EMPLOYMENT TRIBUNALS

Claimant: Mrs M Taylor

Respondent: Peninsula Business Services Limited

Heard at: Manchester (in private; by telephone) **On:** 21 September 2020

Before: Employment Judge Feeney (sitting alone)

Representatives
For the claimant: In person
For the respondent: Mr J Cox, Solicitor and Assistant Director

JUDGMENT

The judgment of the tribunal is that

(1) The claimant's claim of unlawful deductions of wages fails and is dismissed.

(2) The claimant's claim for a preparation time order fails and is dismissed.

Reasons for Reserved Judgment

(1) The "Code A" in the heading indicates that this was a remote hearing by telephone conference call in which the parties participated

(2) Following the hearing on 21 September 2020 I prepared a judgment based on the costs issue only. Subsequently, I wrote to the parties to clarify whether or not the claimant still was pursuing her original claim as my understanding at the beginning of the hearing had been that she did not wish to pursue this as she was content with the issue of costs only to be determined. However, following that correspondence the claimant made clear she wanted an adjudication on the original issue in this case which was an unlawful deduction of wages claim.

(3) Due to the pandemic the correspondence in relation to this case took considerable time to access and consider and I have been unable to complete a full judgment until today, 5 August 2021.

Claimant's Submissions

(4) The claimant submits that the respondent was not entitled to deduct £250 from her wages for a car repair which occurred through no fault of her own.

Respondent's Submissions

(5) The respondents submitted that they had re-issued the company car rules in January 2019 and such deductions would occur following this even where the damage was not the fault of the employee, whether there was an uninsured loss charge.

Issues in this case

(6) Did the respondent make a deduction from the claimant's wages unlawfully, in that it had no contractual basis for making the deduction.

(7) Whether the claimant is entitled to a preparation time order.

Witnesses and Evidence

(8) Although the respondents referred to a PDF bundle, I did not have this and relied on the documents provided from the Tribunal's own file and the evidence given today. The claimant gave evidence

Tribunal's Findings of Facts

(9) The claimant brought a claim presented on 20 February 2020 of unlawful deduction of wages when the respondent deducted £250 from her wages for a repair to her company vehicle. The claimant asserted and it was not disputed that on 20 August 2019 her wing mirror was hit by a Pheasant in a country road when she was travelling in a rural area to visit a client. The claimant said that in the past where there was no fault damage such as this there would be no cost to the employee however on this occasion the respondents deducted £250 from her wages.

(10) The respondents referred to their rules for use of company cars which had been provided to the claimant where it had been stated "where an excess charge is levied you will be required to refund the cost of £250 by deduction from your pay if necessary. This is an express written term of your contract of employment". The respondent accepted that deductions in such circumstances had not been made previously from employees and this had been an error.

(11) In January 2019 the respondents had reissued the company car rules, the same clause was included but there was a further clause at 0.4 which stated "in case of damage to cars however caused this should be notified to your lease provider as soon as possible after the damage occurs or is discovered. Where we incur an uninsured loss charge for any repairs you will be required to refund the cost by deduction from your pay if necessary. This is an express written term of your contract of employment". The respondent had amended this

clause when the error in relation to the previous clause had been noticed. They did not specifically advise staff at the time that this was the reason why the clause was changing nor draw staff's attention to the fact that there had been a previous error and going forward they could be liable in these circumstances.

(12) The claimant had signed and agreed to the company car rules.

(13) The claimant was informed of 23 August 2019 that a charge may be levied in respect of any damage excess, this being dependent on the outcome of the insurance claim. The insurer Aviva then indicated the incident was to be considered accident/fault. There was no explanation as to why in the circumstances they had made this decision, nor any evidence before me that the respondent had challenged it with them. The total value of the damage to the company vehicle was £438.32. The claimant was advised following the 29 October 2019 when Aviva made their decision that she would be charged the £250 uninsured loss.

(14) The claimant brought a grievance about the matter and it was agreed that the incident was not the result of any wrongdoing on the claimant's part however in accordance with the company car rules they were entitled to make the deduction in this case and agreed to take it in three separate instalments to avoid any hardship.

(15) The claimant issued tribunal proceedings .Prior to the hearing on 11 September the respondent paid the claimant £250 which was the subject of the deduction. However, by an email of 17 September the claimant indicated she wished to claim for her personal time in pursuing the matter and she at that stage had not specifically withdrawn the claim.

(16) At the hearing today as I have referred to above clarified that the issue in this case was whether the claimant could obtain her costs, i.e. a preparation time order which was the only type of costs application she could make and that the costs would be those arising from her proceedings and not the time spent in respect of the grievance. Subsequently the claimant has stated that this was incorrect and that she wanted a determination in respect of the main issue as well as the costs issue. Accordingly, I have now with the parties' agreement made a decision in respect of both issues.

The Law

<u>Unlawful Deduction of Wages</u>

(17) Part 2 of the Employment Rights Act 1996 sets out the statutory requirements for an unlawful deduction of wages claim. Section 27(1) defines wages as "any sum payable to the worker in connection with his employment". Wages includes commission payments. Expenses, however, are excluded but these can be recovered as a breach of contract.

(18) Under section 13(1) of the 1996 Act, "A worker has the right not to suffer unauthorised deductions". A deduction is defined in the following terms:

> "Where the total amount of wages payable 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), the amount of the deficiency shall be treated…as a deduction made by the employer from the worker's wages on that occasion."

(19) The deduction referred to in "after deductions" refers to the statutory deductions such as tax and national insurance.

(20) The question of what is properly payable has to be determined by the Tribunal on normal contractual principles.

(21) In addition, the payment in question must be capable of quantification in order to constitute wages properly payable under section 13(3).

(22) A counterclaim cannot be made against an unlawful deductions claim: it can only be made in the Tribunal against a breach of contract claim.

(23) An authorised deduction is as follows:

(1) The deductions required or authorised to be made by virtue of a statutory provision or a relevant provision of the worker's contract.

(2) The worker has previously signified in writing his or her agreement to the deduction.

(24) In respect of the contractual authorisation point (section 13(2) of the 1996 Act), these must be written contractual terms of which the employer has given the worker a copy before the deduction is made, or whose existence and effect the employer has notified to the worker in writing before the deduction is made. A penalty clause cannot be a lawful deduction as the deduction must be lawful at common law.

Contract Law

(25) In effect the respondent varied the claimant's contract when they introduced the amended car repair costs clause in January 2019. They rely on the claimant's signature as sufficient to indicate that the variation was consensual.

(26) However, contractually it is necessary for the employee to be aware of what he or she is agreeing to when signing such a variation. In **Cowie -v- Liberian Operations Limited 1966 two Lloyds reports 45,City of London Court** an office memorandum reducing notice entitlement from three months to one month was passed around and the employer asked staff to initial it and pass it on. Because of discussions he had with the more senior employee the claimant did not think the change applied to him, but he initialled the memo anyway. The Court held that the reported variation was ineffective as C's attention had not been drawn to the fact that the change was intending to apply to him although in that case the change was clear.

Submissions on substantive issue

Claimant's Submissions

(27) The claimant made a number of points. That the respondents did not draw attention to the change in the car arrangements when asking the claimant to sign them, that the respondents had an implied duty in respect of the express term to use their best endeavours with the insurance company to ensure that the insurance companies finding of fault was a reasonable one, that if necessary meant they did not have to deduct from the claimant's wages and the Unfair Contract Terms Act 1977 may suggest that this was an unfair term.

Respondents submissions

(28) The respondent submitted that the claimant had agreed to the term, they agreed they had not drawn the claimant's or any other employee's attention to the particular change or the reason for it, i.e. that they had not been made the deduction in their view in error prior to this and the respondent would submit that the Unfair Contract Terms Act did not apply in these circumstances as there was considerable doubt whether the act applied to employment contracts anyway but would only apply where the term made the performance of the contract not possible which was not the case here. The reference toif necessary only meant if no other means of recovering the money was available.

The Law

Costs

(29) Rule 75(1)(a) of the Tribunal rules read with Rule 76 gives the Tribunal the power to make a costs order against one party in the proceedings, and a number of different grounds. The grounds for awarding costs are:-

(i) A party or that party's representative has acted vexatiously, abusively, disruptively or otherwise unreasonably in the bringing or conducting of proceedings or part thereof, rule 76(1)(a);

(ii) A claim or response has no reasonable prospect of success, Rule 76(1)(b);

(iii) A party has breached an order or practice direction, Rule 76(1)(2);

(iv) A hearing has been postponed or adjourned on the application of a party, Rule 76(1)(2).

(v) The Tribunal decides an allegation or argument for substantially the reasons given in an earlier Deposit Order, where the party claiming costs is not legally represented they can claim a Preparation Time Order under Rule 42 which is to compensate for the time spent working on the case, Rule 76. Preparation time means spent by the receiving party in working on the case except for time spent at the hearing (Rule 75(2)). Rule 79 requires a Tribunal to decide the

number of hours in respect of which a Preparation Time Order should be made, the assessment should be based on:-

(a) Information provided by the receiving party in respect of his or her preparation time; and

(b) Its own assessment of what is reasonable and a proportionate amount of time for the parties to undertake preparatory work with reference to such matters as the complexity of the proceedings, the number of witnesses and the documentation required.

(30) In this case the most appropriate grounds for the claimant to proceed with a costs application is that the respondents have behaved unreasonably. It should also be remembered that a costs application is a two-stage test, first of all, the Tribunal should consider whether to make a costs order or a PTO, once it has been decided it could make an order it has the discretion as to whether actually to make an award as there may be factors which mitigate against making an award.

(31) In assessing unreasonable conduct, the Tribunal should take into account that "nature, gravity and effect for parties unreasonable conduct MacPherson -v- BMP Parabus 2004 Court of Appeal", in Yerrakalva -v- Barnsley Metropolitan Borough Council 2012 Court of Appeal. The Court of Appeal commented it was important not to lose sight of the totality of the circumstances, the Tribunal must identify the conduct and what was unreasonable about it and what effect it had in making the decision to award costs or a PTA.

Claimant's submissions on costs

(32) The claimant's submissions were that the respondent's case was without merit and that by continuing to defend its and/or not making the payment in respect of the sums claimed they were acting unreasonably. This was based on the fact that she did not think it was fair she should be obliged to pay the respondent when she was not at fault in respect of the way the damage arose and that in any event the clause referred to said if necessary it was not automatic, and also in view of the fact that she had been not required to pay anything on four previous occasions where there had been no fault damage to the car.

Respondent's submissions on costs

(33) The respondent relied on the two clauses quoted above which they say made it clear that up to £250 would be recovered where the respondent incurred uninsured losses of £250 or more. The respondent was still of the view that they were entitled to make this deduction and paid the £250 to the claimant in order to save money in attending the hearing which they pointed out had not been achieved, the respondent indicated they may consider asking for costs against the claimant in relation to this and as a gesture of good will, clear the clause in question applied irrespective of fault, but it did allow the deduction in

question, it was the respondent's case that the reference to ' if necessary' referred to making a deduction from pay rather than using any other means.

Conclusions on substantive issue

Express Agreement

(34) In this case the respondent made a change in 2019 and obtained the signature of all employees indicating their agreement to the car lease terms. However, the respondent did not draw attention to the particular change

(35) The question here is by analogy could it be said that the failure of the respondent to point out to the claimant they were implementing a contractual change meant that the variation was ineffective. No case law was drawn to my attention accordingly I have considered the ambit of the Cowie case . This case was not similar to Cowie, there as no explicit exemption indicated to the claimant. I have no authority before me which states the respondent is obliged to draw a change to the claimant's attention, the claimant had the opportunity to read the amendment and sign or not sign it.

(36) Accordingly, the claimant agreed to the contractual change; her claim fails and is dismissed

UCTA

(37) In respect of the Unfair Contract Terms Act 1977 this renders voids certain contractual clauses deemed unreasonable clauses however the courts have only considered that it could apply in two circumstances in employment situation.

(i) Excluding or restricting liability for death or personal injury caused by negligence; and

(ii) Terms excluding or restricting liability for breach of contract or range of performance substantially different from that which was reasonable expected of the contracting party.

(38) Accordingly, UCT A is not relevant to these proceedings.

Conclusions on Costs

(39) In my view the respondents were not unreasonable in pursuing a defence to the claimant's claim, the contractual provisions the respondent relied on were subject to interpretation but on balance have a real prospect of success in establishing that the claimant was obliged to pay the £250 even in circumstances where she was not at fault. The claimant had seen and agreed those provisions.

(40) The claimant had some argument in respect of the fact that they had not, in her view, implemented before (and it appears the respondent agrees with this) and the respondent have failed to draw anyone attention's to the fact that they intended to implement them in the future. However the claimant was able to read the provision in question before deciding to sign it. It is understandable this appeared unfair to the claimant.

(41) However, given that the respondent had a feasible argument that the actual reason for the deduction was contractually agreed and the circumstances came within those contractual provisions. The first stage for awarding costs was not reached and it is not unreasonable conduct for the respondent to defend this claim.

(42) The respondent's right to claim costs in respect of this hearing is reserved and they should advise the Tribunal and the claimant within 14 days if they wish to make such an application.

Employment Judge Feeney

26 October 2021

JUDGMENT AND REASONS SENT TO THE PARTIES ON

28 October 2021

FOR THE TRIBUNAL OFFICE

[JE]