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EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4112392/2021 (V)

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Held by CVP on 21 January 2022

Employment Judge E Mannion

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Mr G Stenhouse

**Claimant
Represented by:
Mhairi Murning,
Lay representative**

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Rest Eazy Ltd

**Respondent
Represented by:
Rita Brown,
Lay representative**

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JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The judgment of the Tribunal is the claimant's claim of unauthorised deduction of wages is upheld.

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The respondent is ordered to pay £1,382.09 to the claimant which is broken down as follows:

£759.54 in respect of wages from 1 to 12 October 2021 (inclusive)

£480.77 in respect of one week's notice pay

£141.78 in respect of 1.4 days annual leave.

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REASONS

Introduction

1. This is a claim of unauthorised deduction from wages. The claimant is seeking payment for unpaid wages, notice pay and annual leave. The claims are
5 disputed and defended by the respondent.
2. It was conceded at the outset of the hearing that the claimant was no longer seeking payment in respect of pension contributions.
3. The claimant gave evidence on his own behalf. Ms Brown gave evidence on
10 behalf of the respondent. A bundle of documents was lodged with the tribunal in advance of the hearing and both parties had a copy of this bundle.

Relevant law

4. Section 13 of the ERA states as follows:
13.— Right not to suffer unauthorised deductions.
 - (1) An employer shall not make a deduction from wages of a worker
15 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
20 consent to the making of the deduction.

Issues

5. The Tribunal has to determine the following issues:
 - 5.1 Was there a deduction from the claimant's wages by the
respondent?
 - 25 5.2 What was the amount of this deduction?
 - 5.3 Was the respondent permitted to make this deduction?

Findings in fact

6. The Tribunal makes the following findings in fact:

5 6.1 The claimant was employed by the respondent as a life insurance salesman. His employment commenced on 21 September 2021 and continued to 12 October 2021 when the claimant resigned from his post.

10 6.2 The claimant's terms and conditions were set out in a contract of employment which was sent to him along with an offer letter dated 15 September 2021. This letter was sent by Rita Brown, Director of the respondent organisation and states that should the claimant have any questions, he should contact Ms Brown or Darrell Robson. Mobile telephone numbers for both Ms Brown and Mr Robson were provided. Mr Robson is not an employee of the respondent organisation but instead acts as a management consultant. The claimant was not aware of that Mr Robson was a management consultant. Mr Robson signed the claimant's contract of employment on behalf of Ms Brown.

15 6.3 The Claimant was employed for 40 hours a week, worked over 4 days, Monday to Thursday. His salary was £25,000 with an opportunity to earn bonuses. As per clause 6.1 of the contract of employment, the claimant was entitled to receive this salary from the commencement date, which is set out as 21 September 2021. This clause confirms that payment will be made on the last working day of each month and that salary will accrue from day to day, payable in equal monthly instalments.

20 6.4 The letter of 15 September confirmed that the claimant would undergo training starting on 21 September 2021, his first day of employment. This training lasted until 30 September 2021 and was also attended by a colleague whose employment began on the same day as the claimant and another colleague whose

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Employee” in situations such as unauthorised absence, unauthorised lateness, under performance or behaviour”.

5 6.8 During his short employment, the claimant did not take any annual leave. He was given a morning off to sit his driving test but this was not requested as annual leave nor understood to be annual leave by either the claimant or the respondent at that time.

Observations on the evidence

7. The claimant gave his evidence in a clear and cogent manner. Ms Brown was the only respondent witness, as well as representing the respondent. She
10 gave her evidence in a straight forward manner.

8. The primary dispute in evidence apart from whether the respondent was entitled to make the deductions they did, related to the claimant giving notice. The respondent position was that the claimant gave notice to Mr Robson, who was a management consultant rather than an employee of the respondent
15 and that the claimant informed Mr Robson that he would not work his notice period. The claimant’s position was that he gave notice to Mr Robson as he had been a primary point of contact and was unaware of his consultancy role. He also stated that he informed Mr Robson he was happy to work his notice period but that Mr Robson informed him this was not necessary.

20 9. I do not accept the respondent position. Whether Mr Robson was an employee or a consultant, he was clearly linked with the respondent organisation. His name and contact details were provided to the claimant on his letter of offer should the claimant have any questions about commencing the role. He delivered the initial training to the claimant and he signed the
25 claimant’s employment contract on behalf of Ms Brown. Given the short nature of the claimant’s employment and the fact that he was either working from home or undertaking training in non-office premises, confusion as to Mr Robson’s exact role in the organisation is unsurprising. It was accepted by Ms Brown that Mr Robson informed her of the claimant’s resignation. There
30 was an opportunity therefore to contact the claimant and advise him that

notice had not been properly given. The respondent organisation did not do so.

10. The critical factor here however is the discussion which took place between the claimant and Mr Robson on 12 October - whether Mr Robson informed the claimant he was not required to work his notice or whether the claimant informed Mr Robson that his notice was taking effect immediately and he would not work his notice. I accept the claimant's position. He was clear in his evidence that he was willing to work his notice and that he informed Mr Robson of this. This is consistent with the contents of the ET1. Ms Brown did not agree with his position, but was not a witness to the conversation which took place between the claimant and Mr Robson. The respondent did not call Mr Robson to challenge the claimant's position. Further, from the evidence heard, the respondent did not speak to or correspond with the claimant after 12 October in respect of working his notice.

15 **Claimant's submissions**

11. Ms Murning submitted that the claimant took up employment with the respondent and performed work in good faith under the contract of employment and so should be paid for the work undertaken. The evidence established that the employee was paid in full for work undertaken in September. She submitted that there were no notifications provided to the claimant that his performance was so negligent and he did not deserve to be paid. She stated that she did not believe there was a term in the contract which gives the respondent the right not to pay the claimant and that there was no evidence that the claimant's performance was so negligent that he would not be paid. She submitted that in respect of the claimant's notice pay, he informed Mr Robson of his resignation who was representing the company. She submitted that the claimant offered to work his notice period but was told not by Mr Robson. Annual leave was not taken by the claimant during his employment and the calculation of leave was based on his 40 hour week. She submitted that there was nothing legally or contractually which

allows the respondent to deny the claimant his lawful right to remuneration under the contract.

Respondent's submissions

12. Ms Brown submitted that when the respondent employs people they try to ensure they have the right levels of training. The claimant came to the role with previous experience and should have been able to do this job. She submitted that the respondent has a right not to pay the claimant under the contract. The reason for this was is poor performance. She submitted that during the first period of training his performance was good but that stopped when he was working on his own. She noted that while she appreciates the difficulty to motivate yourself when working from home, this was an issue. She submitted that when people come to work for the respondent organization, it costs a lot to put training in place for them.

Decision

- 15 *Was there a deduction from the claimant's wages?*

13. Yes. The claimant was not paid on the 29 October 2021 as expected. The claimant was anticipating that he would receive one weeks' notice pay, wages from 1 to 12 October inclusive and 1.4 days' annual leave.

What was the amount of this deduction?

- 20 14. £759.54 in respect of wages from 1 to 12 October 2021 (inclusive); £480.77 in respect of one week's notice pay; and £141.78 in respect of 1.4 days annual leave.

Was the respondent permitted to make this deduction?

- 25 15. Section 13(1) of the Employment Rights Act 1996 provides that an employer can only make a deduction from wages in three circumstances: where required or authorised by statute; where required or authorised by a relevant provision in the contract; or where the employer has previously given written consent.

16. Section 13(2) of the Employment Rights Act 1996 defines 'a relevant provision of the worker's contract' and confirms that it is either one or more written contractual terms which the employer has given the employee a copy of before the deduction is made; or one or more contractual term whose
5 existence and effect the employer has notified to the employee in writing before the deduction is made.

17. In this case, the respondent was relying on the entitlement under a relevant provision in the contract of employment as the justification for the deductions made. Specifically, the respondent was relying on the definition of 'training
10 period' in Clause 1.1 which states:-

The Company Training Period is one calendar month, during the training period the Company reserves the right to not pay the Employee if:

*unauthorised absence is taken for any reason including sickness and
15 personal,*

unauthorised lateness,

under performance,

behaviour.

This list is not exhaustive

20 and also Clause 13.1 which states

13.1 The employment of the Employee may be determined:

*13.1.1 by the Company without notice or payment in lieu of notice if
the Employee*

*13.1.1.7 In [sic], in the reasonable opinion of the Company, negligent
25 and incompetent in the performance of his duties.*

18. Clause 1.1 is relied upon in respect of the payment of wages for the period 1 – 12 October. Clause 13.1 is relied upon in respect of the payment of notice period. The respondent did not cite a contractual provision in respect of the unpaid annual leave.
- 5 19. The relevant provision in the contract must be unambiguous and drafted as precisely as possible. In respect of Clause 1.1, it is unambiguous and sets out the circumstances where wages might not be paid. Turning to Clause 13, I find that this is precise in that it sets out the circumstances where an employer will not be required to make a notice payment or payment in lieu of
10 working notice. Both terms are contained in the contract of employment, a copy of which was provided to the claimant on or around 15 September along with his letter of offer. As such, Section 13(1)(b) is complied with.
20. As it has been established that there is a contractual provision authorizing the deduction, I must now consider whether the deduction is, as a matter of fact,
15 justified.
21. The respondent's position is that they were not required to pay the claimant his wages from 1 – 12 October due to under performance, pointing to Clause 1.1. When giving evidence, Ms Brown referred to the 4 days following the initial training when the claimant was working from home when she stated
20 that he did not meet his targets. She stated that he was not hitting his numbers and not spending enough time talking to employees. The claimant did not accept this and provided that the initial training was substandard. Ms Brown gave evidence that the other new employees who started at the same time or a week after the claimant did not meet their targets. She confirmed that the
25 respondent organisation decided to provide additional training to the claimant and his colleagues and this was organised to begin on 11 October.
22. I do not accept the respondent's position that the claimant's performance justified the non-payment of wages between 1 and 12 October. The respondent is referring to a 4 day week when the claimant was undertaking
30 his duties following his induction training. The respondent took the decision during this week that additional training was required, not only for the

claimant, but also his colleagues did not reach their targets either. I was not provided with any evidence from the respondent that the claimant's colleagues were treated in the same manner and had their pay withheld. Ms Brown gave evidence that she spoke to the claimant during this 4 day period and informed him of his need to reach his targets and speak to more clients. She confirmed that she did not indicate to the claimant that his performance was such that the respondent was considering their right to withhold his wages as per Clause 1.1 of the contract. I find that while the claimant was not meeting his targets, this was to do with the fact that he was adjusting to his role and that further training was required from the respondent rather than any under-performance. I find that the respondent was not justified in making the deductions to the claimant's wages.

23. In respect of his notice period, the respondent's position is that there entitled not to pay the claimant for his notice period because the contract allows at Clause 13.1 for summary dismissal where an employee's performance is "in the reasonable opinion of the Company, negligent and incompetent in the performance of his duties". I do not accept the respondent's position. There is a misunderstanding on the respondent's part of the contractual provision they is attempting to rely on as a basis for non-payment of notice pay. Clause 13.1 sets out the provisions for notice pay, summary dismissal and payment in lieu of notice, where the decision to terminate is made by the employer. That was not the case here as the claimant resigned. As such any alleged negligence or incompetence is not relevant and so does not justify the deductions made to the claimant's notice pay.

24. The respondent did not point to a contractual provision which allowed the withholding of accrued but untaken annual leave. I find therefore that the respondent was not permitted to make the deductions in relation to annual leave.

25. In conclusion, I find that the respondent was not permitted to make the deductions to the claimant's wages when they failed to pay his wages for the period 1 to 12 October 2021, failed to pay his one week's notice pay and failed

to pay him for 1.4 days annual leave. These deductions were unlawful as per Section 13 of the Employment Rights Act 1996.

5 Employment Judge: Eleanor Mannion
Date of Judgment: 02 March 2022
Entered in register: 04 March 2022
and copied to parties

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