EMPLOYMENT TRIBUNALS

Claimant: Miss A Sedgmore

Respondent: Magic Brands Ltd

Heard at: By Video **On:** 26 November 2024

Before: Employment Judge S Moore

Representation
Claimant: In person
Respondent: Mr Wyeth, Counsel

RESERVED JUDGMENT

The claimant's claim for unauthorised deduction from wages is well founded. The respondent is ordered to pay the claimant the gross sum of £1166.00.

REASONS

Background and Introduction

1. The ET1 was presented on 3 September 2024. This followed a period of ACAS early conciliation commencing on 5 August 2024 with a certificate issued on 9 August 2024. The claimant brought a claim about unpaid wages. The claimant is a litigant in person and represented herself. The respondent was represented by Mr Wyeth, Counsel. The hearing was listed for two hours but there was not enough time to give judgment during that time. The parties were offered to return at 2 PM for judgment but the claimant was unable to all return for the afternoon and therefore the decision had to be reserved.

2. The Tribunal had a bundle of documents prepared by the respondent which ran to 288 pages and a witness statement for the respondent for Ms G Norman. The claimant had not prepared a witness statement nor had she sent any documents for inclusion in the bundle. I established that the

claimant had not been given any direction to prepare a witness statement and therefore understandably as litigant in person she had not prepared a written witness statement. The claimant had been directed to disclose to the respondent any documents on which she intended to rely and bring to the hearing but the claimant told me that as she had already written to the respondent about these matters she had not complied with these directions.

The claims and issues

3. The claimant had presented a very limited account in her ET1 of the complaint. She had ticked box 8.1 "arrears of pay" (not notice pay). In 8.2 she stated:

"I left the business on 1 July and I am owed two weeks pay. The company are stating that I am in breach of my contract as I did not work my notice therefore I owe them. However, my contract does not state such clause."

4. In box 9.2, what compensation or remedy are you seeking, the claimant had stated:

   "Compensation: two weeks of pay owed to me amount requested £1166".

5. The claim was reviewed at r26 stage and a judicial decision was taken to confirm the jurisdiction was one of wages and notice pay.

The hearing

6. The claimant was sworn in, asked questions by Mr Wyeth and I then asked questions to ensure I had elicited all relevant evidence enabling compliance with the overriding objective as per Rule 41 of the Tribunal Rules of Procedure 2013. I also gave the claimant the opportunity at the end of the questions to add any further evidence she wished to provide to the Tribunal.

7. Towards the end of the evidence of Ms Norman, the respondent's witness mentioned that the respondent has brought County Court proceedings against the claimant in respect of matters arising from this claim. In fairness to the respondent this had been set out in their response form. I therefore adjourned to consider whether to having heard all the evidence and I decided it was appropriate to continue having regard to the guidance in **Bowater v Charlwood [1991] IRLR 340** recently discussed in **Lycatel Services Ltd v Schneider 2023 ICR 1208** namely:

a) The respondent's breach of contract claim is a small claim issued in the county court on 3 October 2024 in the sum of £5440 which is not a court of higher authority;
b) The Tribunal claim was issued first;
c) The Claimant's claim will be most conveniently and appropriately tried in the Tribunal taking into account the circumstances of the claim which are well within the usual claims within this jurisdiction and require findings of fact that could be determined by me today.

8. I did consider whether the lack of directions (which is the standard for a short track claim listed for two hours under the new reform system) for the claimant to have provided a written statement should be a matter against

me proceeding but as the claimant had opportunity to give the evidence orally I did not consider this outweighed my other considerations above. Furthermore, as can be seen below it was in fact the respondent who had been potentially more prejudiced by the new evidence given at the hearing by the claimant and to which I found on the balance of probabilities an account chose not to prefer. See below.

9. As the parties were unable to stay for an oral judgment when considering my decision I decided I needed further input from the parties regarding the status of the claimant's claim. An email was sent to the parties as follows on 26 November 2024:

Employment Judge Moore wishes to raise a matter with the parties that was not discussed.

It is debatable whether the claim as presented was brought as a s.13 unauthorised deduction from wages claim or a breach of contract. The claimant had presented a very limited account in her ET1 of the complaint. She had ticked box 8.1 "arrears of pay" (not notice pay). In 8.2 she stated:

"I left the business on 1 July and I am owed two weeks pay. The company are stating that I am in breach of my contract as I did not work my notice therefore I owe them. However, my contract does not state such clause."

In box 9.2, what compensation or remedy are you seeking, the claimant had stated compensation two weeks of pay owed to me amount requested £1166.

The claimant's claim therefore could be arguably a claim for unpaid wages rather than notice pay.

As such Employment Judge Moore invites the parties to make any further submissions on how or why the type of claim (wages or breach of contract) should be determined and whether there is a right to set off cross claims for damages against wages due as opposed to notice pay.

Please reply within 14 days of the date this email is sent. Employment Judge Moore may consider fixing a further hearing to discuss these matters prior to reaching a decision on the claim.

10. The respondent replied on 27 November 2024. They asserted that the only reference the claimant made in her ET1 was to her contract and there was no mention of any claim under the Employment Rights Act 1996 ("ERA") or any statutory claim at all. The respondent acknowledged that the claimant was unrepresented but submitted it is for any claimant to properly identify their claims and the only discernible claim is that of a breach of contract and this was not a matter for speculation. Further, it had been identified at the outset of the hearing that the claimant was bringing a breach of contract claim in accordance with the extended jurisdiction of the Tribunal under the Employment Tribunals Extension of Jurisdiction (England and Wales) Order 1994. There was no suggestion that this was a claim being pursued under Part II of the ERA.

11. Notwithstanding the above, even if it could be said that the claimant had a

claim under Part II of the ERA (which the claimant had not identified in her claim) the respondent submitted that it would still be entitled to set off its losses against any sums claimed by the claimant by reason of clause 5.3 as this would fall within s13(2)(a) ERA.

12. The claimant replied on 5 December 2024. She asserted her claim was for unpaid wages. She referenced that her ET1 stated she was seeking payment for two weeks of work completed from June 16th to July 1st, 2024. These wages were earned prior to leaving and were not related to notice pay. The wages were withheld after completion of her duties during the referenced period; therefore, her claim falls within the scope of s.13 ERA as an unauthorised deduction from wages. Although the ET1 referenced a breach of contract, this was not her intention as the basis of her claim but rather a reflection of what the respondent communicated in their email correspondence regarding their position. Her only intention has always been to claim for the unpaid wages she had earned during her final two weeks of employment.

13. She further denied that the contract clause 5.3 entitled the respondent to have made the deduction from pay.

Findings of fact

14. The respondent is a head office company that is part of a group of related companies that included a franchised restaurant under the brand name “Denny’s” and multiple Starbucks franchises.

15. The claimant commenced employment on 15 March 2021 as an Operations Co-Ordinator. Her contract of employment, signed by the claimant on 20 March 2021, contained the following terms:

5.3 The Company shall be entitled to deduct from your basic salary or any other sums which it owes to you any sums which you owe to the Company from time to time such as any overpayments.

16. Notice and Termination

Once you have satisfactorily completed your Probationary Period, if the Company wishes to terminate your employment other than pursuant to clause 17.2. you will be entitled to one weeks’ notice in writing or statutory minimum notice if higher. Once you have satisfactorily completed your Probationary Period if you wish to terminate your employment you must give the Company three months’ notice in writing.

16. The respondent’s pay period runs from 16-15th of each month.

17. The claimant has resigned on 13 December 2024 which was subsequently withdrawn following an agreement to develop the claimant towards an Operations Manager role.

18. By May 2024 the claimant had taken over as an Operations Manager at Denny’s and mainly worked at the restaurant in Swansea.

19. On 24 May 2024 the claimant resigned again giving three month’s notice

stating the resignation would be effective as of 24 August 2024. The claimant accepted in evidence that she understood that she had to give three month's notice to terminate her employment and it was incumbent on her to ensure a smooth transfer and assist with training a replacement.

20. There is a dispute of fact about what then happened on 1 July 2024. None of the following evidence by the claimant had been mentioned in her claim form or any correspondence. The claimant told the Tribunal under cross examination that on 1 July 2024 she had met with Ms Norman in the morning and asked if she could leave straight away or early, meaning that day. The claimant says Ms Norman then agreed if she came in the following day, gave the lap top back and do a handover it was all fine she could go. The claimant believed this would not cause any issues as she had prepared an operations manual and trained a replacement although she accepted in the short term this may be an issue.

21. The claimant had the passwords to the respondent's social media accounts and phone.

22. Ms Norman told the Tribunal she had been due to have a one to one meeting with the claimant at 10am on 1 July 2024 and travelled from Monmouth to Denny's when she noticed the claimant had cancelled their meeting at 9.45am. When she arrived at the restaurant the claimant told her that she was done and would not be working past today. This came as a shock and Ms Norman reminded her of her notice period and asked her if she would be prepared to carry on part time to which the claimant replied "no I am done" or words to that effect.

23. Ms Norman then walked outside the store realising she would need to make lots of calls to get help, as it would be all hands on deck to cover the claimant and began to organise staff cover and the IT handed over. She went back inside and explained what she would need to do and asked the claimant to stay one more day to which she agreed. Ms Norman completely denied authorising the claimant to leave early in breach of her contractual notice period. She said she had been very taken aback and she was not presented with any choice but to accept the claimant was leaving. Ms Norman accepts she did not tell the claimant that in leaving in breach of her notice period there would or could be financial consequences; she did not think this was her responsibility and the claimant had not asked her about this.

24. On 1 July 2024 at 14.49 the claimant sent an email to Ms Norman as follows:

Good afternoon,

I regret to inform you that I will not be working my full notice period, my last working day being Tuesday 2nd of July. I am apologetic for the inconvenience this may cause you, but I have had to make this difficult decision to ensure my business remains a success. Putting my time and effort into Denny's means my business does not have my full attention to run efficiently.

25. The email then went on to set out important notes for the handover of operational and staffing matters that are not necessary to set out here. Nowhere in the email does the claimant mention that it had been agreed she could leave early by Ms Norman.

26. Ms Norman subsequently invoiced the respondent the sum of £3500 for consultancy work to cover the claimant's departure and recruit and assist training her replacement. I am not making findings as to those and the other costs incurred as a result of the claimant's early departure as it is not necessary for the purpose of these proceedings and will be determined by the county court proceedings.

27. The claimant had accrued two weeks' pay at the time of her departure for work done between 16 – 30 June 2024. The respondent decided they would not pay the claimant these wages as she had failed to work her notice and told her such in an email dated 7 August 2024 after the claimant started to chase payment at the end of July 2024. The email from Mr Evans stated:

As you are aware you failed to work your notice in breach of your contractual terms of employment with the company. This breach has resulted in the company incurring significant losses in excess of the amounts owed based on the hours worked up to the point you left. As the company has incurred significant losses, as a result of your breach of contract, the company is within its rights not only to deduct these losses from your final pay but also to recover the residue of losses through litigation and it reserves all of its rights in this regard.

The Law

28. The Employment Tribunal has jurisdiction to hear claims for unpaid wages by way of statute (s.13 Employment Rights Act 1996) or breach of contract claims provided the claim arises or is upstanding at the termination of the employment (Employment Tribunals Extension of Jurisdiction (England and Wales) Order 1994).

29. **Ridge v Land Registry [2014] 6 WLUK 599** is authority for the principal that an employer can rely on set-off as a defence to a breach of contract claim and is not required to bring an employer's contract claim in order to do so.

30. If the claim is advanced as a statutory claim under s13 1996 the position is as follows. I have had regard to the following passage in Halsbury's Laws of England (Employment para 741):

If an employee leaves without giving due notice under the contract, the employer may lawfully retain, as liquidated damages, any wages due to the employee at the time of his breach of contract only if there is a contractual term to that effect; moreover, any attempt to retain some or all of such wages already earned without a written term to that effect in the contract, a written notification of a term to that effect or the employee's prior written agreement or consent is likely to be an unlawful deduction, recoverable by the employee under the Employment Rights Act 1996.

Although this point was not directly before the Court of Appeal in Delaney v Staples (t/a De Montfort Recruitment) [1991] 2 QB 47, it is submitted that it follows from the reasoning in relation to the claim for outstanding commission and holiday pay (the employee has already earned the sum due during the course of employment and so it is 'wages' within the Employment Rights Act

1996 s 27 (see para 246); it is then declared by s 13(3) (see para 247) that any payment of an amount less than the total amount properly payable to the worker is to be treated as a 'deduction', and thus subject to the rules on prior written agreement in s 13(1) (see para 247)). See also Chiltern House Ltd v Chambers [1990] IRLR 88, EAT; New Centurion Trust v Welch [1990] ICR 383, [1990] IRLR 123, EAT.

31. In **Asif v Key People Ltd [2008]3 WLUK 182** the EAT held that however strong a respondent's cross claim might be, Part II of ERA 1996 does not allow an employer to set off cross claims against wages otherwise due.

32. It is not enough for an employer to show that it has made a deduction and the contract permits it, it must also prove that objectively the deduction was justified **Fairfield Ltd v Skinner [1992] ICR 836,EAT.**

33. Where a contract has been drafted by a party that has the greater bargaining power, any ambiguity in the terms of the contract must be construed against the interest of the party who drafted it.

Conclusions

34. I firstly deal with the issue as to whether this claim was a wages claim or a breach of contract claim. It could of course be both. It is important as if the claim is deemed a breach of contract claim the respondent says they were entitled to set off the wages due to the claimant in respect of the breach of the notice.

35. There are many reasons why an employee might choose either the statutory or contractual route when bringing such a claim. The ET1 does not require specificity as to which type of claim is being advanced nor does it provide any prompt for example a box to tick to denote the type of claim. In many cases where the claimant is a litigant in person they do not specify any statute or jurisdiction they simply say 'my employer has not paid my wages' or words to that effect. Most of the time this is not an issue. Claims for unpaid wages are known as short track claims and have no case management orders tending to be listed for short hearings. In this case there were no orders for witness statements. Therefore the first time in this case where this issue arose was at the hearing.

36. In my judgment, the claim has to be considered as a statutory claim under s.13 ERA 1996 for the following reasons:

37. The claimant says in the ET1 that claim was arrears of pay and "I am owed two week's pay". Whilst she mentions breach of contract this is in the context of describing the respondent's reason for not paying her wages; it would be inequitable to judge her complaint on the basis of how the respondent intends to defend it;

38. Whilst the claimant did not mention ERA neither did she mention the (Employment Tribunals Extension of Jurisdiction (England and Wales) Order 1994). She says she is owed wages.

39. The claimant elected to bring her claim in the Employment Tribunal which is the statutory court Parliament has determined will hear unpaid wages

claims brought under the ERA.

40. Even if at the outset of the hearing there was an assumption it was brought as a breach of contract claim this should not defeat the discernible claim contained in the ET1. The pleaded claim is paramount.

41. On that basis, the respondent was not entitled to retain, as liquidated damages, the wages due to the claimant if she was in breach of contract.

42. I find that the claimant was in breach of contract on 1 July 2024 when she informed the respondent she would not be working the remainder of her three months notice pay. I prefer the evidence of Ms Norman in that there was no agreement to vary the written term of the contract and release the claimant from her contractual obligation to work the remaining notice period. I find it implausible that the first time this would have been mentioned would be in answer to questions at the hearing. It was not mentioned anywhere in the documents either the resignation letter or the emails from the claimant chasing payment of her wages. The written terms are clear and they have not been varied.

43. The respondent's alternative position is that they were entitled to withhold the wages under s13 (2) (a) ERA by virtue of clause 5.3 of the contract which entitled them to deduct "*any sums which you owe to the Company from time to time such as any overpayments."*

44. Clause 5.3 meets the obligation of s.13 (2) (a) in so far as it was a written term of the contract which was given to the claimant prior to the employer making the deduction in question.

45. I do not consider that this term can be said to cover sums that the claimant might owe the respondent due to breaching the term to work three month's notice. Indeed the example used is overpayment which would reflect the usual understanding of such a clause along with things like unform or training costs.

46. For these reasons I find that the claimant's claim for unauthorised deduction from wages is well founded.

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Employment Judge S Moore

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Date: 18 December 2024

RESERVED JUDGMENT & REASONS SENT TO THE PARTIES ON

07 January 2025

Katie Dickson
FOR EMPLOYMENT TRIBUNALS

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