



EMPLOYMENT TRIBUNALS

COVID-19 Statement on behalf of Sir Keith Lindblom, Senior President of Tribunals

“This has been a remote hearing. The form of remote hearing was V – by video, CVP. A face to face hearing was not held because it was in accordance with the Presidential Roadmap that this hearing should be conducted remotely.”

Claimant

Respondent

Mr M Wasilowicz

v H P Jung (Beaconsfield) Limited

Heard at: Watford Employment Tribunal by CVP

On: 19 August 2022

Before: Employment Judge George

Appearances

For the Claimant: Ms D Janusz, Employment Advisor

For the Respondent: Mr R Mathea, Managing Director

JUDGMENT

1. The claimant’s complaint of unauthorised deduction from wages is well founded.
2. The respondent shall pay to the claimant the £3,110.37, which is calculated after making deductions for tax and national insurance.

REASONS

1. This has been a final hearing of the claimant’s unauthorised deduction from wages claim.
2. After a period of conciliation which lasted from 24 June 2021 to 5 August 2021, the claimant presented a claim on 3 September 2021. The respondents presented an in-time response on 9 December 2021. The complaint arises out of the claimant’s employment by the respondent as a baker that started on 20 May 2020 and ended either on 26 or 27 April 2021. It does not matter for the purposes of the case before me which of those two dates it was.
3. The claimant brought a complaint that he had not been paid sums he was due by way of wages in March and April 2021 and had not been paid for holiday pay accrued but not taken on termination of employment as set out in a schedule of

loss which accompanied his claim form. The respondent's defence was that they made an authorised deduction for losses incurred due to poor work which had meant that a quantity of baked goods had been spoiled.

4. The respondents had prepared a bundle of 81 pages but the claimant's representative said that she had not been provided with it until shortly before the hearing and asked to use the claimant's bundle of some 86 pages. MR Mathea agreed to do that. I have been taken to documents at different pages in the equivalent bundles. In these reasons I use the abbreviation "CB page ..." for the claimant's bundle and "RB page ..." for the respondent's bundle. Both the claimant and Mr Mathea gave evidence and were cross-examined.

The issues

5. The issues which I had to decide in this hearing were as follows. In relation to holiday pay, the respondent accepts that the claimant had accrued 5.9 days' annual leave at the effective date of termination as alleged and, therefore, the issue was whether the respondent was entitled to make the deduction concerned. The claimant claimed that at the standard daily rate of £85 gross – i.e. before statutory deductions for income tax and national insurance contributions.
6. The next issue was whether the claimant had worked 19 days or 21 days in March 2021 and 14 days or 16 days in April 2021. The daily standard rate of £85 was agreed between the parties.
7. On this point the claimant effectively conceded in evidence that he had been sick for some days during March and April 2021 and that the entry showing that SSP was paid in those months were accurate (see the March payslip – CB page 27; and the April payslip – CB page 36). I find that the claimant worked 19 days in March and 14 days in April.
8. The next question was whether the bonus was payable at the rate of £12.50 or £12 and under cross examination the claimant conceded that £12 was the appropriate daily rate for the bonus. I find that the bonus was payable at the rate of £12 per day.
9. I next had to consider what, if any, preconditions there were on paying the bonus. The respondent's evidence was vague on this. There is nothing specifically in the contract or the handbook to say what the KPIs were by which it was assessed that the bonus is payable for a particular day. The company handbook only refers to working standards at page 50 in terms of identifying that this is something that would be investigated within the context of performance management. There was no formal performance management of the claimant.
10. The respondent's case was that the claimant was culpable for quality problems with the baked goods and there was conflicting evidence on that from the respective parties. Setting aside for a moment the significance of the date of the addendum to the claimant's contract (for which see para.XX below), I accept that the respondent's evidence does show that there were repeated

quality problems for which the claimant was solely responsible and for which it was reasonable to take him to task. There is photographic evidence of poor quality product starting at CB page 59.

11. The claimant argued that he was not solely responsible for this and that in some cases, he was trying to solve problems caused by the equipment or by other work colleagues. He also alleged that this was only being brought up because the respondent was seeking to evade its responsibility to pay him what was due and that, essentially, he was alleging that the managing director was lying about his poor work.
12. There are also relevant WhatsApp messages. I am not convinced that the claimant is absent from the WhatsApp group to which I have been taken to which text messages were sent. The claimant asserted that this did not provide evidence that he was responsible for particular failings. Mr Mathea himself is listed in the group as "Richard". Someone called "Hugh" is listed. However, separate to that, it is also clear that some are directed to the claimant individually. Some comments by Mr Mathea are directed generally, see CB page 62 and 68, but those directed to the claimant include CB pages 64, 65, 66, 67 and 68. The only WhatsApp messages that are dated are dated before the addendum was signed. There are no photographs that clearly on their face, show that they were taken of work that post-dated 12 April.
13. My conclusion on this is that it is probable that not all of the work shown in the pictures where product was spoiled was the responsibility of the claimant but, on balance, the majority was. I found his excuses overall unconvincing and consider that he was seeking to avoid responsibility for something that he clearly was responsible for. He countered what was said, with allegations against Mr Mathea for which we had no objective evidence. The photographs show objectively justifiable complaints in terms of scorch marks, poor workmanship and the like.
14. The problems that the respondent encountered with the claimant work led to an informal investigation and the introduction of an addendum to his contract but no formal performance management proceedings.
15. On the other hand, to judge by the claimant's March payslip, the respondent allocated a bonus of £12 a day to be paid to the claimant despite these problems. I have seen no analysis of work done on a particular day which cause the removal of the bonus. So it is completely unclear whether individuals were assessed on a daily basis to see if they earned the bonus for that day or whether it was something that was going to be assessed on a monthly basis. There is a total lack of transparency about the entitlement of individuals to this sum and I find that removing the bonus was not within the terms of the contract. In principle, the bonus was payable to the claimant for every day because the respondent has not shown that a discretionary basis for payment or a basis on which they should not pay it. It appears that what they did in practice was to pay it for every working day, as appears from the March payslip.
16. So, the respondent had valid and justifiable reasons for concerns about the claimant's work but, rather than institute a formal performance program, the

respondent sought to introduce the addendum which is at the claimant's bundle at page 57 and provides:

"I hereby agree to an addendum to my contract. Any quality issues that I am directly responsible for will be deducted from my salary if my bonus is not sufficient.

Furthermore if there is evidence that there is more than one party in creating the unsaleable product then the cost of this will be split among the parties involved.

Finally if items result in loss of sales these will be deducted at the discounted loss of sale retail price. If they are remade this will then be deducted at the raw material and including labour base price."

17. It is important when considering whether a deduction has been justified under the Employment Rights Act 1996 to consider the full terms of s.13, which provides:

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.

(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.

(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.

(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.

(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.

18. In the present case, I need to consider whether the deduction is authorised under a relevant provision of the workers contract and whether that is contained 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. If I am satisfied that it falls within that section, it is for the respondent to show the deductions made fell within the scope of what was permissible and that the actual deduction or the value of the actual deduction was justified. Where there has been a variation of the contract, it does not authorise the making of a deduction on account of any conduct of the worker or any other even occurring before the variation took effect. The addendum took effect on 12 April 2021.
19. The effect of the variation of contract by the addendum in the present case is that I need to consider whether the deduction was in respect of quality issues for which the claimant was directly responsible because he authorised such amounts to be deducted from his salary if the bonus was not sufficient. The addendum provides if there is a situation where there is evidence that more than one party is involved in creating the unsaleable product, the cost will be split and therefore it seems to me that the respondent has to address the question about whether the particular product for which they wished to make a deduction was the sole responsibility of the claimant and, if not, how they would attribute between two or more individuals the cost of that unsaleable product.
20. There is also provision made for deducting sales at a discounted loss of sale retail price but if the product is remade, deducting it at the raw material and labour base price. So, there is a difference in the amount of the authorised deduction depending upon what has happened in the particular instance. It seems to me that it is necessary to go into the granular detail of what the respondent says was deducted in order to see whether they have shown that it is a deduction that is authorised under the contract.
21. I do accept that the claimant signed this and was bound by it although he argues otherwise. It was reasonable, as I say in all the circumstances for the respondent to introduce it. The claimant's late embellishment of its allegations that he was pressured into signing it by stating that it was Louise rather than Mr Mathea who did so, his late acceptance of the actual dates he worked and his failure to take into account sickness absence and has, in my view, adversely affected his credibility in this regard. I accept that the addendum in principle complies with s.13(1)(a) and 13(2) ERA.
22. I do however take into account that the March payment was due on 15 April 2021. The respondent accepts that payments were being made hand-to-mount due to cash flow difficulties in the lockdown period as some customers closed or scaled back their provision in their orders. Payments were not being made in one lump sum on the due date. The payment should have been made on 15 April 2021. Although on a human level, one might understand the circumstances because the difficulty that the respondent was in was well-known and caused by the national pandemic that does not excuse a failure to pay workers on time. That payment should have been paid only three days after the addendum was put in place. Without detracting from the other

matters the respondent needed to show, the deductions would have to have been caused by conduct of the claimant after the addendum was put into place.

23. As I have said already, it is for the respondent to show that the deductions were within the scope of the authorisation and the actual amounts were justified. They say that the deductions were because of spoiled unsaleable product for which the claimant was solely responsible or, if jointly responsible with others, that the value was spilt appropriately and that the loss of the sales or the cost of remaking the product has been calculated in accordance with this addendum and that is what would justify making a deduction in accordance with this term.
24. In principle, I accept that there were continuing quality problems from 12 April 2021 onwards. The respondent has compiled a delivery note that is at the claimant's bundle page 58, setting out the sums which are now said to be the value of goods not paid by customers and there is also reference in general terms in Mr Mathea's statement to lost customers. Although, in general, I found him to be credible I do understand him to say that this was prepared after the claim form was received and the respondent has produced this now to show the value to the lost business.
25. I do not think that enough has been done by the respondent to show that this falls within the terms of the addendum or that the value they seek to deduct has been established. I am mindful that the texts sent between the parties in May 2021 do not say that the payment will not be made because of quality problems and I interpret those as saying that payment will be made when the clients pay – in other words it is a reference to a cash flow problem. Although the respondent said in evidence that texts could be provided to date the photographs in question, it seems to me that there has been plenty of time to prepare for this hearing and it has to be decided on the basis of the evidence exchanged in accordance with the tribunal directions.
26. On balance I am not satisfied that the respondent has shown that he claimant was solely responsible for the spoiled goods and that they had the values calculated in accordance with the addendum's method of calculation. There is only Mr Mathea's say so that they cover the relevant period and I am not satisfied that any particular amount has been shown be the value of appropriate deduction.
27. The claimant's statement evidence (para.5) was that he eventually received a payment of £200 towards the sums otherwise due on the March and April payslips. The respondent also gave evidence that £200 had been paid. Despite a late attempt by the claimant to explain that sum after I had given judgment, my view is that that credit should be given for that. However, it would need to be deducted from whatever the net payment is because that is a sum that has actually been paid into the claimant's hand.
28. Therefore, I decide that the amounts on the payslips of £1,919.68 for the March payslips and £1,343.36 for the April payslip should have been paid, those are gross amounts. But, to that needs to be added £168 as 14 days' worth of bonus payment at £12 gross per day and annual leave of £459 gross, making a total of £3,890.04. That is the gross amount and what is actually payable is

after deduction of tax and National Insurance. So that is my decision and the reasons for it.

29. After giving judgment I directed that the parties agree a net figure no later than 26 August 2022 after the statutory deductions so that the correct figure could be included in the judgment out that takes £200 off that net figure. No correspondence has been received by the Tribunal. As I explained to the parties, I therefore consider that, doing the best I can, I should calculate the net figure which the gross sum of £3,890.04 represents and deduct the part payment of £200 from that. That will lead to an assessment of the sum which should be paid to the claimant after deduction of tax and national insurance to make good the unauthorised deduction from wages. It is likely that the respondent may need to pay that through their payroll and will be responsible for tax and national insurance payments to HM Revenue & Customs on top of that but that is a matter for their payroll department.
30. The claimant's P60 for the year ended 5 April 2021 shows annual income of £22,712.00 and a tax code of 1250L. Using an online tax calculator it appears that an estimate of his yearly take-home pay is £19,327.58 for that year which means that he paid a marginal tax rate of 15%. Applying that rate of 15% to the gross amount of the deductions (£3,890.04) means that that would represent a net sum of £3,310.37. The £200 part payment needs to be deducted from that. Therefore the respondent should pay to the claimant the sum of £3,110.37 which is calculated net of tax and national insurance.

Employment Judge George

Date: ...12 October 2022.....

Sent to the parties on:

14 October 2022

For the Tribunal Office