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EMPLOYMENT TRIBUNALS

Claimant: **Miss J Hayes**

Respondent: **In-Bloom Industries Ltd**
` **trading as "The Play Factory"**

Heard at: **East London Hearing Centre**

On: **16 February 2018**

Before: **Employment Judge Foxwell**

Representation

Claimant: Mr D Hayes (Claimant's father)
Respondent: Mr B Kotecha (Director)

JUDGMENT having been sent to the parties on 20 February 2018 and reasons having been requested in accordance with Rule 62(3) of the Rules of Procedure 2013.

REASONS

1 The Claimant, Miss Jodanna Hayes, has presented a complaint of unlawful deduction from wages against the Respondent, her former employer In-Bloom Industries Ltd, which trades as "The Play Factory". The Respondent operates a nursery and the Claimant was employed to work there. The Claimant thought that her title was to be "Quality Assurance Practitioner" but a contract that she was provided with after she had started described her as a "Nursery Practitioner".

2 The parties agree that the Claimant's employment began on 30 May 2017 and ended on 31 August 2017, following her giving and working a week's notice. The Claimant received a final payslip which showed a minus figure which I am sure came as a great shock to her, as it would to most of us. Rather than receiving pay for her final weeks of work, the payslip suggested that she owed a substantial sum to the Respondent. The reason for this was a deduction of £3000 under the heading "sourcing fee". Apart from this deduction, the Claimant agrees the figures on the final payslip are correct so that she would have had a positive balance of some £1700 or so had the deduction not been made.

3 The Respondent defends the case on the basis that it made a lawful deduction from the Claimant's pay.

4 The law relating to the payment of wages is set out in Part II of the Employment Rights Act 1996. This contains a strict regime prohibiting deductions from wages except in prescribed circumstances; similar laws have applied in this Country since Victorian times. Under Section 14 of the Act, deductions can only be made from an employee or worker's wages where she has consented to that deduction in writing in advance (the section permits other deductions for things like tax and National Insurance but they are not relevant in this case).

5 The first and critical question for me in this case is whether the Claimant had signified her consent to this deduction in writing in advance. In reaching a conclusion on this issue, I heard evidence from the Claimant and Mr Kotecha. Despite the unfortunate nature of this dispute, one in which they cannot both be right, I nevertheless found them both to be witnesses who gave me their accounts as they honestly believed them to be. This is not a case where I simply disbelieved the evidence of one side and preferred that of the other.

6 The Claimant said in evidence that on 18 August 2017 she signed a contract provided to her by the Respondent. She produced an unsigned copy of this contract to me today. It says as follows on page 3:

> *"Recruitment Costs*
>
> *The nursery has incurred costs of £3000 in recruiting you to your position. In the event that your employment with the nursery is terminated by either party, within 6 months of commencement of employment, you agree that the above amount will be deducted from any final monies owing to you or you will otherwise reimburse the Company".*

7 The Claimant told me in her frank evidence that she did not read the contract closely when it was provided to her but nevertheless signed it. On 23 August 2017, that is a week later, she handed in her notice and the contract ended entirely lawfully on the expiry of her notice.

8 On the face of that evidence, therefore, there was an agreement signed in advance signifying the Claimant's consent to this deduction. I nevertheless questioned the Respondent closely about this because, to my surprise, it had not produced a full copy of the contract that the Claimant admits she signed. While it simply produced the signature page I find on the balance of probabilities, that that is the final page of the contract of which the Claimant plainly had a copy.

9 I find therefore, that the requirements in Section 14 of the Employment Rights Act 1996 are met. That is not the end of the matter, however, because, even where a deduction is authorised under the Statute, a Tribunal must nevertheless consider whether the deduction is in fact enforceable.

10 One matter which Mr Hayes has raised on behalf of the Claimant, his daughter, is

whether this deduction represents an unlawful penalty. A clause imposing a penal sum of damages for a breach of contract may not be enforceable at common law as a penalty if it is not a genuine pre-estimate of the likely measure of loss. This principle applies only to claims for damages for breach of contract however and does not apply in this case where there was no breach; the contract ended entirely lawfully (see *Cavendish Square Holding BV v Makdessi, ParkingEye v Beavis [2015] UKSC 67*). I find that the principles relating to penalties have no application here.

11 Similarly, an issue raised about the Unfair Contract Terms Act 1977 is not relevant as it does not apply to clauses to contracts of employment (see Section 61 of the Consumer Rights Act 2015).

12 I find therefore that there is no reason in common law or statute which might make the deduction clause unenforceable. Such clauses are included reasonably often in contracts of employment where the employer has incurred significant recruitment fees. Furthermore, they are an exception to the obligation to pay no less than the National Minimum Wage (see Regulation 12 of the National Minimum Wage Regulations 2015)

13 One other issue I must consider is whether there is a factual justification for the deduction. It is not enough simply for the Respondent to assert that it has or will have to pay this amount, there should be some evidence to establish this. Once again this has been a concern in this case because, until Mr Kotecha showed me a copy of the recruitment firm's invoice on his computer, there was no documentary evidence of the amount actually incurred and paid by the Respondent.

14 Based on what Mr Kotecha showed me, I find that the sum that the Respondent was charged was £3000. This is not in accordance with the recruitment company's business terms which the Claimant has produced, however. These show that the agency charges 10% of salary for introducing a recruit with a salary at the level of the Claimant's. The Claimant's salary was £20,000 and, therefore, the charge should have been £2000 plus VAT (£2,400) whereas the charge levied at 12.5% + VAT (£3000).

15 In light of the evidence, I find that there is a factual justification for a deduction in this case but I do not find that it is factually justified at the level contended for by the Respondent. I find that it has been overcharged and needs to go back to its supplier to obtain an appropriate refund. The maximum deduction the Respondent can lawfully make is £2400. It follows that the deduction from the Claimant's final pay was not unlawful but similarly the debit balance shown on her final pay slip is £600 too high and should be reduced to reflect this.

16 No counterclaim was possible in this case as such claims only arise in the Employment Tribunal where a claim of breach of contract has been made by the Claimant and this one has been framed as one of unlawful deduction under the 1996 Act. I have nevertheless made findings of fact which will be relevant in any other forum were the outstanding balance to be pursued against the Claimant.

17 I dismiss the claim for these reasons.

Employment Judge Foxwell

21 March 2018