IN THE EMPLOYMENT TRIBUNAL (SCOTLAND) AT EDINBURGH

Order and Judgment of the Employment Tribunal in Case No: 4103401/2023 Heard on the Cloud Based Video Platform at Edinburgh on 29th August 2023 at 2.30 pm

Employment Judge J G d'Inverno

Mr Joseph Timoney — **Claimant In Person**

JCW Energy Services Ltd — **Respondent Represented by: Ms Emma Jane Malin, Senior HR Advisor - Breedon Consulting Limited**

ORDER OF THE EMPLOYMENT TRIBUNAL

Edinburgh 29th August 2023

On the claimant's Application, made at the outset of the Hearing, the respondent consenting, allows the claimant to amend the designation of the respondent, by the addition of the letters "Ltd", after the words "JCW Energy Services Ltd, 7 Saxon

Way, Saxon Business Centre, Melbourn, Cambridgeshire, SG8 6DN"; and Directs that the electronic case record be amended to reflect the same forthwith.

Employment Judge: J d'Inverno
Date of Judgment: 06 September 2023
Entered in register: 07 September 2023
and copied to parties

I confirm that this is my Order and Judgment in the case of Timoney v JCW Energy Services Ltd and that I have signed the Order and Judgment by electronic signature.

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The Judgment of the Employment Tribunal is that the claimant's complaint of unauthorised deduction from wages, contrary to the provisions of section 13 of the Employment Rights Act 1996 fails, and is dismissed.

Employment Judge: J d'Inverno
Date of Judgment: 06 September 2023
Entered in register: 07 September 2023
and copied to parties

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REASONS

1. This was a complaint of unauthorised deduction from wages in terms of section 13 of the Employment Rights Act 1996.

2. The claimant appeared in person. The Respondent Company JCW Energy Services Ltd was represented by Ms Malin, an HR Officer, instructed by Mr Mark Radford, Operations Director.

3. In the course of Case Management conducted at the outset of the Hearing, the following relevant matters of fact were recorded as not being in dispute and as agreed between the parties and binding on the Tribunal for the purposes of the Hearing:-

   (a) Whereas the claimant had directed his claim against "JCW Energy Services" and whereas the respondent had lodged an ET3 resisting the claim using the same name, the respondent is, in fact, properly designed JCW Energy Services Ltd. On the claimant's Application, made at the Hearing, the respondent consenting, the Tribunal granted the claimant Leave to Amend the respondent's designation in the ET1 – such as to direct his claim against "JCW Energy Services Ltd".

   (b) The claimant's employment with the respondent was determined, by the claimant, by his resigning with immediate effect on the 28th of April 2023.

   (c) The Effective Date of Termination of the claimant's employment was the 28th of April 2023.

   (d) During the course of his employment the claimant had the possession and use, for work purposes, of one of the respondent's transit vans vehicle registration WN71 MUW.

(e) The claimant's employment with the respondent was regulated by a written Contract of Employment which incorporated, by reference, the terms of the "Company Handbook" and the respondent's "Driving for Work Handbook" (all 3 documents were produced).

(f) The terms of insurance maintained in respect of the company's vehicles, including the vehicle used by the claimant ("the claimant's van"), were subject to a £1,000 excess on any claim.

(g) In terms of paragraph 9 of the Driving for Work Handbook ("the Driving Handbook") drivers were obliged, in the event of their involvement in any collision or occurrence of any damage to a vehicle, to report the details, including the details of any damage to the vehicle immediately to the respondent and, at the same time record the details of the damage including taking contemporaneous photographs of damage to the vehicle, all at the time of the incident.

(h) Paragraph 10.2 of the Driving Handbook provides:

> "*Should no information and photos be provided by the driver to the Senior Company Administrator or driver's Line Manager at the time of the incident, or within 24 hours of the incident if at the time is not possible, the company reserves the right to charge the full £1,000 insurance excess to the driver."*

(i) The section of the "Employee Handbook" dealing with the return of vehicles provides in its last sentence "*We will also deduct/or pursue you for the cost of unreported damage. This is an express written term of your contract of employment."*

(j) It is the practice of the respondent to operate that clause up to and including the maximum policy excess of £1,000 in respect of any one vehicle.

(k) The claimant's written terms and condition of employment constituted a prior written authorisation for the purposes of making such a deduction from the claimant's wages, in terms of section 13 of the Employment Rights Act 1996.

(l) The respondent's position was that as at the time of uplift from the claimant of his vehicle there existed on it damage to one of the doors and corresponding wheel arch and to one of the rear lights, the cost of repair of which amounted to £1,280.40 inclusive of VAT.

(m) The respondent accordingly incurred the loss of and required to make payment of the whole £1,000 policy excess in respect of the insurance claim made in relation to the claimant's vehicle.

(n) The claimant's position was that of asserting, that at the time of uplift from him, there was no damage of any sort existing on the vehicle and in particular, neither the damaged rear light nor the damage to the door and corresponding wheel arch which were the subject of the repair costs were present.

(o) The respondent accepted, for its part, that in the event that the Tribunal were to find on the balance of probabilities that no such damage was present on the vehicle at the point of its uplift from the claimant then it would not have been entitled to deduct and retain from the claimant's last wage £1,000.

(p) When making payment to the claimant of his last salary, on 28th of April 2023, the respondent made a deduction and retained the sum of £1,000 in operation of paragraph 10.2 of the Driving Handbook, in respect of a deduction of £1,000 in respect of the

insurance policy excess relating to cost of repair of damage which had occurred to the claimant's van.

(q) The claimant, for his part, accepted that in the event that the Tribunal was to find, on the balance of probabilities, that the damage to his van, to which the repair invoice at page 98 of the bundle refers, did exist at the point of the van being uplifted from him, then he would be liable to meet the cost of the policy excess and, the cost of repairs exceeding the excess, that the respondent's would be entitled to recover the policy excess of £1,000 from his final salary payment and that accordingly the deduction would not be an unauthorised deduction in terms of section 13 of the Employment Rights Act 1996.

(r) That accordingly, the only material issue in dispute between the parties requiring investigation and determination by the Tribunal was whether the damage to the vehicle had occurred while it was in the care and possession of the claimant.

The Issue

4. The issue for investigation and determination by the Tribunal at Hearing was:-

Whether the damage to the claimant's transit van WN71 MUW, which was the subject of the repair work itemised on Invoice Number 2630 issued by J Mullen, Specialist Coach Works on 26/05/2023 in the VAT inclusive sum of £1,280.40 (copied and produced at page 96 of the Hearing bundle), was damage which was present on the vehicle at the point of its uplift from the claimant at or about 15:19 on the 28th of April 2023, as is asserted by the respondent and in which case it is accepted by the claimant that the £1,000 deducted from his last salary through the operation of clause 10.2 of the Driving Handbook will fall to be regarded as an "**Authorised Deduction**" and the claimant's claim will fail.

Or alternatively, as is asserted by the claimant, was his vehicle free of all damage, including in particular the damage the repair of which is the subject of the invoice at page 96 of the bundle, at the point at which it was uplifted from him, in which case it is accepted by the respondent that the £1,000 deduction made by them from the claimant's final salary will fall to be regarded as an "**Unauthorised Deduction**" in terms of section 13 of the Employment Rights Act 1996 and the claimant's claim must succeed.

Sources of Documentary and Oral Evidence

5. In accordance with the Tribunal's Case Management Orders, the respondent's representative had compiled, intimated and lodged with the Tribunal a Hearing bundle extending to some 146 pages to which, on the morning of the Hearing there was added, on the direction of the Tribunal, copies of the claimant's written Contract of Employment and of the Employee Handbook, the terms of which were incorporated within the Contract by reference together with, amongst other operating procedures the Driving for Work Handbook, to some of these documents reference was made in the course of evidence and submission.

6. The Tribunal heard evidence for the respondent from Mr Tony Friel, the claimant's former Supervisor, and from Mr Matt Jackson, a former engineering work colleague of the claimant (on oath and or on affirmation). Both witnesses answered questions in cross examination and questions from the Tribunal.

7. The claimant gave evidence on his own behalf, on oath. The claimant answered questions in cross examination and questions from the Tribunal.

8. On the oral and documentary evidence presented the Tribunal made the following additional essential Findings in Fact, restricted to those relevant and necessary to the determination of the issue.

9. At the time of the claimant's resignation he had in his possession a set of tools and the transit van registration number WN71 MUW ("the claimant's van"), both of which belonged to the respondents and under the claimant's terms and conditions of employment required to be delivered up (returned by him) to the respondent.

10. The procedure normally followed would be for the claimant to meet with appropriate employees of the respondent, to give delivery of the vehicle and the tools, at which time a contemporaneous check of the tools and of the vehicle for any damage would be carried out in the presence of the claimant with parties agreeing and recording on the appropriate check sheets any deficiencies in the vehicles returned, and any damage identified on the vehicle.

11. The claimant summarily resigned on the 28th of April which date was the date upon which his salary payment was due.

12. In order to process the payment, the respondents first required to recover from the claimant his issued tools and work vehicle. They required to make arrangements to do so in the course of that same day, 28th April 2023.

13. In the absence of the claimant's Manager, who would normally deal with such recovery, the claimant's Supervisor Tony Friel was tasked with recovering the vehicle and tools from the claimant. As the vehicle required to be driven back from the claimant's home where it was located, he was accompanied by a fellow engineer Matt Jackson.

14. In the course of making arrangements for the recovery the claimant, in an email sent to Mark Radford, the respondent's Operations Director, dated 28th April at 2.05 pm and produced at page 80 of the Joint Bundle, stated "*Your van's ready come get it just a shame you or Craig aren't picking it up. Send the racist he will do.*" In that email the claimant was referring to Tony Friel.

15. The claimant had separately stated to Tony Friel, prior to the 28th of April 2023 "*Don't show your fucking face at my door*".

16. Tony Friel, while accepting in the absence of the claimant's Manager he as Supervisor required to deal with the recovery, was uncomfortable in personally dealing with the recovery face to face with the claimant including the carrying out of the vehicle check.

17. The respondent's Directors/Managers, in those circumstances, instructed Mr Friel to depart from what would have been the normal practice of carrying out the vehicle check in the presence of the claimant at the point of pick up, and rather, to first recover the vehicle and, at the first possible opportunity on the journey back, to stop and then carry out and document the vehicle check.

18. On the 28th of April 2023, at approximately 15:19, Tony Friel accompanied by Matt Jackson drove to the claimant's home. Mr Friel remained with his vehicle while Mr Jackson carried out the tools check with the claimant and recovered the claimant's vehicle.

19. Mr Jackson did not carry out the vehicle check as that was a check which required to be carried out by Mr Friel in his capacity as Supervisor. In the course of carrying out the tools check, Mr Jackson noticed the damage to the rear light on the claimant's car.

20. Mr Friel and Mr Jackson left the claimant's home at about 15:40 with Mr Friel driving his own vehicle and Mr Jackson driving the claimant's vehicle.

21. Both vehicles proceeded to a nearby Tesco car park where they arrived at 15:56. Upon parking the vehicles at the Tesco car park, Mr Friel, in the presence of Mr Jackson, carried out the vehicle check. Both noted damage to the vehicle as follows: a dent on the nearside rear door extending to the wheel arch and a smashed nearside rear light, all as noted on the vehicle inspection check sheet which is produced at page 83 of the bundle.

22. Mr Friel, again in the presence of Mr Watson took contemporaneous photographs which are produced at pages 84 to 87 of the Bundle and which show the recorded damage.

23. Understandably, Mr Timoney was not in a position to give any evidence as to what had occurred to the vehicle in the course of its 20 minute journey from his home to the Tesco car park beyond asserting at the point at which it commenced that journey it was wholly undamaged including in respect of the particular damage now alleged by the respondents. On the evidence of the respondent's witnesses neither of the vehicle drivers stopped between leaving the claimant's home and arriving at the Tesco car park. Nor were they away from the vehicles at any point before carrying out the vehicle check and noting the damage observed and photographing it.

24. Notwithstanding the above where the issue of causation is in dispute it cannot be determined by a process of elimination but rather by the application of the balance of probabilities test. The court must be satisfied on credible and sufficiently reliable evidence that it is more probable than not that the damage occurred, in this case in circumstances asserted by the respondents.

25. I found the evidence of both Mr Friel and Mr Jackson as to the non occurrence of damage to the vehicle in the course of the 20 minute journey between the claimant's house and the Tesco car park, to be both credible and reliable (that the damage had not occurred). That position was supported by the evidence of Mr Jackson that although not carrying out a vehicle check he did, in the course of carrying out the tool check with the claimant while the vehicle was still at his house he did notice the damage to the rear light as already being in existence. While it was apparent from the evidence that there existed a considerable degree of animosity between the claimant on the one hand and Mr Friel on the other, no such motivation for being dishonest in his account of matters was directed against Mr Jackson whom I found to be a wholly credible and reliable witness in relation to the limited matters to which he spoke. While Mr Timoney's position at the outset of the Hearing was that there was no damage whatsoever to the vehicle at

the point at which he delivered it up to Mr Jackson, he ultimately qualified his evidence by the application of the phrase "*To my knowledge*". Mr Timoney explained in evidence that what he meant by that was that while he thought it unlikely given the nature of the damage, it was possible that it had occurred while the vehicle was in his possession and that he had just not noticed it. Such a possibility is not inconsistent with the respondent's witnesses' account and the respondent's asserted position.

26. On the oral and documentary evidence presented I am satisfied that the respondent has discharged its onus of proof and has established, on the preponderance of the evidence and on the balance of probabilities, that the damage to the vehicle had occurred prior to the claimant delivering it up to Mr Jackson on the 28th of April 2023 and I so find in the fact. On the basis of parties' agreed positions it follows, from that finding, that the deduction made from the claimant's final salary falls to be regarded as an "authorised deduction" for the purposes of section 13 of the 1996 Act and that accordingly the claimant's complaint of unauthorised deduction from wages fails and is dismissed.

27. In so holding it was not necessary for me to regard the claimant as an incredible witness the possibility, ultimately confirmed by him in evidence, that the damage had occurred when the vehicle was in his possession but that he had simply not been aware of it, being a position consistent with the account of the respondent's witnesses and the respondent's asserted position.

Employment Judge: **J d'Inverno**
Date of Judgment: **06 September 2023**
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I confirm that this is my Order and Judgment in the case of Timoney v JCW Energy Services Ltd and that I have signed the Order and Judgment by electronic signature.