EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4105782/2016

Hearing Held at Edinburgh on 17 March 2017

Employment Judge: I McFatridge (sitting alone)

Mr William McGilvary	**Claimant** **Represented by:** **Himself**
Benaird Ltd	**Respondents** **Represented by:** **Mr Walker** **Head of Maintenance**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The Judgment of the Tribunal is

1. The claimant's claim under Section 23 of the Employment Rights Act 1996 succeeds. The respondents shall pay to the claimant the sum of One Thousand, One Hundred and Ninety Nine Pounds and Eight Nine Pence (£1199.89) in respect of wages unlawfully deducted.

2. The claimant's claim for notice pay does not succeed and is dismissed.

REASONS

1. The claimant submitted a claim to the Tribunal in which he claimed that he was due a sum in respect of unpaid wages following the termination of his employment with the respondents. He also claimed that he was due notice pay. The respondents denied the claim. They state that the claimant resigned and was not dismissed. With regard to his final month's wages the respondents' position was that they were entitled to deduct from this sums in respect of allegedly defective workmanship carried out by the claimant and a sum in respect of various occasions when the claimant was alleged to have failed to work his full contracted hours. At the Hearing the claimant gave evidence on his own behalf. Mr Gordon Walker, the respondents' Head of Maintenance and Mr Wayne Jeffrey, their Electrical Supervisor gave evidence on their behalf. Both parties lodged a small number of documentary productions. On the basis of the evidence and the productions I found the following essential facts relevant to the case to be proved or agreed.

Findings In Fact

2. The respondents are a property maintenance company. Generally they carry out work for landlords of residential flats in Edinburgh, Glasgow and the Central Belt. The claimant commenced employment with them as an Electrician on or about 14 April 2016. The claimant was paid at the rate of £26,500 per annum. This equates to just over £2200 gross per month. The claimant was paid monthly in arrears and each month would receive the sum of £1750 net. The claimant signed a contract of employment with the respondents on 14 April 2016. The whole contract was not lodged however the final page of the contract was (R1). This contains the following statement:-

> *"DEBTS AND OVERPAYMENTS*
>
> *22.1 If, on the termination of your employment, you owe the Company money as a result of any loan, overpayment, default on your part or any other reason whatsoever, the Company shall be entitled as a result of your agreement to the terms of this contract to deduct the amount of your indebtedness to it from any final payment of salary which it may be due to make to you."*

The claimant's signature appears below a statement which says

> *"I hereby confirm that I have read, understood and accept the above contract of employment. I undertake to observe the terms and conditions of my employment contained therein."*

3. The claimant's normal hours of work were 8.30am to 5.00pm Monday to Thursday and 8.30am to 4.30pm on Friday. If the claimant finished a job in the afternoon his instructions were to telephone the office to find out if they had another job for him. If they did not have another job for him they would usually advise him to simply go home. Generally speaking the view of the respondents' management was that if the claimant was free after about 4.15 in the afternoon there was no point sending him to start another job since he would not be able to finish it.

4. The claimant was given a vehicle to use for work purposes which had a tracking system installed. The claimant was one of five electricians who worked for the respondents and were supervised by Wayne Jeffrey the respondents' Electrical Supervisor. Part of Mr Jeffrey's role was to supervise the claimant and also do qualify control checks on the work which he had carried out. He would generally do this weekly and e-mail the results of his quality checks back to the office. He would usually take photographs every time he found a fault. His view of the claimant was that the claimant was not a bad electrician but there were occasions when his work was not up to standard. The claimant was told at the outset of his employment that he would be on probation for the first six months. On or about 14 October the claimant was advised that because of concerns with his work performance they had decided to extend his probation for another one month. The claimant was told that if they did not see a marked improvement they would have no alternative other than to reconsider his position with the company.

5. Mr Jeffrey's perception was that after the claimant's probation was extended in this way there was a marked fall off in the quality of his work.

6. For his part the claimant became concerned that he felt the respondents were taking insufficient steps to protect him from the dangers of asbestos. The claimant was aware of other companies where prior to starting a job an electrician would be

able to telephone and check the asbestos register for that property to ascertain whether or not it had asbestos. The respondents' position was that they took appropriate steps to protect the claimant from the danger of asbestos. The claimant, like all their electricians, had had training as to how to spot asbestos. Their standing instructions were that if an electrician came across a substance he thought might be asbestos in the course of working on a property he should immediately stop and contact the respondents who would then arrange for a specialist firm to carry out an inspection and ascertain whether or not there was any risk and if so how to take steps to carry out the work safely. There was one occasion when the claimant discovered something he thought was asbestos in a property and followed this procedure. The respondents arranged to have the substance sampled and inspected by a specialist firm who found that the sample sent to them did not contain asbestos. The respondents arranged to have the work finished by one of their other electricians. The respondents considered the claimant had acted perfectly properly in this connection.

7. At some point in October the claimant carried out work on a property at 65 Falcon Avenue. Following the completion of the work the landlord of the property complained to the respondents about the standard of workmanship. Mr Jeffrey arranged to have a look at the property. He took various photographs. These were lodged A, B, C, D, E. Photographs at A and D showed untidy cabling. The photographs at B and C show a more serious defect in that the smoke detectors required to be linked not just to the mains electricity supply but also interlinked by a cable joining them together. This was so that if one smoke detector went off they would all go off. Mr Jeffrey found that no interlink cable had been installed in the smoke detectors in this property. He considered this was a serious fault. If there was a fire for example in the kitchen the smoke detector in the kitchen might go off but the smoke detectors in other parts of the house would not. Mr Jeffrey was also concerned to find a cable which had been pinched exposing a live wire (photograph E). Mr Jeffrey reported his concerns to the respondents' management and was asked to look at various other properties which the claimant had worked on. He looked at around six properties. In his view the electrical work carried out in each case was unsatisfactory and left the property in a dangerous condition. He provided a written statement to the respondents' management in respect of

20/3 Allanfield. This similarly noted that the alarm was not interlinked and that the supply was taken off a 13 amp socket. He reported verbally on the other properties.

8. On 21 October the claimant was called to a meeting with Mr Gordon Walker. Mr William Dodd, another employee of the respondents was also present at the meeting. Mr Walker put to the claimant the various items of poor workmanship which had come to his attention through Mr Jeffrey. He told the claimant that they would have to go down a disciplinary route but that the claimant may wish to consider his position and if he wanted to resign his resignation would be accepted. The claimant agreed that he would resign. Mr Walker then arranged for the claimant to clear his possessions out of the company van and for a colleague of the claimant's to give him a lift home. The 21 October was the claimant's last day at work.

9. Following the termination of the claimant's employment the respondents arranged for a Mr Robert Binnie, one of their employees, to check the Tracking Record from the claimant's vehicle. He identified a number of occasions where in his view the claimant had left work early. He carried out a calculation going back over the whole period of the claimant's employment from April to October. He calculated that the claimant had failed to work a number of hours for which he was contracted to work and had been paid. He calculated that the sum due by the claimant to the company in respect of these occasions when he had gone home early amounted to £161.92. No detail of this calculation was provided.

10. The respondents also arranged to have the items of faulty workmanship identified by Mr Jeffrey rectified. In respect of 20/3 Allanfield this involved stripping out the installation and running a new supply from the lighting circuit to reposition the alarm and interlink with the existing hall alarm. As a result of this some redecoration had to be done to the property. Similar work was done in respect of other properties where the claimant's workmanship was found to be at fault. The respondents considered that the amount of time which their electricians had spent doing this work should be charged to the claimant at the respondents' usual charge out rate. This incorporates an element of profit. The respondents considered that

the sum of £700 was a reasonable figure for this. They also considered that other work had to be carried out on a further two properties at a price of £625 plus VAT. They also arranged for works to be carried out on a property in Glasgow which the claimant had worked on. They did not carry out these works themselves but arranged for an outside firm to do this. No details were provided of the work done by the respondents or their tradesmen on each property in terms of setting out clearly what work had been carried out and providing details as to how the work was linked to the failings of the claimant. Contractor costs of this were £615 plus VAT. An invoice was lodged in respect of this sum.

11. The claimant contacted the respondents on various occasions seeking payment of his final salary. The respondents stated that they were deducting these sums from his salary. In an e-mail dated 25 November 2016 they indicated that his final salary for the period 1 October to 21 October 2016 less 1.5 days' holiday which had been taken in excess of his entitlement would have given him a net figure of £1199.89. It was however their position at that point that they were entitled to make deductions in the total sum of £1763.92. By the time of the Tribunal Hearing it was the respondents' position that the total deductions were £2378.92 to take account of the additional bill for £615 which they had received.

Observations on the Evidence

12. The claimant's position was that he had not resigned but that he had been dismissed. When asked to provide details of the conversation however he was somewhat reluctant to do so. Whilst he denied that he had resigned I had the impression that he did not consider the precise manner of his leaving to be particularly important. It appeared to me on the basis of the evidence that if the claimant had not resigned then he would certainly have been dismissed after a few days. I decided that I preferred the evidence of Mr Walker which was to the effect that whilst some heavy pressure had been put on the claimant to resign, he was not actually formally dismissed but had agreed to resign.
13. The claimant's position was that the reason he had been dismissed was to get back at him for raising concerns about asbestos. The claimant had not made a claim that he had been dismissed for making a public interest disclosure in terms of

Section 103A of the Employment Rights Act 1996. During the course of the Hearing he confirmed that this was the case and that all he was wanting was his final month's pay. The claimant's position was that he did not accept that the various items of poor workmanship which were mentioned were genuine. That having been said he declined to cross examine Mr Jeffrey. I found Mr Jeffrey to be a patently honest witness and accepted what he said as being correct.

14. Whilst I accepted Mr Jeffrey's evidence that he had found fault with the claimant's work, with regard to the claim for unlawful deductions I found that the respondents' evidence regarding the actual cost to them of rectifying defects was severely lacking. Dealing with the issue of the tracking information first the respondents provided a copy of the 10 pages of tracking information which appeared to relate to the month of September. These show that on some days the claimant was home before 5 o'clock and on other, days after. The respondents' witness, Mr Walker, accepted that what the claimant said about finishing early was broadly correct. If the claimant finished a job he was supposed to contact the office and generally speaking if it was late in the day they would not send him to another job but tell him to go home. Therefore it appeared to me that there were likely to be some days when the claimant was quite properly home before 5.00pm. Mr Walker in evidence indicated that there was tracking information which showed that the claimant was sometimes home before 4.00pm however he could not point me to this. More importantly he could not advise me in any detail as to how the calculation of £161.92 had been carried out. With regard to the sum of £700 and the sum of £635 he advised me that the sum of £700 was the cost of an electrician and supervisor for two days at their charge out rate. The sum of £635 was apparently based on a calculation of the cost of work carried out to two properties but no further details were provided regarding this. With regard to the figure of £615 for the property in Glasgow I was provided with an invoice but no detail as to when the claimant was supposed to have carried out this work or what way it was defective.

Discussion and Decision

1. Notice Pay

15. The claimant claimed that he was due notice pay. Having found that the claimant resigned and was not dismissed I do not find that he is due any notice pay. I have to say that even if I had found that the claimant had been dismissed my finding would have been that the claimant had been summarily dismissed for gross misconduct and as such would not have been entitled to notice pay in any event.

2. Unlawful Deductions

16. Section 13 of the Employment Rights Act 1996 states

> *"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."*

It was the respondents' contention that clause 22 of the claimant's contract of employment signed by him in April authorised the deductions. I did not consider that, as a matter of construction of the contract, clause 22 did amount to such an authorisation in respect of the deductions actually made by the respondents. It appears clear to me that clause 22 is to cover a situation where on the termination of employment an employee owes money to the company. That was not the case here. As at the date of termination of his employment the company were, on the basis of the contract, due to pay wages to the claimant. The claimant was not due to make any payment to the respondents. It is true that following the termination of the claimant's employment the respondents sought to monetize the value of their claims against the claimant and to deduct these but in my view they were not entitled to do this by clause 22. In my view clause 22 would only come into play if some other clause in the contract said the respondents were entitled to charge the claimant for the cost of putting right defective workmanship or deduct a sum for occasions when he left early. I specifically asked Mr Walker if he was relying on

any other clause in the contract and he indicated that he was not. Mr Walker did indicate in his evidence that he was unaware of the respondents ever having used this before to recover money expended to rectify defective workmanship.

17. It is therefore clear to me that even if the respondents' claims for payment were good claims the respondents were not entitled to make the deduction from the claimant's wages which they did and the claimant is entitled to be paid his wages in full.

18. I should also say that in the case of Yorkshire Maintenance Company Ltd v Farr EAT0084/09 the Employment Appeal Tribunal stated that clauses involving deduction from wages should be subject to a considerable degree of scrutiny due to the possible disparity in economic power between employers and employees and the potential abuse by an employer of such power. I am also aware that in that case it was suggested that courts had to be alert to employers being judge and jury when they had included in a contract of employment an express term requiring an employee to repay certain costs and expenses. In this case I did not require to reach the stage of considering whether or not the deductions were reasonable or not since in my view it is clear from the terms of the contract that whether reasonable or otherwise they were not authorised. I should say that if I had reached the stage of considering reasonableness then it is highly unlikely that I would have found that the respondents were reasonably entitled to change the sums due in the way that they had. In my view the respondents had failed to provide sufficient evidence to justify their calculation of the cost of putting right the defective workmanship carried out by the claimant. They had also failed to demonstrate how the sum of £161.92 for alleged hours not worked had been calculated.

19. Given that the deduction from wages was not authorised it appears clear to me that the claimant was entitled to be paid his wages for the final period in which he worked. It appeared to be common ground between the parties that the net amount due to the claimant was £1199.89 and I therefore make an order for this amount.

20. The claimant required to raise these proceedings in order to obtain payment and in the normal course I would have ordered the respondents to pay any Tribunal fees paid by the claimant. My understanding however is that in this case the claimant obtained full remission of fees and did not pay anything. I will therefore make no such award.

Employment Judge: Ian McFatridge
Date of Judgment: 22 March 2017
Entered in register and copied to parties: 23 March 2017