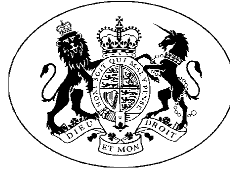

EMPLOYMENT TRIBUNALS

Claimant: Mr A Hughes

Respondent: Bs Eaton Limited

Heard at: **Midlands West Employment Tribunal (CVP)**

On: **25th November 2022**

Before: **Employment Judge A Smith**

Representation
Claimant: In person
Respondent: Mr C Baran, Counsel

RESERVED JUDGMENT

The judgment of the Tribunal is that:

1. The respondent has made an unlawful deduction from the claimant's wages from 22nd June 2020 until 30th August 2020 and is ordered to pay to the claimant the gross sum of £4,755.58 in respect of the amount unlawfully deducted.

REASONS

Claims and Issues

1. The claimant brought an ET1 dated 14th September 2020 and ticked the box for arrears of pay. In the claim form he explained that he was laid off at £72 per day. Further he explained that he was suspended on 6th May on the same rate. He expressed that he

did not believe lay off pay was in his contract and that suspension should have been on full pay. He provided a breakdown of the figures.

2. The respondent denied the claim in the ET3. The allege that the right to lay off was an implied term of the contract. They relied on implication by custom and practice. They also asserted that he was notified of the layoff period. They explained that the clamant was suspended because of an unpleasant exchange and a mediator was arranged, but the claimant eventually unreasonably withdrew.

3. At the start of the hearing, I had seen correspondence from the parties objecting to documents in the bundle and documents that weren't in the bundle. Having discussed matters with the parties, those disputes had fallen away, and I needed not make any decisions about the documents before me.

4. The issues were therefore agreed with the parties to be as follows:

   4.1. In paying the claimant lay off pay from 6th April 2020 to 30th August 2020, was there a deduction from wages?

   4.2. If so, was there an implied term of the contract that the respondent could lay off the claimant?

   4.3. This was alleged to have been implied by custom and practice.

   4.4. Was the period of suspension subject to the same lay off provisions if they did apply?

   4.5. Did the respondent notify the claimant of that deduction.

   4.6. If there was an unlawful deduction, what are the appropriate sums to be awarded?

<u>Procedure, documents and evidence heard</u>

5. I was provided with one bundle, totalling 172 pages. The bundle included the witness statements from the claimant, Mr Oliver Eaton and Mr Bill Cowie.

6. I heard oral evidence from the claimant, Mr Oliver Eaton, Managing Director and Bill Cowie, Accounts Manager. They all swore an oath, were asked questions by the Tribunal, and were cross-examined.

7. Both parties then summed up their respective cases.

8. I reserved my judgment due to lack of time.

Fact findings

9. The claimant was employed by the respondent from 20th August 2010 and, at the time of the ET1 was still employed by the Respondent. He has subsequently obtained alternative employment. At the relevant period for this claim the claimant was employed as a Materials Controller.

10. The respondent is a concrete manufacturer and is a family run business employing 90 staff in a single location. They also own and run their own vehicles, which is distinctive in the sector in which they operate.

11. The claimant's role was unique in the business. He was described as an office worker, but his tasks involved controlling the materials going in and out of the business. One of his tasks was to enquire regarding the lorry drivers and inform management if there was no work for them to do, but also whether they were available for any work.

12. The claimant knew that if there was no work, the lorry driver would be sent home on reduced pay. The respondent described this is lay off, the claimant said it was not: it was simply reduced pay.

13. The claimant's offer letter [57] is silent on terms as to lay off or suspension. There is no written contract of employment available for me to consider.

14. At the start of 2020 the coronavirus pandemic had devastating impacts on lives and businesses.

15. The evidence of the respondent's witnesses, mainly Mr Eaton, was that March and April 2020 were difficult months for the business. They gave evidence that there was a significant downturn in the number of customers and the availability of materials. The claimant initially did not appear to agree with this.

16. The respondent's case is that by April it was apparent to the business that work was down and cost savings needed to be made. The decision was taken to lay off staff.

17. Originally out of 90, 70 staff was laid off. This later tailed off over the next few months as the situation improved.

18. The respondent pays their staff as follows. There is an hourly rate for the first 35 hours worked in any week. It is made up of two elements, firstly there is the basic pay at £6.70 per hour. And in addition, there is appreciation pay which varies according to the skill, experience, and service of the employee. The hourly rate for any hours worked in excess of 35 in a given week includes a higher base rate, which is called premium pay, of £9.20 an hour.

19. The claimant usually worked 48 hours per week between 7 am and 5:30 pm. His weekly pay before tax was £697.78.

20. The decision was taken by the respondent to pay special layoff pay (SLOP). This was in excess of the statutory requirement for layoff. It was also a decision taken at a time when the coronavirus job retention scheme was not clearly set out. The SLOP for the claimant varied during the relevant period. Originally it was £360.00 per week, which then reduced to £260.00 per week.

21. The claimant was paid for holiday during his lay off in payslips 6 and 10. He was paid his full pay for aspects related to holiday pay. He was paid holiday pay, despite not being "on holiday" as such, but it was given to him in order to ensure he received his full holiday entitlement for the year.

22. The claimant asserts that he was not aware of any implied terms relating to lay off at the start of and during his employment. He said he was not told about these terms at his interview. He stated that he did not know whether any members of staff of the respondent were laid off during his 10 years of employment. Further, his employment with the Respondent was his first in the industry and he stated that he had no friends or acquaintances in the industry.

23. The respondent asserts that layoffs were common in the industry, and they were common at the espondent's business. When asked about this Mr Cowley couldn't give specifics he explained that some years there were multiple layoffs and others there were fewer. But the respondent's key argument was that the commonality of layoffs in the business was known to all employees including the claimant.

24. On the 1st of April 2020 Mr Eaton sent an email to the claimant with the subject "scaled down…". In this email he explains that "as is very apparent, the scaling back of all operations has continued and demand has almost arrested now, with almost all builders merchants and construction sites having suspended themselves and of course the primary, vital importance to limit virus spread and limit risk." He asks in the email, as a result, for the claimant to take a shorter day starting at 9:30 am and finishing at 3 pm. He said in the email "I know there isn't by definition a great deal to do currently but hopefully you can find something to do to usefully occupy the day and if you can have those hours please tomorrow, Friday and through until next Thursday, April 9th."

25. The claimant replies the same day acknowledging that these were extraordinary times. But he expresses concern about the reduction to the hours and the financial impact. He asks whether the business had considered furlough. Mr Eaton replies again on the same day expressing surprise at the claimant's email. He says, "out of interest, with no production and almost no sales what would you be doing, even in the broad day I've guided on 9:30 hrs to 15:00 hrs". He says, "I have responded much more conservatively and generously than had been the wider indication that I should, but that's not my style as you know, I'm insufficiently demanding."

26. Mr Eaton then sends another email on the 3rd of April expressing disappointment that the claimant had not responded to his previous email. He says, "hope you've managed to find at least something to do these few days with no materials to oversee at all, I suppose the four so collections coming in breaks the boredom." He explains that quarries have now closed. He explains further in the email that he has come up with special lay off pay which goes beyond the standard national lay off. And he explains that this will be paid to the claimant.

27. The claimant is therefore put on SLOP from the 3rd of April 2020. He does not express any further complaints about SLOP the payment or being on lay off at all.

28. On the 3rd of April at 11:15 at night the claimant sent an email to Mr Eaton. During this email the claimant makes various allegations against Mr Eaton, his father, Mr Starkey, and the business as a whole. He states, "maybe I would be more highly thought of if I questioned why you "Oliver Eaton" was driving around trying to make a name for yourself?" He alleges abuse of position. He alleges further that Mr Eaton has been hoodwinked by Mr Starkey.

29. On the 28th of April 2020 Mr Eaton responded to the claimant's email explaining that he'd given him some time to cool off. He said that there needed to be a meeting by zoom to discuss and investigate.

30. The zoom meeting takes place at some point after that email and prior to the 6th of May 2020. The parties cannot agree on a precise date, but nothing turns on that. On the 6th of May 2020 Mr Eaton sends an email to the claimant thanking him for his time on the zoom call. But he expressed that he was troubled by what the claimant said and described the claimant as having a complete lack of regard for his manager Mr Starkey. He also expressed his disappointment because he alleges the claimant called him a Cunt. He suspended the claimant in this email and explained that his pay for the period of suspension will be the SLOP pay.

31. The claimant sent a reply on the 11th of May 2020 and continued to make his assertions in a similar tone. He also said that he has no trust in Mr Starkey's management style.

32. The respondent eventually decided that the best way forward would be to conduct a mediation between the parties. And on the 7th of July 2020 Mr Eaton makes that suggestion to the claimant. The respondent obtained an independent professional mediator to conduct the mediation. On the 27th of August 2020 the claimant withdrew from the mediation process.

33. On the 28th of August the claimant emailed Mr Eaton, and expressed the question "how can I have any confidence in returning to work?" He explained that he did not go ahead with the mediation because he believed confidentiality had been broken and Mr Starkey had had chance to read the accusations made against him and collaborate with others over the allegations. In his evidence before the tribunal, the claimant said that he had chosen not to go ahead with the mediation because it had been arranged to take place in a pub and he did not want to meet Mr Starkey in a pub.

34. The claimant was invited to return to work on the 1st of September 2020. He did not return to work on that date as he was off sick, and he received statutory sick pay. But he did eventually return back to work.

35. In January 2021 the respondent elected to lay off the claimant for a further period. The claimant did not object to that lay off and that period is not the subject of this claim.

Law

36. Section 13 of the Employment Rights Act 1996 (ERA) sets out the statutory basis for a claim of unlawful deduction from wages. It provides:

    "(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."

37. Section 23 ERA gives a worker the right to complain to an Employment Tribunal of an unauthorised deduction from wages.

38. Any contractual term must be enforceable at common law.

39. Section 13(2)(b) above states that the term need not be in writing, as long as its existence and effect has been notified to the worker prior to the deduction.

40. A Tribunal must not imply a term into a contract unless there is clear evidence to that effect (*International Packaging Corporation (UK) Ltd v Balfour and ors 2003 IRLR 11*).

41. A Tribunal cannot simply imply a term because it is reasonable in all the circumstances, or even if the contract would be unreasonable or unfair without it. There are specific grounds on which a Tribunal can imply a term:

    41.1. It is necessary in order to give the contract business efficacy,

    41.2. It is the normal custom and practice to have such a term in a contract of this particular kind,

    41.3. There has been an intention to include the term, which is demonstrated by the way in which the contract has been performed, or

    41.4. The term is so obvious that the parties must have intended it (the officious bystander test).

42. The Tribunal will only imply such a term if it reflects the intention of the parties at the time the contract was made (*Casson Beckman and Partners v Papi 1991 BCC 68)*. But this is to be based on what reasonable people in the position of the parties would have agreed at the time (*Marks and Spencer plc v BNP Paribas Securities Services Trust Co (Jersey) Ltd and anor 2016 AC 742*).

43. For a term to be implied under the head of custom and practice, the term must be reasonable, notorious and certain (*Devonald v Rosser and Sons 1906 2 KB 728* and *Sagar v H Ridehalgh and Son Ltd 1931 1 Ch 310*).

44. It cannot be arbitrary or capricious. It must be fair, well-known and clear cut.

45. In *Sagar v H Ridehalgh and Son Ltd 1931 1 Ch 310*, the Court of Appeal held that the custom of making deductions from pay for bad workmanship was an implied term in the contract of a Lancashire weaver. They concluded that it was immaterial that the claimant said he did not know about the custom.

46. In *Waine v R Oliver (Plant Hire) Ltd 1977 IRLR 434*, the EAT held that a single incident was insufficient to establish an implied term. However, the EAT commented that if a term is regularly adopted in a particular trade or industry, then it could be possible to

imply the term into a contract even if the specific employer's practices are insufficient to give rise to an implied term of that nature.

Conclusions

Implied term

47. I accept the unchallenged evidence of Mr Eaton that lay offs were conducted when there was decreased demand. I also accept that, in practice, lorry drivers were sent home on lay off when there was no work for them.

48. I conclude that a lay off implied term would be reasonable in an industry that it heavily dependent on the availability of materials and customers.

49. I accept Mr Cowie's unchallenged evidence that the respondent had made lay offs previously at the respondent. I also accept that they varied depending on the amount of business, as is to be expected. The claimant did not challenge this evidence other than by saying that he was not aware of these. I do not consider that an employee in his role, would necessarily be aware of the intricacies of the payment allocations by payroll.

50. The claimant had not worked in this industry before, and I accept he was not told about lay offs in his interview.

51. The fact that the claimant had not worked in the industry before working for the Respondent, and that he had no friends or acquaintances in the industry, means that he is less likely to be aware of the common practice.

52. However, as part of his role the claimant was involved in the process of laying off the lorry drivers on a regular basis. He might not have called it lay off, but he was familiar with the regular process of such an act. He denials in cross-examination about this fact, did not assist his evidence. I conclude that the claimant was not being as open and honest as the Respondent's witnesses on this point.

53. Further, I accept Mr Eaton and Mr Cowie's unchallenged evidence that lay off and short time working are typically used in the manufacturing industry.

54. As a result, I conclude that the claimant was aware that lay offs were a common practice in the industry.

55. Even if I am wrong in this, I conclude, in line with the evidence of the respondent, which I accept on this point, that the common practice of layoffs was notorious in the industry.

56. There is a statutory basis for lay off. I accept the respondent's evidence that this practice had been happening for decades and only on the basis of a downturn in materials and/or customers. The practice is, I conclude, certain.

57. I therefore conclude that there was an implied term, because of custom and practice, within the claimant's contract that he could be laid off when there is a drop in demand.

58. The claimant appeared to be suggesting that the Respondent had not been honest about their financial picture during his lay off. He provided figures from May-August 2020. Unfortunately, the key figures would have been for those in January to April. I accept the unchallenged evidence of Mr Eaton that the figures during that period were much lower and caused him concern. The claimant's evidence under cross examination was in agreement with this position.

59. The claimant suggested that he had work to do before he was put on lay off. Whilst I accept there may have been things to do, such as the odd delivery and cleaning, I accept that the contemporaneous emails show that Mr Eaton was describing a serious downturn in work. The claimant did not challenge this in emails at the time.

60. I therefore conclude that in the start of 2020, and in particular in March to May, there was significantly less work that could have been allocated to the claimant. Therefore, the implied term was exercised reasonably.

<u>Notification</u>

61. The claimant was informed by an email on 3rd April 2020 by Mr Eaton, that he was going to be laid off. He was informed that he would be on SLOP.

62. I am satisfied that the respondent has discharged its obligation to notify the claimant of a deduction under section 13(2)(b) of the Employment Rights Act 1996.

<u>Suspension period</u>

63. The claimant was suspended from 6th May 2020 until 1st September 2020.

64. I accept Mr Eaton's evidence that employees that were laid off were brought back into the business at different times. There was a gradual increase in demand and availability of materials.

65. By 24th July 2020 there were only ten members of staff on lay off, including the claimant [124].

66. When asked about when the claimant would have been taken off lay off if he had not been suspended, Mr Eaton could not be certain. He suggested that by the summer, things were much improved. He also suggested that by mid-June he needed someone in the claimant's role back in the business.

67. I accept that Mr Eaton had been carrying out his role and the claimant's, on an ad hoc basis, since the claimant's suspension. I also accept Mr Eaton's evidence that by mid-June this was becoming difficult to balance.

68. The claimant was not able to challenge much of this evidence having not been in the business. He presented various figures in relation to the Respondent's sold tonnage and production output tonnage in May-August 2020. Those figures were not challenged by the Respondent. The figures show that the Respondent's financial picture was greatly improved by June and July.

69. The implied term of lay off must be exercised reasonably and not capriciously. I conclude that there was no basis for the claimant remaining on lay off from 22nd June 2020. The availability of materials and demand from customers had risen considerably and Mr Eaton was struggling to perform the claimant's role in addition to his own duties.

70. Therefore, the claimant ought to have been paid his full, non lay off pay, during his suspension, from 22nd June 2020 to 30th August 2020.

71. It was persuasively argued by the respondent that the claimant was not entitled to any pay during his suspension because he was not willing and able to return to work. The burden of establishing this is on the employer.

72. The claimant had been suspended by his employer. He had expressed his views as to his line management, albeit in ungenerous terms. The claimant accepted under cross examination that the respondent was right to suspend him in the circumstances.

73. The respondent had considered it more appropriate to resolve matters by mediation, not a disciplinary process. Despite this, the respondent did not offer the claimant a return to work.

74. The claimant did express, at the time, a lack of trust in his line manager Mr Starkey. He had also questioned how he could have had confidence in returning to work. It was the claimant who withdrew from the mediation process. I consider the reasons for withdrawing were those set out in his email at the time: his concerns about Mr Starkey having seen the allegations and that he may have tried to sway witnesses.

75. I accept the claimant raised serious allegations about his manager. I accept those complaints were made in an unhelpful and aggressive manner. I also accept that this was a small employer with no other line management structure of the claimant.

76. However, I consider that, as the larger and more powerful party in this bargain, it was incumbent on the employer to confirm with the employee whether they would be willing and able to return to work. The claimant's comments in emails about his level of trust in his line manager do not go far enough to establish he would not have returned to work if asked.

77. Further, once he was asked to return, he did so. This is despite nothing altering in terms of the respondent's management of the claimant.

78. Therefore, I conclude that the respondent has not established that the claimant was not willing and able to return to work from mid-June 2020.

79. As a result, I conclude that from 22nd June 2020 to 30th August 2020, the Claimant's wages were deducted unlawfully, by the difference between the lay off payments and his full pay.

<u>Holiday</u>

80. During the hearing it became apparent that the claimant believed that he ought to be paid his full pay during the periods that he was paid holiday pay in weeks 6 and 10. I find that, as per the claimant's schedule of loss and his evidence, that he was paid holiday pay at the full rate and not the SLOP rate.

81. There is therefore no deduction made, as the claimant has received full pay for those relevant periods. The claimant is not entitled to holiday pay in full and wages for the same period; that would be double recovery.

Final conclusions

82. From week 12 to week 22 the claimant was paid a total of £2,920 gross.

83. The claimant's normal weekly take home pay was £697.78. For the 11 week period above, that would total: £7,675.58.

84. The unlawful deduction is therefore: £7,675.58-£2,920=£4,755.58.

85. I calculate the amount of payment on a gross basis, but the respondent is entitled to make any deductions which are due for tax and national insurance contributions before payment is made to the claimant.

Electronically signed by EJ Amy Smith

Employment Judge A Smith

Date: 29th November 2022

RESERVED JUDGMENT & REASONS SENT TO THE PARTIES ON

30th November 2022

Eamonn Murphy FOR EMPLOYMENT TRIBUNAL