Case No: 1402363/2021

EMPLOYMENT TRIBUNALS

Claimant: Mr T Cunliffe

Respondent: BAKO (Western) Ltd

Heard at: Bristol (by VHS) **On:** 21 January 2022

Before: Employment Judge Leverton

Representation

Claimant: In person
Respondent: Mr Dominic Holland, General Manager

JUDGMENT

The claimant's claim for unlawful deduction from wages pursuant to the provisions of Part II Employment Rights Act 1996 is well founded. The tribunal orders the respondent to pay the gross sum of £749.16, subject to deductions for tax and national insurance.

REASONS

Claim and issues

1. By a claim form presented on 28 June 2021, the claimant brought a claim for unlawful deduction from wages.

2. The issues were discussed at the outset of the hearing. The parties agreed that the matters in dispute were as follows:

    a. Did the claimant's resignation take effect on 11 June 2021 or, pursuant to an agreement to vary the original notice of resignation, 1 July 2021?
    b. If the resignation took effect on 11 June, did the respondent consent to the claimant giving less than one calendar month's notice?
    c. If the claimant gave less than the required contractual notice without the respondent's consent, can the respondent rely on a clause in the

employee handbook allowing it to deduct one day's pay in respect of each day of the contractual notice period on which the claimant did not work?

3. The respondent's contractual right to make a deduction from the claimant's wages in respect of the costs of a training course attended in October 2020 was not in dispute.

4. There was no dispute about the respondent's contractual right to deduct payment in respect of holidays taken but not accrued at the date of termination of the claimant's employment.

Evidence and procedure

5. The claimant and Mr Dominic Holland (General Manager), who appeared on behalf of the respondent, both provided witness statements and I heard oral evidence and submissions from them. I am grateful to them for their assistance. I was also provided with a 50-page agreed bundle of documents.

Findings of fact

6. I make the following findings of fact on the balance of probabilities.

7. The claimant was employed by the respondent as a driver from 10 May 2019. It was not disputed that his written particulars of employment set out the contractual terms on which he was engaged. He was contractually obliged to give one calendar month's notice to terminate his employment, and his particulars of employment contained the following provisions:

> '*Should you fail to work your notice period, the company reserves the right to deduct one day's pay for each day not worked.*
>
> *Should you report absent during your notice period, you will be expected to comply with company absence control procedures and only SSP will be payable.*
>
> *Should you be on sick leave throughout the duration of your notice period, SSP only will be paid…*
>
> *The company will deduct any monies owed or any holidays overtaken from your final salary payment…*
>
> *At any time during your employment or upon its termination (howsoever arising), the company shall be entitled to deduct from salary or any other payments due to you in respect of your employment, any monies due to you to the company…*
>
> *All other general conditions of employment are as detailed in the employee handbook and/or as contained in the HR policies and procedures.*'

8. The company's holiday year ran from 1 April. The claimant's particulars of employment provided that his annual holiday entitlement was 28 days, including bank holidays, and would accrue on the basis of 1.66 days for each completed calendar month of service. The claimant accepted that he had taken ten days' leave during the leave year starting on 1 April 2021 (the two weeks commencing 12 April and 7 June 2021).

9. Clause 4.1.3 of the employee handbook made provision for sickness absence during a period of notice:

> '*Statutory sickness payment only will apply for those employees who report absent during the notice period and must be covered by the appropriate medical certificate.*'

10. Clause 4.1.8 of the employee handbook is central to this claim. It provided:

> '*Should an employee leave without giving the proper period of notice or leave during [the] contractual notice period (as above) without consent, the company will be entitled to a day's pay for each day not worked during the notice period. This is on the understanding that the company will not deduct a sum in excess of the actual loss suffered by it as a result of the employee leaving without notice. Any sum so deducted will be in full and final settlement of the company's claim for breach of contract. The deduction will be made from any final payment of salary which the company may be due to make. Note that the amount deducted is a genuine attempt by the company to assess its loss as a result of an employee leaving without notice and is not intended to act as a penalty.*'

11. On 30 May 2021, the claimant sent a letter of resignation to the respondent giving two weeks' notice and stating that his last working day would be 11 June. In that letter, he referred to his concerns about his workload and the effect on his mental health, wellbeing and family responsibilities. The respondent did not receive that letter until 1 June. Mr Holland strongly disputes that the claimant's workload was excessive.

12. On 4 June 2021, Mr Holland wrote to the claimant stating: 'Whilst we are naturally disappointed with your decision to resign, we hereby confirm that we accept your resignation. As you will know from the employee handbook your contractual notice period is one month, but in your letter you have advised you will attend work until 11 June, your contractual leaving date should have been 1 July 2021.'

13. The letter went on to advise the claimant that his final day of employment would be 11 June and that a deduction would be made from his final salary payment under clause 4.1.8 of the employee handbook. The amount of the deduction to be made pursuant to clause 4.1.8 was stated to be 14 days' pay, reflecting the number of working days missed during the period 12 June – 1 July inclusive. Deductions would also be made in respect of a training course that the claimant had attended in October 2020, and holidays taken by the claimant in excess of the number of days' leave accrued at his termination date.

14. The claimant took a week's annual leave from Monday 7 June 2021. That leave had been booked for some time. On 7 June he telephoned Mr Holland and attempted to negotiate an extension to his notice period in the hope of avoiding a deduction under clause 4.1.8. Mr Holland granted this request and advised the claimant to let his line manager, Mark Curtis, know in writing. The claimant accordingly sent Mr Curtis an email later that day stating: 'After a chat with Dominic today I have decided to work the extra two weeks of my notice so my last day will be the 1st of July.' Mr Curtis replied: 'Ok, thanks for letting me know.'

15. There was a dispute as to the basis on which Mr Holland granted the claimant's request to extend his notice period. Mr Holland contended that his agreement was conditional on the claimant's physical attendance at work. His evidence was that the claimant asked if he could return to work on Monday 14 June, after his week's holiday, to avoid a deduction under clause 4.1.8. Mr Holland's recollection was that he advised the claimant that if he were to attend work from that date and complete his full contractual notice period, it would be accepted at that point that his employment would continue beyond 11 June, and provided he worked for the remainder of his contractual notice period, the deduction for failing to give full contractual notice would not apply. None of this was set out in writing.

16. The claimant's evidence was that he agreed with Mr Holland to change the length of his notice period and work a full month's notice. He could not recall Mr Holland making it clear to him that his physical attendance at work was required from 14 June until the end of the contractual notice period. He acknowledged that he was not entirely sure about the specific details that were discussed.

17. My finding as to what was said in the telephone conversation on 7 June, based on the evidence set out above, and in the absence of any letter from the respondent detailing the terms of the agreement, is that Mr Holland said something to this effect: 'We will extend your notice if you return to work on 14 June and work out your contractual notice period.' He did not spell out to the claimant that the agreement to extend the notice period to 1 July was conditional on the claimant not being signed off sick.

18. On 9 June 2021, while still absent on annual leave, the claimant was signed off sick by his GP with anxiety, depression and stress. Two sick notes dated 9 and 22 June were included in the tribunal bundle. The first of those sick notes was received by the respondent on Friday 11 June, the last day of the claimant's annual leave. The claimant remained signed off until the end of the month and did not physically report for work with the respondent at any point on or after Monday 14 June. A letter from the claimant's GP dated 29 September 2021, addressed 'to whom it may concern' and included in the tribunal bundle, confirmed that the claimant was unable to work during the period 9 – 30 June due to mental illness and stress. The letter stated that the claimant felt this was due to 'significant stresses at work' and that he had since made a good recovery after changes to his medication and finding new employment.

19. Mr Holland sent the claimant a letter dated 14 June in which he stated: 'Further to our letter dated 4 June, please find attached a payslip which

shows the calculation of the sum due to Bako which totals £330.10, please can you arrange payment.' The payslip showed that 14 days' salary had been deducted from the claimant's final salary payment in reliance on clause 4.1.8 of the employee handbook, resulting in a negative net figure.

20. The claimant started work with a new employer on 14 June. There was a dispute as to the sequence of events that led to his starting that new job. The claimant's evidence was that he had postponed his start date in the new job until 1 July after Mr Holland agreed to the extension of his notice period. He said that he received the respondent's letter requesting payment of £330.10 on 14 June and, following a telephone conversation with Mr Holland about the contents of that letter, that he then telephoned his GP, who confirmed that the sick note issued on 9 June related only to the claimant's job with the respondent and did not prevent him from starting the new job. There was no documentary evidence from the GP of this conversation. The claimant said that, in view of the respondent's stated intention to withhold his final salary payment, he then made a phone call to his new employer, who agreed that the claimant could come in and start work that afternoon. All of this was said to have taken place on the morning of 14 June.

21. However, Mr Holland said that his letter dated 14 June was posted on that date and so could not have been received by the claimant until 15 June at the earliest. He asserted that a telephone conversation between himself and the claimant to discuss the contents of that letter could not therefore have taken place on 14 June. He strongly suspected that the claimant had never intended to work out his extended notice and had always intended to begin his new job on 14 June.

22. Ultimately, it is not necessary for me to resolve this factual dispute as to the sequence of events that led to the claimant starting the new job. The key consideration is that the claimant's absence from his job with the respondent from 14 June was covered by a valid sick note from his GP. The respondent did not seek to argue that the claimant effectively left without giving full contractual notice by starting work with the new employer.

23. The claimant's position was that he was unfit for his job with the respondent owing to work-related stress, but he was well enough to work for the new employer. On that basis, it might have been theoretically possible for him to seek statutory sick pay (SSP) from the respondent for the remainder of his contractual notice period pursuant to clause 4.1.3 of the employee handbook. He did not do so; no doubt he appreciated that such a claim was unlikely to be legally or evidentially straightforward given that he had already started new employment. The claimant only seeks payment from the respondent up to and including his last day of annual leave, 11 June 2021.

24. After the claimant received the respondent's letter dated 14 June, there followed a series of letters in which the claimant asserted that the respondent was not entitled to make deductions under clause 4.1.8 and the respondent restated its position.

25. I accept Mr Holland's oral evidence about the steps taken to cover the claimant's duties from 14 June. The company would normally have used

agency drivers to cover an employee's absence. However, that was not straightforward because agency workers were in short supply, they needed to be familiar with the routes, and it was necessary to entrust them with customers' keys. Mr Holland was not sure whether agency workers had been used on this occasion. The claimant's deliveries were covered, at least to some extent, by the transport supervisor, the transport manager and Mr Holland himself. The transport supervisor and manager both received some financial compensation for working extra hours, and Mr Holland worked at weekends to catch up on his normal duties. Mr Holland argued that clause 4.1.8 was a genuine attempt to pre-estimate the costs of hiring agency staff and paying for overtime. He acknowledged that the claimant had not received salary or SSP during the period 14 June – 1 July, which he said had offset those costs 'a little'.

26. The claimant has not received a final salary payment and has not complied with the request to refund money to the respondent. He claims his full salary for the two weeks commencing 31 May and 7 June 2021, plus £250 that he had paid into an employee savings plan (his entitlement to that sum is not disputed) and compensation for mental and financial strain.

27. With regard to the final head of loss claimed, I explained to the claimant that the tribunal only has jurisdiction to award compensation for consequential financial loss, such as interest payments and bank charges. The claimant did not provide evidence that he had incurred any such losses.

Legal framework

28. Section 13 of the Employment Rights Act 1996 (ERA) provides, in so far as material:

'*(1) 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.

(2) In this section 'relevant provision', in relation to a worker's contract, means a provision of the contract comprised –

(a) in one or more written terms of the contract of which the employer has given the worker a copy on an occasion prior to the employer making the deduction in question, or

(b) in one or more terms of the contract (whether express or implied and, if express, whether oral or in writing) the existence and effect, or combined effect, of which in relation to the worker the employer has notified to the worker in writing on such an occasion.'

29. Section 15 ERA makes similar provision in relation to payments received by an employer from a worker.

30. Section 23 ERA provides: '*(1) A worker may present a complaint to an [employment tribunal] – (a) that his employer has made a deduction from his wages in contravention of section 13…*'.

31. Section 24 ERA deals with remedies:

'*(1) Where a tribunal finds a complaint under section 23 well-founded, it shall make a declaration to that effect and shall order the employer –*

(a) in the case of a complaint under section 23(1)(a), to pay to the worker the amount of any deduction made in contravention of section 13…

(2) Where a tribunal makes a declaration under subsection (1), it may order the employer to pay to the worker (in addition to any amount ordered to be paid under that subsection) such amount as the tribunal considers appropriate in all the circumstances to compensate the worker for any financial loss sustained by him which is attributable to the matter complained of.'

32. Even where a deduction is lawful under the ERA, it must be a genuine pre-estimate of the loss suffered by the employer as a result of the employee's breach. Anything in excess of this is a penalty, which is void at common law. I referred the parties to the decision of the Employment Appeal Tribunal (EAT) in **Giraud UK Ltd v Smith 2000 IRLR 763**. There, a contractual provision drafted in similar terms to clause 4.1.8 of the respondent's employee handbook was held to be unenforceable as a penalty clause because it was oppressive and did not constitute a genuine pre-estimate of the employer's losses.

33. The respondent referred me to **Li v First Marine Solutions Ltd and anor EATS 0045/13**, in which the EAT reached the opposite conclusion. In doing so, it distinguished Giraud on the basis that the claimant in Li was a project engineer on a high salary and was more difficult – and thus more expensive – to replace than a driver such as the claimant in Giraud. The EAT emphasised that it did not wish to set a precedent, and urged tribunals faced with similar cases to consider whether the parties intended a clause to operate as a penalty clause, a liquidated damages clause, or simply as a provision that entitled the employer to withhold pay for the period of time not worked during notice.

34. The law governing the enforceability of penalty clauses was revisited by the Supreme Court in the non-employment case of **Cavendish Square Holding BV v Makdessi and another case (Consumers' Association intervening) 2016 AC 1172**. In that case, it was held that the true test is whether the offending clause is a secondary obligation that imposes a detriment on the party in breach that is out of all proportion to any legitimate interest of the innocent party in the enforcement of the primary obligation. However, it is unclear whether the Court's reformulation of the test applies to contracts of employment, given the unequal bargaining power of the parties.

Discussion and conclusions

Date of resignation

35. I am satisfied that the claimant's notice of resignation was effectively communicated to the respondent on the day after the bank holiday weekend, Tuesday 1 June 2021, when the respondent first had a reasonable opportunity of reading the resignation letter dated 30 May. The calendar month's notice required by the claimant's contract therefore started to run on 1 June.

36. The claimant contended that he resigned with effect from 11 June 2021 with the respondent's consent. He referred to the opening sentence of clause 4.1.8 of the employee handbook: '*Should an employee leave without giving the proper period of notice… **without consent**, the company will be entitled to a day's pay for each day not worked during the notice period [my emphasis].*' He relied on the respondent's letter dated 4 June 2021, which stated 'we hereby confirm that we accept your resignation…. Your final day of employment shall be 11 June 2021.' The claimant submitted that the respondent thereby consented to being given less than the proper contractual period of notice and that clause 4.1.8 therefore did not apply.

37. This was disputed by Mr Holland, who pointed out that the letter of 4 June went on to set out the deduction that would be made from the claimant's final salary payment under clause 4.1.8 of the employee handbook. That clause, he said, was premised on the employer not having consented to being given less than the proper contractual notice, and it was therefore clear from the respondent's letter that consent was not being given.

38. I have no hesitation in concluding that the respondent did not consent to the claimant's resignation taking effect on 11 June. The claimant's resignation letter conveyed a unilateral decision made without any attempt to negotiate an early leaving date with the respondent. The respondent's letter of 4 June merely accepted the practical reality that it could not prevent the claimant from leaving on short notice. The respondent did not consent to receiving less than one calendar month's contractual notice; on the contrary, it pointed out to the claimant that his contractual leaving date should have been 1 July (arguably this should state 30 June) and set out its understanding of the financial implications for the claimant pursuant to clause 4.1.8.

39. The claimant argued in the alternative that his resignation date was extended to 1 July 2021 by agreement with the respondent. The consequence, he said, was that he had given one calendar month's effective notice of resignation even though he was signed off sick for the latter part of that period. The respondent disputed this and asserted that the claimant's termination date was 11 June.

40. Was there an agreement to vary the termination date? This turns on what was discussed during the telephone conversation between the claimant and Mr Holland on 7 June. My factual finding, as stated above, is that Mr Holland told the claimant that his notice period would be extended if he attended work on 14 June and worked out his contractual notice. However, an employee who is absent on sick leave may still be said to be working under

a contract of employment, in the broad sense of being subject to its provisions. Regardless of Mr Holland's subjective intentions, the words he used could not reasonably be taken to mean that the requirement for the claimant to work out his notice precluded him from taking sick leave in circumstances where a valid GP's certificate was in force. It is significant that clause 4.1.3 of the employee handbook envisaged that sick leave could be taken during a period of notice and provided that only SSP would be paid in those circumstances. I conclude that the agreement to extend the claimant's notice period to 1 July was not conditional on his physically attending work throughout that period and taking no certified sick leave. That was not the natural and ordinary meaning of the words used by Mr Holland. If such was his intention, it was incumbent on him to spell it out and advisable to put it in writing.

41. It follows that there was a verbal agreement on 7 June to amend the effective date of the claimant's resignation and substitute 1 July for 11 June. As a result, the claimant gave proper contractual notice of resignation, clause 4.1.8 of the employee handbook did not apply, and the respondent was not permitted to deduct 14 days' pay for the days not worked during the contractual notice period.

Clause 4.1.8

42. For the sake of completeness, I will consider whether the respondent would have been entitled to rely on clause 4.1.8 if the claimant's resignation had taken effect on the earlier date of 11 June without the respondent's consent – in other words, if the claimant had given short notice.

43. The effect of clause 4.1.8 was summarised in the claimant's particulars of employment, which he had signed on 25 November 2019. The particulars also stated that the general conditions of employment were as detailed in the employee handbook. The claimant had signed a document to acknowledge receipt of the handbook on 10 May 2019. I am satisfied that clause 4.1.8 of the employee handbook was effectively incorporated into the claimant's contract and amounted to a 'relevant provision of the worker's contract' for the purposes of S.13 ERA or, in the alternative, that by signing the particulars of employment the claimant had consented to the deduction.

44. Clause 4.1.8 provided: '*Should an employee leave without giving the proper period of notice or leave during [the] contractual notice period… without consent, the company will be entitled to a day's pay for each day not worked during the notice period.* ***This is on the understanding that the company will not deduct a sum in excess of the actual loss suffered by it as a result of the employee leaving without notice*** *[my emphasis].*' The highlighted sentence is no doubt intended to prevent clause 4.1.8 from operating as a penalty clause. However, its effect is to convert clause 4.1.8 from a provision that purports to make a genuine pre-estimate of the employer's losses into a provision whereby, in any individual case, deductions made by the respondent will not exceed the actual loss suffered as a result of the claimant giving short notice.

45. Having regard to the highlighted sentence, the difficulty for the respondent in seeking to rely on clause 4.1.8 is that there was no attempt to calculate

the actual loss suffered as a result of the claimant's failure to work out his notice period, nor to ensure that the loss was reflected in the amount of the deduction. Mr Holland's evidence suggested that the claimant's duties were covered without the respondent incurring significant costs, particularly as the claimant had not been paid during the relevant period. Furthermore, had the claimant given a full calendar month's notice from the outset, it is apparent that he would subsequently have been signed off sick by his GP and that somebody would have had to cover his duties in any event. On that basis, his failure to give the proper contractual notice would not have given rise to any financial loss.

46. The short answer, then, is that the deduction of 14 days' pay was not authorised by clause 4.1.8 because it exceeded the respondent's actual losses. It is unnecessary to consider whether clause 4.1.8 amounted to a penalty clause.

47. Mr Holland struck me as a diligent manager who wished to apply the respondent's internal policies and procedures in a fair and consistent way. Nevertheless, for the reasons given above, I have concluded that the claim for unlawful deduction from wages succeeds.

Remedy

48. I grant a declaration that the claimant's complaint of unlawful deduction from wages is well-founded.

49. The claimant's gross daily rate of pay was £115.29. He was entitled to be paid for the two weeks beginning 31 May and 7 June 2021. (As noted above, he does not claim any payment for the period after 11 June.) Monday 31 May was covered by the claimant's May payslip. The claimant was therefore entitled to the following sums:

    Nine days' pay: 9 x £115.29 = £1,037.61
    Employee savings scheme refund: £250
    Holiday purchase scheme refund: £98
    Phone allowance: £10
    Subtotal: £1,395.61

50. The claimant's holiday entitlement for the period 1 April – 1 July 2021, accrued at the rate of 1.66 days per calendar month, was five days. He accepted that he had taken ten days' annual leave during his final leave year, and that he therefore owed the respondent five days' holiday pay on termination of his employment. He also accepted that he was contractually obliged to refund the cost of a training course attended in October 2020. These deductions work out as follows:

    5 x £115.29 = £576.45
    Training course: £70
    Subtotal: £646.45

51. The total gross sum due to the claimant is therefore £1,395.61 – £646.45 = £749.16.

Employment Judge Leverton
Date: 7 February 2022

Judgment & reasons sent to parties: 7 February 2022

FOR THE TRIBUNAL OFFICE