EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 8000324/2024

Held in Glasgow via Cloud Video Platform (CVP) on 8 July 2024

Employment Judge A Kemp

Mr G Hindman	**Claimant** **In Person**
Transafe Logistics Ltd	**Respondent** **Represented by** **Ms A Dytham - Director**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The respondent did not make unlawful deductions from the wages of the claimant under section 13 of the Employment Rights Act 1996 and the Claim is dismissed.

REASONS

Introduction

1. The claim is one for unlawful deductions from wages, firstly in respect of unpaid wages and secondly for accrued holiday pay said to be due. The respondent denies that any sums were due alleging that all amounts due were paid.

2. The claimant is a party litigant, and the respondent represented by one of its directors Ms Dytham. Neither had experience of Tribunal proceedings in such a capacity, and prior to the hearing of evidence I explained how the process would be undertaken, about the giving of evidence in chief, cross examination, and re-examination, about referring to documents in evidence, and as to making submissions. I also addressed with the parties the issues in the case.

Issues

3. The first issue is whether or not the claimant suffered unauthorised deductions from wages under Part II of the Employment Rights Act 1996. The second is, if so, what sums should be awarded.

Evidence

4. Although case management orders had been made on 27 June 2024 neither party had directly and timeously complied with them. The claimant had provided a Schedule of Loss by email on 1 July 2024. He had sent various email messages with attachments during the course of the management of the case. The respondent sent its documents by email on 4 July 2024. I made allowances for the fact that neither party had professional representation.

5. The claimant gave evidence himself, and the respondent called Mr Stephen Garbett as its only witness. I asked questions of both to elicit the facts under Rule 41.

Facts

6. The claimant is Mr Graham Hindman.

7. The respondent is Transafe Logistics Ltd.

8. The respondent offered the claimant employment with effect from 9 November 2023 after his former employer entered administration. The respondent created a Scottish division as a result of that administration, as its sister company leased vehicles to the claimant's former employer and it sought to keep those vehicles and related staff working.

9. The claimant was employed as an HGV driver. He had worked at premises in Airdrie for his former employer, and continued to do so. He was paid at the rate of £120 gross per day, for five days per week, which rate of pay and hours also continued. He worked on the night shift, which also continued, for between 9 and 12 hours per day.

10. On 9 November 2023 the respondent made a payment of an advance of wages to the claimant and all other employees of the former employer to

whom they had offered employment. That was done as some of the drivers who had been employed by the former employer, including the claimant, had not been paid for about two weeks and some of those drivers (although not the claimant) said that they could not afford to buy petrol for their cars to attend work. The payment was made directly into the bank accounts of each employee, in the sum of £500, and was not documented in any way.

11. On 13 November 2023 Mr Stephen Garbett the Group Operations Manager of the respondent travelled to and attended the Airdrie premises and held a meeting of all staff. It was a meeting that the claimant attended. Mr Garbett stated that the payment of £500 had been made as an advance of wages and would be repaid by the staff from the proceeds of a claim made to the administrator of the former employer for redundancy and other sums due expected after Christmas 2023.

12. On or around 17 November 2023 the respondent prepared, through their agents, a Statement of Main Terms of Employment for the claimant. It was sent to the Airdrie premises. The claimant was unaware of its existence. He was not told about it or sent a copy of it. It was unsigned by either party, although spaces for signatures had been provided for.

13. The claimant was able to access electronically a series of payslips prepared on behalf of the respondent when employed by them. He was aware of the ability to do so during his employment with the respondent. Those payslips provided that during the period of his employment he was paid for a total of eleven days for holiday pay, with four of those days paid at bank holiday rate. For those days the claimant did not work as a driver.

14. The claimant worked as a driver in the period 8 – 10 January 2024. On 10 January 2024 he was informed by WhatsApp message from the Transport Manager of the respondent Derek McLean that a lay off rate of £31 per day would be paid thereafter, as there was no work to do. The claimant did not consider that he could live on such an income, and spoke to Mr McLean about it.

15. On 15 January 2024 the claimant received a message from Mr McLean stating that Mr Garbett would be on the premises in Airdrie that day. On 15

January 2024 the claimant met Mr Garbett. He told him that he would resign from the respondent because of the limited income and that he would seek agency work. Their meeting was not documented.

16. The respondent issued a payslip for the claimant which provided for three working days to be paid at £120 per day, being for 8 – 10 January 2024, and two days at a "lay off" rate of £31 per day, being for 11 and 12 January 2024. It stated that the net sum of £422 was due to the claimant after statutory and other deductions.

17. The respondent did not make that payment to the claimant, as it considered that it was entitled to set off against it the advance of wages payment of £500. It also considered that it had paid more for holiday pay than holidays accrued, and made no payment in relation to holiday pay. It did not meet the claimant or further correspond with him as it was concerned that a message that he had sent constituted a threat.

18. The claimant commenced early conciliation on 24 January 2024. A Certificate was issued on 6 March 2024 and the present Claim was presented on 18 March 2024.

19. Apart from two days around Christmas day 2023 the claimant did not take holidays from work, authorised as such by the respondent.

Submissions

20. Both the claimant and respondent made brief submissions explaining why they considered that they should prevail. The claimant argued that he had not asked for the £500 advance payment, although he accepted that it had been given, nor had he been spoken to about it at a one to one meeting, nor had the arrangements about it been documented. He had not applied for holidays, had not looked at the payslips although accepted that he could have and that not doing so was his fault, but argued that the holidays accrued remained outstanding. The respondent argued that the Statement of Main Terms of Employment document was a contract, that they had had advice that it was in effect, that there had in any event been an overpayment and that the sums sought had all already been paid to the claimant.

The law

21. There is a right not to suffer unauthorised deductions from wages provided for in Part II of the Employment Rights Act 1996, initially in section 13. Wages are defined in section 27 and include wages and holiday pay. For the purposes of this case deductions shall not be made from wages unless by virtue of a relevant provision of the workers contract (section 13(1)(a) or if the purpose of the deduction is made in respect of an overpayment of wages (section 14). The right to make a claim to the Employment Tribunal is provided for at section 23. Section 25 has provisions that include subsection (3) that the Tribunal shall not order an employer to pay an amount "in so far as it appears to the Tribunal that he has already pair or repaid any such amount to the worker."

22. The right to holiday pay is provided for in the Working Time Regulations 1998. It is to 28 days per annum for those working a five day week, as provided in Regulation 13 and 13A. Regulation 14 has provisions for accrued entitlement where employment terminates with a form of pro rata calculation dependent on the period of the employment. The calculation of what sum is due is made under Regulation 16.

Discussion

23. The claimant sought £422 of pay from the payslip and four days of holiday pay he said had accrued to him which was £480, although as discussed below the accrued entitlement was to five days. The sum sought or which might have been due was of the order of £1,000 but the case raises issues in law that are not straightforward.

24. I was firstly satisfied that the Claim was competently before the Tribunal and within its jurisdiction.

25. I considered that both witnesses were giving evidence they genuinely believed to be true. There was some dispute on facts. I generally preferred the evidence of the claimant on some of them. On the issue of the Statement of Terms, referred to below, his evidence was clear, and that from the respondent not. During evidence it was agreed that the claimant had started with the respondent on 9 November 2023 (no issue of whether

that had been a relevant transfer under the Transfer of Undertakings (Protection of Employment) Regulations 2006 was raised). The claimant also made a number of concessions during cross examination, which showed candour on his part.

26. On the issue of when employment ended, it appeared to me inconsistent with the respondent's position, which was that the claimant met Mr Garbett on 10 January 2024 when he resigned, that he had been paid for the two following days. There was a WhatsApp message that appeared to support the claimant to some extent, although it is not impossible that it referred to a potential second meeting after it became clear that the respondent was not to pay the claimant because of the advance of wages, the first having been on 10 January 2024 as Mr Garbett thought in his evidence. In fact the date of termination did not really matter. What matters is whether or not there had been unauthorised deductions as provided for in the statutory provisions referred to. That is the first issue identified above. Whilst the parties had further matters they wished to address (including that the respondent wished to lead evidence from a witness about further behaviour of the claimant they alleged was intimidatory) the case before me is confined to the issues identified above.

27. The first issue identified above is whether there had been unauthorised deductions. The respondent accepts that there was no document in writing providing for the wages otherwise due not being paid, that being a deduction. It argues that there was a contractual term, or that it was an overpayment, or that the sum had in fact been paid.

28. For the first element it was not disputed that the payslip issued at the end of employment provided for £422 net to be paid, and that payment was not made. To that extent it was a deduction, and the focus is on whether or not it was unauthorised.

29. The first question is whether that non-payment was authorised by a provision of the contract. I was satisfied that there was no such contract proved in the evidence. Although a document called a Statement of Main Terms of Employment bearing the claimant's name was tendered in evidence, and had a provision allowing for deduction from wages of any

sums due to the respondent, I was not satisfied that it had ever been sent to the claimant, or that he had been directed to it. He denied ever knowing about it, and I accepted his evidence on that, which was clear and convincing. Mr Garbett was not the person who prepared the document, or provided it, and could speak only to his general knowledge and what he assumed happened. The person who was the local manager in Airdrie, he said, would have attended to it, and drivers would have known by "word of mouth". That person was not however called to give evidence. The evidence of Mr Garbett whilst competent was not even hearsay on this aspect, but at best on the basis that he told the manager there what to do. That is, in my view, no basis for considering that the document was contractual in effect or had been seen by the claimant.

30. There are other reasons. It does not bear to be a contract of employment, but a statutory statement. It was not signed by anyone although there was a preprepared space to do so. It was also not referred to at all in the Response Form. A statutory statement issued under section 1 of the Employment Rights Act 1996, which is required to be done on the first day of employment, can be evidence of the terms of contract if not a contract of employment itself. But section 1 states that the employer "shall give" the worker that statement. That implies passing it to the worker by hand, post, email or similarly. Simply leaving it in an office and hoping that word of mouth leads the worker to understand that it is there to be collected does not appear to me to be giving the worker such a statement.

31. The law of contract requires agreement, what in law is referred to as *consensus ad idem*. For that the employee must be aware of the terms proposed. For similar reasons as in the preceding paragraph the respondent has not in my opinion proved that the claimant either did agree specifically, or should be considered to have agreed by knowledge of the terms and working to them. The respondent did not prove such knowledge, and as stated the claimant's evidence of the lack of any knowledge I accepted.

32. The ability not to make the payment otherwise due as wages was not therefore provided for by such a purported contract, or document, and that potential defence fails.

33. The second element is whether the advance of wages was an "overpayment" for section 14 purposes. It is not a term that is defined. It was given a broad meaning in ***Ridge v Her Majesty's Land Registry UKEAT/0098/10.*** That case was however mainly concerned with an itemised pay statement. Having regard to the statutory context and the authority below which refers to the purpose of the provisions, it appears to me that an advance of wages can fall within the definition of an overpayment of wages. An overpayment is a sum greater than the entitlement to wages at that time. It appears to me that it was that. The claimant knew about it, as he was present at the meeting on 13 November 2023 and was told what it was. Whilst the respondent had not documented it in any way, that is not in my opinion determinative on this particular point. On that basis, the payment of £500 falls within the term "overpayment" in section 14, in my opinion and not paying the £422 as a means of recovering most of that overpayment was not therefore an unauthorised deduction.

34. The third element is not therefore strictly necessary, but is dealt with for completeness and lest I am wrong in the previous paragraph. It is whether the sum sought has been paid, as provided for in section 25. That general issue was considered in ***Robertson v Blackstone Franks Investment Management Ltd [1998] IRLR 376*.** The case concerned a worker whose remuneration consisted solely of payments of commission. In order to assist the claimant in the initial period of his employment the employer made an advance payment to him against future commissions to be paid in monthly instalments for a period of six months and repayable within the first two years of the contract. The Court of Appeal concluded that the advance payments should be taken into account under s 25(3). This, it held, accorded with the purpose of the statutory scheme that workers receive their wages in full at the time at which they were due.

35. That decision is not technically binding on me, but is very highly persuasive as it is in respect of a statutory provision having effect in Great Britain. I consider that I should follow it, and that it sets out the construction of section 25. It also accords with common sense, in that if sums in fact were given to a worker the money has been received. The claimant in this case

did have the funds, and was aware that it was an advance of wages from the meeting held on 13 November 2023. On that basis. the sum having been paid, no award for the claimant would have been made in this regard in any event.

36. I turn to the next aspect of the first issue, which is the claim for holiday pay. I consider that the employment terminated on the claimant's resignation on 15 January 2024 (the dispute over the date which was either 10 or 12 January 2024 according to the respondent makes a very small but, in this case, not material dfference in the calculation of the holidays that accrued). The accrued holiday pay entitlement during his employment was for five days, one more than the claimant had claimed for. The claimant did not dispute however that he had been paid holiday pay on the payslips, to which he had access, but did not in fact look at, at the time of his employment. His argument is that he did not request holidays, and so the payments should be disregarded. The total holidays paid to him was for eleven days which is more than the five he had accrued. No holidays are therefore outstanding unless the fact that he did not seek, or was informed that he was to take, holidays is to be accepted.

37. It seems to me that his argument for the present claim is not correct in law. The claim is regulated by Regulation 14 of the Working Time Regulations 1998, as it concerns payment for annual leave accrued and due at the point of termination. It is not so much a matter of the taking of annual leave as being paid for the annual leave accrued to that date. The focus therefore is on what he had been paid for annual leave. He had been paid for annual leave of eleven days which is more than the accrued entitlement.

38. On that basis, it appears to me that there was no further entitlement to annual leave, and no unauthorised deduction, but that even if there had been section 25 again operates to negate any award. That the claimant did not look at the payslips which he could have is not, to my mind, of any relevance. Nor is that he had not been told in advance that the days were treated as holidays, and were to be paid. What is material in my view is the fact of payment being made for holidays, as set out specifically in the payslips. The money due for holidays he had received, and section 25

applies on the same basis as set out above. This aspect of the claim also fails.

39. These findings accord with my view of a common sense approach to the issue. The claimant knew about the advance payment, and made no contrary comment at the time (nor would one be expected). The respondent had acted in a way to assist employees who had not been paid by the former employer. Whilst a relevant transfer might have been contended for, that was not an issue before me. On the basis of what was before me, there had been both an advance on wages and payment of holidays above the level of the accrual.

40. I conclude that there were no unauthorised deductions from the wages of the claimant, and I must therefore dismiss the Claim.

41. I should however make it clear that the respondent did not in my view comply with its duties in section 1 of the Employment Rights Act 1996 to which I have referred. That was not part of the claim but even if it had been no award would have been competent as it requires another finding in favour of the employee as it is not a standalone right as to remedy. The failure to document matters properly extended to the advance on wages, and the termination of employment by resignation. The respondent may therefore wish to review its practices in that regard.

Employment Judge A Kemp

Employment Judge

10 July 2024

Date of judgment

Date sent to parties 10 July 2024