EMPLOYMENT TRIBUNALS

Claimant: **Mr A Sherwin**

Respondent: **Kwi Business Group Limited**

On: **4 May 2023**

Before: **Employment Judge McAvoy Newns**

At: **Leeds Employment Tribunal**

Appearances:

For the Claimant: **In person**

For the Respondent: **Ms E Mayhew-Hills, Consultant**

JUDGMENT

1. The Claimant's claim for unauthorised deductions from wages contrary to section 13 of the Employment Rights Act 1996 is well founded and succeeds.

2. The Respondent is ordered to pay the Claimant the sum of £165. This is a gross sum and the Claimant is required to account for any income tax or national insurance contributions which may be due on it.

3. All other claims are dismissed following the Claimant's withdrawal.

WRITTEN REASONS

Issues

4. It was agreed at the outset of this hearing that the Claimant's claim was limited to a claim for unauthorised deductions from wages contrary to section 13 of the

Employment Rights Act 1996 (the "ERA"). The Claimant confirmed that no holiday pay claim was being pursued.

5. The specific deductions relied upon evolved during the course of the hearing. However, by the end of the hearing, the Claimant's claim was limited to the following sums which the Claimant said were deducted from his December 2022 wages:

    a. A deduction of £120 concerning an alleged loss of contract at Waddlend; and

    b. A deduction of £105 concerning alleged compensation payable to Tate Smith.

6. The Respondent accepted that these deductions were made. Its position was that it was entitled to make them for the reasons explained in this Judgment and Reasons.

7. The findings of fact and conclusions set out below relate only to these specific deductions. The claims in respect to all other deductions referenced either in the papers or mentioned at the beginning of the hearing were considered withdrawn and have subsequently been dismissed. This includes alleged deductions regarding driving payments.

Preliminary

8. At paragraph 3.1 of the ET3, the Respondent had alleged that the Claimant had failed to engage in the ACAS early conciliation process. Subsequently, Employment Judge Wade directed that this be considered at the beginning of the hearing. This was not pursued any further by the Respondent.

Evidence

9. The Claimant's ET1 comprised his evidence, which he swore to be true, and he was cross examined on that. Mr Knibbs-Washington-Ives gave evidence on behalf of the Respondent. He was cross examined on that evidence. I also had questions for both witnesses.

10. No other witnesses were called to give evidence on behalf of either party.

11. A significant part of the evidence adduced by both parties was relevant to the Claimant's dismissal. As there was no unfair dismissal claim, I explained that this was largely irrelevant.

12. I also had sight of a small bundle/file of documents prepared by the Respondent.

13. Having considered the evidence, both oral and documentary, I made the following findings of fact on the balance of probabilities.

Findings of fact

Background

14. The Claimant commenced employment with the Respondent in September 2022. His employment terminated on 1 December 2022. He was a Cleaner.

15. The parties agreed that the Claimant was employed pursuant to a zero-hour contract. The Respondent's unchallenged evidence was that the Claimant's work was arranged via a monthly rota. Occasionally there was a weekly rota, depending upon whether there had been any late bookings. His team manager allocated work to the Claimant and told him what needed doing and when. The Claimant accepted in cross examination that he was responsible for completing his own timesheets.

16. The Claimant accepts that he was provided with a contract of employment with the Respondent which stated:

    a. "You will only be paid for the hours that you attend work, as agreed in advance, and set out in clause 2"; and

    b. "The Business will make all necessary deductions from your wages as required by law, including pension contributions which may be required to be deducted under the auto-enrolment regime and is entitled to deduct from your wages, other payments due to you, any money which you may owe the Business at any time".

17. The parties agree that the Claimant did not sign this contract. In response to questions from me, the Claimant confirmed that he saw and had read the contract before November 2022 and in particular before the relevant deductions were made on 28 December 2022.

18. The Respondent had a policy which stated: "Any false information you provide regards to the hours you have worked or it has taken you to conduct your duties will be seen as untrustworthy".

19. The Respondent's evidence was that, from November 2022 onwards, it began to have serious issues with the Claimant's attitude. The Claimant allegedly refused to undertake jobs or attend work that had been assigned to him. The Respondent said that the Claimant purported to be sick but did not provide evidence of the same. Meetings with the Claimant were conducted during which his allegedly poor work ethic was discussed. The Claimant accepted in cross examination that the Respondent had raised concerns with him regarding his performance, in particular "time keeping, doing job properly, staying at the jobs for the hours I was supposed to".

20. The Claimant also accepted in evidence that he did not do the work at Waddlend because he did not believe he had been paid correctly. He accepted that he had claimed for doing work on this date which he had not done. However, he disputed the deduction of £120. Instead he believed £60 ought to have been deducted, meaning that £60 was deducted without authorisation. He based this

on an hourly rate of £15, which he believed that the Respondent charged its customers. He later said that only £50 ought to have been deducted. He also challenged the reason for the £120 deduction, namely the loss of contract. The Claimant believed there was another reason for the loss of contract unconnected with his conduct.

21. When the Respondent was asked, in evidence, how the deduction had been calculated for Waddlend, it said: "Don't have the information – mainly due to work non-attendance – don't have the timesheets relevant to that myself".

22. Again, during the hearing, the Claimant accepted in evidence that he did not do the work at Tate Smith because he did not believe he had been paid correctly. However, he disputed the deduction of £105 for this omission. He said that the job he did not attend for was one hour's clean and this did not justify a £105 deduction. Shortly thereafter, however, the Claimant's evidence changed and he said that he did attend to undertake the work at Tate Smith and he only stopped attending when he realised he was not being paid incorrectly, i.e. after receiving his November 2022 wages, as explained earlier. He said that all £105 ought to be repaid to him.

23. When the Respondent was asked, in evidence, how the deduction had been calculated for Tate Smith, it said: "There was a minimum of 4 days non-attendance put on the timesheet, confirmed by me and the other directors having to go and speak about it with the customer".

24. A meeting took place with the Claimant on 1 December 2022. The Respondent's evidence was that the Claimant said during this meeting that he hadn't done the jobs and this was because he "couldn't be arsed with it anymore".

25. The evidence which the Claimant gave regarding the jobs he did was confused. At some points he said words to the effect of: "I had them jobs to do but because I wasn't paid properly I decided not to do them". It transpired that the Claimant believed he was not paid properly in November, the pay date for which was 30 November 2022, hence his decision to not do the work allocated to him.

26. Following that meeting, the Claimant was dismissed for gross misconduct with effect from 1 December 2022. The reason for dismissal was that the Respondent believed the Claimant had been dishonest, brought the Respondent's name into disrepute and had breached policies and procedures.

27. On 1 December 2022, the Respondent wrote to the Claimant stating: "Also you need to give Tate smith key back urgently tonight not tomorrow otherwise the job will not be able to be complete and this will also be deducted from your pay". After some exchanges, the Claimant confirmed he had the key and it was available for the Respondent to collect from him.

28. On 28 December 2022, the Respondent wrote to the Claimant to explain how his final payment had been calculated. In terms of the relevant deductions, the Respondent stated: "£120 [had been deducted] for loss of contract due to your

non-attendance at Waddlend" and "£105 [had been deducted as] compensation to Tate Smith due to your non-attendance".

29. In this same letter the Respondent stated: "It must be noted that deductions for non-attendance resulted in a serious loss of business and was no fault of the business only your own actions were you outlined you attended when asked however it appeared you didn't and stayed at home".

30. The Claimant's pay slip for December, dated 28 December 2022, showed that the Claimant was due to be paid £358.50 gross. It stated that a deduction of £275.75 was made for a "loan repayment".

31. On 30 March 2023, the Respondent wrote to the Claimant signposting the Claimant back to the letter dated 28 December 2022, in order to explain why the challenged deductions had been made.

The Law

32. Pursuant to section 13(1) of the ERA:

"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."

Section 13(2) of the ERA defines "Relevant provision" as 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."

33. In ***Yorkshire Maintenance Company Ltd v Farr EAT 0084/09,*** the EAT cautioned employers against acting as 'judge and jury' when requiring an employee to repay certain costs and expenses and considered that such terms should be 'subject to a considerable degree of scrutiny' because of the vast disparity in economic power between employer and employee.

Submissions

34. Both parties gave oral submissions. These submissions are not set out in detail in these reasons but both parties can be assured that I have considered all the points made, even where no specific reference is made to them.

Conclusions

35. The Respondent conceded that the above mentioned deductions had been made from the Claimant's wages in December 2022 meaning that the question I have to answer is whether the deductions were authorised.

Were the deductions authorised?

36. No.

37. The Respondent's position was that the deductions were authorised by virtue of a relevant provision of the Claimant's contract of employment.

38. A relevant provision means a provision in one or more written terms of the contract which the employer has provided to the employee before the deduction was made. The provision is satisfied if the employer gives a copy of the contract containing the relevant term to the worker. The Claimant accepted that this was done.

39. This provision states:

> "The Business will make all necessary deductions from your wages as required by law, including pension contributions which may be required to be deducted under the auto-enrolment regime and is entitled to deduct from your wages, other payments due to you, any money which you may owe the Business at any time".

40. The relevant part of this is: "any money which you **may owe** the Business at any time".

41. The law states that where contractual provisions and written agreements authorising deductions are being relied on, these should be drafted as precisely as possible. Employers are unlikely to be able to rely on clauses that are ambiguous or too widely drafted. Any ambiguity is likely to be construed against the employer and in favour of the employee.

42. The law also states that, when analysing deductions clauses, Tribunals should bear in mind that such terms should be 'subject to a considerable degree of scrutiny' because of the vast disparity in economic power between employer and employee.

43. Even if it is established that there is a contractual provision authorising the type of deduction in question a Tribunal must then go on to consider whether the actual deduction is in fact justified.

44. The Respondent's position was that the Claimant owed the Respondent the sum of:

    a. £120 for a **loss of contract** at Waddlend; and

    b. £105 for **compensation** payable to Tate Smith.

45. Taking each of these in turn:

Waddlend

46. No evidence of £120 being owed by the Claimant to the Respondent was adduced during these proceedings. This is a requirement of the deductions clause that the Respondent sought to rely upon.

47. There was no clear evidence that the Waddlend contract had even been lost, which is the reason that the Respondent gave for the Claimant allegedly owing it some money.

48. There was no evidence at all about how such alleged loss of contract equated to a payment of £120, presumably paid by the Respondent to Waddlend. Further, there was no evidence of this sum even being paid to Waddlend by the Respondent.

49. Additionally, there was no evidence of any connection whatsoever between the Claimant's conduct and this sum. The Respondent was unable to explain how this sum had been calculated when I gave the Respondent's witness an opportunity to do so during the evidence.

50. The Claimant accepted himself that he did not do all of the work that he was paid for at Waddlend. Therefore, I expect it is correct that the Claimant does owe the Respondent some money for work that was paid to him erroneously. However, based on the evidence it is impossible to say how much money is owed. Furthermore, this is not the reason the Respondent gave for the deduction; the reason it gave was the alleged loss of contract.

51. If the reason for the deduction was genuinely that the Claimant claimed and was paid money for work that he did not do (which is not the reason which the Respondent gave, as explained above), the Respondent should have adduced evidence of:

    a. the dates that the Claimant claimed money for but did not work;

    b. the fact that the Claimant had not worked on those specific dates;

    c. the fact it had paid the Claimant for such dates; and

    d. what the Claimant was paid for those dates and when he was paid it.

52. However, the Respondent did not do so.

Tate Smith

53. The same applies in respect to Tate Smith.

54. No evidence of £105 being owed by the Claimant to the Respondent was adduced during these proceedings. This is a requirement of the deductions clause that the Respondent sought to rely upon.

55. There was no evidence of the sum of £105 being paid to Tate Smith, despite the Respondent's position being that it had deducted this sum from the Claimant's wages in order to pay compensation to Tate Smith.

56. There was no evidence concerning how this sum was calculated. Again, there was no evidence of any connection whatsoever between the Claimant's conduct and this sum.

57. As with Waddlend, there was some confusion regarding whether the Claimant did the work that he was paid for. The Claimant accepted that he did not attend one hour's clean. The Respondent however said that: "There was a minimum of 4 days non-attendance put on the timesheet, confirmed by me and the other directors having to go and speak about it with the customer". However, this timesheet was not provided to me and this was not in line with the reasons given by the Respondent for the deduction, namely that compensation was payable to Tate Smith.

58. To add further confusion to both of these deductions, the reason for the deductions was described as a "loan repayment" on the wage slip. However, none of these deductions arose because of any loan given by the Respondent to the Claimant.

59. Considering all of the above, I have concluded that these deductions were not authorised. The Claimant's claim for unauthorised deductions from wages is well founded and succeeds.

Remedy

60. As to remedy, the Claimant accepted that he did not do some of the work that he was paid for at both Waddlend and Tate Smith, as explained above.

61. In recognition of the fact that there was some wrong doing on his part in respect to Waddlend, and this wrongdoing caused losses to the Respondent, he conceded that the sum of £50 ought to have been deducted. I recognise that he also conceded that the sum of £60 ought to have been deducted but, for the reason explained below, I have decided to apply the lower sum.

62. There was no evidence before me of the Claimant owing £50 to the business. Further, the Claimant conceded that £50 ought to have been deducted because he did not do all of the work he was paid for, not because of the alleged loss of

contract. Nevertheless, given the Claimant's concession I have concluded that it would be fair to the parties for the sum of £50 to be deducted when assessing remedy.

63. Similarly, in respect to Tate Smith, the Claimant accepted that he did not do one hour's clean that he was paid for. His hourly rate was £10. Again, despite this not being the reason relied upon by the Respondent for the deduction, I have concluded that it would be fair to the parties for this to be considered when assessing remedy.

64. Consequently, the Respondent is ordered to pay the Claimant the sum of £165 (representing £70 for Waddlend and £95 for Tate Smith).

Employment Judge McAvoy Newns

19 May 2023

Sent to the parties on:

For the Tribunal:

……