Case No: 2300511/2020

EMPLOYMENT TRIBUNALS

Claimant: A Elliott

Respondent: P&J Dust Extraction Ltd

Heard at: **London South Employment Tribunal by CVP**

On: **14 January 2021**

Before: **EJ L Burge**

Representation
Claimant: In person
Respondent: Ms Bastow (Managing Director)

RESERVED JUDGMENT

It is the judgment of the Tribunal that the Respondent has made an unlawful deduction from the Claimant's wages and is ordered to pay to the Claimant the gross sum of £2,676.59, in respect of the amount unlawfully deducted.

REASONS

Introduction

1. The Claimant worked as an Accounts Department Manager from 23 November 2018 until the Claimant resigned on notice, her employment terminating on 8 November 2019.

The hearing and evidence

2. The hearing was listed for 1 hour at 10am. Previous delay to proceedings had occurred due to the covid pandemic. At 21.57 the night before the hearing the Respondent sent to the Claimant and the Tribunal a witness statement running to 24 pages accompanied by 58 attachments. The deduction had taken place almost 14 months previously. The Claimant wanted to continue with the hearing despite the late service of the witness

statement. The Tribunal decided it was in accordance with the overriding objective for the hearing to proceed, dealing with the case in a way that was proportionate to the complexity and importance of the issues, and avoiding delay so far as was compatible with proper consideration of the issues. The Claimant did not provide a witness statement, box 8.2 of her ET1 was agreed to constitute her evidence in chief. The first 45 minutes of the hearing was taken with the Claimant/Tribunal reading the Respondent's witness statement (without attachments) and the Tribunal/Ms Bastow reading the Claimant's documents.

3. The Claimant gave evidence on her own behalf and Ms Bastow gave evidence on behalf of the Respondent. During the hearing Ms Bastow drew the Tribunal's attention to a small number of the documents annexed to her statement. The hearing ran until 13.06 and judgment was reserved.

Facts

4. The Claimant was offered a job as an Accounts Department Manager on 28 October 2018. The offer letter said:

   "a brief outline of the terms of employment is given overleaf. Full details are contained in the Contract of Employment, Department Operations Manual, Health and Safety Manual, RAMS and Employee Handbook."

5. The brief terms overleaf contained numerous items such as line manager, work location, salary and ended with:

   > "*HEALTH & SAFETY MANUAL, DEPARTMENT OPERATIONS MANUAL, EMPLOYEE HANDBOOK & METHOD STATEMENTS During your induction you will be issued with these documents, they form part of your Contract of Employment.*"

   The Tribunal finds as a fact that it did not specify which terms within the four documents should be considered to be contractual, the assertion was that they all formed part of the contract of employment.

6. There was a detailed induction process. The induction form outlined 48 items of induction such as verifying qualifications, scanning driving license, obtaining an IT log in, the issuing of the Employee Handbook and Health & Safety Manual. The form finished with an "induction summary" which stated:

   > "*The Health & Safety Manual, the Employee Handbook, the Risk Assessments and the Method Statements issued to you are important documents and must be kept in an acceptable condition. The contents of these documents form part of your contract of employment, they remain the confidential property of P&J Dust Extraction Ltd"*.

7. The Employee Handbook was 47 pages and contained numerous policies and procedures from absence, attendance, disciplinary to items such as a prohibition of chewing gum on all the Respondent's premises, vehicles or on any client site. When questioned on whether it was the Respondent's

position that all terms in the Employee Handbook were terms of contract, Ms Bastow accepted that an item such as chewing gum would not be a disciplinary issue and that "the important ones are actually drawn to people's attention." The Tribunal finds as a fact that there was no indication within the Employee Handbook itself which terms were deemed to be a term of employment and which ones were policy/guidance. In the Introduction and General Obligations section of the Employee Handbook, it stated:

> *"This handbook provides information relating to conditions, conduct and general rules for employees while working for P&J Dust Extraction Limited. The intention of this is to ensure that P&J Dust operates in an efficient and well-managed manner. This document should be read in conjunction with your Letter of Appointment, Contract of Employment and the Health and Safety Manual that together form the terms of your employment…"*

8. Section 12 detailed "Deductions from pay/repayment to P&J":

> *P&J Dust Extraction have the authority to deduct money from your wages in certain cases. These deductions may be on behalf of P&J Dust Extraction or for some other authority. The cases where this may occur are:*
>
> - *Court Orders, Attachment of Earnings, or similar official instructions.*
> - *Outstanding amounts owed following employment termination (these could be for loans, the amount of your petty cash float)*
> - *Your liability for the cost of courses following employment termination (see 'Personal Development' chapter). This includes the amount paid by P&J of the course/training cost to the provider, wages you may receive while attending, and expenses incurred.*
> - *Amounts due resulting from your misuse of company property (e.g., credit card, charge card, fuel card, fuel, phone charges, DART Tag, work equipment, etc),*
> - *Amounts due resulting from accidental or malicious damage by yourself to P&J property (e.g., work equipment misuse, damage to computer equipment, vehicle repairs resulting from using wrong fuel),*
> - ***Losses to P&J resulting from your negligence (e.g., failure to service vehicles, not making checks to work equipment, lack of appropriate care for work equipment, failure to cost work accurately, failure to ensure quotations are accurate and all required supporting calculations and documentation are in place).***
> - *Incidents including Vehicle Accidents at which you are found at fault and the company must pay any costs or excess which is not recoverable from the third party or P&J is unable to make an insurance claim due to your failure to comply with insurance conditions or provide claim information.*

- *On your employment termination, the cost of equipment and clothing issued to you on commencement of your employment unless the equipment or clothing is returned in good condition (subject to reasonable wear).*
- *On your employment termination, any holiday overpayment that you may have received.*
- *Any advance of Petty Cash which is found to be an overpayment.*
- *Sums due to the employer arising from the employee's breach of contract, for example failure to work the contractual notice period.*

The payroll department will give you advance notice of any deductions when practical, and if your employment with P&J is continuing, we may in certain circumstances be able to agree to make deductions over an agreed period. It may not be possible to cover the full amount owed using payment deductions if the amount owed exceeds the wages due. If this happens, you are obliged to refund the outstanding amount within 14 days of written demand. In the event of your failure to repay amounts due to P&J debt recovery legal action may be instigated.

[Tribunal's emphasis]

9. In early September 2019 new written statements of employment particulars were issued to the Respondent's employees who signed them on receipt. In the new written statement there was a reference to pay deductions and that "the employee consents to the employer making deductions from pay in certain circumstances". The Claimant's evidence is that she did not sign one. Ms Bastow maintains that she could not find one on the file but she believed that the Claimant had done as it had been the Claimant who had printed out all the new statements. The Tribunal prefers the Claimant's evidence, she was an honest and credible witness, and finds that the Claimant did not sign a new written statement of employment particulars in September 2019.

10. Over the course of her year's employment it is common ground that Ms Bastow required the Claimant to make deductions from other employees' pay. It is also common ground that Claimant made some mistakes in her work. The Claimant gave evidence, and the Tribunal finds as a fact, that these were honest mistakes and that she had received no handover from the previous accounts manager so was unaware of how things were done previously. Ms Bastow was her line manager and she would send her work to be checked by Ms Bastow before it went for payment, the Claimant did not have access to the systems to make any payments herself.

11. The Claimant passed her six month probation period in early summer of 2019. In early September auditors arrived at the Respondent who uncovered some issues with the accounts.

12. The Claimant resigned on 11 October 2019. In her emailed resignation she stated (and the Tribunal finds as a fact the details contained herein):

> *"It is with regret that I wish to tender my Notice, one month as per the conditions of my contract. It would make sense to me for my last day to be Friday 15th November, to fit in with payroll, but please let me know if you would like this to be any different. It is disappointing as I have enjoyed my time with P&J and the people I work with, however it is obvious that you expect more than I am able to give within the role. It is most unfortunate that I had no handover/detailed job description when taking on the position in November last year, as it would appear that you required more tasks to be completed than I was aware. After taking this amount of time to find out, it is obvious that I am a little rusty in carrying some of these out, some of which I haven't been expected to do for many years, hence the fact I did not make an assumption that this would be included in the role."*

.

13. Ms Bastow replied and accepted her resignation. She stated (and the Tribunal finds as a fact) that "in recent weeks it has become clear that you are not coping with the book keeping elements…".

14. On her last day of employment, 8 November 2019, the Claimant wrote to Ms Bastow setting out that she believed she was owed £2,676.59 at the end of November, comprising £1,895.92 (salary), £111.52 for a day's holiday taken, and £669.15 for accrued annual leave. In evidence to the Tribunal, Ms Bastow agreed that this amount was due to be paid to the Claimant at the end of November 2019.

15. On 28 November 2019, the day before the Claimant's final pay was due, Ms Bastow wrote to the Claimant informing her that the Respondent would be withholding her pay pending calculation of the total deductions from pay. She said:

> *"your contract of employment includes a clause giving P&J the right to make deductions from pay in several circumstances including the following which may be applicable to your case*
> *Losses to P&J resulting from your negligence…."*

16. An exchange of emails followed and then on 5 December 2019 Ms Bastow emailed the Claimant saying:

> *"As previously advised your pay is being withheld pending evaluation of the costs of your negligence. When this has been ascertained any balance owing will be paid. You will be provided with full details and be invited to a Grievance Meeting to discuss the matter. We will follow our grievance procedure and you will have an opportunity to appeal. Currently I am awaiting data from 3rd parties which we are chasing".*

17. It was not until August 2020, some 8 months later that the Respondent sought to quantify the amount of the alleged negligence. By email dated 18 August 2020 Ms Bastow produced a "schedule of additional costs incurred by the negligence of [the Claimant]". It provided the following costs totalling £25,974.57:

a. HMRC PAYE October M7 payment not set up & not delegated (Interest to 9 Dec 2019 £31.84, Interest 10 - 13 Dec 2019 @ £1.58 / day £6.32)

   In evidence the Claimant explained that the HMRC PAYE entry for October was due 20 days after payroll was due, she had completed payroll and then left the Respondent on 8 November 2019 after which time the HMRC payment was due on 19 November 2019. Ms Bastow gave evidence agreeing with the timings but stating that it would have been good practice for the Claimant to set up the HMRC payment at the same time that she had completed payroll.

b. Pension value increase short fall compensation for Mr Baines £50.00

   Ms Bastow gave evidence that £50 compensation was offered to Mr Baines as compensation for the Claimant's failure to make pension payments into his pension fund. The Claimant accepted that she had made a mistake with Mr Baines' pension but stated that it was the Respondent's choice to offer £50 compensation.

c. PAYE Payroll error (£288.00 April 2019 "Pension Correction" error £212.73 Dec 2018 - Feb 2019 Employer Pension Contributions £103.54)

   Ms Bastow gave evidence that these transactions were as a result of entries that the Claimant had made and that they caused loss to the Respondent. The Claimant gave evidence that there was no irregularity in her P60s so she did not understand how that could be the case if the wrong entries had been made. The Tribunal finds that it is not clear whether or not the Claimant made mistakes in this respect but finds that if she did they were honest mistakes.

d. Petty Cash missing £65.00

   Ms Bastow gave evidence that there was £65 missing from the petty cash when it was counted on the Claimant's last day. The Claimant gave evidence that the petty cash was kept in an unlocked drawer and that there were three people who had access to the petty cash and that this was not something that had been raised at the time. The Tribunal finds that the Claimant was not solely responsible for the petty cash and the discrepancy could have been caused by other employees.

e. Mr Springett Wage errors compensation £30.00

   Mr Spingett was on an hourly wage but the Claimant had incorrectly put him on a salaried wage. Neither the Claimant, Ms Bastow nor Mr Springett noticed this error for some time until it was corrected. The Tribunal finds that the Claimant was not solely responsible for this error and that it is surprising that neither Ms Bastow nor Mr Springett himself noticed the pay error.

f. The Claimant's hours paid but not worked £1,184.54

Ms Bastow gave evidence that after the Claimant left the Respondent ran a report on the times that the Claimant clocked in and out of the office and that these figures indicated that over the course of the year the Claimant had worked less than her salaried hours. Ms Bastow accepted in cross examination that if the Claimant had been in employment, the first step would have been a management meeting to discuss the discrepancy. The Claimant gave evidence that she worked her hours and that this was not something that had been raised with her. The Tribunal finds as a fact that the Claimant worked her hours as if she had not, Ms Bastow would have raised the issue at the time.

g. Internal Audit Accounts Assistant checking all transactions Spending 20 hrs a week on this from 29th October 2019 to 11th August 2020 (£10,512.50, Holiday Pay £1,103.85 and Employers NI £1,934.26)

It is not credible that the internal accounts assistant spent 20 hours per week for almost 10 months checking all transactions or that this was necessary.

h. Management time @ £40 hour, 41 weeks x 2hrs reviewing (£3,280.00)

The Tribunal does not find it credible that it has taken Ms Bastow 2 hours a day for 41 weeks to "review" the Claimant's alleged negligence.

i. Management time @ 6 hours submission of VAT 7 May 2019 (£240.00), @ 8 employees paid twice July 2019 £320.00, @ 4hrs 10x Pension Contributions April 2019 and £160.00 Employers NI £552.00

Ms Bastow provided evidence that the Claimant did not complete the VAT return in May 2019 and that afterwards she had asked the Claimant to spend some time compiling a list of statutory deadlines to be added to the Claimant's and an accounts department shared outlook calendar so that similar omissions would not happen in the future. The Tribunal finds as a fact that Ms Bastow did not raise with the Claimant that she considered the omissions negligence until some 15 months later when Ms Bastow wrote the email in August 2020 to the Claimant. No evidence was adduced that there were disciplinary or performance management plans put in place as a result of the Claimant's mistakes.

j. Additional Accountants Fees Incurred Estimated (Not yet Billed) £3,500.00

The Tribunal finds that Ms Bastow has not shown that these fees have been incurred as a result of the Claimant's alleged negligence.

The Law

18. The Employment Rights Act 1996 provides the right not to suffer unauthorised deductions:

S.13 (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 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 in relation to the worker the employer has notified to the worker in writing 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.

19. S.27 ERA defines "wages" as "any sums payable to the worker in connection with his employment". This includes "any fee, bonus, commission, holiday pay or other emolument referable to the employment".

20. In *Alexander and ors v Standard Telephones and Cables Ltd (No.2) [1991] IRLR 286* Mr Justice Hobhouse stated that "where a document is expressly incorporated by general words it is still necessary to consider, in conjunction with the words of incorporation, whether any particular part of that document is apt to be a term of the contract; if it is inapt, the correct construction of the contract may be that it is not a term of the contract".

21. In *Keeley v Fosroc International Ltd [2006] IRLR 961*, the Court of Appeal noted that not all of the provisions of a staff handbook would necessarily be incorporated into a contract even where the handbook as a whole had been incorporated by reference. Some provisions, read in their context,

may be 'declarations of an aspiration or policy falling short of a contractual undertaking'.

22. For liability in negligence to be founded, there must be a duty of care, a breach of that duty, damage (which is caused by the breach) and the damage must be foreseeable. Negligence amounts to any act or omission which falls short of a standard to be expected of "the reasonable man".

Conclusions

What was the amount properly payable?

23. The amount properly payable to the Claimant on 29 November 2019 was **£2,676.59** (made up of £1,895.92 salary, £111.52 for a day's holiday taken, and £669.15 for accrued annual leave). The Respondent deducted the whole amount.

Was the deductions clause an enforceable term of the Claimant's contract?

24. It is the Tribunal's decision that it was not. It was one of a great number of terms in the Respondent's documentation and case law is clear that not all of the provisions of a staff handbook would necessarily be incorporated into a contract even where the handbook as a whole had been incorporated by reference. The deductions clause itself did not say that it was to be considered to be an enforceable contractual term. The clause at the beginning of the lengthy Handbook gives a general assertion and does not seek to distinguish the contractual clauses from the general rules.

25. The Claimant's terms of employment attached to her offer letter do not mention the deductions clause. The fact that others signed an updated written statement of employment particulars does not mean that the Claimant should be bound by their terms. In any event where the employer relies on a variation to the contract to establish the necessary contractual authority for the deduction, then that variation will not be effective "in respect of any conduct of the worker or any other event occurring before the variation takes effect" (s.13(1)(5) ERA).

26. The Respondent was therefore not entitled to deduct the Claimant's pay as there was no enforceable contractual clause entitling it to and the Claimant had not consented to the deduction. The Tribunal concludes that the clause in the Employee Handbook was a declaration of an aspiration or policy falling short of a contractual undertaking.

Did the Claimant's actions/omissions amount to "negligence"?

27. It is very unusual for employers to deduct employees' wages for negligent acts/omissions except where there is quantifiable damage to property. Ms Bastow referred the Tribunal to the case of Mr A Barron v Media Displays Ltd: 1800360/2020. That case involved damage occasioned by Mr Barron driving into his employer's roller shutter doors and so it was a very different set of circumstances. In any event, as another first instance decision, this Tribunal is not bound to follow it.

28. At the time that the deductions were made, Ms Bastow did not attempt to set out what sums were deducted on account of the Claimant's "negligence". The Respondent simply withheld the whole amount and the justification came some 8/9 months later. It is telling that the individual items of direct financial loss said to be as a result of the specified mistakes of the Claimant dated some time prior to the Claimant's resignation. Those mistakes had been accepted as being mistakes, there had been no allegation of negligence and indeed no disciplinary or performance action plan had been commenced. In relation to the claim for management time for correcting the Claimant's mistakes, Ms Bastow, as the Claimant's line manager, would be expected to manage the Claimant and it is without a legal basis that she, after the event, seeks to charge the Claimant for it. These were the honest mistakes of an employee and Ms Bastow her line manager who failed to spot the mistakes when checking her work. They cannot be categorised as negligent.

29. The petty cash shortfall had been blamed on the Claimant (unbeknownst to her) despite the fact that two others had access to it and there was no evidence to say that the Claimant was responsible. Calculating the Claimant's hours paid but not worked as a result of interrogating the clocking in/out system without speaking to the Claimant to hear why the records may show a shortfall is unreasonable and in any event does not amount to negligence. If the Claimant had been underworking her hours Ms Bastow would have raised it during her employment. The October HMRC PAYE payment was due after the Claimant had left the Respondent, it was not her responsibility. Management time after the Claimant's resignation "reviewing" is not credibly loss that should be attributed to the Claimant, nor is additional accountants fees "estimated".

30. The Claimant, by her own admission, made mistakes. However, these were honest mistakes that could have been made by anyone and did not fall short of what would be expected of "the reasonable man". Even if this Tribunal is wrong about the Respondent not having a contractual entitlement to deduct from the Claimant's pay, the Respondent was also not entitled to deduct the Claimant's pay under the particular clause as the Claimant was not negligent.

_____

Employment Judge L Burge

Dated: 16 January 2021