JJE

EMPLOYMENT TRIBUNALS

Claimant: **Mr L Lodge**

Respondent: **TNT Cleaning**

Heard at: **East London Hearing Centre**

On: **18 May 2018**

Before: **Employment Judge C Lewis**

Representation

Claimant: **In Person**

Respondent: **Mr Shah, Peninsula Business Services Limited**

RESERVED JUDGMENT

The judgment of the Tribunal is that:

1. The Claimant's claim for unpaid holiday pay fails and is dismissed.

2. The Claimant's claim for unlawful deductions from wages succeeds in the sum of £250.00 which is payable by the Respondent forthwith.

REASONS

The Issues

1. The Claimant brings claims for :

(1) unlawful deductions from wages pursuant to Section 13 of the Employment Rights Act 1996, in respect of the sum of £500.00 deducted from his wages for damage to the company van; and an additional £150.00 for damage to a sat nav; and

(2) unlawful deduction from wages in failing to pay accrued holiday pay lawfully due on termination of his employment, the Claimant alleged that an

unspecified number of days were deducted from his annual leave in respect of days that he alleged he was made to take as holiday when there was no work for him.

Evidence

2. The Claimant was unrepresented. He had sought assistance from his local CAB who had referred his case to the Free Representation Unit (FRU), but he had not been able to secure a FRU rep. The Claimant had not provided a witness statement but gave oral evidence and confirmed the truth of the content of his claim form and his grievance appeal letter contained in the bundle [p94-95]. The tribunal also heard evidence from Mr Atkinson, who is the Director of the Respondent company. The Tribunal was provided with a joint bundle of documents for the hearing.

Findings of Fact

Failure to pay accrued holiday pay / deductions from holiday entitlement

3. The Claimant alleged that he was forced to take holiday when Mr Atkinson refused to give him work, or there was no work available. He alleged that in October 2017 the Respondent deducted a day from his holiday entitlement when there was no work for him. However, in his evidence, he accepted that he was paid a fixed monthly amount, subject to working overtime and that he was paid for the days when he was told there was no work. He believed that his holiday entitlement was reduced by the days on which there was no work.

4. The Claimant accepted that his entitlement to holiday was set out in the employee handbook, [page 38 of the bundle]. This provided for holiday entitlement of 5.6 weeks subject to a maximum of 28 days, inclusive of public/bank holidays during the complete holiday year. The holiday year began on 1 January and end on 31 December each year. The contractual provision also provided that in the event of termination of employment, holiday entitlement would be calculated at $1/12^{th}$ of the annual entitlement for each completed month of service during that holiday year and any holidays accrued but not taken, would be paid for.

5. The Claimant's employment started on 20 February 2017 and he was dismissed on 21 November 2017. He accepted he had accrued 9 complete months' service in that holiday year and was entitled to 9/12ths of the annual holiday entitlement, which amounted to 21 days. The Claimant also accepted that his payslip showed he was paid for 13 days outstanding accrued holiday on the termination of his employment. He gave evidence that he had taken 2 weeks holiday in October from 23 October to 6 November, which he accepted was 11 working days. He accepted that his outstanding entitlement on dismissal was 10 days and he had therefore been paid for more days holiday than he was owed.

6. The claim for unlawful deductions in relation to any holiday pay owed on termination is therefore dismissed.

Unlawful Deductions – damage to company property

7. The Respondent accepts that it made deductions from the Claimant's final salary in

respect of 1) damage to the company van in the sum of £500.00 and 2) damage to a satnav in the sum of £150.00. It asserts that those deductions were lawful under section 13(1) and (2) of the Employment Rights Act 1996, being authorised by a relevant provision in the Claimant's contract.

Contractual Provisions relied upon by the Respondent

8. The provisions relied on were contained in the employee handbook, which was issued to the Claimant at the start of his employment in February 2017. The Claimant signed his statement of terms and conditions of employment on 31 March 2017 confirming that he had read and fully understood the terms and conditions of employment and agreed to abide by the full policies and procedures as stated in the employee handbook. The provisions of the handbook relied upon included those found at page 21 of that handbook, [page 46 of the bundle] headed "Company Vehicle Use" , which provide as follows:-

> *'c Company vehicles are provided for work use they are monitored via tracking systems, private use must be authorised and any unauthorised private mileage will result in disciplinary action being taken*
> *…*
> *k Where any damage to one of our vehicles is due to your negligence or lack of care, we reserve the right to insist on your rectifying the damage at your own expenses or paying the excess part of any claim on the insurers".*

The handbook also provides at page 32, [page 47 of the bundle] under the heading "Liability, Loss and Damage':

> *'"Any damage to vehicles, stock or property (including non-statutory safety equipment) that is the result of your carelessness, negligence or deliberate vandalism will render you liable to pay the full or part of the cost of repair or replacement. Any loss to us that is the result of your failure to observe rules, procedures or instruction, or is because of your negligent behaviour or your unsatisfactory standards of work, will render you liable to reimburse the Company. The Company may seek the full or part of the cost of the loss; and in the event of failure to pay; we have the contractual right to deduct such costs from your pay'.*

9. The Respondent also relied on a document headed "Rules for the Use of Company Pool Vehicles" [page 62-65], which the Claimant signed and dated on 17 February 2017 and which includes the following [at page 65]:

> '*Personal Liability to Damage to Vehicles*
> *Where any damage to one of our vehicles is due to your negligence or lack or care … we reserve the right to insist on your rectifying the damage at your own expense or paying the excess part of any claim on the insurers'.*

10. Lastly, the Respondent relied on a document also contained in the handbook signed by the Claimant, headed "Deductions from Pay Agreement" [page 66] which contains the following:

> '6) A*ny damage to vehicles, or property (including non-statutory safety equipment) that is the result of your carelessness, negligence or deliberate*

vandalism will render you liable to pay the full or part of the cost to repair or replacement.
…
In the event of an at fault accident whilst driving one of our vehicles, you may be required to pay the cost of the insurance excess up to a maximum of £250.00.
In the event of failure to pay, such costs will be deducted from your pay'.

14. The Claimant signed to confirm that he had been issued with the updated company policy and procedures: Health and Safety and Employment Employee Handbook on 22 April 2017, the copy of the handbook in the bundle records the relevant updated version as being issued on 10 March 2017.

The events giving rise to the deductions

Damage to the Company Vehicle

15. The Claimant accepted that he was driving the vehicle on a day when he was not working. Whilst driving the vehicle round a corner, he hit a post, which he described as a gate post and which he indicated was at a low level. This caused damage to the running board, the door of the vehicle and to the chassis The Claimant accepted that he was the driver and there was no other vehicle involved in the incident. I find that the collision with the post was an accident for which the Claimant was responsible, or "at fault"; the fact that the Claimant hit the post itself indicates a degree of carelessness or negligence on his part.

16. The tribunal was provided with photographs of the damage and of the vehicle after the Claimant had had it repaired. The Claimant accepted that he arranged for a garage to carry out repairs to the van without having received authorisation from the Respondent. He told the tribunal that he had shown part of his employment handbook to someone whom he believed understood something about the law, and had been advised that it meant he was able to go and get the repairs done himself. Mr Atkinson was clear that repairs could only be carried out by the employee if authorised by him in advance; there was a particular garage that the Respondent used for all their vehicles and that he would not have authorised the Claimant to get the repairs carried out elsewhere. When the vehicle was returned by the Claimant Mr Atkinson was not satisfied with the repairs, from the photographs it is clear why he might not be. Mr Atkinson took the vehicle to the garage that he normally used and showed them to Dave, the mechanic he dealt with there. Dave confirmed that the repairs were of poor quality. Dave gave Mr Atkinson a verbal quote for the cost of repairing the vehicle which he said would be approximately £1000.00.

17. Mr Atkinson told the tribunal that the excess on the company insurance policy had increased from £250.00 to £500.00 due to previous claims that had been made. I accept that the excess had increased to £500. That was how much it would cost the Respondent if the insurers carried out the repairs, however Mr Atkinson was concerned that if he relied on the insurance policy the premiums would be affected and the cost would increase further. The Claimant disputed that he should have to pay the excess i.e. £500.00 when the Respondent was not going to claim on the insurance and disputed whether the repairs would in fact be carried out.

18. Mr Atkinson accepted that the vehicle had not yet been repaired. He told the

tribunal that he had intended to have the damage repaired, but once the Claimant told him that he would be bringing a claim to the tribunal Mr Atkinson kept the £500.00 deducted from the Claimant's wages instead of spending the money on the repairs, in case he had to pay it back to the Claimant. Mr Atkinson told the tribunal that while the vehicle was still usable he could not leave the repairs much longer as the door seal needed replacing, the door was not watertight and the vehicle would start to rust. I am satisfied that at the time the deduction was made Mr Atkinson intended to carry out the repairs and that they would have cost the Respondent more than £500.00. I accept Mr Atkinson's evidence that he will be arranging for the repairs to be carried out in the near future.

Damage to the satnav

19. The Claimant explained that he placed the Satnav out of sight to be safe, rather than leaving it in its bracket or holder, but that it then fell into the footwell and he accidentally shut it in the van door. The Claimant accepted that he had broken the satnav by shutting it in the van door. He denied that he was careless or negligent in causing the damage. He also disputed the amount the Respondent was claiming the replacement satnav cost on the basis that he believed Mr Atkinson had told him three different amounts on three different occasions, varying from £150.00 to £250.00 to £200.00.

20. The particular satnav was not a generic system, it was a system that came with the Citroën van and was particular to the van and therefore was more expensive than a generic satnav. When the Claimant first told him that he had broken the satnav Mr Atkinson was not sure what the replacement cost would be, but he knew that it was more expensive than an generic one and thought it could be as much as £250.00. When he received the quote for a replacement it was around £200.00 but included an element of VAT which he would not pass on to the employee, the Respondent could claim that back through the company. The cost to the company was the £150.00 which was the amount that was deducted from the Claimant's wages.

21. I accept Mr Atkinson's evidence that the sum reflected the actual cost to the Respondent. I also find that the sum was not excessive in the circumstances.

The Law

22. The question I have to decide is "Were the deductions that had been made such as were authorised to be made by virtue of any relevant provision in the worker's contract?" – thereby falling within s13(1)(a) of the ERA 1996 *(Fairfield Limited v Skinner* [1992] ICR 836, EAT) Or had the Claimant previously signified in writing his agreement or consent to the making of the deduction? – section 13(1) (b) ERA 1996. If so, whether the provisions relied upon amount to penalty clauses or were otherwise unenforceable.

23. Any relevant contractual term relied upon must be enforceable at common law if it is to authorise a deduction under section 13(1) (a) ERA 1996. In *Cleeve Link Limited v Bryla [2014] ICR 264, EAT* His Honour Judge Hand set out at paragraphs 20, 23 and 31 of his judgment the relevant considerations for a tribunal in deciding whether a deduction contemplated by the contract was lawful.

> At 31 . "So things to be borne in mind are, firstly the contract falls to be construed at the time it was entered into. Secondly, it falls to be construed on an objective basis; the issues of genuineness and honesty of the parties are not a relevant

> consideration. Thirdly, the issue, broadly put, is deterrence or genuine pre-estimate but it can involve a question of comparison to be resolved by deciding whether the difference between the amount that could be recovered for loss of breach of contract and the amount stipulated in the contract as a fixed sum is so extravagantly wide of the mark – or, putting it another way, the gulf between them is so great – that is cannot be explained on any other basis than that it is a penalty to deter breach "

I also had in mind the decision of *Yorkshire Maintenance Company Limited v Farr UK EAT/0084/09/SM,* in which Pugsley J highlighted, at paragraphs 9 and 10, that a Tribunal should apply careful scrutiny to terms included in contracts where there is a vast disparity in economic power.

24. In *Cavendish Square Holding BV v Talal EL Makdessi [2015] UKSC 67, [2016] 2 All ER 519* the Supreme Court reviewed the law on penalty clauses holding that the distinction between a valid liquidated damages clause and an invalid penalty clause as described in *Dunlop Tyre Company Limited v Selfridge & Co Limited [1915] AC 847* was too simplistic and that a more flexible and nuanced approach should be adopted. A damages clause might be neither penal nor a pre-estimate of loss or it could be both; the question whether a clause is enforceable should depend on whether the means by which the contracting parties conduct is to be influenced are "unconscionable" or (which will usually amount to the same thing) "extravagant" by reference to some norm (per Lord Neuberger at paragraph 31).

25. The decision of the Supreme Court is considered in *Harvey on Industrial Relations and Employment Law Division* A II, at paragraph 456. The employer must be able to show that there was a commercial justification for the inclusion of the clause. It is not necessarily negated by the fact the clause has and is intended to have a deterrent effect on the employee, if that can be justified in the circumstances. On the other hand, the employer does not have a valid interest in merely punishing the employee. Secondly, if there is such a commercial justification for including a clause, the question becomes whether this clause was in all circumstances extravagant, exorbitant or unconscionable. Was the clause used out of all proportion to the legitimate interest concerned, in this regard, the issue of whether the clause contained a genuine pre-estimate of a potential loss may be relevant. Thirdly, the court or Tribunal may be more willing to uphold the clause if it was subject to arms length negotiation between parties of equal bargaining power.

26. In commercial contracts, any ambiguity will be construed against the person seeking to rely on it (the 'contra proferentum' rule). This principle has been applied in the context of employment law, *Graham Group plc v Garratt* EAT 161/97

Conclusions

27. I accept the Respondent's contention that the manner in which the Satnav and the vehicle came to be damaged demonstrated negligence on the Claimant's part. I find that both the damage the vehicle and to the satnav system fall within the provisions in the company handbook set out above which allow the Respondent to recover the resulting loss by way of deduction from the Claimant's wages.

28. I am satisfied from Mr Atkinson's evidence that there was commercial justification for the inclusion of the relevant clauses. I am also conscious that the parties in this case were not of equal bargaining power. I find that limiting the clause to the cost of repair, or at most the amount of the insurance excess indicates a genuine intention to cover the actual loss to the company. I am satisfied that the provision was also intended to serve the purpose of encouraging employees to take care not to damage company property and ensuring they were not negligent in conducting their duties as drivers, however in the circumstances I do not consider the means by which the employee's conduct was to be influenced to be unconscionable. In providing that the employee could have the repairs carried out at their own expense (albeit subject to obtaining prior authorisation) and in the alternative limiting the amount of the deduction to the amount of the excess of the insurance policy, I am satisfied that the clause was not exorbitant, extravagant or unconscionable. In other words, I find it is proportionate to the interest concerned: it reflects the cost to the Respondent but does not impose unlimited or disproportionate costs on the employee.

Conclusion

29. I have found that the Claimant was provided with the employee handbook on commencing his employment, the written policies were brought to the Claimant's attention and he signed a document to confirm his acceptance, this pre-dated the event giving rise to the deduction, and the clauses are not unenforceable.

30. I find that the damage to the satnav system was a lawful deduction, it falls within, and was authorised by, the provisions of the employee handbook at page 32, [page 47 of the bundle] under the heading "Liability, Loss and Damage':

> *'"Any damage to vehicles, stock or property (including non-statutory safety equipment) that is the result of your carelessness, negligence or deliberate vandalism will render you liable to pay the full or part of the cost of repair or replacement. Any loss to us that is the result of your failure to observe rules, procedures or instruction, or is because of your negligent behaviour or your unsatisfactory standards of work, will render you liable to reimburse the Company. The Company may seek the full or part of the cost of the loss; and in the event of failure to pay; we have the contractual right to deduct such costs from your pay'.*

And the "Deductions from Pay Agreement" [page 66] which contains the following:

> '6) A*ny damage to vehicles, or property (including non-statutory safety equipment) that is the result of your carelessness, negligence or deliberate vandalism will render you liable to pay the full or part of the cost to repair or replacement.*

31. However, in respect of the deduction for the damage to the vehicle, the handbook contains further provision specifically in respect of damage to vehicles, which I am satisfied were intended to reflect the parties' understanding of as to the extent of the employees liability, at page 21, [page 46 of the bundle] under "Company Vehicle Use";

> *k Where any damage to one of our vehicles is due to your negligence or lack of care, we reserve the right to insist on your rectifying the damage at your own expense or paying the excess part of any claim on the insurers".*

And the "Rules for the Use of Company Pool Vehicles" [page 62-65], which includes the

following [at page 65]:

> '*Personal Liability to Damage to Vehicles*
> *Where any damage to one of our vehicles is due to your negligence or lack or care … we reserve the right to insist on your rectifying the damage at your own expense or paying the excess part of any claim on the insurers'.*

32. The words "the excess part of any claim on the insurers" anticipates that there has been a claim and an excess has been applied. The Respondent did not make a claim on the insurance and nor did it intend to. It had decided to adopt a third way, not provided for or envisaged by the terms of the handbook. Insofar as there is ambiguity as to the terms I would apply the contra proferentum rule to resolve the ambiguity in favour of the Claimant. In the circumstances I do not find that the deduction for damage to the vehicle falls within either of the relevant policies on vehicle use in the handbook, which themselves limit the provision of the Liability, Loss and Damage provisions.

33. There is a further basis upon which the Respondent relies to authorise the deduction and that is the 'Deductions from Pay Agreement' also signed by the Claimant prior to the incident giving rise to the deduction, which provides that:

> "*In the event of an at fault accident whilst driving one of our vehicles, you may be required to pay the cost of the insurance excess up to a maximum of £250.00."*

This agreement is phrased in broader terms than the provisions considered above and does not make reference to a claim having been made on the insurers. The Claimant was at fault for the accident that caused the damage to the vehicle, he accepted that no other vehicle was involved. The cost of the insurance excess was £500.00 but the agreement limited the amount to be paid by the employee to a maximum of £250.00. I am satisfied that the Deduction from Pay Agreement authorised the deduction from the Claimant's wages up to the sum of £250.00

34. I find that the deduction of £500 in respect of damage to the vehicle was not authorised by the agreement signed by the Claimant, the Respondent was only lawfully entitled to deduct the sum of £250.00. In accordance with s25 of the ERA 1996 the Claimant is entitled to recover the sum of £250.00 which was unlawfully deducted from his wages and that sum is payable to the Claimant by the Respondent forthwith.

Employment Judge Lewis

26 June 2018