EMPLOYMENT TRIBUNALS

Claimant: Mr M Woods

Respondent: Everyman Motor Racing Activities Limited

Heard at: Leicester Employment Tribunal

On: 29 November 2023

Before: Employment Judge Welch

REPRESENTATION:

Claimant: In person
Respondent: Ms Sanderson, Head of Operations for the respondent

JUDGMENT having been sent to the parties on 15 January 2024 and written reasons having been requested by the respondent on 23 January 2024 in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided:

REASONS

1. The claimant was employed by the respondent as a Workshop Administration Assistant from 18 May 2021. He had previously been engaged as a contractor for some time prior to his employment commencing.

2. On 8 December 2022, the claimant issued proceedings in the Employment Tribunal following a period of early conciliation that started on 22 September 2022 and finished on 27 September 2022. The claim was for unfair dismissal and unlawful deductions from wages.

3. The unfair dismissal claim was struck out following a strike out warning on the basis that the claimant had insufficient service to claim unfair dismissal. Upon reconsideration, the strike out Judgment was initially reinstated by Employment Judge Adkinson, but, following a hearing, was struck out again on the basis that despite the claimant's prior engagement by the respondent he still had insufficient service as an employee to make such a claim.

4. Employment Judge Adkinson gave case management orders about sending relevant documents to each other and the Tribunal for this hearing.

The hearing

5. I was provided with a bundle of documents from the respondent, who additionally referred to three documents from the earlier bundle they had prepared for the reconsideration hearing. The claimant had also sent in a bundle of documents relating to his schedule of loss together with supporting documents, although these were already contained within the respondent's bundle.

6. The claimant referred to one additional document being what appeared to be a printed out list of his payslips, which he said identified that he had not received a payslip for August 2022. However, the respondent objected to this document being considered and it was not necessary to refer to it in coming to my decision.

7. The claimant and Ms Sanderson, Head of Operations gave oral evidence at the hearing. They were given the opportunity to question each other and were questioned by me. They both addressed me orally on the case.

8. The hearing was listed for 2 hours, but started late due to the respondent not arriving on time due to travel/ parking issues.

9. Having heard all of the evidence and the submissions, we went over the 2-hour listing, with the agreement of both parties. I gave my decision on the day.

Findings of fact

10. The claimant had been employed as a Workshop Administration Assistant from 18 May 2021. The claimant's signed contract of employment dated 18 May 2021 provided the following clauses:

Clause 3.5

"*The parties acknowledge that you are a highly skilled/highly paid employee who is key to the business of the [respondent] and that replacing you at short notice will result in significant cost to the [respondent]. If, therefore, you leave the [respondent] without working the appropriate period of notice, the [respondent] reserves the right to recover a sum equal in value to the salary payable for the shortfall in the period of notice. The [respondent] reserves the right to recover such sum from you as a debt, including by deducting the sum from any final payment due to you. You agree that this provision is intended to be a genuine pre-estimate of loss which may be suffered by the [respondent] due to you leaving at short notice and in no way constitutes a penalty.*"

Clause 13 Deductions from Pay

"*For the purposes of the [Employment Rights Act 1996], you hereby authorise the [respondent] to deduct from your remuneration any sums due from you to the [respondent] including, without limitation, any overpayments*

of salary, overpayments of Annual leave pay, whether in respect of Annual Leave taken in excess of that accrued during the holiday year, or otherwise, loans or advances made to you by the [respondent], any fines incurred by you and paid by the [respondent], the cost of repairing any damage or loss to the [respondent's] property caused by you and all losses suffered by the [respondent] as a result of any negligence or breach of duty by you."

29 Entire agreement and former service agreement(s) clause.

"*29.1 This Agreement constitutes the entire agreement and understanding between the parties, and you agree that you have not been induced to enter into the employment by and has not relied upon any Pre-Contractual Statement….*

29.3 . The parties do not intend the terms of this Agreement to be varied by implication due to any custom, practice, usage or course of dealings. No variation of this Agreement shall be effective unless agreed in writing by both parties."

11. The claimant also signed a separate Deductions from Pay Agreement. This contained a number of rules relating to the clocking in system. It contained provisions for deductions from pay should there be any clocking in errors, or lateness and also for payment of fines for being late. Further, the Deductions from Pay Agreement provided at clause 6:

"*Vehicle Stock or Property Damage*

Any damage to vehicles, stock, or property (including non-statutory safety equipment) that is the result of your carelessness, negligence or deliberate vandalism will render you liable to pay the full or part of the cost of the repair or replacement...

Any loss to us that is the result of your failure to observe rules, procedures or

instruction or is as a result of your negligent behaviour or your unsatisfactory standards of work will render you liable to reimburse to us the full or part of the cost of the loss.

In the event of an at fault accident whilst driving one of our vehicles you may be required to pay the cost of the insurance excess.

In the event of failure to pay, such costs will be deducted from your pay."

12. Clause 11 – Period of Notice

"*If you terminate your employment without giving or working the required period of notice, as indicated in your individual statement of main terms of employment, you will have an amount equal to any additional cost of covering your duties during the notice period not worked, deducted from any termination payment due to you. You will also forfeit any contractual accrued holiday pay due to you over and above your statutory holiday pay. If you fail to give or work the required period of notice*."

13. Further the respondent relied upon another additional agreement, which they called the Portal Agreement, although no copy was provided to the Tribunal for the purposes of the hearing. The respondent's evidence was that the Portal Agreement was signed by the claimant when taking members of the public on drives around circuits. This provided that should the cars spin whilst being driven on the track by members of the public, the instructor would be liable to pay the sum of £25 and also be responsible for any damage caused. The respondent's rationale for this was that the respondent considers health and safety to be of prime importance and so wanted to ensure that its instructors prevent such things happening. There was no evidence of this agreement, however, nor how this related to the claimant's contract of employment.

14. It was clear that the respondent had made a series of deductions from the claimant's pay on a regular basis, as accepted by Ms Sanderson on behalf of the respondent. These related to either damage allegedly caused to vehicles by the claimant's negligence/ fault, attendance/ time issues (as set out in the Deductions from Pay Agreement) and amounts for spinning vehicles whilst instructing members of the public.

15. The respondent relied upon the clause in their contract of employment enabling them to make these deductions from pay.

16. The respondent made the following specific deductions from the claimant's wages:

    a. Attendance / Time deductions for being late in the sum of £424.06 from 31 July 2021 until 31 July 2022;

    b. The sum of £150.00 on 30 June 2021 in respect of alleged damage to a vehicle having driven over a ramp;

    c. The sum of £25.00 on 31 October 2021 for spinning a vehicle being driven by a member of the public;

    d. The sum of £138.00 on 31 March 2022 for being in a vehicle when a member of the public spun it, thereby causing damage to it;

    e. The sum of £356.81 on 31 July 2022 for damage caused to vehicle in transit on 20 July 2022;

f. A further £30.00 on 31 July 2022 for the loading of a vehicle which was damaged on 9 July 2022;

g. The sum of £1,228.00 on 31 August 2022 in part for damage caused to a vehicle in transit on 9 July 2022 and a refuelling incident on 29 July 2022;

h. The sum of £791.93 on 30 Sept 2022 for failing to work his notice period; and

i. Holiday pay in the sum of £961.15 which was owed but was offset against the amounts the respondent considered was due from the claimant in his final pay.

17. The claimant's evidence, which was accepted by the respondent, was that the claimant was never shown any invoices, estimates or breakdowns for any of the repair costs relating to damage allegedly caused to vehicles by the claimant's negligence. The respondent's documents provided to the Tribunal contained pictures of vehicles which it said had been damaged by the claimant's failures, but there was no supporting documentation for this.

18. The respondent's evidence was that, whilst estimates/ quotations had been obtained, the work had been carried out in house. There were therefore no invoices provided nor any evidence, external or otherwise, of what costings/ quotations and/or parts were obtained. There was certainly no evidence before me of the specific amounts claimed other than what was stated by the respondent within the bundle of documents. For example, within the statement of Ryan Edmonds, who did not attend the Tribunal to give sworn

evidence, he stated at paragraph 13 that he had requested a quote for the cost to repair a Barricade car and gave amounts relating to different elements (including a £50 administration fee), although no such quotes were provided, nor invoices relating to those costings.

19. It was accepted that the claimant had only been paid £1,000 in respect of his salary payable on 31 August 2022. The amount of £1,000 was stated by the respondent to be an advance in respect of wages owed to him, to enable him to have sufficient funds to pay his rent. There was no payslip for 31 August 2022 and the claimant's evidence was that he had never received any such payslip. I accept this to be the case. As his average pay during his employment was £2,288.00 per month, I calculate that deductions were made from his pay on 31 August 2022 in the sum of £1,288.00.

20. The respondent's evidence was that the claimant was entitled to 10 days' holiday pay, namely £961.50 and that this would have been paid in his final payslip had the respondent not made deductions from the claimants pay in respect of alleged damage caused to vehicles. I therefore accept that there was a deduction of £961.50 from the claimant's final salary in respect of unpaid and owing holiday pay, even though this is not specified in his final pay slip.

Submissions

21. Both parties addressed me briefly on the case. The respondent asked that the claims be struck out on the basis that they were scandalous/ vexatious as there was an attempt by the claimant to mislead the Tribunal in providing a statement which the witness had not given. The respondent said that a lot of what the claimant said in the hearing was not supported by evidence. The

respondent's intention was to ensure the health and safety of individuals and that information had been provided to the claimant about the deductions throughout his employment.

22. The claimant's submissions were that he was entitled to receive his pay and that the deductions should not have been made.

Law

23. Section 13 of the Employment Rights Act 1996 ('ERA') provides protection for employees in respect of unlawful deductions from wages. It provides:

"(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.

…

(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…."

24. I considered the time limits in respect of bringing a claim for unlawful deduction from wages in coming to my decision.

Section 23 "Complaints to employment tribunals

(1) A worker may present a complaint to an [employment tribunal]—

(a) that his employer has made a deduction from his wages in contravention of section 13 …

(2) Subject to subsection (4), an employment tribunal shall not consider a complaint under this section unless it is presented before the end of the period of three months beginning with—

(a) in the case of a complaint relating to a deduction by the employer, the date of payment of the wages from which the deduction was made, or

(b) in the case of a complaint relating to a payment received by the employer, the date when the payment was received.

(3) Where a complaint is brought under this section in respect of—

(a) a series of deductions or payments, …

the references in subsection (2) to the deduction or payment are to the last deduction or payment in the series or to the last of the payments so received."

Conclusion

25. There were no grounds on which to strike out the claimant's claims. The statement referred to did not form part of the evidence before me, and it was quite possible for an individual to have given a statement and have denied doing so when asked by the respondent. Therefore, I had to consider the substantive claim.

26. I firstly considered whether I had jurisdiction to consider some of the claimant's claims, as they appeared on the face of it to have been presented out of time. However, in considering the regular occurrence of deductions made from the claimant's salary, I am satisfied that there was a series of deductions in this case, resulting in the final deduction being made from this salary on 30 September 2022, which makes all earlier deductions within time. I therefore have jurisdiction to consider all of the claimant's claims for unlawful deductions from wages.

27. Clause 13 of the claimant's contract of employment did provide for deductions from the claimant's pay. However, this clause did not provide for deductions for the attendance/timekeeping fines which appear in the Deductions from Pay Agreement. As the claimant's contract of employment has an entire agreement clause within it, I am not satisfied that the Deductions from Pay Agreement forms part of that contract. The respondent asserted that the entire agreement clause related to pre-contractual statements, but I am not satisfied that the wording within the contract of employment supports this. The clause is clear that the contract of employment forms the entire agreement between the parties.

28. In order to enable an employee to know the types of deductions to be made from their salary, it is important for employers to be specific about the deductions to be made. Any ambiguity is construed against the employer, who will be seeking to rely upon the clause to make any such deductions.

29. In this case, there are many deductions for what were referred to as attendance/time off issues. These were not contained within the contract of employment, and I am therefore not satisfied that they were lawfully made.

30. There were additional amounts deducted for alleged damage to vehicles, either caused when members of the public spun the vehicles whilst under the claimant's supervision, when the claimant allegedly failed to properly check that the transporter decks were locked in, or when the claimant had fuelled Ms Sanderson's car with the wrong type of fuel.

31. The problem with all of these claims is that the respondent has failed to demonstrate the actual losses suffered as a result of the claimant's alleged failures. There needs to be a considerable degree of scrutiny over employers acting as Judge and Jury in making deductions from pay due to the vast disparity in economic power between the employer and the employee.

32. Without any evidence of invoices, quotes, estimates, receipts or any other information before me, it is impossible for me to assess whether the amounts deducted were properly incurred by the respondent due to the claimant's alleged conduct.

33. Therefore, particularly as the claimant's evidence, which I accept, was that the respondent never provided any information to the claimant of the basis for these deductions, I cannot say that these were lawful deductions.

34. In respect of the deduction for an amount equal to what the claimant would have earned during his notice period, clause 3.5 does not seek to provide a proper estimate of the losses that the respondent may suffer as a result of the claimant's failure to work his notice. It is, in my view, a penalty clause and is therefore unenforceable. This is despite the wording of the clause seeking to affirm that it is not a penalty clause.

35. In any event, even if this were not a penalty clause, in light of the respondent's unlawful deductions from pay, I consider that the claimant was entitled to leave without working his notice due to the respondent's fundamental breach of contract in failing to pay the salary to which he was entitled. Therefore, the claimant was not in breach of contract in failing to work his notice. Rather, he accepted the respondent's fundamental breach and, as such, the respondent was not entitled to reduce the claimant's pay by the amount equal to the pay he would have received had his notice been worked in full.

36. Finally, there is no basis on which to withhold the claimant's holiday pay, since it relates to alleged damage to vehicles for which no documentary evidence had been provided of the losses suffered.

37. In light of the above, I award the claimant the gross total sum of £4,104.95

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Employment Judge Welch

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Date of written reasons: 16 February 2024

REASONS SENT TO THE PARTIES ON

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FOR THE TRIBUNAL OFFICE