Case No: 1804947/2022

EMPLOYMENT TRIBUNALS

Claimant: James Wilcox

Respondent: Airco Refrigeration and Air Conditioning Limited

Heard at: Leeds Employment Tribunal (CVP)

On: 18 November 2022

Before: Employment Judge G Elliott (sitting alone)

Representation
Claimant: Mr Alexander Hebdon
Respondent: Ms Jade Nelson, Ahead in HR Limited

JUDGMENT having been sent to the parties on 25 November 2022 following oral judgment given on 18 November 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.

REASONS

A. Introduction

1. The respondent operates a refrigeration and cooling company. The claimant was employed by the respondent when damage occurred to a company van he was driving. The claimant alleges he is owed wages which the respondent deducted from his pay in respect of the damage.

2. ACAS was notified under the early conciliation procedure on 10 August 2022 and the certificate was issued on 24 August 2022. The ET1 was presented on 8 September 2022. The ET3 was received by the Tribunal on 14 October 2022.

B. Claims and issues

3. The issues were agreed at the start of the hearing, with brief details of the applicable law given. The claimant alleges that he was underpaid wages in respect of June and July 2022. The question for the Tribunal was, did the respondent make an unauthorised deduction from the claimant's wages contrary to section 13 of the Employment Rights Act 1996 and if so, how much was deducted?

4. The parties agreed that the claimant was an employee and that two deductions of £500 were made, from wages otherwise properly payable to the claimant, on 24 June and 25 July 2022.

5. The respondent relies on s.13(1)(a) of the Employment Rights Act 1996, that the deductions were authorised by a relevant provision of the claimant's contract.

C. Procedure, documents and evidence heard

6. Mr Wilcox was represented by Mr Alexander Hebdon, and the Respondent was represented by Ms Jade Nelson of Ahead in HR Limited.

7. I addressed the claimant's concerns about late receipt of documents and determined that, balancing the interests of the parties and taking into account the overriding objective, it was in the interests of justice to proceed with the hearing. I agreed to take into account all documents submitted, given the time that had elapsed between receipt and the hearing.

8. The claimant experienced some IT difficulties, including with signal and the inability to remain on screen when viewing documents. The clerk assisted the Tribunal by showing documents via the all-parties screen. The parties agreed to proceed with the hearing despite these difficulties.

9. I heard evidence as to the wages due to the claimant and the wages paid to him, and was provided with payslips, correspondence and contractual documents including an employee handbook. I heard evidence from the claimant and from Mr Matthew Collins on behalf of the respondent, both of whom I concluded were honest witnesses doing their best to assist the Tribunal.

10. The parties were asked but did not identify any need for adjustments. The hearing was listed for two hours commencing at 2pm. One break was taken at 2.15pm until 2.30pm to allow me to review documents and for the respondent to share a complete witness statement, one page having been missing from the bundle. The parties declined to take a break to prepare submissions, which concluded at around 3.45pm. The parties agreed to continue the hearing past 4pm, such that after a short break, I gave oral judgment at 4.20pm.

D. Fact-findings

11. The claimant was employed by the respondent from 29 June 2020 to 1 July 2022, most recently as a service engineer. He was initially employed in a different role which did not involve any significant driving.

12. The claimant's pay period was monthly in arrears, running from the 26th to the 25th of the month, and his pay date was on or around the 25th of the month.

13. The claimant's employment was governed by a contract dated 1 July 2020. The contract contained the following clause 4.4: "you agree that we shall be

entitled to deduct from your salary or other payments due to you the following:… 4.4.7 any wilful or reckless damage to vehicles and subsequent insurance excess payments in relation thereto;... 4.4.14 any other losses caused by you."

14. The respondent had an insurance policy in place to cover company vehicles. The excess payable in the event of a claim for damage to such a vehicle was £1000 + VAT. The respondent had a drivers policy in place relating to driving on company business, which did not mention recovery of sums for damage or an insurance excess.

15. On 17 June 2022 the claimant was driving the respondent's van when he collided with another vehicle, causing damage to both vehicles. The claimant reported the damage to the respondent promptly and provided photographs, cooperating with the respondent's requests in relation to the same.

16. The claimant asserts that the collision was at low speed and was neither wilful nor reckless. The respondent has not provided evidence to the contrary. Mr Collins' evidence was that he liked to think the claimant had not acted deliberately, and that the accident was potentially due to a minor lapse in judgement. Beyond reviewing the information the claimant provided upon reporting the damage, the respondent did not investigate the circumstances of the accident, nor did it conclude, following a reasonable process, that the accident had been wilful or reckless on the claimant's behalf. No definition of these terms was provided. On the balance of probabilities, and using the ordinary meaning of those words, I find as a fact that the claimant caused the damage but was not wilful nor reckless in causing the damage.

17. On 22 June 2022 the claimant was notified via his payslip of a deduction to his pay. Mr Collins was notified on the same date that a deduction of £1,000 would be made from the claimant's pay to cover the insurance excess. He was asked to tell the claimant about this, which he did on 23 June 2022.

18. The respondent made deductions from the claimant's pay in his payslips dated 24 June 2022 and 25 July 2022 of £500 each month. The respondent told the claimant the deductions were in respect of insurance excess arising from the damage he had caused to the van. The respondent did go on to make an insurance claim in respect of the damage, and on the balance of probabilities I accept that the sums deducted from the claimant were applied in respect of the relevant excess.

19. I have examined each individual fact and allegation carefully in order to reach a view as to whether on the balance of probabilities it occurred and what it signified.

E. Law

20. The claimant's claim in respect of his wages falls to be considered under section 13 of the Employment Rights Act 1996, which states as follows:

21. "s.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…"

22. The respondent relies on s.13(1)(a), that the deductions were authorised by a relevant provision of the claimant's contract.

23. I am conscious that when analysing repayment clauses, I must apply a considerable degree of scrutiny to their application because of the vast disparity in economic power between employer and employee (**Yorkshire Maintenance Company Limited v Farr EAT 84/09**). Once the existence and scope of a contractual provision authorising the type of deduction is established, I must then consider whether the actual deduction is in fact justified (**Fairfield Limited v Skinner [1993] I.R.L.R. 4 EAT**). The respondent has the burden of proof as to whether deductions were authorised, both as regards whether a contractual term applied and whether the respondent's use of it was justified. In applying damage repayment clauses, it does not necessarily follow from the fact that an incident has occurred that the employee was at fault (**Salter v D&P Coaches Ltd ET 3314605/19**). In the event of any ambiguity in the drafting of a contractual clause, the clause will be interpreted against the party relying on it.

F. Conclusions

24. Referring back to the issues as agreed by the parties and based on the above findings of fact, I set out here my conclusions.

25. The claim is in time.

26. As agreed by the parties, the respondent made deductions from the claimant's wages in his June and July pay packets of £500 each month, totalling £1,000.

27. I have some sympathy with the respondent, who believed itself to be acting pursuant to a contractual right to deduct the sums. Such clauses are in principle permissible, and it does not matter that the claimant's role changed after he signed the contract, or that the claimant was not given further notification prior to the deduction.

28. However, upon examination of the text of the contract and taking into account the applicable law, I find clause 4.4.14 is too wide and vague to be properly enforceable. Further, the existence of clause 4.4.7 specifically dealing with recovery for vehicle damage leaves no room to imply that the purported catch-all provision at 4.4.14 should be construed impliedly as covering vehicle damage.

29. As regards clause 4.4.7, I find this to be ambiguous, in that it does not state that deductions could be made from payments due to the claimant for costs, or losses, suffered by the respondent due to wilful or reckless damage, only that deductions could be made for wilful or reckless damage – its meaning is not therefore entirely clear so I must approach it with caution.

30. In any event, where a clause does properly apply I must consider whether the deduction is justified. In a case like this, that involves considering the extent to which the respondent investigated whether the damage was wilful or reckless, and the reasonableness of its conclusion. In this case the respondent put forward no evidence on the point, relying only on the claimant's admission that he caused the damage. This is the respondent's burden and I do not find it to have been discharged.

31. Taking all this into account I find that the two deductions of £500 were not authorised deductions.

32. Accordingly, the respondent made an unauthorised deduction from the claimant's wages and is ordered to pay to the claimant the gross sum of £1,000, in respect of the amount unlawfully deducted. This sum is subject to any applicable deductions for tax and employee national insurance contributions if the deductions from wages were made from gross pay; however, I understand the deductions to have been made from net pay.

33. The claimant's claim for consequential losses is not well-founded, costs of representation not falling within the scope of the legislation.

Employment Judge G Elliott
Date: 5 December 2022