its premises at South Shields. It employs approximately 65 staff.

6. The claimant started working for the respondent in May 2014. Some three years later, between 15 May 2017 and 23 June 2017, the respondent gave the claimant a document entitled 'Contract of Employment'. At around about the same time the respondent gave the claimant a copy of an Employee Handbook. On 23 June 2017 the claimant signed the contract document on its last page underneath a statement in the following terms: 'I have read, understand and am willing to abide by the terms and conditions laid down in the Employee Handbook and accept that they form an integral part of this Contract of Employment.' On the same date the claimant signed a document headed 'Employee Handbook receipt' underneath a statement in the following terms: 'I acknowledge receipt of this Employee Handbook, which is the property of the Company, and which forms an integral part of my Contract of Employment. I agree that if I do not return this Handbook on the termination of my employment, the sum of £5.00 can be deducted from any monies owing to me.' The claimant returned the Handbook to the respondent at the time he signed it.

7. There was no suggestion in the evidence that any of the terms set out in the contract or the handbook were negotiated with the claimant personally and I find that they were not: the documents were drafted by the respondent and given to the claimant to sign.

8. The document entitled 'Contract of Employment' contained clauses in the following terms:

> ***Pay arrangements***
>
> Payment is made weekly, in arrears, directly into your bank/building society of Friday of each week.
>
> …
>
> ***Hours of work***

> Your normal hours of work are 7.00am to 3.30 pm, Monday to Thursday, and 7.00 am to 2.30pm Friday, with an unpaid break of 30 minutes. These normal hours of work may be varied to meet the needs of the Company.
>
> You may be required to work a reasonable amount of overtime hours as directed by the Company. This may include the need to work shifts, unsocial hours and weekends.
>
> The Company also operates a 'banked hours' system, therefore you may be required to work less hours where necessary and make up the hours at other times.

9. The document also contained clauses relating to garden leave and lay off/short time working. It did not, however, set out the claimant's agreed rate of pay.

10. The Employee Handbook appears to have contained a section entitled 'Salaries and wages etc' but I was not referred to the contents of that section of the document by either party. The only part of the Employee Handbook I was referred to was a section entitled 'Health, Safety, Welfare and Hygiene' and, specifically, paragraph G which was headed 'Fitness for Work' and said:

> 'If you arrive for work and, in our opinion, you are not fit to work, we reserve the right to exercise our duty of care if we believe that you may not be able to undertake your duties in a safe manner or may pose a safety risk to others, and send you away for the remainder of the day with or without pay and, dependent on the circumstances, you may be liable to disciplinary action.'

11. The claimant is employed as a Bench Joiner. On 1 May 2020 the claimant drove to work and, on his way, picked up two work-colleagues in his car. Their shift was due to start at 6am. It would have been difficult for his colleagues to take public transport in to work at that time of day and it was usual for the claimant to give them a lift to work when they were working the early shift.

12. Later that morning, one of the men the claimant had given a lift to work told Mr Brodie that he had been told that someone he (the claimant's colleague) had been in contact with had developed symptoms consistent with Covid19. The claimant's colleague told Mr Brodie either that he had visited the third-party's house to get some tobacco or vice-versa. There was no suggestion that the claimant's colleague had any symptoms consistent with Covid19 himself and I infer he did not.

13. Mr Brodie then spoke to the claimant and asked him if he had shared a car with his colleague that morning. The claimant said he had. Mr Brodie then told the claimant that his colleague had been in contact with someone who had Covid19 symptoms. Mr Brodie told the claimant to go home and stay away from work for the next few days. This the claimant did. It is common ground that he was not paid during this period away from work. Mr Brodie accepted when giving evidence that the claimant was capable of doing his job when he sent him home.

14. Mr Brodie decided the claimant should not be paid because, in his opinion, the claimant had breached what he described as 'specific rules and guidelines' from

the government that said car sharing with someone from another household was not allowed. The respondent did not produce any evidence of any rule or guidance to that effect. When I asked Mr Brodie where the rule or guidance he had in mind was set out his response was that it was in the news and government speeches put out at the time, that it was referred to in the government 'guidelines' and that the Prime Minister had said in his televised broadcasts that people from separate households were not to car-share.

15. In his closing submissions, Mr Collyer said it was his 'understanding' that car sharing with people outside the individual's household was 'forbidden'.

Legal framework

16. A worker has the right, under section 13 of the Employment Rights Act 1996, not to suffer unauthorised deductions from wages.

17. Section 13(3) provides that there is a deduction from wages where the total amount of wages paid on any occasion by an employer is less than the total amount of the wages properly payable by him to the worker on that occasion (after deductions for tax and national insurance).

18. The words 'properly payable' refer to a legal entitlement on the part of the employee to the payment (*New Century Cleaning Co Ltd v Church* [2000] IRLR 27). The claimant case is that his legal entitlement to payment derives from his contract of employment with the Respondent.

19. It does not automatically follow that an employee is not entitled to be paid if they do not work. There are, however, some cases in which the express or implied terms of the contract, properly construed, do not give rise to any obligation to pay when work has not actually been performed, even if the employee is ready, willing and able to work.

20. In determining whether an employee is entitled to be paid for a period during which they have not worked, the terms of the contract are the starting point. As Lord Justice Coulson said in the case of *North West Anglia NHS Foundation Trust v Gregg* [2019] EWCA Civ 387, [2019] IRLR 570: "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?"

21. When construing or interpreting contractual documents, the Tribunal's task is to ascertain the objective meaning of the language which the parties have chosen to express their agreement. In doing so, the Tribunal must "consider the language used and ascertain what a reasonable person, that is a person who has all the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of the contract, would have understood the parties to have meant. The court must consider the contract as a whole and, depending on the nature, formality and quality of drafting of the contract, give more or less weight to elements of the wider context in reaching its view as to the objective meaning of the language used": Lukoil Asia Pacific Pte Ltd v Ocean Tankers (Pte) Ltd (The "Ocean Neptune") *[2018] EWHC 163*

(Comm), [2018] 1 Lloyd's Rep. 654. The starting point in construing a contract is that words are to be given their ordinary and natural meaning unless the context indicates that the words used had acquired or should be understood as being used in some other special sense. Where the meaning of a contract term remains ambiguous, the *contra proferentem* principle enunciated in the case of *Canada Steamship Lines Ltd v The King* [1952] AC 192 suggests that the ambiguity should be resolved against the party who put the clause forward and relies upon it.

22. In the case of Gregg, Coulson LJ went on to say this: "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."

23. The common law principle referred to here is one that recognises that, even if no work is actually performed, so long as the employee is ready and willing to work then he is generally entitled to payment of the remuneration due under the contract unless there is a specific term (express or implied) to the contrary. The common law principle was considered by the House of lords in Miles v Wakefield [1987] IRLR 193, HL. There, Lord Oliver identified an employer may invoke the common law principle and decline to pay where an employee's inability to work is 'voluntary' but not where it is 'involuntary', whereas Lord Brightman used the term 'involuntary impediment.'

24. The case law in this area was considered by the Court of Appeal in the case of Gregg referred to above. Giving the judgment of the court, Lord Justice Coulson acknowledged that it is not always easy to discern a clear set of principles from the authorities but considered the following to be uncontroversial:

    (a) If an employee does not work, he or she has to show that they were ready, willing and able to perform that work if they wish to avoid a deduction to their pay.

    (b) If he or she was ready and willing to work, and the inability to work was the result of a third-party decision or external constraint, any deduction of pay may be unlawful. It will depend on the circumstances.

    (c) An inability to work due to a lawful suspension imposed by way of sanction will permit the lawful deduction of pay.

    (d) By contrast, an inability to work due to an 'unavoidable impediment' (Lord Brightman in Miles v Wakefield) or which was 'involuntary' (Lord Oliver in Miles v Wakefield) may render the deduction of pay unlawful.

    (e) Where the employee is accused of criminal offences, the issue cannot be determined by reference to the employee's ultimate guilt or innocence, nor simply by reference to whether he or she was granted bail or not.

25. Coulson LJ doubted that 'unavoidability' (and therefore the unavoidable or involuntary nature of the third-party decision or external event) is 'to be construed narrowly', as suggested in some cases: it should not be taken to mean an Act of

God, or some other form of 'accident'. He expressed the view, in particular, that an employee should not be automatically characterised as not being 'ready, willing and able' to work, or avoidably or voluntarily unable to work, merely because the employee's actions have led to a suspension from work.

26. The respondent's case is that, even if there was a deduction from wages, the deduction was authorised. Section 13(1) says that an employer must not make a deduction from a worker's wages 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.

    For these purposes, a 'relevant provision' in relation to a worker's contract is defined in section 13(2). It 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 in relation to the worker the employer has notified to the worker in writing on such an occasion.

27. There are some exceptions from the right not to suffer unauthorised deductions but none of them apply in this case.

Conclusions

28. In determining whether the claimant was entitled to be paid for a period during which he did not work, the terms of the contract are the starting point. I have set out the relevant terms above.

29. The respondent's case is that it was entitled to send the claimant home without pay pursuant to paragraph G of the section of the Employee Handbook entitled 'Health, Safety, Welfare and Hygiene'. That is the paragraph headed 'Fitness for Work', which I have set out above.

30. The claimant signed two documents on 23 June 2017 in which he acknowledged that the Handbook contained terms and conditions that formed an integral part of his contract of employment. Paragraph G was apt for incorporation as a contract term. Accordingly, I agree with the respondent that this provision formed part of the claimant's terms of employment.

31. The respondent's case was that this term permitted it to send the claimant home without pay if the respondent considered that the claimant was not able to undertake his duties in a safe manner. I accept that that term permitted the respondent to send the claimant away from work without pay 'for the remainder of

the day' in certain circumstances. The right to send the claimant away from work only applied, however, when certain conditions were met. On the face of the paragraph in question, there were two conditions. They were as follows:

(a) that, in the respondent's opinion, the employee was not fit to work when he or she arrived for work; and

(b) that the respondent believed that the employee may not be able to undertake their duties in a safe manner or may pose a safety risk to others.

32. On the face of it, the discretion to send the claimant away without pay only applied where both conditions were met: it was not sufficient for the respondent to believe that the claimant may not be able to undertake his duties in a safe manner or may pose a safety risk to others; the respondent also had to be of the opinion was not fit to work when he or she arrived to work.

33. As to what is meant by an employee being 'not fit to work', I consider that the ordinary and natural meaning of that phrase in a work context denotes an employee's ability to carry out their job being impaired by virtue of their physical or mental condition or state. I have considered whether a wider meaning can be ascribed to that term as it is used in this context, such that it covers not only those whose ability to carry out their job is impaired due to their physical or mental state or condition but also those whom the respondent may consider to pose a safety risk to others. However, if that were what the words 'not fit for work' meant, then the phrase 'If you arrive for work and, in our opinion, you are not fit to work' would be entirely redundant. I recognise that the Employee Handbook may not have been drafted by lawyers, with every turn of phrase analysed for tautologies or ambiguities. Nevertheless, a reasonable person would have understood the words used to serve some purpose. Furthermore, if a contract term remains ambiguous, the *contra proferentem* principle suggests that the ambiguity should be resolved against the respondent, which is the party that drafted the clause and relies upon it. In all the circumstances, I conclude that, properly construed, paragraph G only permitted the respondent to send the claimant away without pay if both conditions were satisfied. In other words, it was not sufficient that the respondent believed that the claimant was not able to undertake his duties in a safe manner or may have posed a safety risk to others; the respondent also had to be of the opinion that the claimant was 'not fit for work'.

34. Mr Brodie accepted when giving evidence that the claimant was capable of doing his job when he sent him home. That being the case, I find that this term of the contract did not permit the respondent to send the claimant home without pay.

35. In any event, the only right reserved to the respondent by paragraph G was the right, if the relevant conditions were met, to send the claimant away 'for the remainder of the day'. Therefore, even if, contrary to my conclusions, the clause did permit the respondent to send the claimant away without pay on 1 My 2020, it did not permit the respondent to keep the claimant off work without pay on subsequent days.

36. It was not submitted that there is some other term of the claimant's contract, whether express or implied, that permitted it to reduce the claimant's pay while requiring him to stay away from work. Nor does the evidence support the existence of such an implied term. This is not, for example, a zero hours contract where pay was dependant on the claimant carrying out work and the employer could, in its discretion, decide not to offer any work. The claimant had normal hours of work and the contract did not give the respondent a general discretion to reduce those hours or provide no work, with a corresponding reduction in pay. That is evidenced by the fact that specific provision was made in the contract for garden leave and lay off/short time working.

37. The claimant's entitlement to pay therefore depends on whether he was ready, willing and able to perform his work.

38. There is no question that the claimant was ready and willing to perform his work. The issue for me to determine is whether he was able to do so.

39. It is not in dispute that the claimant was physically capable of doing his job. The respondent's case is that he was nevertheless 'unable' to work.

40. Although not referred to in the respondent's grounds of resistance, at the hearing Mr Collyer submitted that if the respondent had not sent the claimant home it would 'arguably' have been in breach of its legal obligations. When I asked Mr Collyer which legal obligations he was referring to Mr Collyer's response was that 'guidance' suggested the claimant needed to self-isolate. The respondent did not, however, produce evidence of any guidance published by the government, or from any other source, that suggested that someone was required, or advised, to self-isolate if they had been in the close vicinity of another person who, though showing no symptoms themselves, had been (for however short a period) in the close vicinity of a third person who had symptoms consistent with Covid19. In the absence of such evidence, I reject the respondent's submission that government guidance or advice at this time was to the effect that the claimant should self-isolate, still less that there was a requirement for him to do so.

41. Regardless of whether government guidance required or advised self-isolation, I accept that the respondent owed a duty of care to all of its employees and that that required the company to assess the risk posed by the claimant being permitted to remain at work. Mr Collyer did not, in terms, submit that the respondent was under a legal requirement by virtue of its duties under the Health and Safety at Work Act 1974 or its common law duty of care to any person to require the claimant to stay away from work. Nevertheless, I have considered whether that was the case.

42. The claimant's unchallenged evidence was that he worked in isolation, being the only person who operated the machinery in question at that time (the other person who would ordinarily operate it being absent from work as he was shielding). Despite the absence of any evidence from the respondent as to how the claimant might have posed a risk to others, I accept that there are likely to have been other considerations in the mind of the respondent, including the possibility that the claimant may have to use other common parts of its building, such as toilet facilities. Relevant to the assessment of risk, however, is the fact

that the respondent had decided to continue to operate and require its employees to attend work despite the virus. I assume the respondent must have carried out some sort of risk assessment when taking that decision, given that there was no way of knowing which of its employees might be harbouring the virus, without symptoms, at any time. I infer that, when deciding to continue to operate, the respondent decided that its employees were able to carry out their work safely notwithstanding the ever-present risk that an employee may have the virus. I infer that was because the respondent put in place appropriate measures to reduce the risk of transmission of the virus in the workplace should any of its employees be carrying the virus.

43. If the respondent asserts that the claimant's continued presence at work would have put it in breach of its duty of care it is for the respondent to prove that to be the case by evidence. It has, however, not led any evidence about relevant matters such as the nature of the claimant's work and the workplace; whether the claimant was likely to encounter others during his working day; if so, how proximate would they be and for how long; and whether or not the premises were well ventilated. Nor did the respondent lead evidence that would assist in gauging the likelihood of the claimant having contracted the virus, such as evidence as to how long the claimant's colleague had been in the presence of the individual suspected of having Covid19 and how close had been their contact; and for how long the claimant had subsequently been in the presence of his colleague. Given the absence of relevant evidence, if and to the extent that it is the respondent's position that the respondent was compelled by its duties under the Health and Safety at Work Act 1974 or a common law duty of care to insist that the claimant stay away from work then I reject that position.

44. In light of the above, I conclude that there was no external constraint that rendered the claimant unable to work.

45. That said, I wish to make it clear that I do not criticise the respondent for its decision to keep the claimant away from the workplace. That, I am sure, was the action of a careful and responsible employer which had the welfare of the wider workforce at the forefront of its mind. It does not follow, however, that having decided that it should keep the claimant away from work the respondent could then opt not to pay him his usual wages. The question, as noted above, is whether the claimant was ready, willing and able to work. It is my conclusion that the claimant was able to work notwithstanding that the respondent had decided that it would be safer not to allow him to do so. The claimant was, therefore, entitled to be paid.

46. Even if, contrary to that conclusion, the claimant could be said to have been rendered unable to work because the respondent considered it should keep the claimant away from work for safety reasons, it does not automatically follow that the claimant was not entitled to be paid. The question is whether the claimant's inability to work was 'voluntary'. The respondent's case, in effect, is that the claimant had put himself in harm's way by car-sharing and that he ought to have known that this carried a risk because that had been spelled out in 'rules and guidelines.'

47. Throughout this case, the respondent has used the terms ‘rules’ and ‘guidance’ interchangeably. When I asked Mr Collyer if the respondent’s case was that the claimant had infringed any particular piece of legislation by car-sharing his response was that there was ‘reams and reams’ of legislation but he could not point me to any specific legislative provision that the claimant had infringed. In particular, there was no suggestion that the claimant had infringed the Health Protection (Coronavirus, Restrictions) (England) Regulations 2020. Given that Mr Collyer did not identify any legislative provision that the claimant is alleged to have breached I conclude that he did not act contrary to the law by giving his work colleagues a lift to work.

48. If, at the time of these events, the government had published formal advice or guidance, short of legislation, urging people not to car-share on the way to or from work or advising against it I would have expected the respondent to be able to produce a copy of that advice or guidance. The fact that the respondent has been unable to do so suggests to me either that such advice did not exist at the time of these events or that if it did it was not so well publicised that the claimant would inevitably have come across it.

49. Even if there had been guidance about car-sharing at the time, there is no reliable evidence before me as to the tenor or content of that guidance. In this regard I do not consider Mr Brodie’s evidence, vague and unspecific as it was, to be reliable. As noted above, the respondent has used the terms ‘rules’ and ‘guidance’ interchangeably as if they are synonymous. Mr Brodie did the same in his evidence. They are, however, two different concepts. A ‘rule’ connotes an instruction that must be obeyed whilst ‘guidance’ indicates something in the nature of a recommendation as to how individuals should behave. The ‘rules’ regulating individuals’ conduct are set out in legislation and, as recorded above, the respondent has not persuaded me that the claimant breached any such ‘rules’. Even if I was persuaded that the government had issued guidance about car-sharing before 1 May 2020 and that the claimant ought to have been aware of it, I would not be persuaded, in the absence of compelling evidence, that such guidance was to the effect that in no circumstances should individuals car-share when travelling to work.

50. In all the circumstances, therefore, even if (contrary to my conclusion above) the claimant could be said to have been rendered unable to work because the respondent considered it should keep the claimant away from work for safety reasons, I am not persuaded that any such inability to work was ‘voluntary’.

51. In my conclusion the claimant was ready, willing and able to work during his enforced absence. He was, therefore, entitled to be paid. By failing to pay the claimant the respondent made a deduction from the claimant’s wages. That deduction was unauthorised: paragraph G of the Employee Handbook does not avail the respondent.

52. The parties agreed that the amount deducted from the claimant’s wages was £480.

Employment Judge Aspden

Date 2 February 2021