Case Number: 1802021/16

EMPLOYMENT TRIBUNALS

Claimant: Miss H Downey

Respondent: Progressive Care Limited

Heard at: Manchester **On:** 4 April 2017

Before: Employment Judge Porter

Representation

Claimant: In person

Respondent: Mr T Pochron, solicitor

JUDGMENT having been sent to the parties on 5 April 2017 and written reasons having been requested in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided:

REASONS

Issues to be determined

1. The issues were identified at a preliminary hearing on 7 February 2017.

2. This is a claim for unpaid wages of £308.70 and travel expenses of £144.00.

3. The respondent does not dispute the amount of wages and travel expenses as claimed.

4. The question is whether it was entitled to rely on the terms of the contract of employment which allowed it to charge to the claimant and claw back training costs if the claimant left during the probationary period.

5. The claimant asserts that the respondent had committed a fundamental breach of contract, entitling the claimant to resign, and therefore the respondent cannot rely on the terms of the contract of employment.

6. In any event, the claimant disputes the amount of training costs. The respondent accepts that the respondent must prove that it incurred training costs at least equivalent to the amount sought to be charged back to the claimant

Submissions

7. The claimant made a number of detailed submissions which the tribunal has considered with care but does not rehearse in full here. In essence it was asserted that:-

    7.1 the respondent insisted that the claimant attend training every day in Sheffield knowing that the claimant could not stay over in a hotel because she had child care commitments;

    7.2 the claimant left as early as she could each morning but had to wait until her youngest child caught the bus to school. The claimant was delayed getting there because of traffic and failure of the respondent to provide parking on site;

    7.3 Mrs Smith treated the claimant very badly, making negative and offensive comments to the other trainees about the claimant behind her back, telling the claimant off for being late in front of the other trainees;

    7.4 The training often finished early. She was always told that she had missed nothing by being late. The respondent could have delayed the start of training every day but didn't;

    7.5 Entries on the internet showed that the respondent did bully people, that they were liars, did not care about their employees;

    7.6 The training was useless, the trainers did not have experience, the claimant learnt nothing new;

7.7 The final straw was when she saw that her time sheet had been changed by Mrs Smith to show that her time of arrival was 9:55am. The claimant had actually arrived at 9.51 or 9;52, she had rounded it down to the nearest 5 minutes, being 9.50. Mrs Smith then changed it to 9:55 to make an allegation that the claimant was falsifying her time sheets, trying to rip off the company. The claimant could not stay once she saw that. She resigned;

7.8 the respondent is obliged to pay, at the very least, her travel expenses. Had the claimant stayed in the hotel during the training it could not have claimed the expenses back from the claimant.

8. Solicitor for the respondent made a number of detailed submissions which the tribunal has considered with care but does not rehearse in full here. In essence it was asserted that:-

8.1 the claimant accepted the job knowing she was required to attend the training in Sheffield;

8.2 it was the claimant's choice to travel every day. She was offered hotel accommodation but rejected it;

8.3 the claimant was not bullied. Mrs Smith acted in a professional way, questioning the claimant about being late every day. Mrs Smith was sympathetic, offering hotel accommodation, offering to change the date of the training to a date to suit the claimant;

8.4 the claimant was not disciplined for being late;

8.5 Mrs Smith did not change the claimant's time sheet. Another employee did that after correctly noting that the claimant had incorrectly stated her arrival time. The claimant accepts that she arrived later than the start time she put on the time sheet. She was not disciplined for that, no accusations were made against the claimant;

8.6 The respondent is required to provide all employees with training;

8.7 The respondent assessed the cost of training the claimant as £607.50 but chose to deduct the sum of £492.50. That was a reasonable sum;

8.8 In addition, the respondent was entitled to deduct from wages, and charge to the claimant, the wages paid to the claimant when she attended the training course. The respondent received no benefit from the wages paid and this was a legitimate training cost

which could be charged to the claimant following the case of **Strathclyde Regional Council v Neil [1984] IRLR 11**

8.9 The claimant had signed the Contract of Employment authorising the deduction from wages, the set-off of training fees.

Evidence

9. The claimant gave evidence.

10. The respondent called Mrs Carol Smith, Training & Development Manager to give evidence. In addition, it relied upon the written evidence of Michelle Waddington.

11. The witnesses, other than Michelle Waddington, provided their evidence from written witness statements. They were subject to cross-examination, questioning by the tribunal and, where appropriate, re-examination.

12. An agreed bundle of documents were presented. References to page numbers in these Reasons are references to the page numbers in the agreed Bundle.

Facts

13. Having considered all the evidence the tribunal has made the following findings of fact. Where a conflict of evidence arose the tribunal has resolved the same, on the balance of probabilities, in accordance with the following findings.

14. The respondent is a care services provider and provides services to individuals with a variety of needs, some of whom suffer from behavioural, emotional and substance abuse issues.

15. The respondent is regulated by the Care Quality Commission ("CQC") and Ofsted, and as part of this, is obliged to ensure that all employees are trained to ensure that they possess a minimum level of skill and are as up-to-date as possible. As a consequence, to comply with its duty, the respondent operates a practice whereby it is a mandatory part of every new starter's role to undertake job training with the respondent.

16. It was explained to the claimant at interview that she would be required to attend this mandatory training, which would take place in Sheffield over a 10 day period. The claimant accepted an offer of employment understanding that requirement.

17. The respondent explained that they would pay for hotel accommodation during the course of the training. The claimant explained that she could not stay in the hotel as she had young children and would prefer to travel every day. The respondent agreed the claimant could travel every day and that they would reimburse her with her travel expenses.

18. On 21 September 2016 the claimant signed a contract of employment (page 139) which included the following paragraphs:

> 4. The contract commences on 19 September 2016
>
> 5. Your employment is subject to an initial probationary period of six months commencing on the contract commencement date.
>
> 19.1 During your employment you will be required to participate in training in connection with your job to enable you to better fulfil your duties.
>
> 19.5: If you leave the employment of the employer within the Probationary Period then you will be required to repay to the employer the cost to or incurred by the employer in providing you with induction training and any other training provided.
>
> 19.9 By signing this contract of employment you authorise and agree that your employer may deduct any such monies from any wages salary or other money due to you.
>
> 27.1 By signing this contract of employment you authorise and agree that your employer will be entitled at any time during your employment and in any event on the termination to deduct from your remuneration including, but not limited to, any outstanding loans, overpayments, advances, the cost of training, the cost of the DBS checks, the cost of medical reports, the cost of repairing and damage or loss to the employer's property caused by you or any annual leave taken in excess of your pro rated entitlement accrued to the relevant date.

19. The claimant agreed to attend training for the two weeks commencing 19 and 26 September 2016.

20. Each of the trainees, including the claimant, was required to sign in and out Registers.

21. Mrs Carol Smith is the training manager for the respondent. It is her role to organise and coordinate training for new starters and existing staff.

22. On each day of the first week the claimant was late arriving for her training session. The claimant was not disciplined for her late arrivals.

23. On Tuesday, 27 September 2016, after training had completed, Mrs Smith asked the claimant if she could have a private word with her. Mrs Smith therefore spoke to the claimant in a separate room where there were no other learners around. Mrs Smith asked the claimant if there were any reasons why she could not get to training on time. The claimant explained that she had to drop her children off before setting off to the training. Mrs Smith asked the claimant if she would like to stay in a hotel. The claimant again declined that offer. Mrs Smith asked if the claimant would prefer to leave the remaining training and attend the next induction course, if that suited her arrangements better. The claimant said she preferred to get the training over with and declined that offer. Mrs Smith acted in a professional manner during this exchange.

    [On this the tribunal accepts the evidence of Mrs Smith.]

24. Mrs Smith did not make offensive or upsetting remarks directly to the claimant or to the other trainees in the claimant's absence.

    [On this the tribunal accepts the evidence of Mrs Smith.There is no satisfactory evidence to support the claimant's assertions.]

25. On 28 September 2016 the claimant arrived for the training session and signed in as having arrived at 9:50 am when she had in fact arrived a couple of minutes later. When she left that day she noticed that someone had changed her sign in time from 9:50 to 9:55 am. The claimant assumed that this was Mrs Smith and was very angry, believing that this amounted to an allegation that she was stealing five minutes of the company's time and money.

26. Mrs Smith did not make the alteration to the time sheet. The claimant was not advised at any time that the timesheet was altered for the purpose of making allegations against the claimant of dishonesty and/or theft. The claimant was not told by anyone from the respondent company that there was any concern about the falsification of the time sheets and/or that the matter would be investigated. The respondent did not, prior to the claimant's resignation, discuss with the claimant the amended time sheet.

27. The claimant did not attend for the training session the next day. Enquiries were made as to the reason. By text message the claimant indicated that she was resigning because of the bullying behaviour of Mrs Black, whom she described as " one cheeky disgusting unprofessional individual" and " sad old cow".

28. The claimant resigned and her employment terminated within the 6 month Probationary Period.

29. On the termination of employment there were wages due and owing to the claimant in the sum of £308.70. The claimant also made a valid claim for repayment of travel expenses in the sum of £144.00.

30. The respondent did not pay either of those sums to the claimant.

31. By letter dated 10 October 2016 (page 147) the respondent informed the claimant that it sought to recoup from her the cost of induction training and the cost of the DBS certificate. The respondent advised the claimant that:

> According to your agreement with the Company, you are required, therefore, to repay:
>
> | | |
> |---|---|
> | Training costs | £492.50 |
> | Training hours | £308.70 |
> | DBS cost | £40.00 |
> | Total costs | £845.20 |
>
> Please see the enclosed document for a full breakdown of the training undertaken and associated costs.
>
> In signing your employment contract you have agreed to make the repayments if you left the employment of the company and provided consent for the company to deduct any monies owed from any wages, salary or money owed to you.
>
> The final salary payment due to you on 7 October 2060 is £360.15
>
> Within your final salary will make a deduction of £360.15…
>
> This will result in a final payment of £0
>
> As the figure you owe the company is greater than the amount we have been able to recoup, you are required to pay to the company the outstanding amount to £485.05.

32. The respondent provides a large part of its training to its employees through an associated company Care 2 Succeed Limited. The respondent is invoiced by the training providers, including Care 2 Succeed Limited, for the services provided. The claimant's training was provided by Care 2 Succeed Limited. The amount of training she undertook was listed on her employee training log.

33. It is part of Mrs Smith's role as Training manager to review the costs of training and to make sure it is at an appropriate level. When the respondent recovers the cost of training from employees it reviews the actual cost to itself of the training provided to that employee and appropriate amendments are made to ensure that a reasonable figure is charged. For example, the claimant attended a hygiene course on 21 September 2016 at a cost of £90 per person to the respondent. In

assessing the training costs to recover from the claimant a figure of £25 was charged not the full £90.00.

34. The respondent prepared and provided the claimant with a copy of the employee training log (page 103) showing the amount of training given to the claimant, the training costs as claimed against the claimant. That training cost is either the actual training cost to the respondent for the claimant's attendance or a lower figure. The training log also records the so-called "hourly cost", being the number of hours which the claimant attended training, for which she was paid her agreed contractual hourly rate.

35. The respondent made an error in charging to the claimant the cost of DBS search. It has acknowledged that error.

36. The respondent has taken no action to recover the remaining of the costs as set out in its letter dated 10 October 2016.

The Law

37. When deciding whether the employer committed a repudiatory breach of contract, the first question is whether there was a breach of an express term of the claimant's contract of employment. The next question is whether there is any breach of the implied terms. The tribunal has referred to the most helpful summary of the principles of law which apply in claims of constructive dismissal as set out by the Court of Appeal in **London Borough of Waltham Forest –v- Omilaju 2005 IRLR 35**. The tribunal notes in particular Lord Steyn's judgment in **Malik v BCCI [1997] IRLR 462** where the implied term of mutual trust and confidence was described as an obligation that the employer shall not, without reasonable and proper cause, conduct itself in a manner likely to destroy or seriously damage the relationship of confidence and trust between employer and employee. Brown-Wilkinson J in **Woods v WM Car Services (Peterborough)Limited** [1981] ICR 666 EAT described how a breach of this implied term might arise: "To constitute a breach of this implied term it is not necessary to show that the employer intended any repudiation of the contract: the Tribunal's function is to look at the employer's conduct as a whole and determine whether it is such that its effect, judged reasonably and sensibly, is such that the employee cannot be expected to put up with it. Northern Ireland Court of Appeal in **Brown v Merchant Ferries Limited** [1998] IRLR 682 identified a vital question as being whether the impact of the employer's conduct on the employee was such that, viewed objectively, the employee could properly conclude that the employers were repudiating the contract.

38. The tribunal notes the law relating to the "last straw principle" and in particular the case of **Lewis –v- Motor World Garages Limited 1985** IRLR 465. Neill LJ said that "the repudiatory conduct may consist of a series of acts or incidents, some of them perhaps quite trivial, which cumulatively amount to a repudiatory breach of the implied term" of trust and confidence. Glidewell LJ said "(3) The breach of this implied obligation of trust and confidence may consist of a series of actions on the part of the employer which cumulatively amount to a breach of the term, though each individual incident may not do so…. The question is, does the cumulative series of acts taken together amount to a breach of the implied term?" The case of **London Borough of Waltham Forest v Omilaju (supra)** considered the question of what is the necessary quality of a final straw if it is to be successfully relied upon by the employee as a repudiation of the contract. It states:

> "Moreover, an entirely innocuous act on the part of the employer cannot be a final straw, even if the employee genuinely, but mistakenly, interprets the act as hurtful and destructive of his trust and confidence in his employer. The test of whether the employee's trust and confidence has been undermined is objective."

39. Section 13(1) Employment Rights Act 1996 states that an employer must not make a deduction from the wages of a worker employed by him unless the deduction is required or authorised to be made by virtue of a statutory provision or a relevant provision of the workers contract.

40. Where an employee brings a claim for breach of contract the employer is able to pursue a counter-claim for monies due and owing under that contract of employment.

41. The employer may include an express term in the contract of employment requiring an employee to repay certain costs and expenses (for example in relation to training the employee) in the event that the employee leaves during training or for a period thereafter, and in circumstances where such costs are clearly not a penalty, they may prove recoverable in effect as liquidated damages. The amount claimed must be a genuine pre-estimate of loss or it may be a penalty and unenforceable.

42. The tribunal has considered and where appropriate applied the authorities referred to in submissions.

Determination of the Issues
(including, where appropriate, any additional findings of fact not expressly contained within the findings above but made in the same manner after considering all the evidence)

43. The first question is whether the respondent can rely on the terms of the contract of employment or whether it committed a repudiatory breach of that contract and can no longer rely on it.

44. The claimant does not assert that there was a breach of an express term. She alleges that the respondent, and in particular, Mrs Black, acted in a bullying and offensive manner, giving her no alternative but to resign.

45. The tribunal has therefore considered whether the respondent has committed a breach of the implied duty of trust and confidence.

46. The tribunal has considerable sympathy for the claimant who, the tribunal accepts, struggled to attend Sheffield for her training, bearing in mind her childcare responsibilities.

47. However, there is no satisfactory evidence to support the claimant's assertions that the respondent breached the implied duty of trust and confidence, committed a fundamental breach of contract. The claimant agreed to attend the training course in Sheffield. She had difficulties with childcare and was late arriving for the course. She was offered assistance by way of an offer of hotel accommodation, which she could not take up because of her childcare commitments. She was also offered an opportunity to delay her training to another date. She declined the opportunity. The claimant was not disciplined for being late, she was not disciplined for incorrectly recording her hours on the time sheets. She was not accused of falsifying timesheets for the purpose of defrauding the respondent company. It would appear that the claimant anticipated that such an accusation would be made. However no such accusation was made prior to the claimant resigning from employment. There is no satisfactory evidence to support the assertion that the claimant was bullied and/or harassed during the course of her employment. The fact that former employees may have made accusations of unlawful deductions from wages, bullying and intimidation, against the respondent company on an Internet site is not by itself evidence that such bullying and intimidation did in fact take place, is not evidence that any bullying and intimidation of the claimant took place.

48. The tribunal has considered the employer’s conduct as a whole and determines that it was not such that its effect, judged reasonably and sensibly, was such that the claimant could not be expected to put up with it. There was no bullying, no offensive or threatening behaviour. The requirement that the claimant attend the training on time was reasonable. The respondent acted reasonably in questioning the claimant about her lateness. The failure of the respondent to change the times of the training to accommodate the claimant was reasonable.

49. In these circumstances the question of the final straw does not arise. However, in any event, the amendment of the time sheet on the claimant's final day of employment was an entirely innocuous act on the part of the employer. It did not amount to a repudiatory breach of the contact. It cannot be a final straw, even if the claimant genuinely, but mistakenly, interpreted the act as hurtful and destructive of her trust and confidence in her employer.

50. The respondent did not commit a repudiatory breach of the claimant's contract of employment. It is therefore allowed to rely on the terms of the contract and in particular on clauses 19.5 and 19.9.

51. The claimant signed that contract on 20 September 2016. There is no satisfactory evidence that the contract was signed under duress or that the claimant was misled in some way before she signed that contract. The claimant therefore consented to deductions from wages within the meaning of section 13 Employment Rights Act.

52. Following termination of her employment the claimant was entitled to:
    52.1 wages in the sum of £308.70;
    52.2 travel expenses in the sum of £144.00.

53. The respondent did not pay those sums to the claimant because it exercised its contractual right to require the claimant to repay the cost of training, the claimant having resigned during the probationary period, and set off the training costs against the sums due and owing to the claimant..

54. The respondent assessed the training costs in the sum of £492.50, a reasonable sum, bearing in mind the amount and nature of the training, the requirements of the respondent to provide training to a certain standard to its employees. The fact that the claimant did not feel that she had learnt anything or was concerned about the level of experience of the trainers is irrelevant. This was training which she was contractually obliged to attend, training which the respondent provided to satisfy the requirements of CQC and Ofsted. This was not in the nature of a penalty clause. The respondent made a reasonable assessment of the cost of the actual training delivered to the claimant in the training period.

55. The tribunal has doubts as to the application of **Strathclyde Regional Council v Neil** a case decided in 1982, which did not address the right not to have an unlawful deduction from wages under section 13 Employment Rights Act 1996.

56. However it is not necessary for this tribunal to make a determination on that point bearing in mind that the actual costs of training, which were

reasonably charged to the claimant, far exceed the amount due and owing to her on the termination of her employment..

57. The respondent failed to pay wages due and owing to the claimant in the sum of £308.70. That is a deduction from wages. However, the respondent was contractually entitled to make that deduction, which was authorised to be made by virtue of the claimant's signed contract of employment. There was no unlawful deduction from wages within the meaning of the Employment Rights Act.

58. The respondent failed to pay to the claimant the travel expenses as claimed. However, the respondent was contractually entitled to set off the cost of training against the sums due and owing to the claimant. The claimant was not contractually entitled to payment of her travel expenses after the set-off. There is no satisfactory evidence to support the assertion that the agreement to pay travel expenses was under a separate agreement, was not subject to the same contractual terms as set out in the Contract of employment. Paragraph 19.9 of that Contract sets out the right of the respondent to deduct the costs of training from any wages salary or other money due to the claimant. 'Other money' includes the travel expenses due and owing to the claimant. The respondent did not commit a breach of contract by failing to pay to the claimant the travel expenses as claimed by her.

59. The claim for unlawful deduction from wages and breach of contract are not well founded and are hereby dismissed

Employment Judge Porter

Dated: 2 May 2017

JUDGMENT SENT TO THE PARTIES ON

3 May 2017

FOR THE SECRETARY OF THE TRIBUNALS