

EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: S/4105340/17

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Held in Glasgow on 9 February 2018

Employment Judge: David Hoey

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Mr Ryan Moore

**Claimant
In Person**

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20 **Stuart Nicol Transport Ltd**

**Respondent
Represented by:
Mr S Nicol -
Managing Director**

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JUDGMENT OF THE EMPLOYMENT TRIBUNAL

30 The Tribunal awards the Claimant the sum of £2,106 (gross) comprising an unauthorised deduction from his wages of £585 (gross) in respect of a week's pay, an unauthorised deduction from his wages of £351 (gross) in respect of accrued holiday pay and an uplift of £1,170 (gross) (in terms of section 38 of the Employment Act 2002).

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REASONS

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Introduction

1. This was a claim for unlawful deduction of wages (in respect of unpaid wages
45 for the last wage due to the Claimant before his employment ended) and
E.T. Z4 (WR)

5 holiday pay. Within the Claim Form sent by the Claimant to the Tribunal the Claimant sought the total sum of £1,215. The Claimant stated in the Claim Form that the Respondent had advised the Claimant that he was due to pay them £1,265. The Respondent noted in the Response Form that the Claimant had signed a declaration that if the Claimant left the Respondent's employment within 2 years, the full training costs incurred by the Respondent in training the Claimant would be reimbursed.

10 2. The Claimant represented himself and the Respondent was represented by its Managing Director, Mr Nicol. The Respondent had brought to the Hearing a letter dated 6 December 2016 issued to the Claimant (which the Claimant had signed) together with copy invoices for training and testing (and retesting) dues. The Tribunal focused the issues in dispute at the start of the Hearing to identify what precisely was claimed, what was disputed and what was
15 agreed. The Tribunal then heard from the Claimant and Mr Nicol who both gave evidence in relation to the issues the Tribunal required to determine. Both parties then summarised their position.

Issues agreed and to be determined

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3. At the outset of the Hearing some time was spent identifying what the Claimant was seeking in terms of the specific sums of wages he maintained were outstanding and due to him (and why) and the specific sums of holiday pay he argued was outstanding and due to him (and why). The Respondent
25 was also able to assist the Tribunal in this regard.

4. This discussion took place in light of the overriding objective contained within the Employment Tribunal rules which requires the parties to deal with the issues arising justly and in a proportionate way. The Claimant and the
30 Respondent worked together to ascertain what was agreed and what issues required to be determined by the Tribunal.

5. The Respondent agreed that the Claimant had not been paid in respect of his last week of work. The sum that was outstanding in respect of this period was agreed as being £585 (gross).

5 6. The Claimant maintained that he had accrued 11.7 days holidays (which he had ascertained from the Government website). The Claimant then conceded that he had entered the incorrect dates into that website. The Claimant stated that in fact he had accrued 11 days holiday, with which the Respondent agreed.

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7. Following discussion as to the particular days holiday that the Claimant had taken and for which payment had been made, the Claimant accepted that there were 3 days accrued holiday due to him which was outstanding upon the cessation of his employment. This was agreed by the Respondent.

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8. The Respondent maintained that the Claimant had agreed that in the event he left the Respondent's employment within a 2 year period, "all costs" associated with the training and testing of the Claimant would be repaid to the Claimant. The Claimant and Respondent agreed that the total sum incurred by the Respondent in this regard was £2,200. The Respondent's position was that this sum was due to be reimbursed to the Respondent (as set out in the letter of 6 December 2016). For that reason the outstanding payments were not paid to the Claimant.

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25 9. The outstanding issue for the Tribunal therefore was whether the Respondent was entitled to withhold the sums due to the Claimant in light of the agreement contained in the letter of 6 December 2016. The Claimant accepted that he had read and signed that letter.

30 **Findings in fact**

10. The Tribunal finds the following facts to be admitted or proved :-

1. The Claimant began his employment on 30 January 2017.

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2. The Claimant's employment ended on 26 June 2017.
3. The Claimant was employed as a Commercial Delivery Driver.
4. The Respondent had not issued the Claimant with a statement of initial employment particulars due to him in terms of section 1 of the Employment Rights Act 1996.
5. The Claimant was paid the weekly sum £585 gross,
6. The Respondent did not pay the Claimant his final week's pay.
7. The Claimant had accrued 11 days holiday upon the ending of his employment.
8. The Claimant had taken 8 days holiday by the end of his employment, resulting in 3 days accrued holidays being outstanding.
9. The Respondent did not pay to the Claimant a sum in lieu of the 3 days' holidays to which he was entitled.
10. The Claimant signed and accepted the terms of the letter of 6 December 2016 which said:-

" , Stuart Nicol Transport Limited are willing to fund your Class 1 licence which will comprise of training at Nithcree Training followed by test.

On completion of training and test Stuart Nicol Transport Limited will employ you as a Commercial Delivery Driver on a full time contract. Should your contract be terminated either voluntarily or due to gross misconduct within 2 years of commencement all costs associated with your training and test will be fully refundable to Stuart Nicol Transport and will require to be settled prior to your final day of employment."

11. The total sum of £2,200 had been incurred by the Respondent in training and testing the Claimant.

5 **Observations on the evidence**

12. The Claimant and Mr Nicol gave evidence in a candid and clear manner.

10 13. The only issue in respect of which dispute existed in connection with the findings in fact was whether or not the Claimant had been issued with a statement of initial employment particulars (which was a matter the Tribunal required to determine for the reasons set out below). The Claimant maintained that no such document had been issued to him. He had received some information in writing but most of the information was given to him
15 verbally.

14. Mr Nicol was clear that upon joining the business all staff are issued with a contract of employment and that included the Claimant. Mr Nicol had checked the Claimant's personnel file and had brought the documents he considered
20 relevant for the Hearing. He was unable to say for certain whether or not a contract had in fact been given to the Claimant, although the Respondent's practice was to do so in every case. The Claimant denied such a document had been given to him.

25 15. In the absence of evidence that the Claimant was in fact issued with a contract of employment that contains the main terms of employment, the Tribunal made a finding in fact that no such document had been issued. The Tribunal must determine factual disputes based on the evidence before it. Given the main issue in dispute before the Tribunal related to the Claimant's entitlement
30 to pay and holidays, it was not unreasonable to expect the Respondent to have brought the contract for the Claimant to the Hearing (since that would set out pay and holidays).

16. In terms of Section 38 of the Employment Act 2002 the Tribunal is required to make a finding as to whether or not the relevant employment particulars were issued to the Claimant in cases to which that section relates (which includes proceedings for unlawful deduction of wages). The Tribunal has done so.

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17. There was no suggestion that the contract of employment the Respondent maintained the Claimant entered into contained the express power to deduct from sums from wages due to the Claimant any training or testing costs and the only issue was whether or not the letter of 6 December 2016 allowed the Respondent not to pay the final wage and accrued holiday pay to the Claimant.

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Relevant law

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18. Section 13 of Employment Rights Act says:-

“(1) An employer shall not make a deduction from wages of a worker employed by him unless -

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(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

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(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 -

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(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

5 (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.*

10 (3) *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), 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.*

15 (4) *Subsection (3) does not apply in so far as 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.*

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25 (5) *For the purposes of this section a relevant provision of a worker's contract having effect by virtue of a variation of the contract does not operate to authorise the making of a deduction on account of any conduct of the worker, or any other event occurring, before the variation took effect.*

30 (6) *For the purposes of this section an agreement or consent signified by a worker does not operate to authorise the making of a deduction on account of any conduct of the worker, or any other event occurring, before the agreement or consent was signified.*

(7) *This section does not affect any other statutory provision by virtue of which a sum payable to a worker by his employer but not constituting “wages” within the meaning of this Part is not to be subject to a deduction at the instance of the employer.”*

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19. Section 23(1) of Employment Rights Act says:-

“(1) *A worker may present a complaint to an Employment Tribunal*

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(a) *that his employer has made a deduction from his wages in contravention of Section 13 (including a deduction made in contravention of that section as it applies by virtue of Section 18(2)),*

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(b) *that his employer has received from him a payment in contravention of Section 15 (including a payment received in contravention of that section as it applies by virtue of Section 20(1)),*

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(c) *that his employer has recovered from his wages by means of one or more deductions falling within section 18(1) an amount or aggregate amount exceeding the limit applying to the deduction or deductions under that provision, or*

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(d) *that his employer has received from him in pursuance of one or more demands for payment made (in accordance with Section 20) on a particular pay day, a payment or payments of an amount or aggregate amount exceeding the limit applying to the demand or demands under Section 21(1).”*

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20. Section 38 Employment Act 2002 says:-

“(1) This section applies to proceedings before an Employment Tribunal relating to a claim by an employee under any of the jurisdictions listed in Schedule 5.

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(2) If in the case of proceedings to which this section applies -

(a) the Employment Tribunal finds in favour of the employee, but makes no award to him in respect of the claim to which the proceedings relate, and

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(b) when the proceedings were begun the employer was in breach of his duty to the employee under Section 1(1) or 4(1) of the Employment Rights Act 1996 (c 18) (duty to give a written statement of initial employment particulars or of particulars of change) [or under section 41B or 41C of that Act (duty to give a written statement in relation to rights not to work on Sunday)],

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the tribunal must, subject to subsection (5), make an award of the minimum amount to be paid by the employer to the employee and may, if it considers it just and equitable in all the circumstances, award the higher amount instead.

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(3) If in the case of proceedings to which this section applies -

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(a) the employment tribunal makes an award to the employee in respect of the claim to which the proceedings relate, and

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(b) when the proceedings were begun the employer was in breach of his duty to the employee under Section 1(1) or 4(1) of the Employment Rights Act 1996 [or under Section 41B or 41C of that Act],

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the tribunal must, subject to subsection (5), increase the award by the minimum amount and may, if it considers it just and equitable in all the circumstances, increase the award by the higher amount instead.

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(4) *In subsections (2) and (3) -*

(a) *references to the minimum amount are to an amount equal to two weeks' pay, and*

(b) *references to the higher amount are to an amount equal to four weeks' pay.*

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(5) *The duty under subsection (2) or (3) does not apply if there are exceptional circumstances which would make an award or increase under that subsection unjust or inequitable.*

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(6) *The amount of a week's pay of an employee shall -*

(a) *be calculated for the purposes of this section in accordance with Chapter 2 of Part 14 of the Employment Rights Act 1996 (c 18), and*

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(b) *not exceed the amount for the time being specified in section 227 of that Act (maximum amount of week's pay).*

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(7) *For the purposes of Chapter 2 of Part 14 of the Employment Rights Act 1996 as applied by subsection (6), the calculation date shall be taken to be -*

(a) *if the employee was employed by the employer on the date the proceedings were begun, that date, and*

(b) *if he was not, the effective date of termination as defined by section 97 of that Act.”*

5 21. Schedule 5 of the Employment Act 2002 sets out the jurisdictions to which Section 38 applies. This includes Section 23 of the Employment Rights Act 1996 (unauthorised deductions from wages).

Submissions

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22. The Claimant argued that he was due to be paid the sums due to him and that the Respondent ought not to be able to in essence offset the sums they say are due to them from him. The Respondent's position was that the 6 December 2016 letter represented what the parties had agreed and that they
15 were entitled not to pay the sums due to the Claimant.

Decision

23. In this case, the Respondent accepts that it has not paid the Claimant the
20 wages and holiday pay ordinarily due to him. The Respondent argues that it is entitled to offset the sums due to him as a result of the agreement entered into by the Claimant in the letter of 6 December 2016.

24. There is therefore a deduction from the Claimant's wages (since the Claimant
25 has not been paid sums which are due to him in terms of his contract of employment). The issue is whether the deduction of the relevant sums is permitted.

25. In terms of Section 13 of the Employment Rights Act 1996 a deduction is only
30 permitted where it is authorised or required in terms of the contract or the worker has previously signified in writing his agreement or consent to the making of the deduction. The letter signed by the Claimant dated 6 December 2016 does not contain any express agreement or consent which would allow the Respondent to deduct sums from the Claimant's wages. The

5 letter states that the sums are "*fully refundable*" and "*require to be fully settled*", neither of which, in the Tribunal's view, amount to a clear authorisation from the Claimant to the Respondent to allow the Respondent to deduct the relevant amounts from wages due to the Claimant. Without the express consent of the Claimant to make a deduction from wages due to him, any such deduction is unauthorised and accordingly unlawful.

10 26. Even if the letter did contain such a power, the Tribunal was not satisfied that the provision in the letter would necessarily be enforceable. Requiring repayment of all sums incurred up to the Claimant's second year of employment (without any reduction during the 2 year period to reflect the value the Respondent has gained from the sums paid) could potentially result in the repayment provision being unenforceable under the common law of Scotland.

15 27. The letter is also unclear as to precisely what sums are to be refunded referring to "*all costs associated with your training and test*". "*Training*" is extremely wide. It is also not clear whether "*test*" would include retest. The letter is lacking in specification as to precisely what sums would be due which creates further doubt as to the enforceability of the restriction as a matter of common law.

20 28. For all of these reasons, the Tribunal is not satisfied that the Respondent is entitled to make the deduction that it did from the wages due to the Claimant and determines that the deduction of the relevant sums is unauthorised.

25 29. The Tribunal therefore declares that the Claimant's claims for (1) one week's wages due in respect of his final week of employment and (2) 3 day's accrued holidays are both well founded. In terms of ***Yarrow v Edwards [2001] AHER (D) 118 a*** week's pay for the purposes of holiday pay is to be calculated on the basis of a day's work. A day's pay for the Claimant is therefore £585 (gross) (a week's pay) divided by 5 (since there are 5 working days in a week) which amounts to £117. 3 day's holiday pay would be £351. The Tribunal therefore orders the Respondent to pay to the Claimant the sum of £585

(gross) in respect of his final week's wages due to him and £351 (gross) in respect of 3 day's holiday pay.

30. In terms of Section 38(3) of the Employment Act 2002 where the Employment
5 Tribunal makes a relevant award in respect of the proceedings before it
(which include proceedings for unlawful deduction of wages), and where the
employer was in breach of its duty to provide the Claimant with the written
statement of particulars as required by Section 1 of the Employment Rights
Act 1996, the Tribunal must increase the award made by a minimum of 2
10 week's pay. This provision is triggered in the present case given the claim
before the Tribunal is for unauthorised deduction of wages (in respect of
wages due for the final week and holiday pay). The Tribunal has a discretion
to increase the award to 4 week's pay or to make no award if there are certain
exceptional circumstances. This Tribunal is satisfied that a total uplift of 2
15 week's pay is an appropriate sum to award in light of the claims before the
Tribunal and the factual circumstances. The uplift amounts to £585 x 2 which
is £1,170 (gross).

31. The award made by the Tribunal is the gross amount. The Claimant is
20 responsible for ensuring that the appropriate tax and other contributions
required by law are made.

25 Employment Judge: David Hoey
Date of Judgment: 16 February 2018
Entered in register: 22 February 2018
and copied to parties

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