



# EMPLOYMENT TRIBUNALS

## Claimant

Mr M Kamal

## Respondent

Embutidos Gamboa Ltd

v

**Heard at:** Watford

**On:** 31 October 2018.

**Before:** Employment Judge Tuck

## Appearances

**For the Claimant:** In person

**For the Respondent:** Mr Clarke, consultant.

## JUDGMENT

The claim of unlawful deduction from wages succeeds in the sum of £153.74 (one hundred and fifty three pounds and seventy four pence).

## REASONS

1. By an ET1 presented on 11 January 2018, following a period of early conciliation between 18 December 2017 and 11 January 2018, the claimant has presented a claim for unlawful deductions from wages.
2. The claim is that the claimant worked as a driver from 16 October 2017 until 2 November 2017, completing 13 days of work. He says he worked 8 hours per day for each of those 13 days, and that the agreed rate of pay was £10 per hour such that he was owed £1040. He in fact received £486.26, and suffered a deduction of £153.74 said to be for "insurance". **The claim is therefore for £553.74.**
3. The ET3 denies the claim. It states that the claimant started work on 17 October 2017 and had his employment terminated on 31 October 2017 (when it was discovered he had a conviction pending for driving without insurance). The respondent says the claimant had two days absence, one on 18 October 2017 to go to an appointment with his pregnant wife and the

second on 25 October 2017 to attend an appointment at the Home Office. It is therefore contended that he completed 8 working days, which at £10 per hour for 8 hours per day gave rise to an entitlement of £640. From that they deducted £153.74 by way of an “insurance premium”.

**Issues.**

4. The two issues for determination, as agreed with the parties at the outset of the hearing are:

4.1 Did the claimant work for 13 days or for 8 days. The dates on which the claimant claimed he was working when the respondent denies this was so are 16, 18, 25 October and 1 and 2 November.

4.2 Was the respondent entitled to deduct £153.74 from the claimant's wages.

**Law**

5. Section 13 of the Employment Rights Act 1996 provides as follows:

- (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.

- (4) Subsection (3) does not apply in so far as the deficiency is attributable to an error of any description on the part of the employer affecting the computation by him of the gross amount of the wages properly payable by him to the worker on that occasion.
- (5) For the purposes of this section a relevant provision of a worker's contract having effect by virtue of a variation of the contract does not operate to authorise the making of a deduction on account of any conduct of the worker, or any other event occurring, before the variation took effect.
- (6) For the purposes of this section an agreement or consent signified by a worker does not operate to authorise the making of a deduction on account of any conduct of the worker, or any other event occurring, before the agreement or consent was signified.
- (7) This section does not affect any other statutory provision by virtue of which a sum payable to a worker by his employer but not constituting 'wages' within the meaning of this Part is not to be subject to a deduction at the instance of the employer.

**Evidence.**

6. I was provided with a bundle of documents consisting of 64 pages, and a written statement from Servhiy Horobets, Managing Director of the respondent – which is a small business employing just two members of staff. The claimant gave oral evidence.
7. The claimant signed a contract of employment dated 17 October 2017 which stated that the “employee will commence permanent full time employment with the respondent on the 16<sup>th</sup> October 2017”. The clauses on payment provided for an annual salary of £20,800, payable at the end of the month. It stated “the employer is entitled to deduct from the Employee’s payment.... any applicable deductions and remittances as required by law”.
8. The claimant told me that he completed training on 16 October, and had been told he would not be paid for that day. He said he did not take time off on 18 October. As to 25<sup>th</sup> he initially said that he had gone to “a part time appointment” and had made up the hours; during cross examination however he said that his home office application had been made on line and he had worked as normal on that date. During questioning of Mr Horobets the claimant’s case was that he had attended the post office on 25<sup>th</sup> October to send documents via a postal order then returned to work.
9. Rotas before me in the bundle indicate that the claimant started on 17 October; that he had a day off on 18 October, and that he was off on 25 October due to a home office appointment.

10. As to 18 October, Mr Horobets said that (as set out in the ET3) that the claimant told him that he wanted the day off to go to a maternity appointment with his pregnant wife; Mr Horobets' statement sets out his suspicion that in fact the claimant was probably attending court in relation to his driving without insurance. During cross examining Mr Horobets the claimant stated (contrary to his oral evidence) that he had attended court on 18 October related to a fine; this contradicted the evidence he had given on oath.
11. In relation to 25 October 2017, Mr Horobets said that the claimant asked him for a letter on 24 October 2017 confirming his employment, to provide to the Home Office the following day. He produced the letter addressed "to whom it may concern". He was adamant that the claimant had taken the day off – as he had put in oral script on the rota.
12. Whilst the claimant was scheduled on the rota to work the whole week commencing 30 October 2017; above the entry for 31 October 2017 there is a manuscript entry saying, "no licence". The claimant had received notification by letter he received on 30 October 2017 that his licence was being revoked as he had been convicted of driving without insurance. He said that he could drive for five more days, then had to return his licence to the DVLA. Mr Horobets asked to see the letter and the claimant took it in on 31 October. The claimant states that he worked on 1 and 2 November, but that he had no evidence of this.
13. Mr Horobets both in the ET3 and orally before me was clear that he considered that the claimant had been dishonest in his application for employment in saying he had a clean driving licence which was untrue. He explained that had the claimant told him that he had a conviction for driving without insurance pending he would not have given him the job – an essential part of which was as a driver – and indeed he had spent some £153.74 on insuring the company vehicle for the claimant.
14. Mr Horobets confirmed that he paid the insurance charges for the other company employee to drive the company vehicle. He said he had deducted the £153.74 from the claimant because the claimant's dishonesty in obtaining the job had caused him this expense.

## **Conclusion**

15. I find that Mr Horobets was an honest witness whose account was consistent with the documents before me.
16. Whilst he had typed into the contractual documents a start date of 16 October, I accept that the claimant attended that day only to produce the documentation necessary to evidence his right to work in the UK and to

speak to the insurance company to be added as a driver on the company vehicle.

17. I accept his evidence both as to the 18 and the 25 October. The burden of proving his loss lies on the claimant and his contradictory evidence has not satisfied that burden. As to 18 October, there is no reason for Mr Horobets to have lied about having been told of a maternity appointment – the claimant has confirmed his wife was pregnant, and given his silence as to a court appointment which during questioning of Mr Horobets he mentioned for the first time, I find it is more likely than not that he had asked for that day off. As to 25<sup>th</sup>, both the letter produced on 24 October and the manuscript note saying “home office” support Mr Horobets’ account, and the claimant accepts that he did have at the very least to send documents to the Home Office concerning his visa on 25 October. Again, I find it more likely than not that the claimant was absent.
18. In relation to 1 and 2 November, again the claimant has produced no evidence that he worked. He accepts that he showed Mr Horobets on 31 October documentation showing the revocation of his driving licence. Given Mr Horobets’ reaction to that – that he considered the claimant to have been dishonest in gaining employment – I cannot accept for a moment that he consented to the claimant working for another two days. I find that the claimant was summarily dismissed on 31 October 2017.
19. As to the deduction from wages, whilst I sympathise with Mr Horobets having been put to an expense he would have avoided had the claimant been frank his pending conviction – a matter he certainly ought to have disclosed when seeking employment as a driver – I do not accept that there was any relevant provision or agreement for any such deduction. I cannot find that it falls within paragraph 10 of the contract of employment – as Mr Horobets said frankly he paid the insurance of the other employee, and fully expected to pay the insurance premium to cover the claimant as a named driver too.
20. Accordingly the claimant is awarded £153.74.

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Employment Judge Tuck

Date: 02/11/2018

Sent to the parties on: 07/11/2018

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For the Tribunal Office