EMPLOYMENT TRIBUNALS

Claimant: Mrs Hyounsuk Kim

Respondent: True World Foods (UK) Ltd

Heard at: Watford Employment Tribunal **On:** 14 February 2024

Before: Employment Judge Young (sitting alone)

Representation
Claimant: Mr Panev (husband of the Claimant, lay representative)
Respondent: Mr S Park (Solicitor)

JUDGMENT having been sent to the parties of Employment Judge Young's judgment dated 14 February 2024 and written reasons having been requested in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided:

REASONS

Introduction

1. The Claimant was employed by the Respondent an importer and distributor of premium Japanese consumable products, as a Sale Representative from 16 November 2015 until her resignation with notice on 31 January 2023. The Claimant contacted ACAS for early conciliation on 3 April 2023. The ACAS early conciliation certificate was issued on 15 May 2023. The Claimant presented her claim for unlawful deduction of wages on 11 June 2023.

Hearing

2. The matter was heard in 3 hours. The Claimant was represented by her husband Mr Stefan Panev who was a school teacher. Mr Panev had no legal training. The Respondent was represented by Mr Sungjin Park a solicitor. I received an agreed bundle of 78 pages. The Respondent also provided late disclosure in the form of 21 pages by 2 emails, the first dated 13 February 2023 at 19:27 and the second email dated 14 February 2024 at 08:55. The 13 February 2023 at 19:27 email was labelled A1-A16. Mr Panev did not object to the inclusion of these additional documents. The

second email dated 14 February 2024 at 08:55 was labelled B1-B5. Mr Panev said that he had not had sufficient time to consider the documents and that he had only received those documents that morning. I asked the Claimant if she had seen the emails before at B1-B5, the Claimant accepted that she had. In those circumstances, I considered that there was no prejudice to the Claimant regarding the late disclosure and the documents were relevant to the issues to be determined and permitted their admission.

3. I heard evidence from the Claimant who did not have a witness statement and so with agreement by the parties her ET1 stood as her witness evidence. I also received a written but unsigned witness statement from Mr Mitchell Drijver, who gave evidence on behalf of the Claimant. I received 2 witness statements from the Respondent, Mr Bongjin Jung, Managing Director of the Respondent and Mr Beng Hooi Chan, Operations Manager, both of whom I also heard oral evidence from.

Findings of fact

4. Only findings of fact relevant to the issues, and those necessary for the Tribunal to determine, have been referred to in this judgment. It has not been necessary, and neither would it be proportionate, to determine each and every fact in dispute. The findings of fact are made on a balance of probabilities. All numbers in square bracket are page references to the bundle and additional documents.

5. The Claimant was employed by the Respondent as a Sales Representative beginning on 16 November 2015 under a contract of employment dated 20 November 2015 ('Employment Contract'). The contract of employment was signed by the Claimant on 20 November 2015. Although the contract of employment states the employer as Sun Ocean Ltd. This was a former name of the Respondent.

6. Clause 6 of the Employment Contract states that 'The company is authorised to deduct any sums due to it from your salary'. [39]

7. The Claimant was a home worker when she worked for the Respondent. The Respondent had a home working policy which applied to the Claimant. The Home working policy said at clause 4.1.1 (b) that the company will provide a business telephone line [48]. The Claimant accepted in evidence that the phone line belonged to the company.

8. In 2021, it was agreed between the parties that the Claimant would buy what was then a brand-new phone, Samsung Galaxy S21+, directly from the manufacturer and in turn the Respondent would reimburse the phone cost to the Claimant subject to the limit of £800. Mr Chan's evidence was part of that agreement was for the Respondent to pay for the phone for the Claimant to use during her employment and for it to be returned back to the Respondent on termination of the Claimant's employment because the phone belonged to the Respondent. However, this arrangement was disputed by the Claimant. The Respondent had an asset register of mobile phones and had the Claimant's phone on that list [58]. The Claimant gave

evidence that she paid an extra £400 on top of the £800 reimbursed to her and that is why she believed that the phone was hers. It was not disputed by the Claimant that the Respondent reimbursed the Claimant for the phone to the tune of £800.00. I find that the Respondent would not have reimbursed the Claimant for the phone unless the phone belonged to them. Coupled with the fact that the Claimant's phone was on the Respondent's asset register, I find the phone belonged to the Respondent.

9. The Claimant resigned by email dated 29 December 2022. The resignation was accepted by the Respondent the next day on 30 December 2022. By email dated 31 December 2022, Mr Chan, the Head of Sales and Operations, emailed the Claimant with a request to return the company work phone [B2-B3]. The Claimant did not respond to this email as she was unwell. I accept the Claimant's evidence on this point. Mr Chan sent another email dated 3 January 2023 offering to have the mobile phone amongst other things collected from the Claimant's home if necessary [B1]. Mr Chan received no response from the Claimant. However, the Claimant did respond to a request to fill in a form. Yet, at no point did the Claimant ever challenge Mr Chan's email regarding the return of the phone because it belonged to her. I find that the Claimant was well enough to fill in a form she could have responded to Mr Chan's email about the mobile phone. I find that the Claimant did not challenge Mr Chan's email because she knew that the phone belonged to the Respondent. This was further supported by the Claimant's attempt to challenge the proprietorship of the phone by saying that it wasn't true that there was no additional arrangement for the Claimant to keep the phone. The Claimant would not need to challenge this if the phone belonged to her and she believed that it did.

10. The Respondent disputed that it was never agreed with the Claimant that the Galaxy S21+ was her phone to keep beyond her employment. However, the Claimant did not give any evidence of such an arrangement. I accept Mr Jung & Mr Chan's evidence that there was no arrangement at all. Mr Drijver gave evidence that he was allowed to keep his phone but accepted also that he had this arrangement because his phone number and the phone belonged to him and that he had an allowance in relation to the standing charge for the phone line. He knew nothing of the arrangements between the Claimant and the Respondent. I find that Mr Drijver had a different arrangement, and his circumstances were not similar to the Claimant's. The Claimant did not dispute that she did not return the mobile phone on termination of her employment, but she now had a different phone number to the one she had at work. I find that the Claimant did not return the mobile phone.

11. Clause 6 of the Claimant's contract of employment states under renumeration "*Your entitlement to salary accrues on a daily basis payable monthly in arrears on the last day of the month….Payment will be made by direct credit transfer to your nominated account"* [39].

12. On 31 January 2023, the Respondent deducted £800 from the Claimant's final monthly salary [65].

The Relevant Law

13. The general prohibition on deductions from wages is set out at section 13 Employment Rights Act 1996 ("ERA 1996") which provides, as far as is relevant:

"

(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."

7. Under section 13(3) ERA 1996 any shortfall of the wages properly payable to the worker, amounts to a deduction, unless there is an exclusion by statute.

8. By section 27 ERA 1996, 'wages' means any sums payable to the worker in connection with his employment and covers any fee, bonus, commission, holiday pay or other emolument referable to the employment.

9. For a payment to fall within the definition of wages properly payable, there must be some legal entitlement to the sum in question (New Century Cleaning Company Limited v Church [2000] IRLR 27, CA). To determine whether any sum is properly payable to an employee as part of an unlawful deduction from wages claim, the Tribunal can resolve any dispute as to the meaning of the contract relied on (Agarwal v Cardiff University and anor [2018] EWCA Civ 2084).

10. A claim under section 23 ERA 1996 for unauthorised deductions from wages must be submitted to the Tribunal before the end of the period of

three months beginning with the date of payment of the wages from which the deduction was made.

Analysis & conclusions

14. The contract of employment at pages 37-43 did apply to the Claimant. Mr Panev sought to argue in submissions that the contract of employment did not apply to the Claimant because the employer was Sun Ocean Ltd and that the Claimant had many promotions since she signed the contract of employment. However, at page 61-64 of the bundle, Mr Panev submitted a defence note that does not mention this argument at all. Mr Park submitted that the Claimant was TUPE transferred to the Respondent as some point before 2022. Mr Park came back after I was ready to give judgment to correct himself and say that Sun Ocean was a name change and that he checked this with companies' house. I had checked myself with Companies House to verify the point. I noted that there was a name change in 2016 from Sun Ocean Ltd to True World Foods (UK) Ltd. In those circumstances, as a matter of law the Respondent can rely upon the contract as applying to the Claimant. That being the case, clause 6 of the Employment Contract *"The company is authorised to deduct any sums due to it from your salary"* did authorise the Respondent to make a deduction from the Claimant's salary in relation to sums owed to them. The sum was owed to them of £800 because the Claimant did not return the phone which belonged to the Respondent.

15. The Claimant's wages for the month of January 2023 were properly payable to her under her contract of employment. The amount of £800 was a deduction because it meant that the amount of the Claimant's monthly salary fell short of the amount properly payable. However, the deduction was an authorized deduction because the arrangement of reimbursement of the phone coupled with clause 6 of the Employment Contract *"The company is authorised to deduct any sums due to it from your salary"* fell within section 13(1)(a) ERA 1996.

16. I was not convinced by Mr Park's submission that there was no deduction under s13(3) ERA 1996, because the amount properly payable to the Claimant did not include £800 because the Claimant was never entitled to it because of clause 6 *"The company is authorised to deduct any sums due to it from your salary"*. As already determined, the amount properly payable to the Claimant was her monthly salary and that £800.00 was a deduction that was authorised by clause 6 of the contract of employment *"The company is authorised to deduct any sums due to it from your salary"* and the reimbursement arrangement under section 13(2) (b) ERA 1996. The Claimant offered no evidence to contradict the efficacy of the contract of employment or the clause relied upon. I found that neither Mr Jung or Mr Chang made any agreement with the Claimant. For those reasons the Claimant's claim fails and is dismissed.

Employment Judge Young

Dated: 26 February 2024

REASONS SENT TO THE PARTIES ON
4 March 2024
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FOR THE TRIBUNAL OFFICE

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