EMPLOYMENT TRIBUNALS

Claimant: Mr D Jordan-Gathercole

Respondent: George Allinson Transport Ltd

HELD AT: Newcastle, by video **ON:** 07 April 2021

BEFORE: Employment Judge Moss

REPRESENTATION:

Claimant: In person
Respondent: Mr F Pawass

WRITTEN REASONS

Introduction

1. These are the written reasons for the Judgment delivered orally at the conclusion of the hearing on 7 April 2021, and sent out to the parties on 22 April 2021. Written Reasons were requested by the respondent in an email of 27 April 2021.

Claim and issues

2. By a claim form presented on 23 January 2021 the claimant complained that there had been an unlawful deduction from his pay in relation to wages deducted for work undertaken prior to the contract being terminated.

3. The response form of 02 March 2021 defended the claim on the basis that the deduction was authorised as the claimant had not given 2 weeks' notice as required by his contract.

Evidence and findings of fact

4. I heard oral evidence from the claimant and from Mr Pawass on behalf of the respondent company. Each of them had an opportunity to question the other and they each answered questions from the Tribunal.

5. Other than a disagreement about the claimant's start date of employment (which was not relevant to the issue to be determined or to the claimant's entitlement to bring the claim), the facts were not in dispute.

6. Prior to his employment ending, the claimant worked for George Allinson Transport Limited as a Class 1 Tramper.

7. He was required by clause 10 of his contract of employment to give 2 weeks' notice of intention to terminate employment with the company. He gave such notice on 7/12/20 but in fact did not return to work after 8/12/20 and so terminated his contract without having given proper notice.

8. Clause 13 of the claimant's employment contract provides as follows:

   The Company reserve the right to deduct deductions at any stage of Employment or after the end of Employment for the following: Damage to company property, vehicles and equipment: Damage to Customers property and equipment: Misuse of company telephone for phone calls or text: Failure to give the correct amount of notice: Failure to return company property, uniform or equipment: recovery of any loans: recovery of expenses found to claimed fraudulently or in error: Recover of any excess holiday taken : Recovery of any Company money un accounted for : Recovery of parking, speeding or any other fines : Recovery or non payment of excess miles, hours or any claimed payment relating to wages where the company feels is a result of error or mistake by the employee.

9. The claimant received £54.10 in wages for 55 hours work undertaken during week 37 and for which his wages were payable on 17/12/20. He received £393.10 in wages for 20 hours work undertaken during week 38 and for which his wages were payable on 24/12/20.

10. A total of £661.16 was deducted from the claimant's wages by the employer on the basis that the claimant had not provided 2 weeks' notice as required by his contract of employment. £458.66 was deducted from wages payable on 17/12/20 and £202.50 was deducted from wages payable on 24/12/20. The employer had calculated the sums using basic rate of pay and had not made any deductions for overtime, overnight attendance or holiday pay.

11. Mr Pawass conceded that wages due for work undertaken by the claimant during his final shift of 08/12/20 had not been factored into the calculations. He sought to justify it by reference to the respondent having based its calculations on basic rate of pay which had benefitted the claimant overall. Gross pay for that day would have been £112.75.

The Relevant Law

12. Section 13 of the Employment Rights Act 1996 (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 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.

13. Although a deduction may be lawful under the ERA, there is a common law rule that any deduction should be a genuine pre-estimate of the loss suffered by the employer as a result of the employee's breach and that anything in excess of this is a penalty, which is void at common law – ***Dunlop Pneumatic Tyre Co Ltd v New Garage and Motor Co Ltd 1915 AC 79.***

14. It was held in ***Giraud UK Ltd v Smith 2000 IRLR 763 EAT****,* that a term in an employee's contract allowing his employer to deduct a sum from his 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.

Conclusion

15. There was no dispute about what was properly payable or that the employer had made a conscious deduction from what was payable. The sole issue was whether that deduction was authorised by a relevant provision of the contract.

16. The employer relied upon Clause 13 to show that the deduction was so authorised. It was not in issue that the claimant had failed to give the correct amount of notice. Such failure is among the list of things set out in Clause 13 for which the company reserves the right to 'deduct deductions'. I considered that in itself to be confusing terminology, but on the assumption that it confers a right to make deductions, I concluded that the contract term is unenforceable as falling foul of the common law.

17. Although the contract term on the face of it appears to permit a deduction for failure to give proper notice, it clearly amounts to a penalty clause, as provided by the *Giraud* case, since it is not a genuine pre-estimate of the loss that the employer could suffer in the event of the employee's breach. Rather the employer unilaterally decided upon the amount to be deducted and the basis on which any sum would be calculated after the event.

18. In accordance with the *Dunlop* case, such penalty clauses are void at common law even though the deduction may be ostensibly authorised by statute. In the absence of an enforceable contract term authorising the

deduction, I found that £661.16 had been unlawfully deducted. I therefore made the award recorded in the Judgment.

Employment Judge Moss

Date 24 June 2021

Note
Reasons for the judgment having been given orally at the hearing, written reasons will not be provided unless a request was made by either party at the hearing or a written request is presented by either party within 14 days of the sending of this written record of the decision.