EMPLOYMENT TRIBUNALS

Claimant: **Mr C Drummond**

Respondent: **Futuretrak Installation Limited (in creditors voluntary liquidation)**

Heard at: **Birmingham**

On: **10 September 2018**

Before: **Employment Judge Flood (sitting alone)**

Representation

Claimant: Did not attend

Respondent: Did not attend

JUDGMENT

The judgment of the Tribunal is that:

1. The respondent has made an unauthorised deduction from the claimant's wages and is ordered to pay the claimant the sum of **£775.97**.
2. The above sums are to be paid gross and the claimant is to be responsible for the payment of any income tax and National Insurance Contributions thereon.

REASONS

The Complaints and preliminary matters

1. The claimant brought a complaint of unlawful deduction of wages under **section 23 of the Employment Rights Act 1996 ("ERA)** by presentation of a complaint on 23 November 2017 having been issued with an early conciliation form from ACAS on the same date.

2. The case had previously been listed for hearing on 4 May 2018. The claimant did not attend that hearing although the respondent did appear. Attempts were

made to contact the claimant and it was determined to be in the interests of justice to postpone and relist. A bundle of documents ("**the Bundle**") and a witness statement prepared and signed by Mr Shoranto Das, the Managing Director of the respondent had been brought to the previous hearing by the respondent and retained on file. The case was relisted for today, 10 September 2018 at 2 pm and came before me.

3. The Tribunal was notified by the respondent's representative on 31 August 2018 that the respondent had gone into a creditor's voluntary liquidation and on 6 September 2018 that the respondent would not be attending the hearing scheduled to take place today. The respondent did not attend the hearing.

4. The claimant did not attend today's hearing either. Attempts were made to contact the claimant by telephone by the clerk and on speaking to the claimant he seemed unaware of the hearing and confirmed that he would not be attending the hearing. The file indicated that the claimant had been sent notification and the claimant confirmed that there had been no change of address. I decided that it would not be in the interests of justice for a further postponement of the hearing to be made and I concluded that the claimant had received notification of the hearing and had opportunity to attend. Therefore the hearing proceeded in the absence of any appearance from either party.

5. Written reasons for the decision are hereby provided.

The Issues

6. The unlawful deduction from wages related to a deduction of £775.97 made by the respondent from the final pay of the claimant in respect of the costs incurred by the respondent rectifying what the respondent's alleges were faulty installations carried out by the claimant. The respondent acknowledges that a deduction was made, so the only issue I need to determine was therefore <u>whether the deduction was authorised by a "relevant provision of the worker's contract" before the deduction</u>.

Findings of Fact

7. As no witnesses attended to give evidence. I have considered the ET1 and the ET3 together with the Bundle and the written witness statement of Mr Das. I make the following findings of fact:

    7.1. The respondent is a telematics installation provider.

    7.2. The claimant started working at the respondent as an Electrical Installer on 17 October 2016. His duties included fitting telematics devices and cameras to vehicles at locations around Scotland.

    7.3. The claimant signed a written contract of employment and a copy of the signature pages of an Employment Contract appeared to be signed by the claimant on 5 October 2016 was at pages 44 and 45 of the Bundle. An unsigned version of an Employment Contract between the claimant and the respondent is shown at pages 30-43 of the Bundle. I find that this is the contract of employment that applied to the claimant as the documentary

evidence strongly suggests that this the case

7.4. Mr Das in his witness statement points out two relevant sections of the Employment Contract, which I set out in full below:

*"9. **Reputation of the company**: You agree to use your utmost endeavours to promote the interests and reputation of the Company and any associated body. The Company only receives payment for work that has been completed to the customer's satisfaction. It is therefore an essential part of your job to ensure that all work/service sheets are completed correctly and signed for by the customer before you leave site."*

and

*"20. **Deductions from Pay**: The Company is entitled to deduct from your remuneration any tax or employee's National Insurance contributions deemed payable on any payment or benefit due under this agreement. In addition, by signing this contract you agree that the Company may make deductions to your pay where the requirements under clause 9 of this contract are not me."*

7.5. Mr Das's statement also made reference to an e mail sent to employees of the respondent including the claimant on 23 May 2017, the relevant extracts of which are as follows:

"Hope you are all well, well its time that time of year when I need to apply some changes. These are important changes so please read and remember.

> *Any service calls made by use for rectification work for our own previous visits, if found to be faulty which be charged to the engineer who made the mistake. A different engineer will be sent to fix the problem. I am no longer going to pay for work which cost the company, I don't think it is fair all parties……"*

And

> *"The above will come effect from the 1st June 2017, no excuses, if there are reasons, please e mail me directly with why you cannot do this while you're off the road. I am very reasonable, but when it costs the company money, it affects us all. I have recently seen pictures of installs and not pleased at all. So, you have been warned with a week notice to get this sorted."*

7.6. The claimant was dismissed from his employment on 4 October 2017. He received an e mail on 20 October 2017 from Mr Das and the relevant parts of that email are set out below

"*As you know, we have been and visited Precise Glasgow now 5 times. The work that was found was not of a very high standard. We have had to de-install and re-install everything, Darren report was not good and yesterday Adrian and Phil went and did the whole job. As stated before*

any rectification work would be payable by the engineer and costs reimbursed to the company. So below are the costs, if you require proof, let me know.

I hope you understand and know that I have been fair and as always, if you require a reference, we will of course provide one.

Flight for Darren to Scotland and ½ day rate = 200.97 (flight) plus the ½ day rate £150 = £350.97
Adrian Day Rate for the 19th October (no charge for Phil) = £325
Side Camera Damage =£100"

7.7. I make no findings about the reasons for the claimant's dismissal as this has no relevance to the claims before me.

The Law

8. **Section 13 ERA** provides that a worker has the right not to suffer unauthorised deductions from their wages. The relevant sections are set out in full below:

"13. Right not to suffer unauthorised deductions.

(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.

9. **Section 23 ERA** provides a right for a worker to present a complaint to Employment Tribunal that their employer has made an unlawful deduction from their wages, contrary to **section 13**.

10. In the first instance decision of the Employment Tribunal in **Lawrance v Golden Wonder (22656/95)** a deductions clause that referred to stock losses was held to be ambiguous and so had to be construed in favour of the worker. This clause was ambiguous and too widely drafted to be relied upon.

11. In **Potter v Hunt Contracts Ltd [1992] ICR 337** the EAT decided that an employer must have authority to make a deduction from wages in order to satisfy **section 13(1) of the ERA**. A clause simply providing that the employee will be liable for any losses incurred is insufficient and there needed to be sufficient clarity that any sums due would or could be made by way of a deduction of wages.

Conclusion

12. The respondent contends that it was entitled to make the deduction from the claimant's wages because of the deductions clause set out at clause 20 in conjunction with clause 9 of the claimant's Employment Contract. In particular in relies upon the provisions stating "***by signing this contract you agree that the Company may make deductions to your pay where the requirements of clause 9 of this contract are not met***". The relevant part of clause 9 provides that it is "***an essential part of your job to ensure that all work/service sheets are completed correctly and signed for by the customer before you leave site***".

13. It then further relies on the email sent to the claimant and other employees on 23 May 2017 referred to at paragraph 7.5 above stating that "***service calls made by us for rectification work for our own visits, if found faulty will be charged to the engineer who made the mistake.***"

14. I can see some force in an argument that the two contractual clauses taken together and read in light of the later e mail amount to "*a relevant provision of the worker's contract"* as provided by **section 13 (1) (a) ERA**. However I conclude that this is too much of a stretch of interpretation of the contract and applying the contra preferentem rule – the well established rule in contract law that any ambiguity will be resolved against the party who seeks to rely on it - I do not find that the clause is sufficiently clear to authorise the deduction.

15. I make reference to the first instance decision in **Lawrance v Golden Wonder** referred to above and as in that case where the term "stock losses " is ambiguous and had to be construed in favour of the worker, there is a similar ambiguity in the current case. Clause 20 of the claimant's Employment Contract simply states that the respondent "*may make deductions to your pay where the requirements under clause 9 of this contract are not met*". Clause 9 is expressed in general terms and states "*all work/service sheets are completed correctly and signed for*". It does not go on to say that any costs incurred from failure to complete such work/service sheets will then be deducted from pay and upon what basis any such deductions will be made. It is therefore too ambiguous for the respondent to rely on in order to make specific and substantial deductions from the claimant's wages.

16. I have considered whether the e mail of 23 May 2017 amounts to a change in the contractual terms and conditions of the claimant and whether it adds to the original contractual provisions and provides the required authority deriving from "*a relevant provision of the worker's contract"* to make the specific deductions. However I have concluded that firstly this does not

amount to a change to the terms and conditions of employment. The Contract of Employment does contain a very general variation clause at clause 50 whereby the respondent "*reserves the right to make any reasonable changes to any of the terms and conditions of your employment. Any change will be notified in writi*ng". However there is nothing in the email of 23 May 2017, which states that this was intended to be such an amendment to the terms and conditions of employment. I therefore do not conclude that this is the case and it would be wrong to make such a jump in contractual interpretation.

17. In any event, even if such a change to terms and conditions was notified, and this did add to the provisions of the Contract of Employment, applying the case of **Potter v Hunt Contracts** above it would still not be sufficient. A provision stating that an employee will be charged for the mistake is not sufficient to amount to authority to make such deductions. As well as imposing liability on the employee, it must go on to give the employer specific authority to deduct from wages in respect of such losses that the employee is said to be liable for. Again there is insufficient clarity here for this to satisfy **section 13(1) ERA**.

18. Therefore taken together I do not find that the various provisions of the Contract of Employment, amount to a "*relevant provision of the worker's contract*" within the meaning of **section 13 (1) (a) ERA 1996** which would authorise the making of such deductions from the claimant's wages. The respondent has therefore made an unauthorised deduction.

19. In respect of the claimant's complaint, I award the claimant the full sum of **£775.97** (a breakdown of which is shown at paragraph 7.6 above) which was the sum deducted from his wages in his final payslip.

Employment Judge Flood

10 September 2018