



# EMPLOYMENT TRIBUNALS

**Claimant:** O Thompson

**Respondent:** Am-R-Az LLp t/a Bluebird Care (Northampton & Daventry)

**Heard at:** London South (Croydon) Tribunal      **On:** 27 May 2021

**Before:** Employment Judge O'Dempsey

## **Representation**

**Claimant:** Mr Sayani (Partner in Respondent)

**Respondent:** Mr Wallis (Counsel, Free Representation Unit)

# JUDGMENT

- 1. The claimant's claim for unlawful deductions from wages is well founded.**
- 2. The claimant's claim for failure to provide itemized pay statements is well founded.**
- 3. In respect of unlawful deductions the respondent is ordered to pay £1661 including £161 in respect of unpaid holiday pay.**

# REASONS

1. These are the reserved decision reasons. It was necessary to reserve the decision due to the time at which the hearing finished (due to technical difficulties and cross examination). I am grateful to both parties for their willingness to deal with the technical difficulties that arose in this case, for their submissions and the way in which they co-operated to ensure that this case could be dealt with.

2. After various technical difficulties with this CVP (Video) hearing had been overcome the applicant applied to amend the particulars of claim to include a claim for failure to make or provide itemised pay statements. The respondent did not object and so the particulars of claim were amended to include "the respondent failed to provide itemised pay statements from November 1 – November 30." It was agreed between the parties that this allegation amounts to the failure to provide one payslip.

3. We discussed the issues that were relevant to the matters before me. Essentially the issue was whether the claimant had been provided before the date of the deduction from pay with a copy of the relevant provision.

4. At the start of hearing evidence counsel for the claimant requested to ask supplementary questions and the respondent did not object. The claimant adopted her witness statement and gave further evidence to the following effect. She was asked what had happened on 22 October 2019 in relation to receiving or not receiving a copy of her contract of employment. She told me that on that day she was supposed to start the job. She was not given a care plan or the address where she would be working. The respondent asked her to come to their Northampton office and they would accompany her to the house that she would be working at as a live-in carer. However the respondent was not present at the office and they had to go to another office where the claimant was asked to wait. She told me that she did wait and later on one of the managers of the respondent brought out a form for her to sign. She asked for a copy of it. The manager went inside. She believed it was Mr Azeem Sayani the manager. She said that he told her that they were going to give her a copy.

5. The claimant then said that the manager came out and said that the CQC were on the premises that day doing an inspection. They were very busy and they would give her a copy in due course. She took his word. They then proceeded to the client house. The claimant was then asked about her probation period. She said that she was not told about it. She said that it was only when the issue of not being paid two weeks arose that she was told that there was any question about receiving the contract. She told me that she asked for it many times and they did not send it to her.

6. She told me that she received nothing for her holiday and that she did not take any holiday. I accept her evidence on this point as it was not challenged.

7. She told me that the client was not a comfortable person to work for and that she was not comfortable. When they were alone the client would praise her but that when another worker would arrive the client would become hostile and would shun her. The claimant said that she asked for a change and that her supervisor spoke to the client and to her and told her she should carry on and that the difficulties were because she was new.

8. Because I had allowed supplementary questions and because the respondent was self representing I gave an adjournment to the respondent to consider the supplementary questions that had been asked. Under cross examination she told me that when she got to the office she waited for an hour after being let into the building. She said that she waited for a long time and that the CQC were around. She said that Mr Azim Sayani asked her to sign the last page of the contract and that she was just given the last page to sign. She signed it and asked for a copy. He said okay and went back to the office. After he had been away for 15 to 20 minutes in the office, where the copy was, she was told that they would send it to her but they were busy with the CQC inspecting.

9. On further questioning it appears that the claimant had signed an application form and on the day she got what she described as another form which she signed before she started the job and which was the contract.

10. One of the matters that slowed the process of the case down substantially (and without which it might have finished within its three hour allocation) was that it emerged at this point in the claimant's cross examination that she did not have the bundle in either hardcopy or open on an electronic device before her. This was very unfortunate as the claimant thereafter could only access documents by looking at either her mobile phone or an iPad which she had to hand. It was clear to me that this was very difficult, distracting and time consuming for her to do. However her counsel had the full bundle for him as did all the other participants. I therefore suggested to the parties after an adjournment in order to ensure that the electronic bundle was sent to the claimant, that the claimant should have passages on which questions were going to be put to her read out. Counsel for the claimant would be able to point to any other passages on the same page or nearby to which attention should be drawn either at the time or in re-examination.

11. Thereafter I read out the passages which appeared to be relevant to the questions that anyone wished to put to the claimant. When referred to the contract, page A155, the claimant confirmed that the name address and start date were correct. She then stated that she could not remember clause 3 because she did not get a copy of it.

12. She was referred to page A167. She confirmed that the dates reflected accurately when she came in to sign the agreement and agreed that she signed a document saying that she had read and fully understood the contract and that she agreed to be bound by it. However she also said that she needed a copy of it and was not given a copy of it. She said that she did not look through it.

13. She was referred to page A153 and it was pointed out to her that she had signed the declaration on it on 17 September 2019. It was put to her that therefore there were two separate documents with different dates on them and it was only the contract that had been signed on 22 October at the Northampton office and not at some other office. The claimant said she was not sure that was the Northampton office that she said it was the office where the respondent had asked her to meet them. The claimant accepted that she had not been forced to sign the contract. It was put to her that she in fact read the contract and all the terms within it including the terms relating to the issues in this case. She again asserted that she did not read the contract and that she asked for it many times. She denied that she was given a copy of the contract on 22 October or that she read it and she asserted that the contract was deliberately withheld from her. I do not accept that the document was deliberately withheld from her.

14. The claimant explained to me that the first time she had asked for a copy of the contract was on three November by text message and that the only time she had asked for it orally before then was on the day she signed.

15. The claimant said that she had expressed her unhappiness with the client on the third day of being there she raised it with her supervisor. She explained that she had not raised it via the official telephone number because the only number she had for her supervisor was the one she had phoned. It emerged that this was the supervisor's personal telephone number paragraph by reference to page A139. It became apparent that the claimant had been told on 24 October that she should not send messages to the supervisor's personal number.

16. The claimant explained that she had spoken to Rozina, a manager of the respondent's, once or twice. She said that the first time she spoke to her was on 3

November apart from the day that she met her when she signed the contract on 22 October. The claimant then explained that on 22 October Rozina came to greet her and introduced herself.

17. She explained that during the phone call Rozina became aggressive with her when she mentioned that she had not been given a care plan. The claimant said that Rozina said that they do not give care plans prior to the starting date because of giving away address and the job plan to people who do not turn up on the day. Claimant said that she asked Rozina to be sent to another placement and was told that this was not going to happen and that she would not get paid if she did not go back to the placement.

18. The claimant challenged this and Rozina told her that it was in her contract but refused to give her a copy of the contract when the claimant explained that she had not received the contract. However the claimant was not clear as to whether she did ask Rozina during this conversation for a copy of the contract. She believes that she did because immediately after the conversation she sent the text message. It was put to her that the email from Rozina of that date in fact represents the actual conversation. She denied this she said that it did not give the detail of everything that was discussed and did not reflect other conversations.

19. Mr A Sayani gave evidence. He adopted his witness statement and in cross examination was challenged over his assertion in paragraph 24 of his witness statement that the signature on the document showed that the contract had been provided to the claimant and that she had read it and agreed to all terms contained in it.

20. It emerged that the contract on page A167 does not in fact say that the claimant was acknowledging receipt of the contract. Mr Sayani accepted that nothing said that the claimant had received it but he stated that it was the respondent's process to give the claimant a new employees a copy. He was challenged on his statement that it was not apparent to the respondent that the claimant had not collected her contract copy until they investigated it further when she first communicated by making it a condition of meeting with them that she would need to see her contract. In response to the question whether he accepted that the claimant left the office without her contract that day he stated that it was entirely possible that she left the office without taking the contract. He stated that he did not know before the time that she stated that it was a condition of meeting the respondent that she would need to see the contract that she had left the contract at the office or left the office without a copy of it. He stated that it was not a case of the respondent not giving the claimant the contract.

21. When asked why he had not provided a copy of the contract when she had asked for it on three November he explained that he had no access to email and could not leave what he was doing. The request had been made at the weekend when it was not possible for him to get into the office. He was booked into meetings. He tried to give her a copy of what he had. He tried to send her a copy but she was not interested in it. I do not accept that the claimant was not interested in receiving her contract.

22. However on 6 November (page A213) he was able to send a photograph of the document that had been sent to him namely a copy of part of the contract. He accepted that this was only clause 12 of the contract. He asserted that he did provide a copy of the contract before making the deduction and that he had not

only showed clause 12. He denied that 22 October was the first day of the claimant's contract because the claimant was shadowing another worker.

23. In the course of his cross-examination Mr Sayani very frankly accepted that the respondent had not sent the claimant a payslip and readily owned that this was a fault.

24. The claimant's counsel put the various terms which I have to construe to Mr Sayani. Mr Sayani did not accept that clause 12 requires the respondent to present an invoice or bill to the claimant before a deduction could be made under clause 6. I have to say that I agree that it does not require something so formal.

25. Mr Sayani was also cross-examined on the question of whether the respondent had mitigated its losses. He pointed out that the claimant was a live-in carer and was hired for the specific contract. He said that it was hard to fill such vacancies in winter and this is because it is a specific type of care work which is completely different from the other kinds of care work that the respondent covers. In the case of a live-in carer the client's care needs are likely to be higher than the case where a domestic worker is provided as the latter can go home at the end of the day whereas with a live-in client it is necessary for round-the-clock care to be given.

26. Briefly I consider that the respondent appears to have taken, so far as it is relevant, proper steps to mitigate any loss. I remember that the activities of the respondent in this context are not to be weighed in refined balances. The respondent took reasonable steps to mitigate their loss. I consider below whether any of that is relevant to the issues before me.

27. Mr Azim Sayani then gave evidence. He adopted his very short witness statement. He said that he had given a copy of the contract to the claimant on 22 October. He said that he gave her the contract and remembered this because she lived in London. He said he would drive her to the client and then stated that he had asked her to follow him in her car. He showed her where the customer was. He helped her with her bags. He recalled that she had papers in her hand as well. She, he said, did take everything with her to the client.

28. Of course that was not put to the claimant for her to be able to comment on it. He speculated that perhaps the documentation had gone missing in the client's home but he was clear that he remembered that the documentation was with her. The claimant did not have the opportunity to meet the point made by Mr Sayani that as care plans are digital she had installed it on her phone or that she had taken the contract with her from the office. Mr Azim Sayani stated that the CQC inspection might have come up in conversations but that it was not a very busy day. All of these details were not put to the claimant so that she could respond to them and nor were they dealt with in the respondent's witness statements. I have to assess whether, in the light of the fact that the respondent is self-representing, there is any significance in that. In order to do that I have looked at the documentation and the way in which the parties put their respective cases.

### **The pleadings**

29. The claimant at paragraph 8.2 of her ET1 stated "I was told it would start with the probation period where either side could decide to terminate the agreement. I asked for the contract I'd signed many times before and during the assignment I

carried out which they refuse to provide in its entirety." Continued "I wrote to staff members... By email on... Asking for my contract and my outstanding pay.". "I was not given a care plan for my client in order to know the assignment was going into which is required of care agencies to do by law."

30. From that it should have been apparent to anyone including a non-legally qualified reader that the claimant was saying that she had not received her contract and it must have been apparent that the details of what happened on 22 October were central to this case.

31. In their response the respondent's state "for all employees before they start with us they sign a contract in duplicate a copy of which they get the second copy which we keep electronically. Lolo will have received her contract when she signed this we have not refused at any point to give her a copy of her contract."

32. The respondent also stated "Lola was given access by us to the customers care plan on her phone..."

33. There was in addition a case management hearing on 4 March 2021 before Employment Judge Dobbie. The judge spent some time discussing the issues with the parties. The issues were defined in the following ways which remain relevant:

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1. did the respondent make an unauthorised deduction from the claimant's wages country section 13 of the Employment Rights Act 1996?

2. Was there a valid contractual term in the claimant's contract permitting the respondent to make the deduction in question pursuant to section 13 (1) (a) of the Employment Rights Act 1996?

3. If so had the contract been provided to the claimant on a prior occasion as required by section 13 (2) of the Employment Rights Act 1996.

34. Further issues were defined relating to whether the clause was an unlawful penalty and whether in those circumstances the period of recovery of two weeks pay was a genuine pre-estimate of loss; and finally there was a question raised as to whether if the amount was unenforceable penalty clause what the true extent of loss suffered by the respondent as a result of the breach was.

35. What is perfectly clear from that list of issues is that the respondents must have known that the question of whether the claimant had been provided with a copy of the contract before the deduction was made was absolutely central to the issues in the case.

36. Mr Azim Sayani in his witness statement had stated that he was involved in bringing the claimant on board to the company. In his witness statement he said that he was the person who met her at the offices to sit down with her and go through all employment documents with her. He said that he witnessed her sign the contract of employment on 22 October 2019.

37. However it does not appear that any of the details were put to the claimant when she was cross examined. Nor are they in the statement he has provided. I have to determine whether I accept Mr Azim's statement "I was involved in onboarding Lola to the company, carrying out pre-employment tasks and met her at our offices to sit down with her and go through all employment documents with her." is sufficient. The question of whether the claimant was present to sign documents is not really the relevant issue. The statement appears to suggest that

the purpose of him meeting her was to go through all employment documents with her. He does not suggest however that he actually did this. In particular there is no suggestion that the claimant read the contract before signing it. His statement is extremely short and lacking in detail.

38. Mr Amir Sayani's witness statement there is a great deal of argument. He asserts at paragraph 12 that the contract was signed by the claimant on 22 October 2019. It is correct to say that the claimant signed the contract and that it does say that she had read and fully understood the contract and agreed to be bound by. She does not deny signing a document to that effect. In fact Mr Amir Sayani says this: "the fact that the claimant left her copy of the contract in the office and did not take it with her..." However at no point has anyone who was present on the occasion stated that the claimant left her copy of the contract in the office and did not take it with her. At best this has been speculation on both the respondent's witnesses part. Crucially the assertions of Mr Azeem Sayani to the effect that he saw the document in the claimant's hands and that he saw her with the documents at the client's home should have been in the witness statements and should have been put to the claimant even if they did not appear in the statements. I make every allowance for the fact that the respondent in this case was representing itself and that the representatives are not legally qualified. They are on the other hand highly intelligent and qualified people. These details were key evidence which could and should have been put in the witness statements. It is quite clear that some time and effort was put in to constructing the respondent's witness statements in this respect.

39. At paragraph 24 Mr Amir Sayani purports to deal with the events on 22 October 2019. He does not assert that he was present on this occasion and Rozina was not called to give evidence by the respondent. In paragraph 24 Mr Amir Sayani states "it was not apparent to us that she had not collected her copy of the signed contract from the office until we investigated this further when she first communicated making it a condition for meeting us that she would need to see her contract." However I was provided with no details of the investigation which it is said was conducted.

40. It should be said that it is not a question of whether the respondent was trying to give a copy of the contract or not. The question is whether the respondent prior to the deduction being made had drawn attention to the contract entitling them to make the deduction.

41. The respondent was saying at this stage of these meetings that it was refusing to pay the claimant the pay due to her for the work that she had done.

### **The submissions of the parties**

42. The claim by the claimant is that the respondent made an unauthorised deduction of £1500 from her wages in November 2019. There is also claimant for £161 for unpaid holiday pay which is also pursued as an unauthorized deduction.

43. The claimant relies on section 13 of the Employment Rights Act 1996 and makes the following submission. The respondent did not give the claimant a copy of the entire contract before the deduction was made. The respondent provided the claimant with a copy of clause 12 on November 6. The respondent relied on clause 12 to make the deduction. It did not provide the claimant with copies of any other parts of the contract or notify her of their existence and effect in writing.

44. The claimant says that the deduction was not authorised by a valid contractual term and contract as clause 12 did not authorise a deduction from wages. The claimant relies on one EAT decision (**Potter v Hunt contracts Ltd** (1992) ICR 337). The claimant says that this stands for the proposition that an employer must have express, unambiguous contractual authority to make a deduction from wages. The claimant also cites some employment tribunal decisions. In particular she relies on paragraph 12 in **Drummond v Future Track installation Ltd** case number 130 4121/2017; **Mitchell v fire security installations Ltd** case number 240 8510/09 and paragraph 113 of **Armagh v Fama's support and Services Ltd trading as Fama's security** case number 260 2168/2019. These provided very general principles and the case can be determined purely on general principles of interpretation without recourse to their guidance.

45. Referring to the contract more generally the claimant submits that the contract authorises the respondent to make deductions from wages in certain situations and refers to clause 9D. I do not accept that the specific clauses allowing for specific deductions in different cases are relevant to the interpretation of Clause 12. The clauses of the contract, if read collectively would allow a deduction to be made for any situation in which the respondent had suffered a loss. If I find that a copy of the contract was given to the claimant on 22 October those clauses would permit a deduction.

46. It was submitted that clause 12 does not permit the respondent to deduct wages. It permits the respondent to levy a charge. That charge may be up to a total equal to 2 weeks wages.

47. The claimant needs to deal with clause 6 of the contract. This provides that the respondent could deduct from the claimant's pay or any other sums due to her any amounts owed to the business by her, including but not limited to any overpayment of salary et cetera. The claimant submits that she did not owe any sums to the business at the point the deduction from wages was made. This is because no charge had been levied against her under clause 12.

48. In the alternative the claimant submits that clause 6 was drafted with situations such as the repayment of uniform or overpayment of salary in mind and not clause 12. I do not accept that submission.

49. The claimant says she never received a copy of the contractual provision and so it was not notified in that way and neither was it notified as a specific clause to her.

50. The second submission made by the claimant is that clause 12 imposes a cap on the recovery that the respondent can make. Whilst I accept that this is the correct construction of the clause I do not need to record this submission further in the light of the findings I have made.

51. The claimant then makes various submissions relating to the alleged failure to mitigate the loss by the respondent. For the reasons I have already given I do not consider that any of those submissions have merit or succeed.

52. The claimant submission then proceeds to assert as a conclusion that the respondent has not shown that two weeks worth of wages was anything more than a number plucked out of thin air so that the tribunal should declare the clauses



unenforceable. This is a submission that the clause was a penalty clause. In brief I do not consider that the clause is penal, but stands as a genuine pre-estimate of loss.

53. The claimant says that the respondent has not shown that it suffered £1400 of loss directly as a result of the claimant leaving. It should be remembered that the charge might be levied to cover the costs associated with the claimant's nonavailability, and I do not accept that the respondent's evidence fails to show it suffered £1400 costs associated with the claimant's nonavailability.

54. In relation to unpaid holiday pay the claimant seeks her entitlement under the Working Time Regulations 1998 regulation 14 (2).

55. Finally in relation to the amended claim the claimant submits that in contravention of section 8 (1) of the Employment Rights Act 1996 the respondent failed to provide her with a written itemised statement pay statement at all before making a deduction of 15 days worth of wages at £700 per week. The claimant says under section 12 (3) that if I find that the employer has failed to give the claimant any pay statement in accordance with section 8 I must make a declaration to that effect and (noting that under section 12 (5) an un-notified deduction is defined as one that is made without the employer giving the employee or worker in any pay statement or standing statement of fixed deductions the particulars required by amongst other things section 8, I should award the total of the unnotified deductions from pay, under section 12(4). This amounts to £1500.

56. The untaken holiday pay is £161. And the claimant claimed £1661 altogether.

### **The law**

57. The claim for unlawful deductions from wages requires consideration of section 13 ERA 1996

"13 Right not to suffer unauthorised deductions.

(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.

..."

58. Where the total wages paid on any occasion by an employer to a worker is less than the net amount of the wages "properly payable" on that occasion, the deficit counts as a deduction, unless it is attributable to an "error of computation" (section 13(3) and (4), ERA 1996). Non-payment of wages amounts to a deduction for the purposes of the section (**Delaney v Staples** [1992] ICR 483). The payment

in this case has never been made and ought properly to have been paid at the end of the month it seems and certainly before 6 November.

59. There cannot be a deduction unless the wages claimed are properly payable in the first place (section 13(3), ERA 1996). In determining what is "properly payable" in this sense, I must construe the meaning of the contract (**Agarwal v Cardiff University and others** [2018] EWCA Civ 2084).

60. A deduction will not be unlawful if it has been "required or authorised to be made by virtue of... a relevant provision of the worker's contract" (section 13(1)(a), ERA 1996). A "relevant provision" means

(a) one that is set out in a written contract which has been given to the worker before the deduction was made,

or

(b) an express or implied term, the existence and effect of which have been notified to the employee in writing before the deduction is made (section 13(2), ERA 1996 and see **Kerr v The Sweater Shop (Scotland) Ltd** [1996] IRLR 424).

The contractual provision must make it clear that the deduction may be made from the worker's wages (**Potter v Hunt Contracts Ltd** [1992] IRLR 108). The employer must also be able to demonstrate that the event justifying the deduction has occurred.

61. A contractual provision which is a penalty clause will be unenforceable, and so any deductions that are purportedly made under such a clause will not be required or authorised by a contractual provision (**Cleeve Link Ltd v Bryla** UKEAT/0440/12).

62. A deduction will not be unlawful if "the worker has previously signified in writing his agreement or consent to the making of the deduction" (section 13(1)(b), ERA 1996). The written consent must be given before the event giving rise to the deduction, not just before the deduction itself (**Discount Tobacco & Confectionery Ltd v Williamson** [1993] IRLR 327). The written consent must make it clear that the deduction may be made from the worker's wages (**Potter v Hunt Contracts Ltd** [1992] IRLR 108).

63. A worker's remedy for an unlawful deduction from their wages or an unlawful payment to the employer is via a claim to an employment tribunal (section 23(1), ERA 1996). The worker can seek a declaration, claim payment (or repayment) of the sum unlawfully deducted (or received) by the employer, and in some cases compensation for further financial loss (section 24, ERA 1996).

64. The law relating to failure to provide itemized pay statements is in sections 8 – 12 ERA 1996 and that relating to annual leave entitlement is in the Working Time Regulations cited above. I have considered those provisions.

## **Conclusions**

65. I consider that it is most likely that the claimant was not given a copy of her contract on 22 October 2019. I do not accept the evidence of the respondent that she was given the contract at that stage. I consider that if the respondent had given the contract then the witness statements dealing with the events of that date would have given sufficient detail and the events of that day would have been put to the claimant so that she could answer.

66. Whilst I found the claimant's evidence disjointed in presentation I considered the documentation I was shown between the parties. These documents reveal that it was only at the end of the process that the respondent asserted that the claimant had seen and read the document before she signed it, and never asserted that the claimant had been given a copy of the contract.

67. On 3 November 2019 the claimant asked "Could you please forward me a copy of contract of employment which you referred to In our conversation of today and all the contracts I signed In your office.". On 4 November 2019 she wrote: "I will like to see copy of contract of employment before the meeting as one of the reasons for the meeting will be to discuss and clarify its content. I want to study it before the meeting. By law you should have given this to me at the start or shortly after I started work with Bluebird.". On 5 November 2019 there was a reply to this. However the reply was not to the effect that the claimant had been given a copy of the contract but "Following on from your last email I am happy to give you a copy of the contract you have signed. I am not sure why you did not collect your own copy on the day that you signed it also?" That is very different to saying that the claimant had received it. The point was made very clear by the claimant on that day: "I was not given a copy when I signed the contracts and I expected to be given one, but I still expect to have all the relevant copies before I can come to your Northampton". Later that day the claimant wrote: "I may not attend the meeting of tomorrow if I don, receive all copies of the contract by today". To this Amir Sayani emailed the claimant replying: "As I've stated in my email I am happy for you to have another copy of the signed contract and as I stated I am not sure why you did not take a copy when you signed one in the office." He asserted during that email "As you have already read the document before you signed it before starting with us , once I send you a copy this should not take to long to review".

68. He had not been present on 22 October so it seems likely that his comment was simply an assumption. I heard no evidence from him that he had checked with anyone to see whether the claimant had received the contract at that meeting.

69. I consider therefore that the claimant had never received a copy of the contract, despite signing it. I think it is more likely than not that the claimant was given the contract to sign, handed it back, and then, for whatever reason, the respondent did not give her a copy of it on that day. I do not know whether she signed it having read it or not. I consider it most likely that she did not read it so as to take it in. For the purposes of the claims before me, that is no relevant. I do not consider the requirement to give a copy of the contract to a person satisfied where it is handed to them to sign, taken back, and then a copy is not made accessible to the person so that they have notice of the potential for a deduction to be made in a way that can be readily understood.

70. However this does not answer the question whether before the date on which the deduction was made (the date of normal payment), she was sent a copy of the relevant provision.

71. The only evidence before me was that she was sent a copy of clause 12 on 6 November. First I consider that by that date the deduction (in the form of a refusal to pay and the passage of pay day) had already occurred.

72. I take the view that the terms of clause 12 do not permit a deduction by themselves. They permit a charge to be made. However no charge was ever notified to the claimant prior to the deduction being made. Hence the terms of

clause 12 would not have permitted any deduction to be made until a charge had been levied as it provides:

**“If the Employee should leave a live-in assignment without the approval of Bluebird Care a charge up to a total equal to two week's wages may be levied against the Employee to cover the costs associated with their non-availability. This clause applies to live in carers.”**

73. I interpret this clause as meaning that something more than a simple deduction (or non-payment) of wages was to occur. If that was to be the intention of Clause 12 there was already a simple mechanism (contained in Clause 6) for expressing that a deduction could be made for this purpose. Clause 12 operates rather by stating that a charge may be levied. That is read in conjunction with clause 6 which permits deductions. Once a charge is levied against the employee, the basis of the deduction is Clause 6 which permits deductions to be made. Clause 12 is the mechanism by which the amount of any deduction under clause 6 is to be calculated, and it imposes the cap of two weeks' pay on the charge which may be levied. However for Clause 12 to be the basis of a deduction at all, there would need to be **notification** of the sum which was to be “levied” or raised against the employee. This would not have to take the form of an invoice. However for Clause 12 to apply the sum was to be “up to” two weeks' wages and was to “cover the costs associated with their non-availability”. This suggests that the charge would be notified to the employee to show the costs associated with their non-availability.

74. Neither side showed me evidence relating to the normal date of payment. However it was common ground that there would have been only one pay slip to cover the period the claimant worked for the respondent and I have concluded that it is more likely than not that the date of payment would have been either before the end of the month or within the first few days of the following month. I think it highly unlikely that the payment would not have been made until after Wednesday 6 November. Thus Clause 12, even if it could form the basis of an unspecified (but capped) deduction from wages, was not notified to the claimant before the non-payment (deduction) of wages was made.

75. Clause 6 which does refer to the ability to make other deductions from whatever sums are due, was never properly notified to the claimant and had no effect. She was never given a copy of the contract prior to the refusal to make payment and the passing of the likely date of payment of the proper amount. Thus the claimant was never given a copy of the relevant provision of the contract. The only term of which she was given proper written notice “in one or more terms of the contract ... the existence and effect, or combined effect”, of which the respondent gave notice to the claimant was Clause 12. This was only done in writing after the date on which the deduction was made. Clause 12 in any event did not apply because no “charge” was “levied”. Unlike most or all of the times the expression “charge” is mentioned in the contract, in this case it does not have a specific sum attached to it. In all other cases therefore there is a notification in the contract of the charge that is to be levied in a particular situation. Instead in Clause 12 an unspecified sum to cover associated costs, which may be up to two weeks' pay, may be levied. In those circumstances proper prior notice of the actual sum to be raised by way of charge needed to be given. It was not given in writing on the occasion of the deduction being made (or before that time). There appears to be no notification in writing (even tangentially) until 6 November 2019. In any event Clause 12 by itself does not permit the deduction from wages. It is only operative when read with Clause 6, of which no notice was given.

76. Thus the sum of £1500 was unlawfully deducted from the claimant's wages, and her claim is well founded. I do not need to consider whether the clause is penal or the question of whether the respondent had mitigated any losses in those circumstances for the purposes of reaching a conclusion.

77. The claimant is also owed £161 in terms of unpaid holiday pay. I consider that her contract of employment commenced on 22 October 2019. I do not consider that the written agreement states 23 October 2019 is relevant. The claimant in return for pay she was to receive went to the client's house on 22 October 2019. I do not consider the fact that she was shadowing another carer that day to be relevant to whether or not she was working under a contract of employment. This was necessary work she would need to do and was not work done on her own time.

78. Finally I have considered the question of whether there should be an award for failure to provide itemised payslips. I consider there should be such an award. However as I have made a finding that there has been an unlawful deduction from wages, I decline to exercise the power under section 12(4)ERA 1996. If I am wrong and the deductions were made lawfully, I would have made an order for £1500 as compensation under section 12. The itemised pay statement would have given details of the gross pay, and it would have given the details of any variable or fixed deductions from that pay amongst other things. None of the details required in section 8 or 9 were given by the respondents to the claimant.

79. Thus the claimant is entitled to an award of £ 1661 by way of compensation for unlawful deductions of pay and holiday pay.

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Employment Judge **O'Dempsey**

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Date 7 June 2021

RESERVED JUDGMENT & REASONS SENT TO THE PARTIES ON

12/7/2021

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FOR EMPLOYMENT TRIBUNALS