



EMPLOYMENT TRIBUNALS

Claimant: Neil Borowiak

Respondent: Martin Nietrzebka (sole trader) trading as Dentwizard

Heard at: Leeds Employment Tribunal (CVP)

On: 13 April 2023

Before: Employment Judge G Elliott

Representation

Claimant: Ms A Fadipe, counsel

Respondent: Ms Louise Simpson, administrator

RESERVED JUDGMENT

1. The respondent made an unauthorised deduction from the claimant's wages and is ordered to pay to the claimant the gross sum of £2438.06, in respect of the amount unlawfully deducted. This sum is subject to applicable deductions for tax and employee national insurance contributions.
2. The respondent provided a written statement of terms to the claimant prior to the claimant filing his claim of unauthorised deduction from wages with the Employment Tribunal. As such the claim for compensation in respect of a failure to provide written particulars fails and is dismissed.

REASONS

A. Introduction

1. The respondent operates a business fixing cars by paintless dent removal. The claimant was provided with training by the respondent. The claimant alleges he is owed wages which the respondent deducted from his pay in respect of the training.

2. ACAS was notified under the early conciliation procedure in respect of Martin Nietrzebka on 5 November 2022 and Dentwizard on 14 November 2022, and the certificate for each was issued on 15 December 2022. The ET1 was presented on 11 January 2023. The ET3 was accepted by the Tribunal.

B. Claims and issues

3. The issues were agreed at the start of the hearing, with brief details of the applicable law given.

4. The claimant alleges that he was underpaid wages in respect of the pay period 16 September to 15 October 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?

5. The parties agreed that the claimant was an employee and that a single deduction of £2438.06 was made, from wages otherwise properly payable to the claimant, on 15 October 2022.

6. 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.

7. The claimant also alleges he was not provided with written particulars of employment in accordance with s.1 of the Employment Rights Act 1998. He confirmed that his complaint is brought under s.38 Employment Act 2002 not s.11 Employment Rights Act 1998. The question for the Tribunal was, in the event of there being an unauthorised deduction from wages, did the respondent fail to provide employment particulars to the claimant and if so, what award is due under s.38 of the Employment Act 2002?

8. The claimant was invited to identify the specific particulars lacking as at the date of claim, with reference to the written contract provided to him by the respondent (see below). The claimant declined to do so, stating his case is that as such contract was provided late into his employment, all particulars specified under s.1 Employment Rights Act 1996 were lacking.

C. Procedure, documents and evidence heard

9. Mr Borowiak was represented by Ms Fadipe of counsel and gave evidence on his own behalf. The Respondent was not legally represented. Ms Simpson took on the role of representing the respondent, with Mr Nietrzebka as the respondent's witness.

10. I addressed the issue of the correct respondent and determined on discussion with the parties and with reference to payslips that it is Martin Nietrzebka (sole trader) trading as Dentwizard. Mr Nietrzebka had responded to the claim and there was no dispute that he was the employer nor as to valid service of the claim.

11. Ms Fadipe considered making an application to amend the claim to include a claim in respect of pension, but following an adjournment this application was not pursued.

12. I was provided with a bundle prepared by the claimant of 88 pages, an additional payslip dated 15 October 2022 and a witness statement of the claimant. The respondent elected to treat pages 35-38 of the bundle as the witness statement of Mr Nietrzebka and stated that it had no documents relevant to the issues in the claim in addition to those in the claimant's bundle, and as such the bundle was agreed.

13. I heard evidence as to the wages due to the claimant and the wages paid to him, and was provided with payslips, correspondence and an unsigned contract. I heard evidence from the claimant and from Mr Nietrzebka, both of whom I concluded were honest witnesses doing their best to assist the Tribunal.

14. Adjustments were made for Mr Nietrzebka, who stated he struggled to find pages in the bundle and to read from them. Ms Simpson was asked to sit away from him while he was giving evidence but to come forward to find pages for him as needed. Ms Fadipe was asked to read out passages from the bundle rather than ask Mr Nietrzebka to read them himself.

15. The hearing was listed for two hours commencing at 2pm. One break was taken at 2.15pm until 2.25pm to allow Ms Fadipe to take the claimant's instructions. A second break was taken between 2.45pm and 3pm to allow Ms Fadipe to take further instructions and to allow the respondent to prepare for the process of witness evidence following explanation. The parties agreed to continue the hearing past 4pm to avoid going part-heard. The parties declined to take a break to prepare submissions, which concluded at around 4.30pm. Given the late hour, I reserved judgment.

D. Fact-findings

16. The respondent operates a business fixing cars by paintless dent removal. The claimant was employed by the respondent from Spring 2021 until his employment terminated on 14 October 2022.

17. The claimant's pay period was monthly in arrears, running from the 16th to the 15th of the month, and his pay date was on or around the 15th of the month.

18. At the outset of the parties' relationship, the claimant undertook a period of training paid for by the respondent. The claimant then continued training on-the-job. No written terms were agreed to govern the employment.

19. A conversation took place in a van in March 2021, prior to the claimant commencing his training, in which the parties discussed the work, pay and training involved in the potential job opportunity. At the time the claimant was still employed by an alternative employer of 16 years and he was considering whether to join the respondent employer. As part of this conversation, Mr Nietrzebka said that because of the cost of the training to him, if the claimant left his employment before three years, Mr Nietrzebka would ask for the training fees back. The claimant did not challenge this in the conversation. Nothing more was said about payment of the training costs thereafter until the events described below.

20. Some considerable time into the claimant's employment, on 24 August 2022, the respondent provided the claimant, by email, with a detailed written contract. The claimant acknowledged receipt of the contract and queried the

meaning of various clauses. He did not sign the contract, nor did he indicate verbally or in writing that he accepted its terms. He continued to work for the respondent and did not indicate he was working under protest. He did not explicitly indicate that he did not accept the terms of the contract until an email of 13 October 2022.

21. The written contract contained the following clauses relating to training costs:

1. clause 4.2: "The Employee will be instructed in the skills, techniques and trade secrets of the Group which will include the process of paintless dent removal ("PDR")...All training costs will be met by the Company. If employees leave the Company within three years of their training, they are subject to pay all monies owed to the Company."
2. clause 6.3: "For the purposes of the Employment Rights Act 1996 and generally, the Employee authorises the Company at any time during the Term, and on termination of his employment howsoever arising, to deduct from the Employee's remuneration due under this agreement any monies due from the Employee to the Company, including but not to any outstanding loans, advances...training costs and any other monies owed by the Employee to the Company."
3. clause 13.2.5: "The Company shall be entitled to terminate this agreement at any time, without notice or pay in lieu of notice, if the Employee:...leaves the Company during the three years training clauses (4.2 and 6.3). Any monies owed for training will be deducted from any monies owed to the Employee."

22. The written contract contained a statement at clause 21 as follows: "Employment Rights Act 1996: This agreement contains the particulars of employment pursuant to the above Act.". No evidence was given in relation to any failings by the written contract to honour that statement and meet the requirements of s.1 of that Act in full. It is not the Tribunal's role, of its own accord, to interrogate the same.

23. On 11 September 2022 the claimant resigned from his employment with the respondent. A conversation took place shortly thereafter between the claimant and Mr Nietrzebka in which the claimant agreed to work a month's notice. The claimant raised with Mr Nietrzebka that he did not expect to be required to repay training costs.

24. On 13 September 2022 Ms Simpson emailed the claimant on behalf of the respondent explaining that he would be required to repay training costs of £5,410 and that the respondent believed this was authorised by the written contract. The parties had a number of exchanges thereafter in which the claimant denied having agreed to repay the training costs and the respondent maintained that he was required to repay them.

25. The respondent issued the claimant's payslip of 15 October 2022 giving gross pay of £2,438.06 and net pay following applicable deductions for tax, national insurance and pension of £1,919.96. The claimant accepts these were the wages due to him (not the £2,700 referenced in his claim form). Although the payslip did not show a deduction for training costs, the respondent withheld the full net pay amount on account of training costs.

26. 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

Unauthorised deduction from wages

27. 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:

"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..."

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

29. A relevant provision of the contract must have been agreed between the parties, and either included as a written term of a contract given to the worker prior to the deduction, or formed by way of an express or implied term (which may be oral or written) the effect of which has been notified to the worker prior to the deduction. For a contract to be formed, there must be offer, acceptance, consideration, intention to create legal relations and certainty of terms. These items can be difficult to establish where terms are not agreed in writing. Terms implied into a contract based on the intention of the parties, must usually either be necessary to give business efficacy to the contract, or so obvious to a bystander that they go without saying.

30. 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 the event of any ambiguity in the drafting of a contractual clause, the clause will be interpreted against the party relying on it.

31. 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**).

Written particulars of employment

32. The claimant's claim in respect of his contract arises from the requirement in s.1 of the Employment Rights Act 1996 for an employer to provide a worker with written particulars of employment. In the event of there being an unauthorised deduction, the Tribunal is asked to consider did the respondent fail to provide employment particulars to the claimant and if so, what award is due under s.38 of the Employment Act 2002 relating to a failure to provide the same?

33. If there has been such a failure, the Tribunal must award the claimant two weeks' pay and may, if it considers it just and equitable in all the circumstances, award four weeks' pay instead. A weeks' pay for these purposes is calculated in accordance with s.221 to 229 of the Employment Rights Act 1996, which require the calculation of normal remuneration.

34. When determining whether an employer is in breach of the requirement to provide written particulars of employment, the relevant date is the date on which the claimant brought his claim for unauthorised deductions (s.38(2)(b) and (3)(b)). Where an employer has failed to provide particulars at the outset of employment, but has later provided such particulars prior to the claimant bringing his claim, no remedy is due under s.38 (**Govdata Limited v Denton 2019 ICR D8, EAT**).

F. Conclusions

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

36. The claim is in time.

37. The respondent made a deduction from the claimant's wages in his October pay packet of £2,438.06 gross.

38. I have some sympathy with the respondent, which had incurred considerable costs in training the claimant and which I accept had been transparent about its wish to reclaim training costs in the event of the claimant leaving his employment in the first three years.

39. However, in order for a deduction from the claimant's wages in respect of training costs to be an authorised deduction, there must have been agreement over a contractual term explicitly authorising the deduction.

40. Such contractual agreement could arise without a written term, but I find the statement made by Mr Nietrzebka in the van was insufficiently clear or certain as to amount to a contractual term and that in any event, the necessary contractual elements of offer, acceptance, consideration and intention to create legal relations were not present at that time. Even on Mr Nietrzebka's own evidence, the term he purports to have been agreed was only mentioned at interview and was that he would "ask the claimant to repay training costs" – not that the claimant authorised the respondent employer to make a deduction from his wages in respect of training costs incurred by the respondent.

41. Turning to the written contract, I find that the claimant did not accept the detailed written terms, including those relating to training costs. His continuing in employment for two weeks after receipt of the contract is not sufficient to imply his consent to its full terms, particularly given the correspondence in which he queries some of its detail.

42. Even if I had found that the claimant had agreed the written terms dealing with training costs, upon examination of the text of the contract and taking into account the applicable law, I find the relevant clauses too wide and vague to be properly enforceable. Given the drafting, the clauses do not actually specify that training costs incurred by the employer fall due to be paid by the departing employee – they refer to "monies owed by" or "due from" the employee but do not include a provision specifying that training costs incurred by the employer are owed by or due from the employee. In any event, importantly, they do not refer to training costs incurred in the past, prior to the contract being entered into.

43. Given the above findings, I do not need to go on to consider whether the deduction is justified.

44. Taking all this into account I find that the deduction of £2,438.06 was not an authorised deduction.

45. Accordingly, the respondent made an unauthorised deduction from the claimant's wages and is ordered to pay to the claimant the gross sum of £2,438.06, in respect of the amount unlawfully deducted. This sum is subject to any applicable deductions for tax and employee national insurance contributions.

46. I therefore have jurisdiction to consider whether an award under s.38 Employment Act 2002 is due. On its face the written contract provided to the claimant on 24 August 2022 purports to provide a written statement of terms and on the evidence put to me I have insufficient grounds to declare it non-compliant with s.1 Employment Rights Act 1996. The statement of terms was provided to the claimant before he filed his claim with the Employment Tribunal on 11 January 2023. As such the claim in respect of a failure to provide written particulars fails and is dismissed.

Employment Judge **G Elliott**

17 April 2023

