EMPLOYMENT TRIBUNALS (SCOTLAND)

Case Number: 4112513/2019

Held in Edinburgh on 31 January and 18 September 2020

Employment Judge P McMahon

Miss C Powell	**Claimant** **In Person**
The Nail & Beauty Zone Ltd	**Respondent** **Represented by:** **Mr M Lumsden** **(Director)**

JUDGEMENT OF THE EMPLOYMENT TRIBUNAL

The judgment of the Tribunal is that:-

(i) The respondent made an unlawful deduction of the gross sum of £340 (THREE HUNDRED AND FORTY POUNDS) from the claimant's wages in September 2019 contrary to section 13(1) of the Employment Rights Act 1996 (the "ERA").

(ii) The respondent is ordered to pay the claimant the gross sum of £340 (THREE HUNDRED AND FORTY POUNDS) in accordance with section 24(1) of the ERA.

(iii) The respondent shall be at liberty to deduct from the above sums prior to making payment to the claimant such amounts of Income Tax and Employee National Insurance Contributions (if any) as it may be required by law to deduct from a payment of that amount made to the claimant, provided that if it does so, the respondent shall duly remits such sums so deducted to Her Majesty's Revenue and Customs (HMRC), and provide

to the claimant written evidence of that fact, the amount of such deductions and of the sums deducted having been remitted to HMRC, payment of the balance to the claimant shall satisfy the requirements of this judgment.

REASONS

Introduction

1. The claimant presented a claim to the Tribunal comprising a complaint of unlawful deduction from wages in relation to the deduction of the gross sum of £340 (THREE HUNDRED AND FORTY POUNDS) from her monthly salary in September 2019.

2. At the outset of the Hearing the claimant stated that it was only the unlawful deduction from wages claim referred to at paragraph 1 above that was being made and there was no claim in respect of unpaid holiday pay, two additional days worked and not paid for, or any claim for anything else.

3. In response, the respondent stated that the claim was defended by the respondent on the basis that the respondent was entitled to make the deduction from the claimant's wages because the claimant had taken more holidays in the holiday year than she was entitled to. In the course of proceedings, the respondent clarified that they were not seeking to argue that the deduction in September 2019 itself was for holidays taken in excess of entitlement, but rather, the fact that the respondent did not make a deduction for holidays taken in excess of entitlement in October 2019 corrected the deduction in September 2019.

4. The case was heard on 31 January and 18 September 2020.

5. The claimant represented herself and the respondent was represented by Mr Michael Graeme Lumsden in his capacity as a director of the respondent.

6. Productions were lodged by the both parties; with the claimant's set of productions extending to 29 pages in total (the "Claimant's Bundle") and the

respondent's set of productions extending to 60 pages in total (the "Respondent's Bundle"). There was a degree of overlap between the contents of the Claimant's Bundle and those of the Respondent's Bundle. Not all documents were referred to in evidence.

7. Evidence was heard on oath or affirmation from all witnesses. For the claimant, evidence was heard from the claimant and for the respondent, evidence was heard from Mr Lumsden and Ms Becky Woodhouse. The claimant and Mr Lumsden, on behalf of the respondent, made brief closing submissions.

Issues

8. The issue to be determined by the Tribunal was as follows:-

   8.1. Had there been an unlawful deduction from the claimant's wages contrary to section 13(1) of the ERA and, if so, should the respondent be ordered to pay the claimant the amount of any such deduction in accordance with section 24(1) of the ERA.

Findings in fact

9. The Tribunal considered the following facts to be admitted or proved:

10. The claimant was employed by the respondent as a beauty therapist from in or around May 2018 under a contract of employment, a copy of which was produced and referred to at document 1, pages 1 to 7 of the Claimant's Bundle (the "Contract of Employment")

11. The Contract of Employment included a provision in relation to the respondent being permitted to make deductions from the claimant's wages in certain circumstances and provided as follows:

"You authorise the Company to deduct from your salary including final salary any sums due from you to the Company, including but not limited to any overpayment of salary, commission, bonus, training costs, incentive, expenses, no notice period penalty, payment for hours not worked and payment for holidays taken in excess of entitlement."

12. The Contract of Employment also provided that the length of notice of termination of employment which the claimant required to give the respondent was two weeks.

13. The claimant's holiday entitlement in the holiday year in which she left the respondent's employment was 30 days for the full year, inclusive of bank holidays and an additional holiday in respect of her birthday because she had been employed for more than a year. The respondent's holiday year was 1 April to 31 March.

14. The claimant took 15.5 day's holiday in the holiday year up to the date of termination of her employment (but only if one excluded 22 May 2019 and 7,9 and 10 October 2019 as being holidays). The dates on which these holidays were taken were as follows: 20 and 21 April 2019, 24, 25 and 26 May 2019, a half day on 10 July 2019, 20,21,22,23,24,27,28,29,30 and 31 August 2019.

15. The Contract of employment authorised the respondent to make deductions from the claimant's salary in respect of payment for holidays taken in excess of entitlement.

16. On 12 September 2019 the claimant gave the respondent four weeks' notice of termination of her employment by way of resignation on 10 October 2019 by email, a copy of which was produced and referred to at document 6, page 14 of the Claimant's Bundle.

17. In response, the claimant received an email from the manager overseeing the premises where the claimant worked, Charlene Riddle, dated 12 September 2019, a copy of which was produced and referred to at document 7, page 15 of the Claimant's Bundle, in which reference was made to the claimant having taken 17.5 day's holiday up to the, then, anticipated date of termination of 10 October 2019. This calculation included an anticipated two day's holiday at the end of September 2019 (28 and 29 September 2019) but which it was subsequently agreed that the claimant would not take as holidays.

18. Subsequently the claimant had a conversation with Ms Riddell, when the claimant informed her that she would, in fact, be terminating her employment

earlier, on 6 October 2019. In response, Ms Riddle told the claimant in that case, money would be deducted from her wages for not working her full four week notice period.

19. The claimant was paid in full but did not work all of her contracted hours in respect of the monthly pay period of 18 May to 17 June 2019. The claimant was not on holiday on 22 May 2019.

20. The claimant was paid less than the total amount of the wages properly payable to her in September 2019, the respondent having deducted £340 from the claimant's monthly salary payment that month (the "September Deduction")

21. The reason for the September Deduction, and the basis on which it was made by the respondent, was the length of notice of termination of employment that the claimant had given to the respondent.

22. The claimant's employment with the respondent terminated on 6 October 2019. The claimant was not on holiday on 7,9 and 10 October 2019.

23. The claimant was paid in full by the respondent up to 10 October 2019, which included payment in respect of 7,9 and 10 October 2019 as holidays.

24. The respondent believed that they were entitled to deduct five day's pay from the claimant's October 2019 monthly salary payment in respect of five day's holidays taken in excess of entitlement, and that not doing so corrected the September Deduction.

Observations on the evidence

25. Generally speaking, the Tribunal considered the witnesses to be giving an honest account of events as they remembered and understood them when giving evidence and there were very few areas in the case where there was a direct conflict of evidence on essential matters.

26. The Contract of employment was produced and referred to in evidence, in particular the terms in relation to permitted deductions and notice requirements were referred to in evidence and not disputed.

27. The Contract of Employment also provided that the claimant was entitled to 29 days holiday a year, including bank holidays. However, the claimant, Mr Lumsden and Ms Woodhouse stated in their evidence that the claimant was entitled to an extra day in respect of her birthday as she had been employed for more than a year. Mr Lumsden explained that this extra day's holiday was discretionary and was granted to the claimant that year. He further stated at this stage that it was the respondent's position in its defense of the claim that the claimant was entitled to 30 days holiday, pro-rata, for the year when she left employment. Ms Woodhouse said, in the claimant's case, that the claimant was entitled to an extra half day and that wouldn't normally be added to the calculation of leaving entitlement, but there was no further explanation given for this.

28. All witnesses were agreed that the claimant took 15.5 day's holiday in the holiday year up to the date of termination of her employment (but only if one excluded 22 May 2019 and 7,9 and 10 October 2019 as being holidays). The claimant's evidence as to the dates on which these holidays were taken was not disputed.

29. The claimant's evidence in relation to providing notice of a termination date of 10 October 2019 and then bringing that forward to a termination date of 6 October 2019 during a subsequent conversation with Ms Riddle was not disputed. This was also supported by surrounding evidence, in that a deduction was made from the claimant's wages for not giving correct notice of termination of employment.

30. The evidence from the claimant that Ms Riddle's calculation of the claimant having taken 17.5 day's holiday up to the, then, anticipated date of termination of 10 October 2019 included an anticipated two day's holiday at the end of September 2019, but which it was subsequently agreed that the claimant would not take as holidays, was also not disputed.

31. Mr Lumsden gave detailed evidence in relation to the hours worked and payment made in respect of the monthly pay period of 18 May to 17 June 2019, which was not challenged by the claimant. The Tribunal accepted that

this evidence showed that the claimant was paid in full, but did not work her all of her contracted hours, in respect of the monthly pay period of 18 May to 17 June 2019.

32. However, the Tribunal did not accept that it had been shown that claimant was on holiday on 22 May 2019 on the following basis:

32.1. There was documentary evidence providing contradictory indications as to whether the claimant was on holiday on 22 May 2019:

32.1.1. The claimant produced and referred to a copy of a rota at document 8, page 16 of the Claimant's Bundle, which she said was the original rota she received in respect of the period which included 22 May 2019, and a copy rota at document 9, page 17 of the Claimant's Bundle, which she said was the updated rota for the same period. Both of these rotas showed 22 May 2019 as being blank. The claimant said that a day being blank on the rota showed that this was a standard day off, and not a holiday. Both the respondent's witnesses accepted that a day being shown blank on the rota usually meant that this was a standard day off.

32.1.2. The respondent produced and referred to a copy of a screen shot from the respondent's computer system at document 6 page 20 of the Respondent's Bundle showing the same period, which showed 22 May 2019 as being a holiday.

32.1.3. It was unclear what the explanation was for the discrepancy between the copy rotas produced by the claimant and the copy screen shot from the respondent's computer system produced by the respondent, referred above.

32.2. The claimant said that 22 May 2019 was a standard day off for her and that she was not on holiday on that date. This was the only direct evidence the Tribunal heard as to whether the claimant was actually on holiday that day.

32.3. The respondent's witnesses did not claim to have any direct knowledge of whether or not the claimant was on holiday on 22 May 2019.

32.4. Ms Woodhouse said that the only knowledge that she had about the claimant being on holiday on 22 May 2019 was the information that was recorded in the respondent's computer system.

32.5. Ms Woodhouse said that information in the respondent's computer system was based on information provided and input into the system by the manager and the manager used the rota to input the information into the system. Ms Woodhouse went on to say that sometimes errors creep in to the system and they ask employees to report it if they spot any errors. The Tribunal considered that this, together with the fact that the respondent did not call the manager who input the information into the system as a witness, could undermine the reliability of the information recorded in the system that the respondent was relying on in relation to the question of whether the claimant was on holiday on 22 May 2019 (and 7,9 and 10 October 2019 too, for that matter).

32.6. Ms Woodhouse said that the person who would know about whether the claimant was on holiday that day was the manager, Jenna Spiers. It was noted by the ET that the respondent did not then call the manager as a witness and it was also noted that neither of the respondent's witness said that they had spoken to the manager in relation to whether the claimant was actually on holiday on 22 May 2019.

32.7. Ms Woodhouse did also say that there is no way the claimant could have been at work that day because the time sheets link to the diary system. However, and in any event, the claimant didn't deny that she was not at work that day; she said it was standard day off, not a holiday.

32.8. When Mr Lumsden was asked if he knew if the claimant was on holiday on 22 May 2019 he said in response that the claimant had said in her own evidence that she didn't work that day and it was not marked down as a sick day or any other absence. Mr Lumsden also made reference to the copy screen shot from the respondent's computer

system produced and referred to at document 6, page 20 of the Respondent's Bundle highlighting that 22 May 2019 was marked as a holiday on it, that the claimant had not worked her full contractual hours for the month and pointed out that the claimant was paid in full for the month.

32.9. The fact that Ms Riddle's reference on 12 September 2019 to the claimant having taken 17.5 day's holiday up to the, then, anticipated date of termination of 10 October 2019 included an anticipated two day's holiday at the end of September indicated that, as at 12 September 2019, the claimant had already taken only 15.5 day's holiday in the holiday year (not 16.5 day's holiday, as would have been expected if 22 May 2019 had been a holiday, it also being the case that the claimant took the 15.5 day's holiday, excluding 22 May 2019, prior to 12 September 2019). It was also noted that the respondent's representative, in cross examination, asked the claimant if she accepted that she had taken 15.5 days holiday up to the end of September, which she did accept.

33. It was a matter of agreement that the September Deduction occurred. In relation to the reason for the September Deduction, the claimant's pay slip for September 2019, a copy of which was produced and referred to at document 10, page 55 of the Respondent's Bundle, indicated that the reason for the September Deduction related to sickness absence. Ms Riddle sent an email to the claimant on 1 October 2019, a copy of which was produced and referred to at document 4, page 12 of the Claimant's Bundle, in which Ms Riddle stated that the September Deduction was made due to the claimant not working a full four week notice period. Ms Woodhouse, in her evidence, stated that the spreadsheet provided by the manager to finance for September 2019 contained a note that the claimant didn't provide notice and the deduction was made for that. Mr Lumsden said in evidence that he assumed that the reason for the September Deduction at that time that it was made in September 2019 was in relation to the notice period given by the claimant

34. In relation to the finding that the date of termination of the claimant's employment was 6 October 2019, and that the claimant was not on holiday on 7,9 and 10 October 2019, the Tribunal considered the following matters were relevant:

34.1. It was noted that in the claimant's claim to the Employment Tribunal, the claimant stated that her employment came to an end on 6 October 2019 and, in the respondent's response to claim, the respondent answered yes to the question "Are the dates of employment given by the claimant correct?".

34.2. As noted above, the Tribunal accepted that the claimant informed the respondent that she would be terminating her employment on 6 October 2019 rather than 10 October 2019. It was not asserted by the respondent that this was not accepted by the respondent at the time, in fact, by her actions, Ms Riddle appeared to accept it by responding by telling the claimant money would be deducted from her wages for not working her full four week notice period and then proceeding to make the September Deduction on that basis. It was also noted it was not asserted by the respondent that the claimant had not given proper notice of termination of employment. Nor was there any evidence or assertion made that the date, 6 October 2019, was subsequently ever changed.

34.3. The claimant, in her evidence, said that her last working day was 6 October 2019 and she was led to believe that her employment would end that day and that her official leaving date was 6 October 2019. She also said she did not request holidays on 7,9,10 Oct 2019. This was not challenged by the respondent.

34.4. The claimant had used all of her holiday entitlement in the leave year by the time she had given notice of termination of her employment in September 2019, she had no further holiday entitlement to take prior to termination of her employment.

34.5. Ms Woodhouse accepted that the only knowledge she had of when the claimant's employment terminated was from the system report produced and referred to at document 6, page 25 of the Respondent's Bundle. This was a further copy of a screen shot from the respondent's computer system which showed 6 October as a working day, 7,9 and 10 October 2019 as holidays and all days after that for the rest of the month of October 2019 were blank. It did not make reference to a termination or leaving date. Ms Woodhouse said that this showed the claimant's last day as 6 October 2019 so officially her last day would have been 10 October 2019. Ms Woodhouse also said that the only knowledge she had as to whether claimant was on holiday on 7,9 and 10 October was the fact that they were recorded as holidays on the system.

34.6. In her evidence Ms Woodhouse also said the claimant's P45 would also state the termination date, but did not say if she had seen this herself or what it stated. It was noted that at this point in proceedings the respondent was given the opportunity to adjourn to produce a copy of the P45 and the respondent's representative stated that the respondent was satisfied that the claimant's last day of work was 6 October 2019 and she was paid holiday for 7,9 and 10 October 2019 and declined the opportunity to produce a copy of the P45.

34.7. Mr Lumsden did not address the date of termination of the claimant's employment directly in his evidence but did say that the claimant had given a termination date of 10 October 2019, originally, and this was changed. Mr Lumsden did also said the claimant took holiday on 7,9,10 October 2019, implying that the claimant was still in employment, at least until 10 October 2019. He said that he believed that it was agreed between the respondent and the claimant that 7,9 and 10 October 2019 would be treated as holidays, but said he based this belief on the fact that the claimant had given a termination date of 10 October 2019 originally and this was changed. Mr Lumsden admitted that he was not aware of any discussion or conversation with the claimant in relation

to her taking 7,9,10 October 2019 as holidays. He did highlight that the claimant was paid for 7,9,10 October 2019, and the claimant did not deny that, and that the dates were shown as holiday on the copy screen shot from the respondent's computer system produced and referred to at document 6, page 25 of the Respondent's Bundle.

34.8. As noted above, in relation to the reliance placed on the information that was on the respondent's computer system that stated the claimant was on holiday, again, the Tribunal noted that Ms Woodhouse stated that the information on the system was based on information provided and input into the system by the manager, that sometimes errors creep in to the system and they ask employees to report it if they spot any errors. Again, the Tribunal considered that this, together with the fact that the respondent did not call the manager who input the information into the system as a witness, could undermine the reliability of the information recorded in the system that the respondent was relying on in relation to the question of whether the claimant was on holiday on 7,9 and 10 October 2019, as well as 22 May 2019.

35. The Tribunal was satisfied that the respondent had demonstrated in the evidence of its witnesses, with reference to what dates the claimant worked and was paid for in October 2019, that the claimant was paid in full by the respondent up to 10 October 2019, which included payment in respect of 7,9,10 October 2019 as holidays. This evidence from the respondent was not admitted by the claimant, but it was not challenged.

36. The Tribunal was also satisfied that the evidence from the respondent's witnesses demonstrated that the respondent believed that they were entitled to deduct five day's pay from the claimant's October 2019 monthly salary payment in respect of five day's holidays taken in excess of entitlement, and that not doing so corrected the September Deduction. Mr Lumsden said in evidence that the September Deduction should not have been made but it was corrected in the October 2019 pay. Ms Woodhouse stated the September Deduction was corrected by not making a deduction in October 2019 for the five day's holiday taken in excess of entitlement.

Relevant law

37. Part II of the Employment Rights Act 1996 (ERA) sets out the statutory prohibitions on deductions from wages.

38. Section 13(1) contains the general prohibition as follows:

"(1) An employer shall not make a deduction from wages of a worker employed by him…"

39. Section 13(3) of the ERA provides a deduction from wages occurs where:

"….the total amount of wages paid on any occasion by an employer to a worker employed by him is less than the total amount of the wages properly payable by him to the worker on that occasion (after deductions)"

40. Section 13(3) of the ERA also makes clear that:

"the amount of the deficiency shall be treated for the purposes of this Part as a deduction made by the employer from the worker's wages on that occasion."

41. There are certain exceptions and qualifications to the general prohibition on deductions from wages.

42. As well as containing the general prohibition, Section 13(1) of the ERA also provides that the prohibition does not apply where:

"(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."

43. Clauses in employment contracts are unenforceable where they are penalty clauses rather than a genuine pre-estimate of the loss (see **Giraud UK Ltd v Smith 2000 IRLR 763, EAT**). In that case the Employment Appeal Tribunal (EAT) held that a term in an employee's contract allowing an employer to deduct a sum from the employee's final payment in the event that he failed to give notice and work out his notice period was a penalty clause as it was not

a genuine pre-estimate of the loss that the employer could suffer in the event of the employee's breach.

44. A sum deducted under a penalty clause cannot be a lawful deduction under Section 13 of the ERA (see **Cleeve Link Ltd v Bryla 2014 ICR 264, EAT**)

45. Section 13(4) of the ERA provides that a deficiency in wages will not be a deduction for the purposes of Section 13(3):

"….in so far the deficiency is attributable to an error of any description on the part of the employer affecting the computation by him of the gross amount of the wages properly payable by him to the worker on that occasion."

46. The EAT has made clear that the "error in computation" exception in Section 13(4) of the ERA will not apply to situations where the employer has made a deliberate decision to make the deduction, albeit in the erroneous belief that it was entitled to (see **Morgan v West Glamorgan County Council 1995 IRLR 68, EAT** and **Yemm and ors v British Steel plc 1994 IRLR 117, EAT**).

47. Section 14 of the ERA provides that the general prohibition on deductions from wages regime does not apply to deductions where the purpose of the deduction is the reimbursement of the employer in respect of an overpayment of wages.

48. Section 25(3) of the ERA provides that, where it is determined that an unlawful deduction from wages has occurred:

"(3) An employer shall not under section 24 be ordered by a tribunal to pay or repay to a worker any amount in respect of a deduction or payment, or in respect of any combination of deductions or payments, in so far as it appears to the tribunal that he has already paid or repaid any such amount to the worker."

49. Section 25(3) of the ERA applies to payments made by an employer to a worker in respect of a deduction at any time before the date on which the Tribunal make an order against the employer (see **Robertson v Blackstone**

Franks Investment Management Ltd 1998 IRLR 376, CA and **Autonomy Systems Ltd v Cuddington EAT 0854/02**).

50. If an employer makes an unlawful deduction from an employee's wages but unilaterally increases another element or aspect of a worker's wages so that, even where the amount of the increase is the same as the amount of the unlawful deduction and so that there is no overall reduction in pay, there will still have been an unlawful deduction from wages (see **Pendragon plc v Nota EAT 0031/00** and **Laird v AK Stoddart Ltd 2001 IRLR 591, EAT**).

51. If an employer is owed any amount by an employee, the statutory prohibitions on deductions from wages provisions do not permit the "setting off" of such claims or counterclaims against an unlawful deduction from wages by, for example extinguishing the employee's right to recover the unlawful deduction because they owed or were liable to the employer for some other amount. (see **Delaney v Staples (t/a De Montfort Recruitment) 1992 ICR 483, HL** and **Asif v Key People Ltd EAT 0264/07**).

Submissions

Claimant's submissions

52. The claimant made brief oral submissions. In summary, her submissions were as follows:

53. The claimant still believes that the money was deducted from her wages because of the notice.

54. The claimant did not deal with either of the respondent's witnesses during the notice period, the manager the claimant did deal with was not present.

55. The amount deducted from the claimant's pay was more than the four disputed holidays in question (22 May 2019 and 7,9 and 10 October 2019).

56. If the deduction in September 2019 was for holidays, some dates deducted were prior to the claimant taking holidays and one date was in May 2019, months prior and it just didn't quite add up.

57. £340 for a big company with multiple locations and expanding is nothing to them, but a lot to the claimant.

58. The claimant worked 40 hours a week in September 2019 in a demanding job, working various shifts and all she asks for is that she is paid for the work she did. Instead the company have put the claimant through misery.

59. The claimant is seeking payment for an unlawful deduction from wages of £340, being a week's pay for eight hours per day for five days, paid at a rate of £8.50 per hour.

60. After the respondent's submissions the claimant added that, in relation to the holiday dates in dispute (22 May 2019 and 7,9 and 10 October 2019) , anyone had access to the system and can add things and the claimant knows that when she left, those holiday dates were not there.

Respondent's submissions

61. Mr Lumsden, on behalf of the respondent, made brief oral submissions. In summary, his submissions were as follows:

62. The respondent has made some errors in communication and the way the deduction was handled and it could have been better.

63. The reasons were largely because of changes in managers in the salon with Ms Riddle coming from another location, another manager being off sick and senior managers involved who were not familiar with the situation.

64. The deduction probably shouldn't have happened in September 2019 and the respondent apologises for any issues that caused the claimant.

65. The respondent takes great care to ensure final pay is calculated correctly.

66. The respondent has tried to demonstrate that the days in question (22 May 2019 and 7,9 and 10 October 2019), whether holidays or not, were paid for and they were not worked. The respondent applied the system in the same way as for any employee in that situation.

67. The five days holiday that was not deducted comes from the days in question (22 May 2019 and 7,9 and 10 October 2019) but also the fact that the claimant took 19.5 days holiday and accrued only 14.5 days holiday.

68. The claimant referred to these two figures being the same, the £340 deducted in September 2019 and £340 in relation to holidays taken in excess of entitlement, as being a coincidence, and it was just a co-incidence. The £340 in relation to holidays taken in excess of entitlement is the correct amount.

69. It is unfortunate that there was some poor communication but, in essence, the respondent is 100% confident that the claimant was paid in accordance with her contract, hours worked and the holidays she has had.

70. It is noted that we didn't hear in the claimant's submissions that the claimant claims that she hadn't been paid three days in October 2019 and 22 May 2019. She was paid on these days and didn't come to work.

Discussion and decision

71. The issue for the Tribunal to determine was, had there been an unlawful deduction from the claimant's wages contrary to section 13(1) of the ERA and, if so, should the respondent be ordered to pay the claimant the amount of any such deduction in accordance with section 24(1) of the ERA.

72. The respondent's defense originally appeared to be that September Deduction was for holidays taken in excess of entitlement. By the time of the Hearing, it was clear that the respondent's position was that the reason for the September Deduction, and the basis on which it was made by the respondent, was the length of notice of termination of employment that the claimant had given to the respondent. The respondent did not seek to argue that the September Deduction itself was lawful, in fact in evidence both the respondent's witnesses were candid enough to accept that the September Deduction should not have been made and Mr Lumsden in submissions on behalf of the respondent accepted that the deduction probably shouldn't have happened in September 2019.

73. It having been accepted that the claimant was paid less than the total amount of the wages properly payable to her in September 2019, the respondent having deducted £340 from the claimant's monthly salary payment that month (which has been referred to throughout this judgment as the "September Deduction"), the Tribunal found that there had been a deduction for the purposes of Section 13(3) of the ERA.

74. The Tribunal was mindful that, in accordance with Section 13(1) of the ERA, the prohibition on deductions does not apply where:

"(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."

75. There was no evidence or any suggestion that the September Deduction was required or authorised by virtue of a statutory provision in this case, nor was there any evidence or suggestion that the claimant had previously signified in writing her agreement or consent to the making of the September Deduction.

76. Nor was there any evidence or suggestion that the September Deduction was authorised by a provision in the claimant's contract. However, it having been produced and referred to, the Tribunal did consider the provision in the Contract of Employment in relation to deductions from wages and, observing that the reason for the September Deduction was the length of notice of termination of employment that the claimant had given to the respondent and noting the reference to a "no notice period penalty" in the provision in the Contract of Employment in relation to deductions from wages, considered whether this provision could authorise the respondent to have made the September Deduction. The Tribunal concluded it could not.

77. There was no evidence heard from any of the witnesses as to what the "no notice period penalty" was, when it might be applicable and/or whether it was or should be applicable in this particular case, entitling the respondent to make the September Deduction. The Tribunal considered that, at face value,

the words themselves could indicate that it would be applicable where "no" notice was given, and in this case notice was given. Further and in any event, if the "no notice period penalty" was intended to be a penalty to allow the respondent to deduct a sum from the claimant's salary in the event that she failed to give notice and work out her notice period, then, noting the EAT's guidance in the cases of **Giraud UK Ltd v Smith 2000 IRLR 763, EAT** and **Cleeve Link Ltd v Bryla 2014 ICR 264, EAT**, this would be a penalty clause and not a genuine pre-estimate of the loss that the employer could suffer in the event of the employee's breach and any sum deducted under such a penalty clause cannot be a lawful deduction under section 13 of the ERA.

78. Again, whilst it was not asserted by the respondent, the Tribunal considered the provision at Section 13(4) of the ERA, that a deficiency in wages will not be a deduction for the purposes of Section 13(3) where it is attributable to an error, and concluded that the exception in this provision did not apply in the present case when considered in the light of the decisions in the cases of **Morgan v West Glamorgan County Council 1995 IRLR 68, EAT** and **Yemm and ors v British Steel plc 1994 IRLR 117, EAT**, referred to at the "Relevant law" section above. The September Deduction was not the result of some computation or arithmetic error, it was a deliberate deduction that was made for a reason, i.e. the length of notice of termination of employment that the claimant had given to the respondent, albeit that it may have been made by the respondent in the erroneous belief that it was entitled to.

79. The Tribunal next considered if the exception to the general prohibition on deductions from wages regime at Section 14 of the ERA applied and concluded it did not. The Section 14 of the ERA exception only applies where the purpose of the deduction is the reimbursement of the employer in respect of an overpayment of wages. In this case the reason for the September Deduction was the length of notice of termination of employment that the claimant had given to the respondent and there was no evidence or assertion that the purpose of the deduction was the reimbursement of the employer in respect of an overpayment of wages.

80. Whilst the respondent did not seek to argue that the September Deduction should have been made, they did argue that the fact that the respondent did not make a deduction of five day's pay from the claimant's October 2019 monthly salary payment in respect of five day's holidays taken in excess of entitlement "corrected" the earlier September Deduction.

81. The Tribunal considered whether the respondent not deducting a sum in respect of holidays taken in excess of entitlement from the claimant's October 2019 monthly salary payment (assuming it would have been entitled to deduct such a sum) could either:

81.1. prevent the September Deduction from being an unlawful deduction when it otherwise would have been; or

81.2. mean that the Tribunal should set-off or otherwise subtract the sum in respect of holidays taken in excess of entitlement the respondent did not deduct from the claimant's October 2019 monthly salary payment from the amount the Tribunal orders the respondent to pay to the claimant in respect of the September Deduction,

and concluded that it could not on the following basis:

82. The Tribunal did not consider that the respondent's act of not deducting a sum in respect of holidays taken in excess of entitlement from the claimant's October 2019 monthly salary payment (even if it would have been entitled to deduct such a sum) could be considered an amount being "*paid or repaid"* for the purposes of the provisions of Section 25(3) of the ERA. Even if it could, and taking into account the cases of **Robertson v Blackstone Franks Investment Management Ltd 1998 IRLR 376, CA** and **Autonomy Systems Ltd v Cuddington EAT 0854/02** referred to at the "Relevant law" section above, Section 25(3) of the ERA applies to any payment made by an employer to a worker <u>in respect of</u> a deduction and, in this case, the act of not deducting a sum from the claimant's October 2019 monthly salary payment was in respect of five day's holidays taken in excess of entitlement, while the September Deduction was in respect of the length of notice of termination of employment that the claimant had given to the respondent.

83. Even if the respondent would have been entitled to deduct the sum in respect of holidays taken in excess of entitlement it did not deduct from the claimant's October 2019 monthly salary payment, as observed above, and even if that could be characterised as an amount owed to the respondent, if an employer is owed any amount by an employee, the statutory prohibitions on deductions from wages provisions do not permit the "setting off" of such claims or counterclaims against an unlawful deduction from wages by, for example extinguishing the employee's right to recover the unlawful deduction because they owed or were liable to the employer for some other amount. (see **Delaney v Staples (t/a De Montfort Recruitment) 1992 ICR 483, HL** and **Asif v Key People Ltd EAT 0264/07**).

84. The Tribunal did not consider that the act of not deducting a sum in respect of holidays taken in excess of entitlement from the claimant's October 2019 monthly salary payment (even if it would have been entitled to deduct such a sum) could be considered as the respondent in some way unilaterally increasing another element or aspect of a worker's wages. But even if it could, and even if that resulted in no overall loss to the claimant, as the cases of **Pendragon plc v Nota EAT 0031/00** and **Laird v AK Stoddart Ltd 2001 IRLR 591, EAT** make clear, there will still have been an unlawful deduction from wages.

85. Even if the respondent not deducting a sum from the claimant's October 2019 monthly salary payment in respect of five day's holidays taken in excess of entitlement could prevent the September Deduction from being an unlawful deduction or mean that the Tribunal should set-off or otherwise subtract the sum from the amount the Tribunal orders the respondent to pay to the claimant in respect of the September Deduction, which the Tribunal concluded it could not for the reasons and on the basis set out above, the respondent would have required to have been entitled to make the deduction in respect of five day's holidays taken in excess of entitlement in the first place.

86. However, the Tribunal concluded that the respondent would not, in fact, have been entitled to make a deduction of five day's pay from the claimant's October 2019 monthly salary payment in respect of five day's holidays taken

in excess of entitlement, the most the respondent could have been entitled to deduct from the claimant's October 2019 monthly salary payment in respect holidays taken in excess of entitlement was half a day's pay, on the following basis:

87. The Contract of employment authorised the respondent to make deductions from the claimant's salary in respect of payment for holidays taken in excess of entitlement.

88. The Tribunal noted the respondent's submission that the claimant had only accrued 14.5 holidays in the year that her employment terminated. The Tribunal did not accept this submission as the claimant was entitled to 30 days holiday per year in the year that her employment terminated, the holiday year ran from 1 April to 31 March and her employment terminated on 6 October 2019. Accordingly, the claimant's accrued holiday entitlement at the termination of her employment was 30 days divided by two (her having been in employment and accruing holiday entitlement for six full months of the holiday year (i.e.half of the holiday year), which equals 15 days.

89. It was a matter of agreement that the claimant took and was paid for 15.5 day's holiday in the holiday year up to the date of termination of her employment, if one excluded 22 May 2019 and 7,9 and 10 October 2019 as being holidays. The claimant did not take holidays on 22 May 2019 and/or on 7,9 and 10 October 2019. As a result, the Tribunal concluded that the claimant had taken 15.5 days holiday in the holiday year up to the date of termination of her employment.

90. Accordingly, as at the date of termination of her employment the claimant had only taken half a day's holiday in excess of her holiday entitlement, not five days.

91. It was recognised that the respondent had paid the claimant for holidays on 7,9 and 10 October 2019 when it did not need to. The Tribunal considered if this fact could mean that any of the legal provisions or principles set out above could apply to prevent the September Deduction from being an unlawful deduction when it otherwise would have been and/or the payment for holidays

in respect of 7,9 and 10 October 2019 could be set-off or otherwise subtracted from the amount the Tribunal orders the respondent to pay to the claimant in respect of the September Deduction. The Tribunal considered that it could not on the following basis:

92. The payment in respect of 7,9 and 10 October 2019 was in respect of holidays, albeit erroneously, while the September Deduction was in respect of the length of notice of termination of employment that the claimant had given to the respondent. So the provisions of Section 25(3) of the ERA, which require the payment made to be in respect of a deduction, would not apply so as to require or permit the Tribunal to deduct the amount of the payment made in respect of 7 ,9 and 10 October 2019 from the amount the Tribunal orders the respondent to pay to the claimant in respect of the September Deduction.

93. The legal principles in relation to "set-off" as referred in the **Delaney v Staples (t/a De Montfort Recruitment) 1992 ICR 483, HL** and **Asif v Key People Ltd EAT 0264/07** cases and as referred to at paragraph 83 above would apply to the payment in respect of 7,9 and 10 October 2019, i.e. even if it could be characterised as an amount owed to the respondent, it cannot be set off against an unlawful deduction from wages.

94. Similarly, the legal principles in relation to the effect of any increases made to another element or aspect of a worker's wages referred to in the cases of **Pendragon plc v Nota EAT 0031/00** and **Laird v AK Stoddart Ltd 2001 IRLR 591, EAT** and as referred to at paragraph 84 above would apply to the payment in respect of 7,9 and 10 October 2019 so that, even if could be characterised as unilaterally increasing another element or aspect of a worker's wages, and even if that resulted in no overall loss to the claimant, it would not prevent the September Deduction from being an unlawful deduction.

95. Accordingly, for the reasons and on the basis set out above, the Tribunal concluded that the September Deduction (i.e. the deduction of the gross sum of £340 by the respondent from the claimant's monthly salary payment in

September 2019) was an unlawful deduction from wages contrary to section 13(1) of the ERA and the respondent is ordered to pay the claimant the gross sum of £340 in accordance with section 24(1) of the ERA.

Employment Judge: Paul McMahon
Date of Judgment: 23 December 2020
Entered in register: 24 December 2020
and copied to parties

I confirm that this is my Judgment in the case of Powell v The Nail & Beauty Zone Ltd and that I have signed the Judgment by electronic signature.