EMPLOYMENT TRIBUNALS

Claimant: Mr K Moore

Respondent: Builders' Merchant Co Ltd

Heard at: Leeds Employment Tribunal (via CVP)
On: 17 Mar 2021

Before: Employment Judge K Armstrong

Representation
Claimant: Mrs S Moore (claimant's wife)
Respondent: Mr D Thomson (Director)

JUDGMENT

1. The respondent has made an unauthorised deduction from the claimant's wages and is ordered to pay to the claimant the sum of **£1101.94** in respect of the amount unlawfully deducted.

REASONS

Claims

1. The claimant brings a claim for unauthorised deductions of wages in the sum of £1101.94 (net) which the respondent deducted from his final pay in September 2020. The respondent accepts that it deducted this sum but says that it was authorised to do so by a provision of the claimant's contract of employment.

Conduct of the hearing

2. The hearing today took place via video hearing, namely CVP, due to the current restrictions due to COVID-19. The claimant was present and represented by his wife Mrs Susannah Moore. Mr Duncan Thomson, director, represented the respondent. There were some issues with delayed internet connections but all parties were able to participate fully in the hearing.

Issues for the tribunal to decide

3. The claimant originally brought a claim for unlawful deductions from wages and unfair dismissal. His unfair dismissal claim has previously been struck out and therefore the only issue for the Tribunal to determine was the unlawful deductions from wages claim. The issue was whether the respondent is able to rely on the particular clause of the claimant's contract of employment or whether it amounts to a penalty clause.

Evidence

4. I had sight of the ET1, ET3, and a number of documents which were submitted with the ET3. Neither party had produced any witness statements. I heard some brief oral evidence from Mr Thomson regarding the purpose and operation of the disputed clause relied on.

Background

5. The parties agree that the claimant resigned without notice on 17 September 2020. There is a dispute as to the background leading up to this resignation but as the unfair dismissal claim has been struck out there is no need for me to make a determination as to those facts. It is agreed that the claimant was due to be paid £1,101.94, after deductions, in his final payment at the end of September, consisting of payment for days worked, overtime and accrued holiday pay. The respondent accepts that the claimant was paid nothing.

6. The respondent relies on a clause in the claimant's contract of employment. This is set out in his offer of employment and statement of terms both dated 28.01.20 and both signed by the claimant. The term is as follows:

   'Your notice period will be one month from commencement of employment with BMCo. If you leave without working the correct notice, BMCo will deduct a sum equal in value to the salary payable for the shortfall in the notice period. Should there be insufficient funds, BMCo will demand the balance repayment.'

7. Mr Thomson's evidence was that this clause is necessary in order to protect the respondent. He stated that the contract has to work both ways and that if a contract was terminated without notice by the respondent, they would have to pay notice to the employee. He said that the respondent has previously had problems with employees leaving without notice and it causes difficulties and costs to the respondent. He said that the clause was there to protect the respondent against this.

8. In this case, the respondent incurred costs after the claimant had left. There is a schedule in the bundle of what was paid to two individuals. One is a self-employed individual who was brought in to cover the work. The other is an employee of the respondent who usually works at another site and was transferred to the site where the claimant worked. This cost was then 'billed' back by his usual site. There were in fact two yard workers absent at the time – the claimant and another individual who was dismissed for

gross misconduct around the same time. The yard manager also covered some of the yard work.

Relevant law

9. Section 13 Employment Rights Act 1996 (ERA 1996), in so far as relevant sets out 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 a statutory provision or a relevant provision of the worker's contract,
   …
   (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'

10. It is not disputed that in this case there was such a provision, as set out above.

11. However, even where a deduction may be authorised under the ERA 1996, there is a common law rule that any clause in a contract (including an employment contract) which amounts to a penalty clause, is void and unenforceable. A penalty clause purports to entitle the innocent party to a sum of money in the event that the contract is breached by the other party, where that sum of money is not a genuine pre-estimate of the loss.

12. The key principles are set out in the case of *Dunlop Pneumatic Tyre Co Ltd v New Garage & Motor Co [1915] AC 79*. In so far as relevant to this case:

    (i) The terminology used by the parties is not determinative – it is a question for the court;
    (ii) The essence of a penalty is a payment of money stipulated as a threat against the offending party. The essence of liquidated damages is a genuine covenanted pre-estimate of damage;
    (iii) The question of whether a sum stipulated is a penalty or liquidated damages is a question of construction to be decided on the terms and circumstances of each particular contract, judged as at the time of the making of the contract, not at the time of the breach.

13. The issue of penalty clauses was considered more recently by the Supreme Court in *Cavendish Square Holding BV v Makdessi and another (Consumers' Association intervening) [2016] AC 1172, SC.* In that case the clauses concerned were found not to be penalty clauses because although they were not a genuine pre-estimate of loss, they were justified because of the wider commercial interest of the innocent party in the performance of the contract. The court therefore held that the test is somewhat broader than the 'genuine pre-estimate of loss' test, although this remains a relevant factor. I remind myself, however, that in that case the Supreme Court placed weight on the fact that the parties were of comparable bargaining power. This is not the case in most employment contracts, and therefore I must consider the principle with caution in this context.

14. The case of *Giraud UK Ltd v Smith 2000 IRLR 763, EAT* pre-dates the *Cavendish Square Holdings* case but is factually very similar to this case. At first instance, the Employment Tribunal found that the following clause in the contract of employment was an unlawful penalty clause: '*failure to give the proper notice and work it out will result in a reduction from your final payment equivalent to the number of days short'*. The EAT agreed that the clause did not represent a genuine pre-estimate of loss. Furthermore, it did not place any limitation on the right of the employer to recover damages for actual loss in the event of it being greater than that specified. Therefore the employee was in a position where if the actual loss was nil, he would be liable for the calculable sum, but if it was greater, he could face an unlimited claim for the balance. The ET at first instance, as approved by the EAT, held:

'We consider in the context of this contract, as made at the outset, the intention of the clause is to deter employees from leaving without giving notice and to impose a penalty upon them for doing so. As such it is an illegal provision, which will not be enforced.'

Conclusions

15. I have given careful consideration to the application of the law above to this case. In particular, I have carefully considered the commercial impact on the respondent of employees leaving without notice. They obviously have a commercial interest in enforcing the requirement for employees to work out their notice, and they are exposed to a potential risk of loss if they do not.

16. However, on balance I find that the clause is a penalty clause and is not enforceable. The claimant was not in an equal bargaining position to be able to negotiate the terms of his employment like the parties in the *Cavendish Square* case. I find that the circumstances of this case are strikingly similar to the *Giraud* case, and in the context of an employment contract I am satisfied that is the correct law that I should apply. The rationale given by Mr Thomson is essentially the same as that found by the ET in that case – the purpose of the term in the contract is to deter employees from leaving without giving notice and to impose a penalty upon them for doing so. It is not a genuine pre-estimate of the loss as made at the time of entering the contract. The respondent does not know at the time of the contract what the loss will be, and could not say that in every scenario it is likely to be equal to or around one month's salary. For the same reasons as given in *Giraud*, I am satisfied that it is not a genuine pre-estimate of the loss and is in fact a penalty clause and thus is not enforceable.

17. Therefore, the claimant is entitled to the payment of **£1101.94** from the respondent.

Employment Judge **Kate Armstrong**

17 March 2021