



EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4101173/2020

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Held in Glasgow on 1 December 2020

Employment Judge L Doherty

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Mr J Banks

**Claimant
In Person**

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Falkirk Car Carriers Limited

**Respondent
Represented by:
Ms Y Guild -
Director**

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JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The judgement of the Employment Tribunal is that the claimant's claim under Section 23 of the Employment Rights Act 1996 succeeds and the respondents are ordered to pay the claimant the sum of £1,423.56

REASONS

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1. On 24 February 2020 the claimant presented claim to the Employment Tribunal claiming unauthorised deduction of wages, failure to pay holiday pay, and breach of contract. All claims were resisted. At a Preliminary Hearing (PH) for case management purposes it was established that the claimant's claim related to 2 weeks' pay which he said had not been paid, and to expenses which he said he had incurred but had not been paid.

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2. Prior to the commencement of the final hearing the claimant provided a specification of the wages he was claiming, but did not identify the dates in respect of which payment was claimed. At the commencement of the Hearing it was established that the claimant claimed a week's wage in respect of a week which he said he worked but was not paid for, at the start of his employment. After some investigation of this with the respondents, and after

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the claimant looked at his banking records, he accepted that this had been paid, and this no longer formed part of the claim.

3. The claimant's position is that he was due to be paid £1,038 for the week ending 21 December, having worked 71 hours that week. The respondents do not accept the claimant worked 71 hours. Their position is that the sums which he was due to be paid are set out in the payslip for the week ending 21st December, and comprised 51 hours work, plus 3 overnight allowances, and eight hours holiday pay.
4. The claimant also claims that he is due to be paid £60 for a day he worked on 26 October 2019. The respondent's position is that no payment is due for 26 October, as this was a trial before employment commenced.
5. The claimant also has a claim for expenses of £34 parking fee, and a £12 road toll. The respondent's position is that receipts were never submitted for this, and no monies are due.
6. The respondent's position is that all sums due to the claimant had been paid. Monies were deducted from his wages in line with the provisions of this contract of employment, due to losses incurred by the respondents as a result of the claimant's negligence.
7. The claimant appeared on his own behalf, and the respondents were represented by Ms Guild, Director. The respondent's lodged documentary productions. The claimant give evidence one on his own behalf, and for the respondent's evidence was given by Ms Guild.

Findings in Fact

8. The respondents are engaged in the business of transporting vehicles. Ms Guild is the sole director of the company, which has around 16 employees.
9. Prior to employees commencing with the respondents, they are asked to undertake a trial for which they are not paid. The purpose of this in part is so that the prospective employee can consider if the job is right for them.

10. The claimant attended for an interview with Ms Guild at some point in October 2019. He was asked to attend for a trial on Saturday, 26 October, when he worked from around 9am to 2pm or 3 pm in the afternoon. The claimant was not paid for work done on 26 October. He never requested payment for the work on 26 October during the currency of his employment with respondents.

11. The claimant commenced employment on 28 October 2019. The claimant was provided with a contract of employment, (document 1 in the respondent's bundle), which he signed on 28 October. The contract was signed behalf of the respondents on 4 November. The contract provides that his start date was 28 October 2019.

12. Clause 8 of the contract provides as follows:

"The Employer reserves the right and the Employee irrevocably authorise the Employer, at any time during the Employees employment, or in any event upon termination, to deduct from the Employee's wages/salary and or/any monies due to the Employee, an amount equivalent to any of the following:

Overpayments, fines, expenses, speeding fines, traffic offence finds, negligent or wilful damage caused by the Employee and any other money due from the Employee to the company.

Parking fines will only be paid by the Company if incurred during the delivery of vehicles and completely unavoidable. Where this is not the case the Company will pay the parking fine to ensure the minimum charge and deduct the amount from the Employees pay.

Where it is intended to make any such deduction, the employee will be notified of the total amount owed and of the rate at which and the means by which the company intends to recover the sum."

13. The rates of pay in terms of the claimant's contract of employment where £12 per hour for the first 40 hours which he worked per week, and thereafter for hours over 40 hours, the rate of pay was £18 per hour.

14. The claimant's wages were calculated on a weekly basis, on the basis of a record of his driving time, which was submitted on a weekly basis. In the event the claimant incurred expenses, such as parking charges, then he submitted receipts for this alongside details of his weekly hours and was reimbursed for these charges.
15. Clause 12 of his contract dealt with Expense and provided at 12.2:
"All expenses must be authorised in advance by Yvonne Guild, Director. All purchases must be supported by VAT receipts i.e. for parking, tolls etc."
16. The claimant's wages were paid one week in arrears. For example, the claimant would have been paid on 27 December 2019 for the week of 16 to 21 December.
17. In the week commencing 16 to 21 December the hours which the claimant worked, as reflected in his payslip were 51 hours, being 32 hours at the rate of £12 per hour, and 19 hours £18 per hour. He was entitled to an allowance of £26.20 per night for three nights away from home. He was also paid in that period eight hours holiday. The total wages due to the claimant were £701.32 for the week ending 21st December
18. The claimant worked on 23 December for eight hours. He was also entitled to 16 hours holiday pay, the total wages to include holiday pay due to him for the week ending 20 December were £331.60.
19. The claimant drove to London on 18 December with a trailer of cars. He stopped overnight at Birch Service Station. One of the vehicles he was transporting, a Land Rover, sustained damage to its rear end on the night of 18 December. The claimant resumed driving at around 6.50am on 19 December. He waited till the office had opened and then contacted the respondent's office at around 10 am, when he spoke to Ms Guild. He advised her that another vehicle had damaged the Range Rover by reversing into his trailer during the night. Ms Guild did not believe the claimant, but told him to carry on and to learn from this. The claimant sent three photographs of the damage to the rear of the Range Rover

20. Later in the day the same day, the Range Rover sustained further damage as a result of an issue the claimant had with the trailer. The front of the vehicle sustained damage on this occasion.
21. Ms Guild did not know exactly how the damage had occurred, but she considered it unlikely that the damage had occurred other than through the fault and negligence of the claimant . She did not believe that the claimant's vehicle had been struck overnight when he was parked at Birch Service Station, as she thought it unlikely that the claimant would have waited until 10 the following day to advise her of the damage.
22. She did not accept that it was an issue with the trailer which caused damage to the Range Rover, as the Trailer was not damaged. The Trailer was inspected after the claimant's trip was completed, and no damage was found.
23. The claimant had been off work for the Christmas break from 23 December, and was expecting payment of his wages on 27 December. He did not receive payment on the 27 December, and he contacted Robert, the respondent's senior driver, to ask about the position.
24. The claimant had previously caused damage to other vehicles. Ms Guild took the view that claimant's employment should be terminated. She was on holiday abroad by the then, and texted him on 27 December to advise of her decision. The claimant's employment was terminated on 27 December 2019.
25. Ms Guild stated in her text:
- 'Robert was saying you were expecting your wages today. I've held onto them as I'm waiting on the final bill for the damage to the Range Rover. The car had a lot more damage than what you reported so not quite sure how you damaged it. Also due to this I decided to terminate your employment as I already mentioned to you have damaged five cars only in two months. Once I have the final bill I will send any payment due to you, although it's looking like a hefty bill so not quite sure there will be anything left over. This will all be put in writing to you once I'm back from holiday.'*

26. The respondents required to pay for the damage to the Range Rover to be fixed. They incurred a charge of £453.19 excluding VAT to Pentland Jaguar Land Rover, Stirling to repair the rear of the vehicle. They also incurred a charge of £560 excluding VAT to SDM Group to repair part of the rear and front of the vehicle, and they incurred a charge of £590 excluding VAT which they had to reimburse the Land Rover dealer for the transport costs. The total costs to the respondents, excluding VAT were £1,603.19.
27. The claimant was given one week's pay in lieu of notice, which was confirmed to him in which slip for the week ending 4 January 2020. He was due to be paid for 40 hours at £12 per hour which is a total of £380.64 net.
28. The respondents deducted their total charges associated with the repair of the Land Rover, including the cost which was reimbursed for transport costs, all of which totalled £1,603.19 from the claimant's net wages of £701.32 due on 27 December 2019, £331.60 due on 3 January 2020, and £380.64 due on 10 January 2020 (payment in lieu of notice) with the with the effect that his wages were extinguished and he did not receive payment.

Note on Evidence

29. The Tribunal formed the impression that neither witness set out to deliberately mislead, and such conflicts as there were, were caused either by genuine confusion or a lack of relevant information. The Tribunal has dealt with the relevant conflicts below in its Consideration.

Submissions

30. Both parties made brief submissions, effectively relying on the evidence in support of their respective positions.

Consideration

31. Section 13 of the Employment Rights Act 1996 (the ERA) provides as follows;
- “(1) An employer shall not make a deduction from wages of a worker employed by him unless-*

- (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*
- (b) *the worker has previously signified in writing his agreement or consent to the making of the deduction.*

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(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 in relation to the worker the employer has notified to the worker in writing on such an occasion."*

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32. There is no dispute that the respondents made deductions from the claimant's wages.

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33. The Tribunal was satisfied that the claimant had received a contract from the respondents which he signed on 28 October 2019, which contained clause 8, as set out in the findings of fact, which authorised the respondents to make a deduction from the claimant's wages in certain circumstances, including where negligent or wilful damage was caused by the employee.

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34. It is this clause in the contract term which the respondents rely upon. It is their position that they were entitled to deduct from the claimant's wages the costs which they incurred in repairing and transporting the damaged Range Rover, as their position is this damage was caused due to the claimant's negligence.

35. It is for the respondents to establish that they suffered a loss as a result of the negligent damage caused by the claimant.

36. The principal factual issue which the Tribunal had to determine was whether the claimant had by his negligence caused damage to the Range Rover which he was transporting on 18 December.
37. The claimant give evidence the effect that his trailer was struck during the night of the 18 December by another lorry while he was parked, and this caused damage to the rear of the Range Rover. He said that he telephoned the respondents at some point between 9am and 10am to report the damage, when he spoke to Ms Guild, who was sceptical about his explanation. The claimant thereafter said that damage occurred to the rear of the Range Rover because of a problem with the trailer. He said he had a WhatsApp telephone call with Robert about the problem, when he explained that if he did as Robert suggested, the Range Rover would be damaged. He went ahead and followed Roberts' direction and that is how the Range Rover sustained damage to the front.
38. Ms Guild did not accept any of this. Her position was that if the Range Rover had been damaged on the night of 18 December when the claimant's vehicle was parked, then he would have noticed this on his mandatory check round of the vehicle first thing in the morning, and would not have waited until around 10 am on the 19 December to telephone the office. Her position was that the claimant's suggestion that the trailer was somehow defective was nonsense. The trailer had been inspected and there was no damage to it.
39. Ms Guild accepted that she did not know how the Range Rover was damaged, but she was confident that the damage was due to the fault and negligence of the claimant.
40. There was no evidence before the Tribunal beyond Ms Guild's assumptions and assertion, to support the conclusion that the vehicle was damaged as a result of the claimant's negligence. Ms Guild relies upon the timing of the claimant reporting the damage to the front of the vehicle. The claimant explained this by saying he waited till the office opened before phoning. That claimant's failure to report the damage earlier is not sufficient, without more,

to establish that there was some negligent act on his part which caused the damage to the rear of the vehicle.

41. In relation to the front of the vehicle Ms Guild relies on the fact that there was no damage to the Trailer. She also put to the claimant that he changed his story when asking him questions in cross examination, however it was not clear from the evidence what that change was said to be. Both of those factors without more are insufficient to establish that it was the claimant's negligence which caused the damage to the front of the vehicle.
42. The claimant has the burden of proving that the respondents made deductions from his wages, but once he has established that, the burden shifts to the respondents to prove on balance of probabilities, that the claimant's negligence caused damage to the vehicle, so as to justify the deduction from his wages in terms of Clause 8 of the contract of employment.
43. On the basis of the evidence before the Tribunal, the respondents have not discharged that burden of proof. While the respondents believed that it was the claimant's negligence which had caused the damage, and Ms Guild hypothesised as to how the damage may have occurred, she was frank enough to accept that she simply could not say how the Range Rover had been damaged. That burden was not discharged by asking the Tribunal to draw an inference from the timing of the claimant's report of the damage to the vehicle, or by virtue of Ms Guild's statement that the Trailer was not damaged and it would have been if the claimant's story was to be believed. The Tribunal was unable to find primary facts, or draw a sufficient inference from the primary facts found, to conclude that the claimant had by his negligence damaged the Range Rover.
44. The effect of that conclusion is that the respondents are not entitled to rely on Clause 8 of the contract in order to make the deductions which they did from the claimant's wages.
45. The claimant's evidence was that he was due to be paid for at 71 hours for the week he worked on 21 December.

46. The claimant did not produce any evidence in support of this, other than his oral testimony as to his own recollection of events. The claimant from time to time appeared uncertain of details surrounding payments claimed, as evidenced by his initial claim for a week's pay said to be due at the commencement of his employment, which was then withdrawn.
47. Ms Guild, on the other hand explained how wages were calculated, and was able to refer to the calculation of the claimant's wages for the week ending 21 December by reference to the payslips produced in the bundle, and the Tribunal found her evidence to be credible and reliable on this point.
48. The Tribunal similarly found Ms Guild's evidence be credible and reliable in relation to payment for 23 December, and it was satisfied that the payslip for the week ending 20 December, in terms of which the claimant was paid eight hours £12 per hour on 23 December + 16 hours holiday pay was accurate, and the net sum due to the claimant for that week was £331.60.
49. The Tribunal was also satisfied that the respondents had recognised that the claimant was due one week's pay in lieu of notice, which is reflected in his payslip in 4 January, albeit the claimant did not actually received payment of that sum of £380.64.
50. The claimant indicated that he was making a claim for pay in lieu of notice but did provide any alternative figure to £380.64.
51. The claimant claimed he should have been paid for the work he did on 26 October, saying he had already been told at interview he had the job.
52. The Tribunal was satisfied however that as Ms Guild said, the claimant was told this would not be paid work. The first date of the claimant's employment is 28th October in terms of his contract of employment. The claimant said he did not ask for payment for the 26 October as he did not want to rock the boat, however the tribunal considered it likely that had the claimant understood he was to be paid for this day's work, that he would have raised this earlier. Both these factors support the conclusion that the 26 of October was an unpaid trial.

53. The claimant also has a claim in respect of parking fees and a toll. His evidence was that he submitted receipts in respect of this. Ms Guild denied any receipts were submitted. The Tribunal preferred her evidence. The Tribunal found Ms Guild's evidence about how the payroll worked to be convincing, and on balance it was satisfied that had the claimant submitted receipts, as he was required to do in terms of clause 12.2 of his contract, then the sum vouched would have been reimbursed to him. The claimant appeared at times uncertain about details surrounding payments which he claimed, and on balance the Tribunal was not persuaded that he had incurred the expenses which are claimed. Had he done so the Tribunal considered it likely that he would have submitted receipts, and it was not persuaded that he had done so.

54. The Tribunal however concluded that the respondents had made unauthorised deductions from the claimant's wages to the extent that they had subtracted from his wages the sums paid to Pentland Jaguar, S D M, and the transport costs, which total £1,423.56, and are ordered to pay this sum to the claimant.

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Employment Judge: Laura Doherty

25 Date of Judgment: 03 December 2020

Entered in register: 04 March 2021

and copied to parties

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