# EMPLOYMENT TRIBUNALS

**Claimants (and Respondents to counterclaim):** **(1) Mr Paul Groom**
**(2) Mrs Rachel Groom**
**Respondent (and Claimant to counterclaim):** **Samuel Smith Old Brewery (Tadcaster)**

**Heard at:** **Leeds** **On: 14th and 15th July 2022**
**Before:** **Employment Judge Lancaster**

**Representation**
Claimants: In person
Respondent: Mr G Vials, solicitor

**JUDGMENT** having been sent to the parties on 19 July 2022 and written reasons having been requested in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided, taken from a transcript of the oral decision delivered immediately upon the conclusion of the case.:

# REASONS

1. This case turns upon the proper construction of a clause in the contract of employment dated 22 March 2019: that is clause 7.2. The respondent seeks to rely upon that clause, taken together with a contemporaneous assent to a policy document called the “free flow” policy, as authorising a deduction from wages under section 13(1A) of the Employment Rights Act 1996.
2. In purported exercise of that authority, in the claimant’s payslips for the month of July 2021, the respondent deducted from each of them the statutory maximum 10% of £166.66, but also indicated that they each owed a further sum of £2014.11.
3. I understand that their salaries at that point had increased from the original contract figure of a joint salary paid equally to them as managers of the Brunton Arms in Nunthorpe that had originally been £34,900.But from the last payslip

that appears to have gone up to a total of £40000, £20000 each. That is that the monthly payment was £1666.67. If I multiply that by 12 that is the figure I arrive at. If those figures are correct, and I note that neither party had actually specified the remuneration within the ET1 or the ET3, those purported deductions in a total of £4361.54 would represent some 11% of gross salary or some 12.5% of net salary.

4. The claimants were both on holiday when that July payslip was sent out and they were due to return to work on 17 August. Having seen the payslip that recorded that deduction and the purported claim for further sums, they tendered their resignation. This was done by letter stating that this amounted to a constructive dismissal because they claimed there had been a fundamental breach of contract, that is the breach of trust and confidence, though they did not in fact specify in the letter what that was. At that point they gave their contractual two weeks' notice, but in the light of a subsequent representation made by Mr Capon for the respondent the following day they withdrew that notice and resigned with immediate effect.

5. So the claims are for unauthorised deduction from wages, constructive unfair dismissal, and, so far as it is material, breach of contract for payment of the remainder of the notice period.

6. The background to this case is that the claimants commenced work as the joint managers of the Brunton Arms on 7 May 2019. There had obviously been some trouble with the previous manager and prior to them taking over Mrs Groom had acted as the relief manager. On the day before they were due to start, that is 6 May 2019, I accept the claimants' evidence that the then stock taker for the respondent company (who clearly had ostensible authority to act on behalf of the brewery) required Mrs Groom to make up an alleged deficiency in stock during her period of relief management. That was in the sum of £480 or thereabouts, which that stock taker required to be paid in cash necessitating the Grooms going to a cash point and withdrawing the amount.

7. It seems highly likely that that sum was not in fact accounted for to the company and I have heard a submission that that person would not have had actual authority to act in that way. If that is correct, and it appears to be the case, it may well give rise to a criminal offence. I accept the claimants' evidence that there was no proper stock take on Mrs Groom taking up her relief post, nor upon her leaving it, and therefore there is no paper trail to establish any potential liability for this sum. And it certainly was not deal with appropriately by way of any deduction from the wages due to her as relief manager. I also accept unhesitatingly their evidence that this was presented to them effectively as an ultimatum, that if that money were not paid over they would not be able to take up their joint contractual position as managers, and without wishing to be facetious whilst dealing with the pub trade they were effectively "over a barrel".

8. Having heard the evidence in this case, whatever the precise mechanism by which that money was extracted from the Grooms, I am quite satisfied that the reason that was able to happen was because of a prevailing culture within the respondent company which meant that publicans and managers were not easily able to challenge the decision of senior management. That is succinctly expressed by Mr Groom in his evidence about Mr Humphrey Smith to say that Mr Smith's attitude was effectively "it's my way or the high way". That is

corroborated by a covertly recorded conversation between the Grooms and Mr Smith on 13 April 2021 when he attended at the pub in Nunthorpe. His opening remarks were to the effect that he believed that Mr Groom was drinking too much. I accept Mr Groom's evidence that there was no proper basis for that assertion and yet even when the error was pointed out Mr Smith was by no means willing to retract that assertion. Had he made such a statement in public it would almost certainly have been defamatory. Again that is indicative of the attitude of senior management towards those actually managing, running their public houses.

9. The contract of employment as I have said provided for a joint gross salary at that time of £34900 split between the two claimants. The normal working hours for each of them appear to be 44, that is the figure they give in their witness evidence and that comes from the final payslip. I accept their evidence that on occasions they would work in excess of those 44 hours and I do note from the contract that there is an opting out of the maximum working hours under The Working Time Regulations. They did however have living accommodation at the public house. Without that living accommodation and making the appropriate adjustments those salaries would have been below the national minimum wage. With that living accommodation adjustment they appear to me on a rough calculation just above it, provided the hours remain at around 44 and not significantly higher.

10. Clause 7.2 I shall read in full.

> "For the purposes of Part 2 of the Employment Rights Act 1996 or otherwise the managers hereby consent to the deduction from any sums owing from the company to the managers including the salary referred to at Clause 7.1 herein (which I have just summarised). Accrued holiday pay, sick pay and bonus etc of any sums owing by the managers to the company including any cost claims, damages or expenses etc, arising out of any breach of this agreement, any breach of company rules or any failure in good management and including without limitation any cash or stock losses, damage to property etc at any time and the managers also agree to make any payment to the company of any sums owed by the said managers to the company upon demand by the company at any time. This clause is without prejudice to the right of the company to recover any sums or balance of sums owing by the managers to the company from the security referred to in Clause 22 below and/or by legal proceedings". (That reference to a security is a bond of £1000 payable on taking up the employment and repayable with interest at the end.)

11. The next clause, Clause 8 is also relied upon by the respondent. The heading is "book of account". Although the headings do not form part of the contract itself nor affect its meaning, it does nonetheless reflect an accurate summary of the substance of the following clause:

> "The manager shall properly safeguard the stock of intoxicating liquors and other stocks and stores and shall keep proper books of account and shall at all times and in such manner as the company may direct cause entries to be made there and of all monies received and paid and all goods received in or delivered out of the premises and of the stock and all other particulars and matters relative to the business necessary to show the dealings in relation to the business and such book shall at all

time be kept on the premises and be open to the inspection of the company and its duly authorised agents. The managers shall give all information explanations with reference to such accounts and business which the company or its duly authorised agents may require and on the determination of the agreement or when such books have ceased to be in current use they should be handed over to the company forthwith. For the purpose of this clause and otherwise the company reserves the right to carry out stocktakes and cash checks and do so without prior notice to the managers."

12. Although the respondent seeks to rely upon the phrase at the start of that clause that managers should "properly safeguard the stock of intoxicating liquors" so as to mean that they shall manage the supply in accordance with a free flow expectation of a 5% surplus on draught beers which I shall come to in a moment, that is not the natural interpretation of that clause. It relates to recording of stock in and out, the keeping of accurate records and the permission of the company to inspect those records. That is why I say the heading "book of account" appears to be accurate.

13. The free flow agreement I will not read in its entirety, but it establishes a number of expectations. It explains the way in which the company expects a surplus may be generated particularly from the beers. Sam Smith beers normally carry a head which means that if you pull a pint only 95% of what is pulled is actually liquid and the remaining 5% is the head. That means if every pint were pulled in that way you could expect to have a surplus and be able to pull another 5% or thereabouts. Similarly on mixer drinks there is the potential for a surplus because if you add ice to a drink the volume of actual paid for liquid is less than if you did not have ice.

14. The relevant parts of the policy indicate the stock should not merely balance but should reflect a significant positive stock surplus returned of approximately 5% on the sales of free flow draught products with one or two exceptions covered below.

15. It is noted:

"In the proper perspective therefore a stock result where free flow draught products are operative which reflects the balance return a small stock surplus would need, a small stock loss **can** in fact be masking a serious stock loss. The company has a standard expectation of draught products dispensed by free flow will typically be served with approximately a 5% head. In particular in analysing the overall stock results of a public house where the actual stock returns across all products is less than expected the company will analyse the stock results of individual free flow draught product lines to ascertain whether the expectation of stock surplus of approximately 5% on these products is being met or whether there is any evidence of a stock loss that might explain the lower than expected overall return. Allowances will be built in to the analysis to reflect legitimate variation. There is reference there to the fact of course customers are entitled to have their pint levelled up to the top, in which case of course there will not be the potential 5% surplus. Whilst this only occurs in a relatively minor of cases there will be a margin of error to reflect customer choice. In

addition allowances will remain for legitimate wastage such as cleaning the lines."

16. It is envisaged that what is described as a new stock taking approach "will assist managers to ensure that a true stock surplus result is achieved as the average wet stock surplus in Samuel Smith's on licence premises now exceed 6% the company reserves the right to claim any deficit below 6% from you under clause 7.2 of your management agreement."

17. How that clause was operated in practice was that whenever a stock take was taken, and this was undertaken not on any fixed regular period, there was then an analysis of the stock in at the start and of the total sales at the end of that period. I take by way of example the bar report the stock check at 22 July 2021. This is the material one for these purposes. That goes back to 18 November 2020 and of course that was during one of the lockdown periods and the public house had only re-opened at the end of April. So it appears to have been again from the figures only 96 days trading period up to 22 July, but of course the figures are based on the longer time frame.

18. From the records which of course the claimants had properly kept in compliance with clause 8 of their agreement, you can identify therefore the total wet sales. That includes everything. Of course on a number of items there is no possibility of a surplus. Spirits and wine must be sold in set measures, bottled beers are a fixed quantity and cider does not carry a head. But all of those are nonetheless included in the total retail figure which over this period was a little under a hundred thousand pounds - £99,086. That then is the baseline for assessing the surplus and allowances are made which are quantified in this case at £4,465.44. And it can be seen that that relates to an allowance for cleaning over 96 days and also two specific further reductions for the time when cellar services were called out. That was because this period coincided with an extraordinary number of returns of defective barrels of beer to the brewery, coming out of lockdown it appears that a defective product was sent out and there was need not only from the Brunton Arms but other pubs to return.

19. What those allowances do not give any credit for however is any margin of error for those customers who would insist on their pints being topped up nor any other possible allowances in those particular circumstances to allow for wastage and therefore in carrying out this exercise the company itself was not strictly following the free flow policy, because it was only making limited allowances for line cleaning and the calling out of cellar services. But having deducted those deduced allowances from the total sales of everything, it brings the figure down to £94,620.56. And that is then compared to nominal income figure of £95,936.25. So again as against a figure for actual income which is ascertainable from the proper record keeping, there is a recorded surplus of £131,569 which is calculated at 1.39% of £94,620.56. And although it is not set out in the writing in any document the shortfall between that surplus calculated in this way and the nominal 6% on £94,620.56 is £4,361.54 and that was the sum which the respondent purported to be entitled to deduct in equal shares from the wages of the claimants.

20. That method of calculation by reference to the total value of wet sales including those items where there is no possibility of a surplus is not spelt out within the free fall agreement or the contract. Though the respondent is right to point out that on two earlier occasions whilst managing the pub deductions had been

made according to this formula and without any objection being raised, I repeat that the culture within this company was not one that encouraged managers to raise objections even if they thought they were being unfairly treated. Those two previous instances of deductions having been made were a significantly smaller account. The first occasion it was £219.48 each, a total of £438.96. On the second occasion it was £282.68 each a total of £565.36. That is of an entirely different magnitude to the figure of over £4,000 reflecting as I said probably 12.5% of net earnings on those who were receiving not much more than the national minimum wage.

21. The key question is was the respondent as it claims entitled, to rely upon the construction of the contract and the free flow agreement to authorise those deductions being made again in this particular manner even though they were such a swingeing effect upon the claimants.

22. The free flow agreement as I have read out indicates that where there is any perceived deficiency the company will analyse the stock results of individual free flow draught product lines to ascertain whether the expectation of a stock surplus of approximately 5% on these products is being met or whether there is any evidence of a stock loss that might explain the lower than expected overall return. The respondent never carried out any purported analysis of the underlying circumstances that gave rise to these results.

23. That was the similar position to that which had ascertained in relation to earlier deductions from wages where no allowance was made for the underlying potential cause. So in the first instance it was subsequently ascertained that the loss did have an identifiable cause, theft by an employee who resigned but the claimants nevertheless bore that responsibility, although that member of staff had been held over from the previous manager and was not their employee and there was as far as I can tell from the evidence I have seen never any suggestion that it was negligent management by them that led to that thieving.

24. On the second occasion part of the problem was identified as an error in the calibration of the input of syrup to soft drinks which again was outside the claimants' control, but once again no adjustments were made. Nothing else was factored into the equation. So though the respondent asserts that almost by definition if there is less than 5% surplus raised on draught beer sales that must be evidence of some mismanagement I do not accept that that necessarily follows. ndeed to take an extreme example that would never happen if every single customer insisted on a full pint, there could never be any surplus whatsoever on draught beer and that would not be the fault of the management at all. It would in fact be entirely in accordance with the free flow policy that says the customers must be given that right.

25. So far as 7.2 of the clause of the contract is concerned then, whether or not any sums under the free flow agreement may be claimed by the respondent as that policy provides, will depend on construction of clause 7.2 as to whether there has in fact been any breach of the agreement itself, any breach of company rules or any actual failure in good management. And in my view on construction of that clause, absent one or more of those necessary pre-conditions, the respondent is not in fact authorised to make a deduction. This is not an unfettered discretion on the company where it finds that there has been less than the optimum 6% surplus sales for it unilaterally to determine how that is calculated and to make the deduction irrespective of any enquiry as required

under the free flow policy itself or any finding following that enquiry that there has been a breach as specified. The respondent alleges that it must be a breach of the contract or a breach of company rules by virtue of the fact that there is less than 5% surplus. I consider that to be a wholly circular argument. The respondent is seeking to say that because there is less than 6% surplus that must be evidence of a breach of how it construes clause 8 to apply to properly safeguarding the stock and therefore that entitles the deduction. Or alternatively if the policy agreement is construed as a "company rule", where for the most part it is a simply a statement of aspiration and expectation, it says that because the claimants have breached that purported rule of not maintaining a 6% surplus therefore they are in breach of the rules and the respondent is entitled to claim the deficit, again that is the 6% surplus under clause 7.2. As I have said I consider those arguments to be circular. The only possible ground which they could rely therefore is a failure in good management,,and absent any attempt to undertake any enquiry I consider they have not established that. Under a free flow policy itself all that the respondent is saying is that a short fall can be evidence of serious deficiencies in stock control, not necessarily that it must.

26. So for those reasons I conclude that on a proper construction of the clause, and in particular also noting that there is nothing whatsoever in the contract to identify the time frame over which losses are to be ascertained, that the respondent is not entitled to make these deductions. The respondent argues that because the clause refers to the right to make deduction of sums owing at any time they are entitled arbitrarily to pick any time frame for stock check and if there happens to be a short fall within that period to make the deduction irrespective of whether there has been a surplus over 6% on any other stock taking period. Again I do not accept that. The reference to at any time does not help to ascertain whether sums are in fact owing by the managers by reason of a failure of good management to the company, and whether they are so owing depends on the appropriate time frame for assessment. There were in fact four occasions during the whole of their employment where there was a surplus of less than 6% though on one occasion no action was taken. But in every other instance the claimants exceeded 6% and indeed fairly early in their employment they received approbation from Mr Smith that they had apparently turned the situation around, and certainly making a year on year comparison with the previous manager on the preceding July there are significantly increased sales and therefore profits. No credit was given for any other such periods. And of course the whole free flow agreement is premised on the fact it is an average. The figure of 6% as an expectation is arrived at because on average across Samuel Smith on licence premises that is what is achieved, but if it is an average in that sense by definition some will be higher and some lower, and it cannot in my view reasonably therefore be used to dictate a right to assess the assessment period at the unilateral will of the respondent. The whole basis being based on averages there ought to have been some assessment of how that could be reflected in the assessment of any individual public house and absent any express provision in the contract the decision to treat it in this way is not authorised. That means that the deduction from the July wage slip and the failure to pay anything at all at the end of employment including the reimbursement of the £1,000 bond is an unauthorised deduction from the claimants' wages.

27. The next issue I have to determine is how whether or not that deduction in fact constitutes a breach of contract or a fundamental breach. Ordinarily a failure to pay the wages properly due would of course be a fundamental breach of contract. It is essential to the employment relationship. But I have to recognise that this is a somewhat different case in that I accept, although wrongly in my finding, the respondent made these deductions because that was how it had routinely interpreted these inadequately worded clauses. So this is not for instance a deliberate attempt to withhold the payment of wages. It is purportedly doing so because they believed that they were justified on their interpretation of the contract.

28. There are two factors that persuade me that acting upon that interpretation in these circumstances is a breach of the implied terms to trust and confidence. And of course I am not in a position where I am relying upon that implied term to override an express provision of the contract because I have ruled that there is no such express authorisation. Those two factors are these. Firstly there was no prior notification of the amount that was to be claimed and it is of such extraordinary magnitude as set against the actual salaries of the claimants. The second factor is this that there was no enquiry whatsoever as to why that purported level of shortfall may have occurred on this occasion, where it had not occurred previously and did not occur subsequently. And that was in fact as I found also a breach of the free flow policy on the part of the company itself because that policy requires them to carry just that analysis.

29. So for those reasons a failure to carry out any adequate enquiry as to the underlying causes in breach of their own policy that obliges them to do so and having no regard for the swingeing effect of deducting some 12.5% from net salary of people on relatively low income I cannot imagine anything that could be more demonstrative of improperly acting in a manner calculated or likely to destroy the relationship of trust and confidence that ought to exist between an employer and an employee. And that I say is set against a general background but it appears that the company was not making it at all easy for employees to register their objection to any of its somewhat dictatorial actions.

30. So up to the point of the initial resignation letter, the 16th, I found there had been a fundamental breach. There is not affirmation. As I said the claimants had been on holiday from 4 August. The payslip that indicated for the first time that these large deductions were claimed against them was received during that period of absence, they put in their notice of resignation before they actually returned to work. To their credit they prepared nonetheless to work out their notice. I do not need to dwell upon the circumstances which they then retracted that notice except to say it was an issue about a surplus stock of cider ordered in anticipation of the immediate post-lockdown sales that were hit by bad weather and of course huge difficulty in predicting sales given the previous history and lack of trade. I have heard the claimants ‘evidence that they sought to return that to the company and it was not recovered. And although they had been alerted to the fact that its best before date had passed on 24 June at the earlier stock take, upon their return to work I accept that they were told by Mr Capon that although of course they could still seek to sell that product because it was still usable, it had not passed its use by date, when the notice expired in two weeks it would be removed from consideration on the stock take and that they therefore were purportedly going to be liable for the full retail cost

of that stock for which I can see no justification within the contract at all. So it is not surprising that they refused to signify their assent to that course being taken and indeed then decide they would not work out their notice. But it matters little because there had already been a fundamental breach. They would have been entitled to resign without notice as of 16th irrespective of the later events and the only difference for the purposes of any breach of contract claim means that the notice period which they may claim for wrongful dismissal is slightly less than the two weeks.

31. I should say that although of course Mr Vials is correct that even if there is a fundamental breach of contract there may be circumstances where that is nonetheless reasonable, I do not consider these circumstances give rise to that inference. The respondent was not acting reasonably in failing to carry out any investigation at all and simply adopting a purely mechanistic approach without actual reference to their own policy in terms of the allowances that should have been made or for the enquiries to be made where investigation that were envisaged.

Employment Judge Lancaster

Date 11th August 2022

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