Case No. 1801871/2022

EMPLOYMENT TRIBUNALS

Claimant: Mr J Kubisa

Respondent: Pro Driven (Barnsley) Limited

Heard at: Sheffield on: 11 November 2022
5 December 2022 (reserved decision in chambers)

Before: Employment Judge Cox

Representation:
Claimant: In person
Respondent: Mr Carr, director and owner

RESERVED JUDGMENT

1. The claim of unauthorised deduction from wages succeeds.

2. The Respondent must pay the Claimant £1,385 in respect of those unauthorised deductions, less any sums that it is legally obliged to deduct in respect of income tax and National Insurance contributions.

3. The claim for damages for breach of contract by failure to pay a 'phone allowance is dismissed on withdrawal by the Claimant.

4. The employer's contract claim succeeds.

5. The Claimant must pay the Respondent £2,135.68 in damages.

REASONS

1. During the course of the Hearing of the claim, the parties agreed that the Claimant worked for the Respondent, a haulage company, as an HGV Class 1 Driver for 9 full days, namely 28 March to 1 April and 4 to 7 April 2022 inclusive. On starting work, the Claimant was allocated a truck with a trailer. His claim arose because the Respondent withheld the Claimant's wages for that period because of damage it said he had caused to the truck and trailer during two incidents. At the Hearing the parties agreed that the total wages that the Claimant would otherwise have been due for that period, inclusive of night allowance, was £1,385.

Unauthorised deduction claim

2. The first issue for the Tribunal was whether the Respondent's failure to pay the Claimant amounted to an unauthorised deduction from his wages, contrary to Section 13 of the Employment Rights Act 1996 (the ERA).

3. The Claimant accepted that when he joined the firm he had been shown a copy of the Respondent's written accident reporting procedure and that it formed part of his terms and conditions of employment. It was therefore a "relevant provision" of the Claimant's contract that could potentially authorise the deduction the Respondent had made (Section 13(2) ERA). The Tribunal still needed to decide whether the terms of that procedure authorised the deduction from his wages in the circumstances of this case.

4. The relevant parts of the procedure read as follows:

> "Introduction
>
> The procedure to be followed where a Company vehicle is involved in a traffic accident or 3rd party property damage is summarised below: The following definitions are given for the purposes of traffic accident and 3rd party damage procedures:
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> Traffic Accident/3rd Party Property Damage:
>
> A Company vehicle has been involved in a traffic accident or damage to a 3rd parties property, if it is established or alleged that:
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> - whether moving or stationary, it is involved in collision with another object causing injury to a person or domestic animal, or damage to any vehicle, goods or any other object.
>
> . . .

> These instances apply whether or not the accident occurs on Company property.
>
> Company Vehicle:
>
> Any mechanically propelled road vehicle or any trailer or toed vehicle or plant owned by the Company or for which it is responsible.
>
> Company Driver:
>
> Any employed person who with, or without authority, was driving or controlling the Company vehicle at the time of the accident or 3rd party damage, or alleged accident or 3rd party damage, will if proven be liable for the insurance excess of £1,000 or the total cost (whichever is greater) of replacement parts and/or repairs to the company vehicle or 3rd party property, this amount will be deducted from the employed persons wages."

5. At the Hearing, both parties gave oral evidence and submitted documentary evidence. For the Respondent, evidence was given by Mr Carr, the Respondent's director and owner. The Tribunal also viewed two pieces of video footage. The first showed the Claimant examining his vehicle at the Respondent's yard before moving off on Monday 28 March 2022 ("the first incident"). The second showed the Claimant's vehicle being driven onto a weighbridge at a customer's premises on Thursday 31 March 2022 ("the second incident").

6. On the basis of that evidence, the Tribunal makes the following findings.

The first incident

7. The Claimant produced written guidance from the Health and Safety Executive (HSE) on the safe coupling and uncoupling of trailers from large goods vehicles. In the introductory paragraph, the guidance states:

> "Accidents and dangerous situations occur all too often when drivers of large goods vehicles (LGVs) fail to follow safe coupling and parking procedures. Unsafe practices often lead to vehicle runaway or trailer rollaway situations. They can result in serious and fatal injury to the driver or others, and costly damage to both vehicles and property.

8. The section headed "Guidance" states that "the driver should be trained in the safe system of work and simple monitoring systems should be set up to check that safe systems are followed at all times – a careless driver can be a danger to to others as well as themselves".

9. The Guidance goes on to set out a coupling procedure for standard semi-trailers. This includes the following steps:

    - "Carry out a visual check that the 5th wheel jaws have engaged correctly and fit the security 'dog clip' or other safety device." (The 5th wheel is the mechanism by which the trailer is attached to the truck.)

    - "Carry out a second test that the 5th wheel jaws have engaged by selecting a low forward gear and with the trailer brakes still applied slowly pulling forward." (This is referred to as a "tug test".)

10. The Respondent's system of work requires its drivers to carry out certain checks on their vehicle at the beginning of the working day. The checks are set out in a table entitled "daily walkaround checks". They include the following:

    > "Check title: Unit/Trailer Coupling Security. Check description: If applicable, check the trailer is located correctly in the fifth wheel and the security bar is in the correct position. Check priority: Major".
    >
    > "Check title: Tug Test. Check description: [no entry in this column]. Check priority: Major"

11. The Respondent requires drivers to complete an electronic record on an app on their 'phone to confirm that they have carried out these checks. On the sheet that the Claimant completed on 28 March he ticked to indicate that the vehicle had passed the test for "Unit/Trailer Coupling Security" and the "Tug Test".

12. The video footage shows that the Claimant's examination of the vehicle was cursory. On the record of the walkaround, it is recorded as lasting 38 seconds. There were 41 items on the checklist, and it is not credible that even the external checks caught on the video footage could have been completed within that time if being conducted with proper care. The video shows the Claimant pulling at something in the area in which the fifth wheel is located, but the area with which the Claimant is making contact is not visible. The Respondent's case was that the Claimant was pulling at the security arm and so loosened the jaws of the fifth wheel. The Claimant's case was that he was not pulling at the security arm, he was just checking that it was not loose. The video gave no indication that the Claimant carried out the tug test. When the Claimant drove the truck off, the video footage shows that the trailer became uncoupled and the front of it fell to the ground. From the photographs submitted by the Respondent, the Tribunal accepts that when the trailer hit the ground it resulted in damage to the electrical suzzies (electric cables between the trailer and the truck), the battery cover, a 30-amp

battery box, mega fuse and the batteries and the external metal stanchion on the trailer.

13. The Claimant's case was that the responsibility for this accident lay with the Respondent because Mr Carr had told the Claimant that he would prepare the vehicle over the weekend ready for him to drive on the Monday. If the trailer had not been safely coupled to the truck, that was the fault of whoever had prepared the vehicle. The Respondent's case was that the Claimant pulled at the security arm and in doing so loosened the fifth wheel mechanism, causing the trailer to uncouple when the truck moved forward.

14. The Tribunal is satisfied that the Claimant did not take reasonable care when carrying out the necessary checks before he drove the vehicle away. As the driver of the vehicle, he had been told what checks he was required to do. The two checks involving the coupling of the trailer had been allocated a "major" priority. He had not carried out the tug test as he should have done, even though he had confirmed that he had. Whether or not the person who prepared the vehicle had done a proper job of coupling the trailer, under the Respondent's system of work, which complied with the HSE guidance, it was clear that it was the driver's responsibility to check that the coupling was safe and the Claimant had not done so.

The second incident

15. On 31 March 2022, the video evidence confirmed that the Claimant was driving his vehicle onto the weighbridge at a customer's premises when the vehicle collided with an object. The video does not show clearly what the object was, but the Claimant did not challenge Mr Carr's evidence that there had been a collision of some sort. After the impact, the Claimant continued to drive the vehicle forward. The Claimant did not challenge Mr Carr's evidence that the truck was fitted with a sensor that would have sounded an audible alarm to indicate that it was coming too close to an object. The Tribunal finds that the Claimant had not exercised reasonable skill and care when driving the truck on the weighbridge.

16. The Tribunal accepts from the photographs submitted by the Respondent that the collision at the weighbridge resulted in damage to one of the truck's wheels, wheel hub and mudguard, and to the fuel tank.

The repairs

17. The Tribunal accepts Mr Carr's evidence that the Respondent incurred significant expense in arranging for the damage the vehicle sustained in the two incidents to be repaired. The total cost was in excess of the Claimant's outstanding wages.

Did the relevant provision authorise the deduction?

18. The Claimant's case was that when he was recruited he queried the accident reporting procedure and the provision for deduction from wages and Mr Carr assured him that deductions were made only if the driver did not report the accident. The Tribunal accepts Mr Carr's evidence that he did not say that. It is highly unlikely that Mr Carr would have reassured the Claimant that he would not be liable for any damage provided he reported it, however clear it was that the accident had been caused by his negligence or recklessness.

19. Although the two incidents did not happen in traffic and so would not normally be viewed as "traffic accidents" as that phrase is commonly understood, the Tribunal accepts that they did fall within the definition of that term in the accident reporting procedure. The Claimant's truck and trailer had been in collision with object, that is, the ground or the weighbridge, causing damage to the Respondent's vehicle and trailer.

20. The specific clause authorising a deduction from wages is less clear. It states that the employee driving the vehicle "will <u>if proven</u> [Tribunal's emphasis] be liable" for the insurance excess or the total cost of parts and repairs, whichever is greater, and this will be deducted from the employee's wages. The clause does not make clear what needs to be proven and to whom for the employee to be liable to a deduction. At the Hearing, both parties said that they believed the words meant that the driver would need to have been at fault in some way. But that is not what the clause says. Even if it did, it is not clear what "at fault" would mean. Being reckless about what damage might be caused? Or just not taking reasonable care? And how would fault be taken to have been "proven"?

21. The clause was drafted by or on behalf of the Respondent. It governs the circumstances in which the Respondent has the right to make a deduction that has significant financial consequences for the employee. The Tribunal is not satisfied that the clause is clear enough to authorise the deduction that the Respondent made from the Claimant's wages.

22. The claim for unauthorised deduction from wages therefore succeeds and the Respondent is ordered to pay the Claimant £1,385 in respect of those deductions (from which it will be required by law to deduct income tax and National Insurance contributions).

Contract claims

23. The Claimant also claimed that the Respondent had failed to pay him a 'phone allowance to which he was entitled. That claim could only be brought as a claim for breach of contract as payments for expenses incurred in carrying out employment are excluded from the definition of wages for the purposes of an unauthorised

deduction from wages claim (Section 27(2)(b) ERA). The Claimant withdrew this aspect of his claim at the Hearing and it was dismissed.

24. The Respondent made an employer's contract claim, seeking to recover for the cost of repairs to the company vehicle caused by the Claimant's actions. It is an implied term of every contract of employment that the employee will carry out their duties with reasonable skill and care.

25. The Claimant did not present a response to the employer's contract claim. At the Hearing the Claimant said that he was not aware that he needed to submit a response, but the Tribunal finds that he was. By a letter dated 10 June 2022 the Claimant was told that if he wanted to contest the claim he must send the Tribunal his response within 28 days.

26. On the basis of the findings set out above in relation to the Claimant's actions during the two incidents, the Tribunal accepts that he breached his contractual duty to exercise reasonable skill and care in carrying out his duties. In order to put the Respondent in the position it would have been in had the Claimant complied with his duty, the Tribunal awards the Respondent damages equal to the cost of the repairs to put right the damage caused in the incidents, insofar as they are supported by the invoices that the Respondent submitted in evidence. The Claimant's case was that he should not be liable for the cost of a replacement fuel tank when even before the accident the fuel cap was not working and the anti-theft device on the tank was broken. The Tribunal accepts Mr Carr's evidence, however, that the fuel tank was made of aluminium and, once dented, could not be safely repaired and was potentially dangerous. It was therefore necessary to replace it.

27. On that basis, the Tribunal calculated the damages as follows:

Painting and repair of wheel trim	£55
Replacement electrical suzzie	£60.75
Replacement battery cover	£19.85
Replacement battery	£296.58
Replacement mudguard and mega fuse	£92.08
Replacement fuel tank	£1,611.42
TOTAL	£2,135.68

28. The Tribunal therefore orders the Claimant to pay the Respondent £2,135.68 in damages for his breach of contract.

Employment Judge Cox Date:
8 December 2022

Reserved Judgment and Reasons sent to the parties on:

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For the Tribunal