EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4111746/2021

Final Hearing Held in person in Edinburgh on 4 April 2024 at 10.00am

Employment Judge Russell Bradley

Caitlin Allan	**Claimant:** **C Herbert** **Employment Specialist** **Dalkeith CAB**
ELOSCN	**Respondent:** **A Bourke** **Consultant**

JUDGMENT

The judgment of the Tribunal is that: -

1. The complaint that the respondent has made a deduction from the claimant's wages in August 2021 in contravention of section 13 of the Employment Rights Act 1996 is well founded; and

2. The respondent is ordered to pay the claimant the sum of FIVE HUNDRED AND FIFTY THREE POUNDS AND SEVENTY SIX PENCE (£553.76) being the net pay due to her on 20 August 2021.

REASONS

Introduction

1. By notice dated 15 February 2024 this final two day hearing was fixed to consider merits and if appropriate remedy. The claim is for arrears of pay said to be owing to the claimant following her resignation.

2. By way of brief history, the ET1 was presented on 25 October 2021. An ET3 with Grounds of Resistance was lodged on 23 November 2021. It denied the claim. At paragraphs 31 to 33 of its Grounds the respondent made reference to a report that it had made to Police Scotland. In her reply dated 10 December 2021 and in particular to the respondent's application to sist the case, the claimant said that she had not been contacted by the police despite her approaches to them. The case was nonetheless sisted. It was first considered at a case management preliminary hearing on 27 September 2023 at which; the claimant confirmed that she sought £553.76 in the name of arrears of pay outstanding to her on termination of her employment; and a final hearing was fixed to take place at 10am on 8 December 2023. It was fixed as a hybrid hearing. I understood that the reason for this was related to Mr Bourke's disability which had been indicated on the ET3 form.

3. Shortly thereafter the respondent sought to postpone that hearing because in its view "*With 6 witness now (3 from respondent and 3 from claimant, including the claimant herself) there is now no way (including remedy, authorities, summing up, submissions, evidence in chief, cross and re-examination) that we will be able to get through all of this in one day*." The hearing was duly postponed from 8 December and a two day hearing listed for 4 and 5 April 2024.

4. The start of this hearing was delayed as the tribunal service had not appreciated that the respondent's witnesses and Mr Bourke would attend virtually. When we started, Mr Bourke advised that notwithstanding a two day hearing being fixed at his behest, he was not able to attend on the second day because of a hospital appointment recently notified to him. It

was agreed after discussion that the hearing should proceed and continue until 4.45pm if necessary, and even if it went part heard; that position being preferable to postponing to new dates.

5. Regrettably the CVP technology did not allow all of us to hear the evidence of Alistair Barclay the respondent's managing director. Despite various efforts and the assistance of the clerk the technical difficulties could not be resolved. By 3.45pm I came to the view that the hearing should be adjourned to another day. I suggested that that hearing should be in person. In early discussions, Mr Herbert and Mr Bourke agreed. However, after a short adjournment the respondent's position changed. It did not wish to lead any further evidence. It sought a decision based on the material available up to that point in time. That being so, we agreed that parties should lodge written submissions by 8 April. Both were then at liberty to apply by 15 April for an oral hearing. By 15 April neither had.

Evidence and witnesses

6. The respondent had produced a bundle of 40 unpaginated items. Reference was made to some of them in the oral evidence.

7. In addition to the claimant, she led evidence from Lisa Smith, manager of Mayfield/Lawfield & Tynewater After School Club. As the hearing progressed the respondent decided to call only Mr Barclay of its three intended witnesses. As things transpired, the hearing ended before his evidence in chief had concluded as noted above. There was no opportunity to cross-examine him.

The claims and issues

8. The single claim is for arrears of pay said to be due on or about 20 August 2021 following the claimant's resignation.

9. I set out at the start of the hearing what I considered to be the issues being:-

a. Did the claimant's contract contain a relevant provision which authorised a deduction from her final instalment of wages (£553.76) which deduction was made in respect of (i) goods allegedly removed by the claimant and (ii) the cost of replacement of lanyards because of an unreturned ID badge?

b. If not, has the respondent made a deduction in contravention of section 13 of the Act and

c. If so to what remedy is the claimant entitled?

Findings in fact

10. From the discussion prior to evidence on uncontentious issues, from the ET forms and from the evidence that I heard and its reference to material in the bundle, I made the following findings in fact.

11. The claimant is Caitlin Allan.

12. The respondent is The Edinburgh & Lothians Out of School Care Network. It is a charity. It is a private limited company by guarantee without share capital. It is commonly known by its acronym ELOSCN. Its managing director is Alistair Barclay.

13. ELOSCN provides parents with childcare support. It does so via clubs such as Breakfast, After School and Holiday clubs. It provides Breakfast clubs at a variety of schools including Tynewater Primary School, Pathhead, Midlothian.

14. By unsigned and undated statement of particulars of employment the respondent employed the claimant as "*Staff Bank*". It bears to have been issued on 6 January or 28 February 2020 (**document 5**). Clause 2 of the statement provides, "*The Employer reserves the right in its absolute discretion to deduct from your pay any sums which may be due by you to the Employer including without limitation any overpayments or loans made*

to you by the Employer or losses suffered by it as a result of your negligence or breach of any of the Employer's rules and regulations."

15. Clause 3 of the statement provided that she was a "*zero hours*" employee.

16. The claimant's agreed dates of employment were between 2 February 2020 and 12 August 2021. By that latter date her agreed job was as Children's Support Worker.

17. The claimant spent the majority of her time working at the respondent's breakfast club at Tynewater Primary School. Her hours there were between about 7.30am and 8.45am.

18. Shortly after starting at Tynewater, the claimant realised that there were no toys on site provided by the respondent for the children to play with. Accordingly she brought some from home. She sought her mother's permission to do so. That permission was given on condition that they were to be ultimately returned because they belonged to the claimant. In the period of her employment the claimant bought and brought into the club a number of other toys. Examples were vouched by **documents 16 and 18 to 21**.

19. By email 12 August 2021 the claimant gave notice of her resignation (**document 6**). On 13 August, Mr Barclay replied (**document 7**). In it and amongst other things he reminded the claimant that she was contractually required to give notice of one month. He then said, "*However, under the circumstances we have covered both todays and future shifts you were previously allocated and accept this notice with immediate effect. In order for you to receive your last payslip, please complete the attached timesheet full and return it to the finance department …*" The claimant replied that day (**document 7**). In it and amongst other things she said, "*…I went above and beyond to make sure that the setting was the best it could be for the children. We had no toys or anything for the children to play with so I went off my own back and got some*."

20. It appears that some time shortly after 13 August, the claimant was asked to return a lanyard and keys belonging to the respondent to it, either at another school club (Pencaitland) or during breakfast club hours at Tynewater. The claimant did not do so because (i) of the distance to Pencaitland and (ii) she did not wish to be on site at Tynewater during breakfast club hours.

21. On 18 August at about 2pm the claimant telephoned and spoke to Lisa Smith the manager of Mayfield/Lawfield & Tynewater After School Club. It is also a charity which provides childcare services before and after school. It provides the after school club at Tynewater Primary School. The claimant's purpose in doing so was to gain access to the premises that day. Ms Smith advised the claimant to contact Louise Munro, the school secretary. The claimant did so. Ms Munro allowed the claimant access to the premises that afternoon. She collected the toys which belonged to her. She removed them.

22. **Document 35** bears to be a collection of five photographs taken on 19 August 2021 at Tynewater Primary School Breakfast club. The text on two of them says, "*Came into breakfast club this morning to discover 90% of our toys have disappeared. Fuming*."

23. On or about 20 August the claimant received a wage slip bearing that date (**document 8**). It shows net pay due to her of £553.76. At about 9.30am on 20 August the claimant emailed Karen Laidlaw of the respondent (**document 9**). She said, "*I have received a wage slip with no wages. Can you advise me to why that is please?*"

24. On 23 August and from Ms Laidlaw's email address Mr Bourke (in the capacity of HR Manager for the respondent) replied to the claimant (**document 9**). Amongst other things he said, *"… whilst on the premises, you removed almost the entire stock of toys and other items which were shared between ELOSCN and another site user. You are being reported to Police Scotland, for this for theft. Until this matter is investigated and resolved to ELOSCN's satisfaction, any wages you were due are being*

held as ELOSCN will have to now replace all these toys and other items, as they did not all belong to ELOSCN."

25. Some time around that time the claimant destroyed an Identity Card which had been issued to her by the respondent. Around the same time, she disposed of ("*binned*") the lanyard.

26. In the paper apart to its ET3 lodged on 23 November 2021 the respondent asserted (paragraph 48) that a list of items (14) were missing from the Tynewater Breakfast Club. In the paper apart, the respondent attributed a value to each of the items. The total of those values is £503.25. The respondent also attributed £50 as the value of the claimant's missing lanyard, ID badge and lanyard holder. In addition, it attributed £1,000.00 as a cost for a change of colour/style for 50 other staff lanyards "*due to unreturned ID badge*".

27. In its paper apart the respondent asserted that; (paragraph 11), "*It is part of every Contract of Employment and Terms and Conditions that employees who gift toys to ELOSCN have no right to have them returned to them on leaving*"; and (paragraph 39), "*ELOSCN are within their rights to withhold Ms Allen's pay, as it only covers approximately half of their current losses as a company*".

28. On 28 July 2023 and following a report by the respondent to Police Scotland the claimant received a letter from one of its Sergeants (**document 12**). It advised the claimant that her appeal in respect of a Recorded Police Warning (issued on 18 June 2023) had been upheld and that that "*the issuing of ……..* [the] *Warning was not justified …..*".

29. The claimant removed a number of the items listed by the respondent in its paper apart, paragraph 48. She did so because they belonged to her. She did not remove arts and crafts items, Playdough, or any "*Other miscellaneous missing items including office / admin equipment*." She did not remove all of the toys that she had brought to the premises at least because she did not want the children to have no toys to play with after her resignation.

30. The claimant had not seen a "*Frequently Asked Questions*" extract from a respondent's induction (**document 40**) indexed as dated 26 March 2024. That is not surprising given that she left in August 2021.

31. The respondent has not paid to the claimant the sum of £503.25 shown on the payslip, **document 8**.

Submissions

32. Both parties relied on their written submissions which I have considered. Mr Herbert said that the respondent in its ET3 acknowledged that the claimant had supplied the toys in question. At paragraph 13 of its paper apart the respondent's position was that she had gifted toys to the respondent. He reminded that the claimant's evidence was that she "*maintained at the hearing that most of the toys that she had provided were from her family home and had been loaned on the understanding that they would be returned*." In his written submission, Mr Burke persisted with and repeated the respondent's argument that the claimant had "*stolen*" the toys. That assertion was totally without foundation. It is fundamental to an allegation of theft that the goods taken belong to another. In this case the claimant was doing nothing other than recovering property which was her own. The view of Police Scotland (see paragraph 28 above) was definitive and clear. Mr Bourke argues that the induction extract "*shows that Ms Allan knew that she was donating the toys and that they were not there to be taken back by Ms Allan at any point in the future. It is part of every employee's induction that they are informed of this by ELOSCN, unlike what has been claimed by Mr Herbert. This was put to Ms Allan*." It was indeed put to her. But two important points are the answer to that. First, the claimant's evidence (which I accepted) was that she had not seen it before. My finding at paragraph 30 refers. Second (even if she had seen it or something like it) the relevant part of document 40 simply poses the question, "*What happens if I'm offered equipment and toys donated to ELOSCN?*" It does not provide an answer. He comments that the fact that the claimant's Police appeal was successful "*says much about how Police Scotland are run and the time it took them to do their jobs,*

rather than Ms Allan's innocence." The obvious criticism of Police Scotland is a gratuitous, baseless misrepresentation. Similarly, his claim that "*Ms Allan and her representative have been economical with the truth to inflate claims or deliberately omitting* [sic] *vital factors*" is an unjustified irrelevant slur.

The statutory framework

33. Section 13(1) and (2) of the Employment Rights Act 1996 provides that *"(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*."

Discussion and decision

34. Part II of the Employment Rights Act 1996 (of which section 13 is the first section) provides protection of wages. Section 13 is headed, "*Right not to suffer unauthorised deductions*". It hardly needs explaining that section 13 provides a "*right to pay*" unless certain steps have been taken that allow an employer to make a deduction from those wages.

35. In this case the respondent has recognised the claimant's "*right to pay*" of £553.76 on 20 August 2021 by the issuing of a payslip (**document 8**) with that date. What the respondent then seeks to do is to rely on a "*relevant provision of the* [claimant's] *contract*" which it says requires or authorises the deduction of that whole sum. The relevant provision (clause 2) is noted at paragraph 14 above.

36. On my findings the various items removed by the claimant on 18 August were hers, either because she had provided them from her home or because she had purchased them. Documents 16 and 18 to 21 are contemporaneous and provide some support for those findings. The claimant's evidence about original ownership was not seriously challenged in cross examination. She was therefore entitled to remove them when she left the respondent's employment. Contrary to what is pled by the respondent (at paragraph 11 of its paper apart) it was not a part of the claimant's contract or terms that if toys were gifted she had no right to have them returned. It was surprising to see this assertion of fact within the respondent's pleadings when it had no evidential basis.

37. The logic of the respondent's position appeared to be that in addition to the value attributed by it to the 14 items allegedly removed (£503.25) clause 2 of the contract entitled it to withhold the remainder of the sum due to the claimant by reference to £1050.00 costs to which it had been put. There are two fundamental difficulties with that position. First, in my view clause 2 does not permit the withholding of wages in those circumstances and it is a curiosity that nowhere does the respondent expressly plead its basis for doing so. Second, there was no evidence to support a finding that the respondent had incurred those costs even if they could have fallen inside clause 2. No witness spoke to any material to vouch the £1050.00 withheld.

38. Accordingly, in my view there was no provision of the contract which required or authorised the deduction of the claimant's last pay. That being so, the deduction of £553.76 was in contravention of section 13 of the 1996 Act. The complaint under section 23 of that Act is well founded. I have made the mandatory declaration under section 24 and the mandatory order (section 24(1)(a)). The payslip shows that the gross and net sums are identical. That being so the sum of £553.76 is due. The respondent is ordered to pay that sum, as ordered above. The answers to the issues are:-

    a. No

b. Yes

c. A declaration and order for payment as per the judgment.

Employment Judge: **R Bradley**
Date of Judgment: **18 April 2024**
Entered in register: **19 April 2024**
and copied to parties