



EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4103454/2023

5

**Held via Cloud Video Platform (CVP) in Edinburgh on 4 September and 2
October 2023**

Employment Judge S MacLean

10 **Mr George McDermid**

**Claimant
In Person**

15 **New Apex Ltd**

**Respondent
Represented by:
Mr Yiwen Guo -
Director**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

20 The judgment of the Employment Tribunal is that (1) while the claimant's claim under section 23 of the Employment Rights Act 1996 is well founded, the respondent has now paid to the claimant the amounts due; and (2) the respondent is in breach of contract for failing to give the claimant notice of termination of employment, and is ordered to pay the claimant the sum of £576.30.

25

REASONS

Introduction

1. The claimant was employed by the respondent, a company involved in technology, as senior business development manager-Scotland, from 6 March 2023 until 28 April 2023. Early conciliation started on 30 April 2023
30 and ended on 11 June 2023. The claim form was presented on 20 June 2023.
2. The claim is about unauthorised deductions from wages and breach of contract for failure to pay notice pay on termination.
3. The respondent's defence is that the claimant has been paid all wages to which he is entitled. His employment was terminated on the grounds of gross

misconduct. The respondent is not in breach of contract for failing to give notice or make a payment in lieu.

The issues

4. The issues the Tribunal will decide are as set out below:

- 5 a. In relation to unauthorised deductions from the wages:
- i. Did the respondent make an unauthorised deduction?
 - ii. If so how much was deducted?
- b. In relation to wrongful dismissal:
- i. What was the claimant's notice period?
 - 10 ii. Was the claimant paid for that notice period?
 - iii. If not, was the claimant in repudiatory breach of contract?

The final hearing

5. The final hearing was conducted by Cloud Video Platform. The claimant gave evidence on his own account. Yiwen Guo, director and Somin Tong,
15 administrative assistant gave evidence for the respondent.
6. The Tribunal heard a significant amount of evidence but has set out facts as found that are essential to the Tribunal's reasons or to an understanding of the important parts of the evidence.

Findings in fact

- 20 7. The respondent is a limited company based in Newcastle Upon Tyne. The respondent employs approximately eight employees including Mr Guo, a sole director and shareholder.
8. Around December 2022, the claimant, who worked for a company in partnership with the respondent, was introduced to Mr Guo. Discussions
25 followed about the claimant working for the respondent, the contractual basis of which was dependent on the termination arrangements that the claimant reached with his employers.

9. Around 24 February 2023, the claimant advised Mr Guo that he was in the position to take up employment with the respondent.
10. The respondent sent the claimant draft terms and conditions of employment. Clause 19 headed “additional items” referred to, “Travel allowance up to £250 per month”. The claimant messaged Mr Guo querying what the travel allowance was for, and if it was his expense allowance. Mr Guo confirmed that it was. The claimant asked if he was being provided with a car allowance. Mr Guo replied: “That’s the car travel allowance.”
11. In the terms and conditions of employment signed by the claimant on 2 March 2023 (the T&Cs), clause 19 referred to, “Car allowance up to £250.00/month”.
12. The T&Cs also provided that:
- a. the first twelve weeks of employment would be a probationary period and employment may be terminated during this period at any time on one week’s prior notice.
 - b. A basic salary of £30,000 per year accruing daily at the rate of 1/260th of annual salary paid monthly in arrears in equal instalments less any statutory voluntary deductions on or about the 26th of each month.
 - c. Reimbursed for all reasonable expenses properly and exclusively incurred in the performance of duties subject to complying with the expenses policy.
 - d. The respondent is entitled to dismiss the claimant without notice or payment in lieu of notice if the claimant commits a serious breach of obligations as an employee.
13. The claimant commenced employment on 6 March 2023. The claimant was provided with a starter guide which had access to various company policies including the need to provide a P45 or an HMRC code.
14. The claimant worked from his home in West Lothian. He was initially involved in training and attending exhibitions. He attended two appointments with customers in Edinburgh between 6 March and 6 April 2023.

15. On 9 March 2023, the claimant was involved in training. He was absent in the afternoon to attend to an unexpected family emergency.
16. On Sunday 12 March 2023 the claimant travelled to England for an exhibition. On 16 March 2023, the respondent had granted the claimant time off in the morning because of the late return home. The claimant asked for time off that afternoon to collect his son from school because the claimant had missed his birthday. He said that he was happy for the time to be taken from his holiday entitlement and, if necessary, he would pick up emails in the evening.
17. The respondent did not pay the claimant on 26 March 2023. The claimant was concerned and stressed about the financial implications of this. The respondent received the claimant's P45 on 28 March 2023. The respondent was transitioning its payroll system. The claimant and Mr Guo spoke about possible alternative means of paying the claimant during this period.
18. The claimant was aware of the respondent's pricing policy. A prospective customer asked the claimant to raise revised terms with the respondent, which he did. The claimant was directed by Mr Guo and Bruce Gallagher not to get back in touch with the customer. There was discussion around further training for the claimant. There was no discussion about the respondent considering the claimant's conduct to be gross misconduct.
19. The claimant worked between 27 March 2023 and 6 April 2023 (eight days). He was then absent from work due to sickness. The absence was initially self-certified. The claimant did not return to work.
20. On 12 April 2023 the respondent issued a payslip for the period 27 February 2023 to 26 March 2023 pro-rated as the claimant started working on 6 March 2023. It was calculated that the claimant had worked a total of 15 days resulting in a gross payment of £1,730.40. Deductions were made for tax and national insurance. The claimant was paid £1,088.84 net.
21. The claimant provided the respondent with a statement for fitness to work dated 18 April 2023 covering the period 18 April 2023 to 24 April 2023.

22. On 21 April 2023 Mr Guo messaged the claimant to ask if he was free to talk. The claimant said that he was not, and proposed that they chat the following week.
23. The claimant remained on sick leave and submitted a further statement of fitness to work which the respondent did not receive until later.
24. On 27 April 2023, the claimant sent an email to Mr Guo at 09:02 referring to sections 8-10 and 13-14 of the Employment Rights Act 1996 which he said the respondent had breached. The claimant asked for detailed payslips for March and April 2023 paying sums contractually due to him in respect of work carried out, bank holidays, car allowance and expenses. The claimant also advised that he would process expenses by the close of business that day. If it was not resolved, he would proceed with legal action.
25. The respondent prepared a letter to the claimant dated 27 April 2023, advising that his probationary employment was being terminated immediately (the Termination Letter). The Termination Letter said that the claimant's action had led to a loss of business. He had provided a potential client with unauthorised discounts, flexible 24 month terms in lieu of the standard 36 month terms and offering a trial period contrary to the respondent's quotation procedures. The claimant's unauthorised adjustments to the quotation procedures had jeopardised the respondent's revenue and reputation and could prompt other customers to have similar expectations provoking operational difficulties. The respondent requested the claimant to return company property by 3 May 2023.
26. The Termination Letter was attached to an email sent to the claimant on 28 April 2023 at 00:42.
27. The respondent issued payslips to the claimant for the period month ending 26 April 2023 and month ending 30 April 2023. The claimant's salary on the month ending 30 April 2023 was calculated at a gross monthly pay of £923.08, statutory sick pay of £262.56 and holiday pay of £346.15.

28. The respondent calculated that the claimant was entitled to 31.9 hours of holiday (four days). The respondent calculated that he had taken 1 day (0.5 day in the afternoon of 9 March 2023 and 0.5 in the afternoon of 16 March 2023 as holiday). Accordingly, he received three days' pay totalling £346.15 gross paid.
29. The respondent withheld the holiday pay pending receipt of the company property which was not received until July 2023 when the holiday pay was paid.
30. All work related expenses claimed by the claimant as at the date of termination has been paid by the respondent.

Observations on witnesses and conflict of evidence

31. The Tribunal considered that the witnesses gave their evidence honestly based on their recollection and perceptions of events.
32. When these proceedings were raised there was a dispute about the amount of SSP due to the claimant. At the final hearing it was agreed that the claimant had now been paid all SSP to which he was entitled.
33. The disputed evidence mostly focused in relation to what was meant by car allowance of up to £250 per month. The claimant's position was that this was a benefit to which he was entitled each month in addition to any entitlement be reimbursed for expenses. The claimant did not maintain that he should receive a payment of this on non-working days or sick leave.
34. Mr Guo's position was that the employees normally recovered their business expenses through the expenses policy. Business expenses includes mileage if a personal car is used for business travel (45p per mile), public transport fares, accommodation and subsistence. The claimant worked from home. Mr Guo understood that the claimant may require to use his car to visit potential customers in the Edinburgh area. However, the car mileage expenses to which the claimant was contractually entitled was restricted to a maximum of £250 per month. This restriction did not include other business expenses which could be claimed through the expenses policy. Ms Tong assisted the

respondent's accountant with payroll issues following the change in payroll supplier in April 2023. She was not involved in initial discussions. She did confirm that none of employees received a benefit of a car allowance. When employees used their car for business, they would make an expenses claim by recording the date and nature of the business and the number of miles involved.

5
35. The Tribunal considered that the respondent's evidence in this regard was more plausible. None of the employees had a car allowance. The claimant did not use his car for work on a daily basis. While employed by the respondent he had two customer appointments in Edinburgh. The car allowance was discussed in the context of expenses. It was not a fixed amount but a monthly limit or restriction of what could be claimed for use of his car but did not restrict other travel and business expenses.

15
36. There was also disputed evidence about the basis upon which the claimant's absence was authorised on the afternoon of 9 March 2023. It was undisputed that he claimant was scheduled to attend training that afternoon but he left around 2pm due to a family emergency. The claimant's position was that he had never agreed that this absence would be treated as annual leave. The respondent's position was that this was discussed and that annual leave would be used to pay for the absence. There was no dispute that the claimant was paid for these half days on 12 April 2023.

20
37. The Tribunal considered when the claimant attended to the family emergency, that it was unlikely that he asked to take annual leave in advance of his departure. The claimant was entitled to time off to attend to a family emergency but not to be paid to do so. The Tribunal considered that it was more likely than not that following discussion, it was agreed that the claimant would be paid as annual leave would be used for this purpose. The reasoning was that this was similar to the situation which arose on 16 March 2023 when the claimant did offer to take annual leave and catch up on any emails later if necessary.

25
30

38. There was disputed evidence about the circumstances surrounding the claimant's discussion with a prospective customer. The claimant accepted that he was aware of the respondent's pricing policy. His position was that he had only recently joined the respondent. A prospective customer asked him to raise revised terms with the respondent, which he did. The claimant was directed by Mr Guo not to get back in touch with the customer. The claimant's conduct was not gross misconduct; it was not repeated and further training was appropriate. The respondent's position was as set out in the Termination Letter.
39. The Tribunal did not doubt that the claimant's involvement may have raised a potential customer's expectations. However, it appeared to the Tribunal that while this matter had been discussed with the claimant around mid to late March 2023, the respondent did not indicate to him that it was considered to be potential gross misconduct. Had it been as serious as the respondent now suggested, that would have been mentioned and action would have been taken then to terminate the claimant's employment. There was no evidence to support the respondent's position that but for the claimant's conduct it would have secured the business.

Deliberation

40. The Tribunal first considered the claim of unlawful deductions and asked if the respondent make an unauthorised deduction. The Tribunal found that the claimant was not entitled to the "car allowance" so there was no unauthorised deduction in respect of this. The Tribunal did however consider that there were unauthorised deductions in respect of sick pay and holiday pay when these proceedings were raised.
41. While these deductions were made the Tribunal noted that the deducted payments have since been paid to the claimant. The Tribunal was not satisfied that any further payment was due and accordingly no further order was made in this regard.
42. In relation to the wrongful dismissal claim the claimant was entitled to a week's notice. He was not given notice nor did he receive a payment in lieu.

43. From the findings the Tribunal did not consider that the claimant's conduct at the time was considered by the respondent to be a repudiatory breach of contract. The only action identified was that the claimant should not contact the potential customer and possible further training.
- 5 44. In the Tribunal's view it seemed highly unlikely given in the parties' respective positions on delayed payment of wages and performance that the employment relationship would have continued. However, the respondent's decision to terminate the claimant's employment without notice appeared given the timing to be more in response to his continued absence and the
10 tone of his email sent on 27 April 2023 than any alleged misconduct.
45. The Tribunal was not satisfied that the claimant was in repudiatory breach of contract entitling the respondent to terminate the employment contract without notice. The respondent was ordered to pay the claimant one week's pay, being £576.80, in lieu of notice as damages.

15

Employment Judge:	S Maclean
Date of Judgment:	12 October 2023
Entered in register:	13 October 2023
and copied to parties	