EMPLOYMENT TRIBUNALS

Claimant		Respondent
Mr Gelu Mandache	v	**Immingham Transport Limited**

PRELIMINARY HEARING

Heard at: **Hull** **On:** **12 March 2018**

Before: **Employment Judge T R Smith**

Appearance:

For the Claimant: **Did not attend**

For the Respondent: **Mr Kevin Donovan, Compliance & HR Manager**

JUDGMENT

The claimant's complaint of unlawful deduction from wages is dismissed.

REASONS

1. **Attendance**

1.1. On 9 March 2018 at 14:58 an email was received from the Director of the Free Advice Centre who were acting on behalf of the claimant which indicated that

"Mr Mandache would like the Tribunal to hear the case without his participation and make a decision".

1.2. It was indicated that the claimant had other work commitments.

1.3. I therefore had to consider whether to proceed in the absence of the claimant.

1.4. Mr Donovan urged me to proceed.

1.5. I decided to proceed in the claimant's absence for the following reasons. Firstly there was no application for an adjournment. Secondly there was no guarantee that if I did adjourn the hearing that the claimant would be able to attend. Thirdly I had regard to the overriding objective. Fourthly I

noted that the request was made via skilled advisors. Fifthly I noted the inconvenience and costs this would cause to the respondent.

1.6. I therefore decided to proceed but had full regard to rule 47 of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013 ("the Rules") and in particular had full regard to all the information on the Tribunal file and in particular the claimant's ET1.

2. Evidence

2.1. I had before me: –

a. the claimant's ET1

b. a bundle of documents from the respondent which I marked "R1" and which I numbered consecutively therein and totalled 40 pages.

2.2. I also heard sworn evidence from Mr Donovan. I found Mr Donovan a compelling witness. He gave his evidence in a straightforward manner, without embellishment and I found him honest and credible.

3. The issue

3.1. The claimant had made a complaint under section 23 of the Employment Rights Act 1996 ("ERA 1996") that the respondent made an unlawful deduction from his wages contrary to section 13 of the ERA 1996 and in particular there had been a non payment of certain bonuses.

4. The Law

4.1. Section 13 of the ERA 1996 provides:-

"(i) 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"

4.2. Section 13(2) explains what is meant by a "relevant provision"

4.3. Reading section 13(1) and 15(1) of the ERA 1996 together no deduction may be made from a worker's wages unless either

(i) it is required or permitted by a statutory or contractual provision or

(ii) the worker has given his prior written consent to the deduction.

4.4. If, as here, deduction is made pursuant to an alleged contractual provision, the terms of the contract must have been shown to the worker or, if not in writing, its effect notified in writing to the worker before the deduction is made see **Kerr v Sweater Shop (Scotland) Limited 1996 IRLR 424 EAT**.

4.5. In **Discount Tobacco and Confectionery Limited v Williamson 1993 ICR 371** it was held that for there to be prior written consent, the consent must precede not only the deduction itself, but also the event or conduct giving rise to the deduction. What would have to appear in writing in either case is not merely a provision for repayment of the sum concerned but for it to be deducted from wages, see **Potter v Hunt Contracts Limited 1992 ICR 337**.

4.6. "Wages" is defined in section 27(1) of the ERA 1996. Wages in relation to a worker means any sum payable to the worker in connection with his employment including, according to section 27(1)(a):-

> "any fee, bonus, commission, holiday pay or other emolument referable to his employment whether payable under his contract or otherwise".

4.7. A non contractual bonus may count as wages when payment is made see section 27(3) ERA 1996. Sums which would normally be expected to be paid, even if there is no strict contractual entitlement fall within the definition of wages see **Kent Management Services Limited v Butterfield 1992 ICR 272**.

4.8. Where the issue relates to bonuses the critical issue is whether the sum can be quantified in order to be brought under the deduction from wages provisions of the ERA 1996.

4.9. I remind myself that the burden of proof is on the claimant and the standard of proof is the balance of probabilities.

5. Findings of fact

5.1. The respondent is a transport/logistics/warehousing company.

5.2. It operates approximately 60 vehicles. It has a total staff of approximately 100.

5.3. Mr Donovan acts as the respondent's Compliance Officer which includes responsibility for Human Resources.

5.4. The claimant entered into a contract of employment on 12 April 2016 to commence employment with the respondent on 6 April 2016 as an HGV Driver.

5.5. The claimant is of Romanian extraction. I accept Mr Donovan's evidence that he speaks good English.

5.6. The claimant's contract can be found in the respondent's bundle at pages 3 – 11 inclusive. The contract was signed by the claimant on 12 April 2016.

5.7. There are a number of matters within the contract which I ought to refer to. The first appears on page 5 under the heading "Remuneration", it provides:-

> "part of your remuneration package is paid as a discretionary bonus relating to your performance. In the event of any damages or claims being made against the Company due to your performance, the award of a bonus payment may not be made until costs of any claim is recovered…"

5.8. Later in the same section the following appears:-

> "you authorise Immingham Transport Limited at any time during your employment, or in any event on the termination of your employment, to deduct from your salary payment and any sums Immingham Transport Limited is liable to pay to you any amount from time to time which you owe to Immingham Transport Limited including, but not limited to any outstanding loans, advances, payment for excess holiday, training fees, costs of private use of mobile telephone, any equipment/PPE not returned and any overpayment of wages and you expressly consent to any such deductions pursuant to Part 2 of the Employment Rights Act 1996".

5.9. On page 11 of the respondent's bundle was a salary schedule. In essence a driver received the basic pay of £365 per week for 5 day's work.

5.10. In addition there was an entitlement to earn a number of further bonuses. The bonuses relevant to this case are set out below.

5.11. Firstly there was a loyalty bonus payment of £25 per week. It was payable once drivers had completed the first 12 months of service with the company.

5.12. There was a performance bonus of £25 per week which was payable in respect of punctuality, correct use of the respondent's fuel card and completing paperwork correctly.

5.13. There was then an accident bonus of £40. T per week. This was if the claimant was free from accident. It was lost in the event of "non insured losses until full payment paid".

5.14. The above bonuses, £25, £25 and £40 were payable per week.

5.15. I accept on the evidence placed before me that discussions took place between the respondent and its drivers, which included the claimant, as to the introduction of a new pay structure from 1 July 2016.

5.16. A document was issued to all drivers and a copy can be found on pages 13 and 14.

5.17. The effect of the new pay structure was that basic pay increased from £365 per week to £400 per week. Loyalty bonus was no longer payable weekly and the qualification period was extended. The performance and accident bonuses were merged into one and a sum of £40 per week was payable.

5.18. If there was an accident where there was driver error no performance bonus was payable up to £250. If there was a further accident where there was driver error no performance bonus was paid up to £1,000.

5.19. The respondent's carried insurance and the figure of £1,000 equated to their excess. The claimant signed the form on 27 June 2016 indicating that he wished to change to the new pay increase/structure.

5.20. It follows, therefore, that at all times the claimant's employment with the respondent was governed by his contract dated 12 April 2016 but the remuneration schedule attached to the contract was varied effective from

1 July 2016. I have come to the conclusion the two documents must be read together

5.21. On 15 February 2017 an incident occurred whilst the claimant was driving one of the respondent's vehicles. The claimant failed to lower a container and reversed into a bay at the site of International Produce Limited damaging the bay door.

5.22. The claimant completed a driver statement in the presence of Mr Donovan. Reading the statement in its totality (page 16) it is clear that the claimant admitted liability for the incident.

5.23. Assuming that the respondent was entitled to make a deduction/non payment this was the first driver error of the claimant and therefore he would not receive performance bonus until the sum of £250 was reached, unless the damage was for a smaller sum.

5.24. I accept the evidence of Mr Donovan that the amount in contention, which is still in dispute between the insurance companies, exceeds £250.

5.25. A second incident occurred on 13 April 2017 again involving the claimant. He clipped another vehicle while making a delivery at BFS Limited in Oldham.

5.26. A driver statement of incident was completed by the claimant on 15 May 2017 in Mr Donovan's presence. He accepted he had damaged the other vehicle.

5.27. Mr Donovan told me, and I accept his evidence, that the in cab driver camera had been viewed which showed that the accident was the claimant's fault.

5.28. The owner of the other vehicle, Bidvest Logistics Limited submitted a claim for £717.58 plus VAT. The respondents took the view that having seen the photographs of the damage, the nature of the damage and the appropriate documentation that the claim was reasonable and made payment without involving their insurers.

5.29. On the basis of the evidence before me I am satisfied that this was an accident involving driver error.

5.30. Given the claimant had already had one accident, if the respondent's interpretation of their contractual terms is correct, the respondent's were entitled to deduct /not pay £717.58 by way of non payment of performance bonus. This was the actual cost of them. They were not entitled to deduct £1,000 because the deduction was either £1,000 or the actual cost of repairs whichever was the lower.

5.31. The respondents produced a printout from the computerised wage record which appeared in the bundle and were placed before me (pages 29-37). It is noticeable that on 1 July the claimant's base rate increased from £365 per week to £400 per week. This shows the new terms as to remuneration were in operation.

5.32. At all times when the claimant has worked a full week he has been paid his full contractual salary.

5.33. The first issue I have to determine is whether what has been described as a performance bonus falls within the statutory definition of wages. I am so

satisfied relying upon section 27 ERA 1996 and that the sum was quantified at all material times.

5.34. The next question I have to ask myself is whether the claimant has consented to deduction from his wages, which may include non payment either by a contractual provision or by given prior written consent.

5.35. I am satisfied that prior to the two incidents which led to the deduction/non payment the claimant had entered into a contractual provision, that is the contractual provision in his contract of employment of 12 April as varied by the change in terms and conditions signed by the claimant on 27 June 2016.

5.36. The final question is whether the documents that the respondent relies upon address the deduction/non payment. I do not find the wording in the contract at page 5 to be particularly clear but looked at in totality as I have reproduced above I am satisfied that the wording is sufficient to justify the non payment of the performance bonus to the claimant. It must be recalled that the definition of performance bonus was varied effective from 1 July and included the accident bonus. I am satisfied that reading the contract and the variation thereto together it was clear that if there was an accident which involved driver error there be non payment of the bonus up to £250 in the first instance and thereafter up to a maximum of £1,000 from wages.

5.37. To the extent the claimant now asserts he is entitled to a loyalty bonus from the respondent I am satisfied that he agreed a variation on 27 June 2016 so the bonus would only be payable on the anniversary date after 2 years employment.

5.38. I have come to the conclusion, on the evidence placed before me that the claimant does not satisfy me on the balance of probabilities that there has been an unlawful deduction from wages as he claims or at all.

5.39. I must therefore dismiss the claim.

6. Mr Donovan made an application for costs.

7. The provisions and procedures as regards costs are set out in rules 74 – 84 of the 2013 Regulations.

8. This was not a case where the respondent was legally represented and thus any claim would be limited to a preparation time order.

9. My power to make such an order is set out in rule 76. I can only consider making such an order where:-

> "a party…has acted vexatiously, abusively, disruptively or otherwise unreasonably in either the bringing of the proceedings…or the way that the proceeding.. have been conducted".

10. I considered whether to adjourn the issue of costs to a further hearing to allow the claimant to make representations as I cannot make an order against him unless he has had a reasonable opportunity to address me (rule 77).

11. However, I have come to the conclusion that I can deal with this matter without the need for representations from the claimant.

12. Costs do not, normally, follow the event in the Tribunal. Each party bears their own costs.

13. The mere fact that one party has succeeded and one party has failed does not mean that the high hurdle set out in rule 76 has been surmounted.

14. I cannot say that this was a case doomed to failure. Similarly there is nothing about the way the proceedings have been conducted to show that the claimant has acted vexatiously, abusively, disruptively or otherwise unreasonably.

15. In the circumstances I dismiss the respondent's application for costs.

Employment Judge T R Smith

Date: 20 March 2018