EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 8001382/2024

Final Hearing heard at Dundee remotely by Cloud Video Platform on 20 November 2024

Employment Judge A Kemp

Mr I Duncan	**Claimant** **In person**
Press Glass Ltd	**Respondent** **Represented by** **Mr M Roberts** **HR Officer**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

1. **The respondent made unlawful deductions from the wages of the claimant under section 13 of the Employment Rights Act 1996.**

2. **The claimant is awarded the sum of ONE THOUSAND FIVE HUNDRED AND NINETY THREE POUNDS SIXTY SEVEN PENCE (£1,593.67) payable by the respondent subject to any necessary statutory deductions. In the event of such deductions being made the respondent shall provide details of the same to the claimant in writing at the time of doing so and evidence of payment of those sums to His Majesty's Revenue and Customs.**

REASONS

Introduction

1. The claim is one for unlawful deductions from wages, in respect of amounts as a shift allowance said to be due. The respondent denies that any such sums were due.

2. The claimant is a party litigant, and the respondent represented by one of its employees Mr Roberts. 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 as without that those in the Bundle would not be considered, 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. The parties had provided documents by email. No single Inventory or Bundle was provided. I made allowances for the fact that neither party had professional representation.

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

Facts

6. The claimant is Mr Iain Duncan.

7. The respondent is Press Glass Ltd. It has changed its name from earlier names including Glass Systems North Limited and Glass Systems Ltd.

8. In March 2017 the respondent acquired a site at Cumbernauld from Pilkington Glass Ltd. The employees at that site transferred to the respondent under the provisions of the Transfer of Undertakings (Protection of Employment) Regulations 2006. The terms so transferred included a provision for Production Operatives that they were paid a shift allowance equating to 25% of their gross pay.

9. Shifts were worked either 6am to 2pm or 2pm to 10pm, the former known as the early shift and the latter as the back shift.

10. The claimant was interviewed for a post with the respondent by Mr John Davie, then the Production Manager of the respondent. He informed the claimant that he would be paid the same shift allowance as the former employees of Pilkington Glass Ltd.

11. The respondent offered the claimant employment on 14 August 2017. It was set out in a contract of employment in writing dated that date and signed by the claimant and Mr Davie. Pay was stated as £7.55 per hour. Weekly hours were stated as 39. It stated "This is an employment contract between the Employer, Glass Systems Ltd and the Employee named above and mutually signed as a binding and legal agreement." Under payments it was stated that the wage was paid monthly in arrears. It further stated "You will be notified in writing of any change to your Contract giving you one month's notice." It did not have any provision as to shift allowance.

12. After the claimant started work he was paid a gross wage which included a shift allowance calculated at 25% of the gross wage. The gross wage was the hours worked multiplied by the hourly rate. The rate increased from time to time, and the shift allowance increased in line with that.

13. Payslips produced for the claimant did not differentiate between pay and shift allowance in the period up to December 2020. From January 2021 onwards payslips showed pay separately to shift allowance. At that stage the shift allowance was calculated on the same basis of 25% of gross pay.

14. The frequency of payment of wages was changed on a date not given in evidence from monthly to weekly.

15. No written change of pay rates, arrangements or as to frequency was provided by the respondent to the claimant.

16. On or around 9 July 2021 the claimant's shift allowance was £95.06 per week. His gross pay then was £380.25.

17. The claimant's gross weekly pay being that without the shift allowance increased each tax year. For the tax year 2022/23 it was £407.55. For the tax year 2023/24 it was £438.75 and for the tax year 2024/25 it was £462.15. The claimant's shift allowance did not change from and after 9 July 2021 remaining at the level of £95.06.

18. On 13 April 2022 Mr George Thanas of the respondent sent an email to shift supervisors. It was not sent to or seen by the claimant. It started "In case you are asked about this…." It referred to the transfer from Pilkington Glass and that the respondent "decided to give these employees the same amount of shift allowance the rest of the employees were receiving at the time….". It then said that payroll had assumed that the employees had been with Pilkington, that that was a "mistake" which would be rectified from that week's pay. It stated that as there had been a mistake by the respondent the employees would not be asked to pay back the extra money. The employees affected were listed, including the claimant.

19. In around April 2024 the claimant asked his shift supervisor about the shift allowance when he heard a discussion between employees formerly with Pilkington Glass Ltd about the amount of the shift allowance they had received, which was greater than his own. His supervisor indicated that there would be a meeting with HR, but none took place.

20. The claimant emailed Mr Matthew Roberts of the respondent's HR department on 10 April 2024, and they exchanged messages. Mr Roberts sent the claimant the said contract of employment.

21. The claimant commenced early conciliation on 27 June 2024. The Certificate was issued on 8 August 2024 and the present claim commenced on 6 September 2024.

Submissions

22. Both the claimant and respondent made brief submissions explaining why they considered that they should prevail, of which what follows is a very brief summary. The claimant argued that he had been treated unfairly and that there was no evidence of any communications with him. The respondent argued that the contract did not mention shift allowances, that it was a non-contractual payment that the respondent was entitled to cap, and that there had not been any unauthorised deduction.

The law

23. 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 means "any sums payable to the worker in connection with his employment , including any …. bonus….or other emolument referable to his employment whether payable under his contract or otherwise."

24. In ***Delaney v Staples [1992] IRLR 191*** the House of Lords held that wages are consideration for work done. In ***Yemm v British Steel plc [1994] IRLR 117*** shift payments were included in the definition. In ***New Century Cleaning Co Ltd v Church [2000] IRLR 27*** the majority of the Court of Appeal held that it was necessary for the worker to show some legal entitlement to the sum but that did not need to be from an express term of the contract.

Discussion

25. I decided not to issue an oral judgment but to consider the matter and issue this Judgment in writing as although the claim is for a moderate sum it raises some issues in law that are not straightforward.

26. I was entirely satisfied that both the claimant and Mr Roberts sought to give honest evidence. Where there was a dispute on fact the issue was of reliability, but on that I had no hesitation in accepting the evidence of the claimant. I accepted the claimant's evidence as to what Mr Davie had told him. It is supported by the fact of the payments made to him thereafter being not simply the stated rate in the contract but with the extra 25% for

shift allowance, and it is also supported to a large extent by the email sent on 13 April 2022 albeit that the claimant was not aware of that at the time as it was not sent to him and no one spoke to him about it.

27. The difficulty for Mr Roberts as a witness is that he was not there at the time either of those matters or the later change with what was described as a cap to the shift allowance. He was making the best he could of what he had to work with, but that was distinctly limited. Although hearsay evidence is competent in this case it was not the best evidence that could have been led by the respondent. No attempt had been made to obtain the evidence of Mr Davie, albeit he had left. No attempt had been made to obtain the evidence of Mr Thanas similarly. The shift supervisor spoken to by Mr Roberts did not, he told Mr Roberts, speak to the claimant, and the one who was the shift supervisor at the time and is still employed was not spoken to and did not give evidence.

28. It appears to me clear from all the evidence I heard that although this was not in the terms of the written contract, which had all the appearance of a standard form one with a very few aspects added in handwriting such as hourly pay and shift pattern, it had been agreed with Mr Davie, who had at least ostensible authority to bind the respondent, that the claimant would receive the same shift allowance as the other staff at that site of 25%. The shift allowance at that rate of 25% of gross pay was in my view a term of the contract of employment.

29. Mr Roberts sought to rely on the terms of the contract, which made no reference to the shift allowance. That the shift allowance agreement was not set out in the written contract is not in my view determinative. There was no entire agreement clause within the written contract which might have had such an effect. Written contracts can be and are amended or supplemented by oral agreement, and the fact of the payments made after the contract was signed is relevant in that regard.

30. Nor was the provision of the contract with regard to variations by the respondent of any effect in my view, as no written notice to the claimant was ever given, and in any event such terms may or may not be legally

effective given the apparent width of the words used such that they are so ambiguous as may render the contract meaningless.

31. Separately, the legal obligation to pay can arise outwith the terms of any written contract, as is clear from the wording of section 27 and the authority of ***Church*** and as I consider is the case here even if the shift allowance was not a contractual term, and that is again supported by the comments by Mr Davie and the fact of payment of such a shift allowance at the 25% rate for around 4 years. That means that the shift allowance was a percentage of the gross pay, and not a fixed amount. Mr Davie's comments could be construed as an unilateral obligation to pay those sums, which (like the terms of a contract) are not required to be in writing, or include any consideration, under the law of Scotland.

32. Mr Roberts referred in questioning of the claimant to other employees who had started after October 2017 who had a shift allowance of £20 per week, but that is an entirely different set of circumstances and contractual terms agreed. The claimant did not agree to those terms, which were not offered to him. Similarly that other employees of the respondent elsewhere have different terms, or that the Pilkington Glass former employees have different holiday terms is of no relevance to the issues before me.

33. The shift allowance was therefore in my view payable, both as a term of contract and if not that as a term otherwise payable under section 27, and was payable at 25% of the gross wages otherwise earned throughout. There was no basis effective in law for the change to be made to cap it at the level in 2021 in the manner that was done, as the respondent argued that it was entitled to. It was not, at least as it was conducted by them at that time. Even if there was, the contract provided for any change to be intimated in writing, and no such change was intimated in writing, in fact no such change was intimated to the claimant at all whether orally or otherwise.

34. In support of that conclusion sections 1 - 4 of the Employment Rights Act 1996 require certain terms to be set out in writing and any changes to them also set out in writing. That was not done by the respondent. These factors are independent of the main conclusions I have reached but support them.

35. The respondent argued that there had been some form of mistake, but I did not consider that there was any evidence that that was so, and it had not been pled as such in the Response Form in any event. Mr Davie had made an offer which the claimant had accepted. That appeared to have been the respondent's position at the time, as appears from the email of 13 April 2022. It was acted upon by the payments made, with payslips narrating the shift allowance from January 2021 onwards. This was not a mistake, but a decision made to treat those such as the claimant who commenced work in mid 2017 in a certain way, consistently with those who had transferred in to the respondent. That there was later a decision to treat those starting after October 2021 differently is immaterial to the issues before me. In any event those who could have given evidence about these points did not do so. I concluded that there was no question of any mistake.

36. I did consider whether there had been acquiescence in the breach such that the claimant could not later found on it. I concluded that that was not the case. Firstly it was no part of the respondent's pled case. Secondly it was not suggested to the claimant in evidence that that had been the position. Thirdly even if the matter had been properly before me the claimant stated that he was simply unaware of any issue until April 2024 when he then raised it with the respondent and sought to rectify matters. I accepted his evidence with regard to that, on which he was not cross examined. When nothing was done he commenced early conciliation and then this claim, and did not delay doing so in such manner as infers acquiescence in my opinion even if that point was properly before me. Fourthly the terms of the email of 13 April 2022 indicate a certain desire for lack of transparency, as the message referred to "if asked". But the claimant did not know to ask as he was not asked himself about agreeing to any proposed change or given any notice of the change being effected unilaterally. Such a unilateral variation of contract is of no legal effect, and has been described as "a thing writ in water". In light of the evidence I heard it did not appear to me that there had been acquiescence.

37. My conclusion is that the term as to shift allowance at 25% was a term of the contract, and remains so. There was no lawful basis for the effective imposition of the cap limiting the amount to £95.06. It was in any event a

sum properly payable without such cap. Failing to pay the sums properly due is an unauthorised deduction from the claimant's wages under section 13 of the Act.

38. Section 23(4A) of the 1996 Act limits the amount that I am able to award to that for a period of two years. I am bound by that provision. It means that I cannot award for the deductions before November 2022.

39. Mr Roberts very sensibly accepted that there was no dispute over the amount of the deductions, the dispute was over whether they had been made. The claimant set out the calculations in his email of 14 October 2024 and he gave evidence on that which was not challenged. I accepted the figures given there, but have reduced them slightly because of the two year limitation that applies.

40. I calculate the sums due as follows –

    (i) In the current tax year from 6 April 2024 to the anticipated date of payment being on or around 6 December 2024, a period of one day short of 35 weeks, the difference between what was due and paid (£115.54 less £95.06 = £20.48 per week) x 35 weeks is £716.80.

    (ii) In the previous tax year the difference is £109.69 less £95.06 = £14.63 x 52 weeks = £760.76.

    (iii) In the period from 6 December 2022 to 5 April 2023 the difference is £101.89 less £95.06 = £6.83 per week x 17 weeks = £116.11.

41. The total sum is £1,593.67. The calculation is made gross, such that it is subject to appropriate statutory deductions provision for which is made in the Judgment. Dependent on the arrangements there may require to be an additional payment for pension under the auto-enrolment provisions but as that was not sought directly no award is made.

42. The claimant did not seek an order as to the terms of his contract. The decision sets out the sums due for the period to the anticipated date of payment, and should there be further deductions the claimant is able to raise a new claim for them, but I would hope that that is not necessary. It is competent to vary a contract by agreement or otherwise but until that is

lawfully done the shift allowance remains in my view a term of the claimant's contract of employment with the respondent.

43. For the avoidance of doubt I was satisfied that the Claim was competently before the Tribunal and within its jurisdiction.

A Kemp
Employment Judge
26 November 2024
Date of judgment

Date sent to parties **27 November 2024**