



# EMPLOYMENT TRIBUNALS

**Claimant:** Mr M Sherlock

**Respondent:** Cheetham Hill Construction Limited

**Heard at:** Manchester

**On:** 2 October 2018

**Before:** Employment Judge Sherratt

## REPRESENTATION:

**Claimant:** Litigant in person

**Respondent:** Mr N Flanagan, Counsel

## JUDGMENT ON THE CLAIMANT'S CLAIM 2410899/2018

The judgment of the Tribunal is that:

1. The claimant was not unfairly dismissed.
2. The respondent did not make unlawful deductions from the claimant's wages.
3. The claimant's claim in respect of unpaid expenses succeeds to the extent of £451.84 and the respondent shall pay this sum to the claimant. The claimant is entitled to interest on this sum at the statutory rate of 8%.

## JUDGMENT ON THE EMPLOYER'S CONTRACT CLAIM 2416349/2018

4. The respondent employer's contract claim succeeds to the extent of £3535 and the claimant shall pay this sum to the respondent. The respondent is entitled to interest on this sum at the statutory rate of 8%.

# REASONS

## The Issues

1. In his ET1 the claimant ticked the box to claim unfair dismissal and then for remedy the claimant said he wished to have all outstanding wages and expenses paid to him equating to about £3,000.
2. When responding to the claim the respondent in addition to defending it pleaded an employer's contract claim.
3. When acting as Duty Judge I rejected the employer's contract claim on the basis that the claimant had not himself brought a claim for breach of contract but I was asked to reconsider this decision by the respondent.
4. In a letter the claimant accepted that he was claiming for expenses, which does not amount to wages for the purposes of the Employment Rights Act 1996, and that he did not object to the respondent's employer's contract claim being heard at the same time as his claim.
5. I therefore decided to allow the employer to bring its claim against the claimant alleging breach of a contractual term in relation to recovering monies paid out to two universities in respect of degree courses undertaken by the claimant during his employment.

## The Evidence

6. The claimant gave evidence on his own behalf. The respondent called Dan Peattie, who is employed as Contracts Manager, and Claire Chamberlain, a Director with responsibility for payroll, expense claims and Human Resources.
7. There was a bundle of documents containing 262 pages.

## The Facts

8. The claimant joined the respondent, a Civil Engineering, Building and Equipment Hire business, in November 2006. His employment ended with his resignation which was effective on 15 March 2018. The claimant started as a Site Engineer and progressed to Site Manager.
9. As is normal within the Civil Engineering Industry the claimant worked on various sites which involved him living away from home from time to time. The Construction Industry Joint Council sets a night subsistence or lodging allowance for employees in the Construction Industry. The non-taxable nightly allowance was at the relevant time £37.12.
10. According to Ms Chamberlain some members of staff may stay away for the odd night in an hotel but they will seek approval prior to arranging the stay and they must hand in VAT receipts before they are reimbursed. If an employee wishes to claim the Construction Industry Joint Council daily fixed allowance they state this on their weekly timesheet and the amount is paid with the wages.

11. The claimant usually claimed the lodging allowance when he worked away from home although he sometimes received payment for staying in hotels. No evidence has been given as to the claimant seeking formal approval prior to incurring hotel expenses but until the matters which are the subject of this case transpired the claimant's claimed expenses had never been refused.

12. In the offer letter to the claimant dated 13 October 2006 under the heading Lodge/Subsistence it stated that it may be necessary to work away from home and "Whilst doing so lodge/subsistence will normally be paid at the Working Rule Agreement civil engineer rate."

13. There was in the bundle a copy of an Employee handbook-staff relating to the respondent company. The second page of the introduction finished in the middle of a word. There was no date on the document. Ms Chamberlain, with responsibility for Human Resources could not explain why this was the case nor how it had been brought to the attention of the claimant other than by it being on the company intranet. The claimant did not recognise the document.

14. The claimant was sent to work on a site in Barrow-in-Furness starting during the week commencing 8 January 2018. He found accommodation in a local hotel and claimed the cost of this as expenses. According to Dan Peattie, during the week he had a conversation with the claimant and advised him that as his transfer to the site had been at relatively short notice his hotel expenses would be paid but the costs were excessive and he would need to find alternative accommodation. The claimant, he says, acknowledged this and agreed he would look for alternative accommodation. According to Mr Peattie the claimant was reminded he must get prior approval of any accommodation costs.

15. There were other employees of the company working on the same site who were claiming the standard lodging allowance having found local accommodation. The claimant's brother was one of them.

16. According to the claimant, when he reached the site he spoke to Mr Pointer of the respondent company who told him that he would be engaged on a long-term contract from January 2018 until June 2018 when there would be a two week break after which they would return to site until October 2018.

17. The claimant accepts that he had discussed accommodation with Mr Peattie, and according to him:

"As a result of that discussion it was agreed that I could arrange alternative long-term accommodation and claim expenses for this. This was agreeable because the weekly cost of long-term accommodation would be cheaper, or more or the same as the cost of staying at a Travel Lodge. I advised Mr Peattie that I would let him know what my accommodation arrangements would be. Thereafter I arranged to stay at the Orchard Cottage at a cost of £220 per week with breakfast and evening meal at £60 a week. Because I need to arrange long-term accommodation I had to pay Orchard Cottage four weeks' accommodation in advance which amounted to £1,120. I paid that amount out of my own pocket on 11 January 2018 and received an invoice for this on the same date."

18. In his evidence the claimant does not state that he told Mr Peattie what his accommodation arrangements would be. In cross examination the claimant indicated that he had told Mr Peattie that he had found accommodation at a weekly cost of £280 and that Mr Peattie did not say 'yes, he could take up the accommodation', on the other hand he did not say he could not. The claimant had never previously had accommodation arrangements expressly approved in advance. He had always just put in the receipt and got it paid.

19. According to Mr Peattie, the first he was aware of the claimant having reached an agreement to stay at Orchard Cottage was on 22 January 2018, and the claimant did not tell him that the cost was £280.

20. When the claimant went to the accommodation the owner asked for a payment of four weeks in advance and the claimant paid this in cash, thus not being able to produce what he normally provided to the respondent in the form of a credit card receipt showing the payment.

21. On 26 January the claimant emailed Mr Peattie asking him to confirm what he could claim per night so that he could look for alternative digs and asking when his expenses would be paid. Mr Peattie responded saying he would discuss with Claire and let him know but payment of expenses for the current digs had been delayed because of the matters they had discussed the previous day because no-one knew what was going to be submitted and this was why it was imperative to get approval before making commitments or submitting invoices.

22. The invoice for the accommodation was provided to Claire Chamberlain and the following week Mr Peattie told the claimant that Ms Chamberlain was not happy with the accommodation expenses and she would not pay them because £1,120 (4 x £280) was too much. He told Mr Peattie this was a one-off payment to secure long-term accommodation and he would be happy to receive payments at £280 per week until the balance was cleared. According to the claimant, Mr Peattie agreed to this and he thought nothing more about it, until 11 February when he was paid ten nights of lodging allowance on top of his normal pay.

23. On 12 February the claimant emailed Claire Chamberlain with a copy to Dan Peattie saying:

"I have checked my wage slip for last week and I have been paid for four nights lodge when my timesheet does not stipulate this. Also the week before I had additional money on top of my wage but did not receive a wage slip to compare against. Can you please confirm what this is for and why?"

24. On 13 February at 08:56 Dan Peattie emailed the claimant asking, "how many nights are you actually lodging?" and at 09:10 the claimant responded to state, "I am not lodging, I put a receipt in as you are both fully aware".

25. At 09:12 Dan Peattie asked the claimant, "Ok, how many nights are you staying away from home?". At 09:22 the claimant responded with, "Know what, you can keep the money. My notice will be in today".

26. At 15:40 on 13 February 2018 the claimant sent an email to Dan Peattie, copied to others within the respondent company, attaching a letter confirming his resignation which stated:

“It is with a heavy heart and great sadness that I find myself writing this letter and it is a decision that has been extremely difficult to make.

After over 12 years of hard work and loyalty to CHC, some incidents over the last 12 months have questioned my honesty and integrity. This is something that I cannot or should not have to tolerate.

Due to these incidents I feel I have no other option but to leave my role and hereby give this letter as confirmation of my resignation with my four week notice period commencing from 15/02/18.

I would like to thank everyone for all the help and training that I have received in my time with the company and wish you all well for the future.”

27. The claimant's contractual notice period was four weeks on either side.

28. According to the claimant in his witness statement he resigned due to Mr Peattie agreeing he could arrange accommodation which would be paid for as accommodation expenses but which were not ultimately paid in full. In addition to this the respondent's conduct in this matter together with the shortfall in accommodation expenses undermined his trust and confidence in his employer.

29. From Mr Peattie's perspective he had not authorised the claimant's expenditure, and he had told the claimant on 25 January on site that he had not complied with company procedure, had not sought authorisation to expend funds in advance and so payment of accommodation expenses was being questioned and therefore delayed. According to Mr Peattie, he explained that as a company they were not happy with what he had done, but as a gesture of goodwill if he could prove he had paid for the accommodation they would reimburse him on a weekly basis on the proviso that he found further alternative accommodation and returned to claiming the lodging allowance.

30. Having received the claimant's resignation Mr Peattie invited the claimant to a meeting on 15 February to discuss his concerns. The meeting took place on 15 February. According to Mr Peattie he asked the claimant if there was anything to do to make him change his mind and the claimant stated that he had three job offers in Glasgow, that he did not owe the company anything and that his mind was made up. He left the site at approximately 13:00.

31. According to the claimant, he suggested that if his expenses were paid this might change things.

32. The claimant did not provide a copy of the initial accommodation invoice with a receipt, in the form of a typewritten but unsigned note to the effect that it was paid in full in cash on 15 January, until 20 February which was one week after his resignation.

33. On 20 February Dan Peattie sent an email to the claimant following a discussion on site that day putting him on garden leave for the remainder of the notice period, and as the claimant had indicated he had already incurred costs for accommodation this week he should please provide proof of it in order to receive reimbursement/lodge payments.

34. Claire Chamberlain wrote to the claimant concerning his expense claims for the period from 15 January to 8 February on 22 February. He had claimed £1120 and had been paid lodging allowances of £668.16 leaving a shortfall of £451.84. Her objections to paying the balance of the claim were set out. He had booked a house for four weeks and had claimed to have paid in cash for 4 weeks upfront without knowing how many nights the accommodation would be needed for. The meal costs were not shown separately. Accommodation is normally booked by the night and sometimes shared between a number of employees pooling their lodging allowance. The employee might be sick or moved to another site thus wasting the pre-payment and potentially incurring further charges elsewhere. A valid VAT receipt had not been provided. It was not authorised in advance. Had it been requested he would have been advised to find an alternative. Staying there for 12 nights equated to £93.33 per night. The company did not believe the expense claim to be reasonable and no more would be paid. This was in line with the company handbook from which she quoted.

35. The claimant submitted further accommodation expense claims for £280 on an invoice dated 19 February and £210 on 13 March claiming that Mr Peattie authorised him to find accommodation and it had been agreed with him.

#### The Employer's Contract Claim

36. On 22 February 2018 a letter was sent to the claimant reminding him that the company had paid for him to study for a BSc in Construction Management. The total costs paid during his employment for the course amounted to £13,850. There was a formal training agreement which he signed stating he was liable to reimburse the company for the costs:

“When considering this, please bear in mind you have two more weeks’ full pay to receive and the company can arrange to withhold these payments, with your consent, as an initial contribution to the repayment, plus any holidays accrued but not taken, should you have any by the time your notice period has expired.”

37. The claimant responded questioning why he should repay the university costs when the company had received grants from CITB in relation to the cost of him attending university. The company's response was that the grants received from CITB go towards the company's cost of training and the claimant's agreement with the company did not take grant monies into consideration. The company would withhold salary payments in accordance with the training agreement in the absence of an alternative repayment proposal being received and accepted. The salary deductions alone would not satisfy the amounts involved. The deductions were of £850 and £945.

38. The claimant entered into a first training contract with the respondent by which the respondent agreed to pay the costs of training related to BSc Construction Management. It was understood the training would cost £2,520 per academic year

for four years plus £6,000 “which was paid for your first year at Leeds University”. The amount would be paid directly by the respondent to the training provider. The employee would be permitted to be absent from work for one day a week by way of day release to attend the course.

39. The first agreement went on to provide that if the employee leaves the organisation:

- (1) before attending the training course but where the employer has incurred liability for the cost of the training, 100% of the training costs incurred, or such proportion of the costs that cannot be recovered by the employer from the course provider, are to be paid in full by the employee to the employer;
- (2) either before completion of the course or within 12 months of the date of completion of the course then 100% of all the training costs are to be paid in full by the employee to the employer;
- (3) more than 12 months, but not more than 18 months from the date of completion of the course, then 75% of all the training costs are to be paid in full by the employee to the employer; or
- (4) more than 18 months but not more than 24 months from the date of completion of the course, then 50% of all the training costs are to be paid in full by the employee to the employer.

40. This agreement was signed by the claimant and dated 22 January 2016.

41. There was a second agreement in similar terms with the total cost of training that will be met being £16,080, and again if the employee leaves the service of the employer (through resignation or gross misconduct dismissal) then the training costs were to be repaid. In the second agreement, also signed and dated on 22 January 2016 there was a further provision that:

“The employee agrees to the employer deducting any monies owed from his wages, including from his final salary or any outstanding payments due to the employee.”

42. On 24 October 2014 Leeds Beckett University issued a student fee invoice to the respondent for undergraduate tuition fees in the amount of £6,000.

43. On 10 September 2015 Glasgow Caledonian University issued an invoice to the respondent for fee year 2015 in respect of the claimant undertaking the Construction Management course in the sum of £2,520. The invoice for fee year 2016 in the sum of £2,600 was dated 17 January 2017.

44. In 2017 Glasgow Caledonian University issued a further invoice for fee year 2017 in the sum of £2,730.

45. The respondent as an employer in the Construction Industry pays a levy to the Construction Industry Training Board. The respondent receives grants from CITB in respect of training it pays for or provides for its employees, and from the bundle it was apparent that the respondent had received from the CITB a number of

payments specifically related, by reference to his name, to expenditure on the claimant's degree course fees.

46. According to Ms Chamberlain, the grants the company received from the CITB are not simply to cover the tuition fees and these are grants from the annual levy which the company must pay. The company was still paying the fees even after he left. In any event, such grants are irrelevant – the claimant agreed to pay the fees under the training agreements.

47. The claimant was paid his normal wages for the weeks ending 18 and 25 February 2018 but his wages were withheld on 11 and 18 March in sums of £850 and £945 pursuant to the training agreements.

### Submissions

48. For the respondent Mr Flanagan submitted that it was for the claimant to prove his case. He referred to the well-known case of **Western Excavating Ltd v Sharp [1978] IRLR 27 CA** which holds that an employee is entitled to treat himself as constructively dismissed if the employer is guilty of conduct which is a significant breach going to the root of the contract of employment; or which shows that the employer no longer intends to be bound by one or more of the essential terms of the contract. The employee in those circumstances is entitled to leave without notice or to give notice, but the conduct in either case must be sufficiently serious to entitle him to leave at once.”

49. Mr Flanagan accepted that the claimant had not delayed in resigning but he questioned whether the employer was guilty of conduct which amounted to a significant breach going to the root of the contract.

50. The 2006 contract was the only thing mentioning a lodging allowance. It was perhaps not ideal that the lodging allowance was not referred to in the handbook, which provided that:

“An employee should not spend their own money without authorisation. Things must be approved prior to the expenditure being incurred.”

51. The claimant claimed lodging allowance 85%-90% of the time and on occasions when he had stayed in hotels and provided receipts he had been reimbursed. There was a great divergence of evidence between the claimant and Mr Peattie, but the claimant did not suggest he got permission from Mr Peattie: he just told him what he was doing. The claimant had never paid four weeks in advance before.

52. As some point the claimant submitted the invoice and it was not paid. In reality Mr Peattie was not aware in advance of the value or location of the claimant's accommodation, and this is confirmed by his email to the claimant on 26 January.

53. Looking at the email exchange the respondent's requests for information did not amount to a breach sufficient to justify resignation. The claimant acted too hastily.



54. If the claimant knew he was underpaid in respect of the expenses claim, why did he go back to the same premises on 12 February? There was no precedent for the claimant hiring a cottage for four weeks in advance. The response of the respondent was an appropriate one. It needed evidence before considering the payment. If permission had been granted, why would Mr Peattie state what he did in his email?

55. The respondent says that there had been no breach of contract at the time the claimant tendered his resignation. The claimant resigned in a fit of pique before the respondent had made any final decision on the expenses claim.

56. As to the employer's contract claim, there were two contracts that were clear and unequivocal. The employee was bound and liable to repay. He had resigned before completion of the course and so clause 2 applied and 100% was repayable.

57. The fact that the respondent had a separate agreement with a third party should not make any difference.

58. Counsel accepted the general proposition of contract law put by me that past consideration was no consideration. This was in relation to the first agreement.

59. Mr Sherlock submitted that the respondent knew where he was staying and what was being paid. He assumed it was ok and never thought anything more until the email exchange. The resignation was due to the queries he was asked concerning the expenses and the lodging payments. He lost his temper. They were being very sarcastic. This was the reason for his resignation. He had previously booked accommodation after the expiry of the four weeks. He was under the impression his expenses would be paid. He was not told they would not be. The question was never answered and he assumed everything was ok. There was breach of the mutual obligation of trust and confidence which had broken down between him, Dan Peattie and Claire Chamberlain. He could not stand being called a liar. He resigned. He had lost his temper.

60. As to the university fees, he left because of the expenses claim. He should not have to repay. The expenses had got cheaper when he moved the course from Leeds to Glasgow. The respondent had been reimbursed by the Construction Industry Training Board for the fees paid on his behalf.

## **Discussion and Conclusions**

### Unfair Dismissal

61. I am satisfied that when the claimant booked and paid for his accommodation, paying four weeks in advance and a total of £1,120, he did not have the approval of Mr Peattie to incur this expenditure. I find it more likely than not that Mr Peattie was unaware of the nature and cost of the accommodation, but even on the claimant's evidence Mr Peattie had not agreed to it.

62. By 25 January at the latest the claimant and Mr Peattie had discussed questions relating to the claimant's accommodation expenses, and the claimant was aware that he had to find something cheaper. Mr Peattie did tell the claimant as a gesture of goodwill that if he could prove he had paid for the accommodation for the

first four weeks they would reimburse him on a weekly basis. The claimant did not provide this confirmation until one week after his resignation.

63. Reviewing the email exchange on 12 and 13 February against the background of the respondent having paid to the claimant a lodging payment rather than his full expenses, I am satisfied that the respondent was not in breach of contract in not paying expenses that had not been previously approved, where no receipt had been provided and where questions were being asked of the claimant rather than there being an outright refusal to pay.

64. In these circumstances I am not satisfied that the respondent was in breach of contract, thus in my judgment the claimant was not entitled to resign and claim constructive dismissal.

#### Claimant's Expenses

65. On the basis of the evidence before me I find that the respondent should pay to the claimant the sum of £451.84, the figure referred to at paragraph 34 above, on the basis of the statement of Mr Peattie set out at paragraph 29 to the effect that the respondent would pay the accommodation costs for four weeks if the claimant could prove he had paid for the accommodation. The claimant did provide a receipted invoice.

66. I am not satisfied that the claimant is entitled to any further expenses beyond the lodging allowance already paid in respect of any nights subsequently spent away from home on the business of the respondent company given his conversation with Mr Peattie on 25 January.

#### The Employer's Contract Claim

67. There are two contracts and both are dated 22 January 2016.

68. By 22 January 2016 the respondent had made payments up to and including the 2015/16 academic year. There is a general principle in contract law that past consideration is no consideration, the consideration for a promise must be given in return for it rather than after the act has been done. There are certain situations where an act done before the promise was made can be consideration for the promise if certain conditions are satisfied, but these matters were not put to the claimant so I do not find that the claimant is liable to make payment to the respondent in respect of any payments made by it to universities on behalf of the claimant prior to 22 January 2016.

69. The second agreement was signed before the respondent made payments to Glasgow Caledonian University on invoices dated 17 January 2017 in the sum of £2,600 for the fee year 2016, and a further £2,730 for the fee year 2017, making a total of £5,330.

70. The claimant argues that because the employer has been reimbursed by the CITB that he should not have to make any payment at all.

71. The second of the two agreements entered into by the claimant on 22 January 2016 provides for the claimant to repay 100% of the training costs if the employee

leaves the service of the employer (through resignation or gross misconduct dismissal) before the completion of the course.

72. It seems to me that the employer's contract claim is for a sum of money fixed by the agreement of the parties as payable by one party in return for the performance of a specified obligation by the other party or upon the occurrence of some specified event or condition. In my judgment this makes the amount claimed by the employer a debt rather than a claim for damages.

73. In this case, because it is a debt rather than a claim for damages, the law of contract means that there is no need for the employer to prove any actual loss, such as in this case where there is no actual loss because the employer has been reimbursed by the CITB.

74. I therefore must find that the employer's contract claim for a debt succeeds and that the claimant shall pay to the respondent the sum of £3535 which is £5,330 less the amount of £1795 already deducted from the claimant's wages.

#### Unlawful deduction from wages

75. On the basis of my findings above and the inclusion in the second agreement of the clause allowing deduction from the claimant's wages, I find that the amounts deducted from the claimant's wages amounted to lawful deductions.

Employment Judge Sherratt

25 October 2018

RESERVED JUDGMENT AND REASONS  
SENT TO THE PARTIES ON

5 November 2018

FOR THE TRIBUNAL OFFICE

#### **Public access to employment tribunal decisions**

Judgments and reasons for the judgments are published, in full, online at [www.gov.uk/employment-tribunal-decisions](http://www.gov.uk/employment-tribunal-decisions) shortly after a copy has been sent to the claimant(s) and respondent(s) in a case.

**NOTICE****THE EMPLOYMENT TRIBUNALS (INTEREST) ORDER 1990**Tribunal case number(s): **2410899/2018 & 2416349/2018**Name of **Mr M Sherlock** v **Cheetham Hill**  
case(s): **Construction Limited**

The Employment Tribunals (Interest) Order 1990 provides that sums of money payable as a result of a judgment of an Employment Tribunal (excluding sums representing costs or expenses), shall carry interest where the full amount is not paid within 14 days after the day that the document containing the tribunal's written judgment is recorded as having been sent to parties. That day is known as "*the relevant decision day*". The date from which interest starts to accrue is called "*the calculation day*" and is the day immediately following the relevant decision day.

The rate of interest payable is that specified in section 17 of the Judgments Act 1838 on the relevant decision day. This is known as "the stipulated rate of interest" and the rate applicable in your case is set out below.

The following information in respect of this case is provided by the Secretary of the Tribunals in accordance with the requirements of Article 12 of the Order:-

"the relevant decision day" is: **5 November 2018**

"the calculation day" is: **6 November 2018**

"the stipulated rate of interest" is: **8%**

Mr S Harlow  
For the Employment Tribunal Office