# EMPLOYMENT TRIBUNALS

**Claimant:** Mr G Woodward

**Respondent:** Northern Diver (International) Limited

**Heard at:** Manchester **On:** 31 May 2018

**Before:** Employment Judge Tom Ryan

**REPRESENTATION:**

**Claimant:** In person
**Respondent:** Mr Ian McLeod, General Manager

# JUDGMENT

The judgment of the Tribunal is that:

1. The respondent made an unlawful deduction from the claimant's wages.

2. The respondent is ordered to repay to the claimant the sum of £447.71.

# REASONS

1. By a claim presented to the Tribunal on 21 March 2018 Mr Gary Woodward made a complaint that the respondent had made an unauthorised deduction from his wages when upon termination they recouped from his wages part of the costs of a diver training course that he went on in 2016 when he joined the company.

2. It is agreed between the parties that on 21 March 2016 Mr McLeod conducted an induction session with the claimant in which he offered the claimant employment at £25,000 a year. There was a letter of employment, which is schedule 1 to Mr McLeod's witness statement. Mr McLeod prepared, and I accept, a written statement of terms and conditions of employment naming the claimant on 21 March 2016. He gave the claimant a pro forma letter dated the same day (schedule 3) which Mr Woodward acknowledges that he signed on that day. The importance of that is that that letter says "I confirm I have received and accepted the following …(2)

copy of the contract of employment for review and signature". Clearly that was a reference to the written statement of terms and conditions of employment.

3. Mr McLeod gave evidence that he gave a copy of that to Mr Woodward. Mr Woodward's evidence was vague. He said that he could not remember receiving it. He looked for it when he wanted to find out his notice period and could not find it. That was some two years later and I recognise that people do misplace documents. What is clear is that Mr McLeod had gone methodically through every other matter listed in the record of induction, because he had given him the offer letter, which Mr Woodward acknowledged, which is also listed, and the signature that Mr Woodward put on that letter acknowledged that Mr McLeod had completed the new appointee's induction, the pre-employment medical questionnaire and the health and safety induction. Mr McLeod showed Mr Woodward and me in this hearing the claimant's signature in respect of each of those on documents that he still had in his possession. A generic job description was attached to the contract of employment and Mr McLeod acknowledged that that was probably all that was given on that day.

4. I was therefore satisfied on the balance of probabilities that Mr McLeod gave Mr Woodward the statement of terms and conditions. What is significant about that is that clause 14 provides as follows (and there written thus):

> "**Deductions**
>
> The employer may provide the employee with agreed specified training in relation to their duties as described in the Job Description and in consideration of which the employee undertakes to not resign from his employment with the employer for a period of two years from the date on which the last of the training courses is completed.
>
> If the Employee does resign from the Employers service before the expiry of the agreed period (or before completion of the last of the said training courses) such costs of the training by reason of this undertaking may be recovered by the Employer in whole or part by deduction from payment of the final salary or other payment due to the employee on termination of the employment.
>
> Any monies due to the employer at termination of the contract including loans and holidays paid and accrued will be deduced written thus from the final salary in the first instance and the balance is repayable on demand."

5. Mr Woodward went on a training course which cost the employer £1,535 with a company called STATS ("Scuba Technical and Training Services 2000"). The course was a dive industry technician's course and cylinder part 2. Another employee, Jonathan Williamson, also went on the technician's course on the same day. Although it is likely on Mr Woodward's evidence that the course was done after it had been paid for, and therefore it was probably after 20 April, when he calculated the deduction at the end of the claimant's employment, to which I will come in a moment, Mr McLeod took the date of 20 April as the date of the completion of the training course. That was an appropriate and fair decision. Nobody was able to say precisely when the training course and neither party takes a point on that before me. That is the date from which the calculation that Mr McLeod performed was done.

6. The claimant resigned, giving a week's notice, and his employment, it is common ground, ended on 19 January 2018. Therefore 21 months after the date treated by the parties as completion of the training course and therefore within the two year period referred to in clause 14.

7. The final invoice issued on 26 January 2018 to Mr Woodward, including in the bundle before me, shows that course fees of £639.58 were deducted from his final pay. There were other adjustments, I believe, at about that same time in relation to one day's attendance and accrued holiday pay. Nothing turns on that. I think the position was that perhaps the respondent had not given the claimant full credit and a further payslip was issued for a smaller amount. Nothing turns on that.

8. The issue here is only about the £639.58. That is the sum in respect of which Mr Woodward is making a claim for unauthorised deductions from wages.

**The Law**

9. The question then in my mind is whether the deduction made, relying on clause 14, is lawful. The relevant provisions of the Employment Rights Act 1996 are section 13. Section 13(1) provides, in material part:

> "An employer shall not make a deduction from wages of a worker employed by him unless – … the deduction is … authorised to be made by virtue of … a relevant provision of the worker's contract."

10. A relevant provision is defined in sub-section (2) as:

> "A provision comprised – … 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."

11. In summary, where an employer deducts more that he is entitled to do under that section it becomes an unlawful deduction and he may be ordered to repay the amount unlawfully deducted.

**Conclusion**

12. I turn my attention to clause 14. I have set it out already. In my judgment clause 14 is problematic for the employer. It is not well drafted. I do not criticise Mr McLeod because I have no idea who drafted it. I consider that it has three principal flaws which cause me to doubt that it is enforceable in its present form to make the deduction made in this case, lawful.

a. It is vague. Paragraph 1 of the clause refers to two years from the end of the last training course. Paragraph 2 refers to but does not define the "agreed period". It is not clear whether that is the same two years; and it also refers to completion of the *last* training course (emphasis added). In the next paragraph the employer says that they may deduct the cost of the training "in whole or part".

b. In my judgment clause 14 paragraph 1 it is coercive, which is a strong term, in the sense that in consideration of this provision of training the employee undertakes that he will not resign from the employment

without risking the recoupment of the entire fees at any stafe at the employer's whim.

c. Clause 14 I also consider to be incomplete, and that is because it does not inform the employee of the method of the calculation of the recoupment of the costs of the training course, or the circumstances in which different calculations could or would be made and the consequences for the employee.

13. The obvious consequence is this: if you tell an employee in your contract in effect that if he continues in employment for two years from the date on which the last of the training courses is completed no recoupment will be made then he knows where he stands. He knows that if he leaves at the end of two years, or gives notice at two years and leaves a week later when the notice expires he will not have to repay any of the training fees. But that is not what occurred in this case because the sum recouped from the final salary, as Mr McLeod acknowledges and it is not a matter of dispute, was calculated on the basis of reducing or amortising the cost of the course (£1,535) not over two years but over three, and it is on that basis that the sum of £639.58 was deducted.

14. Had the clause explained that that was what the employer would do or had the employer given in writing to the claimant that basis of calculation, then I consider that it would have been lawful notwithstanding the other flaws that clause 14 has. But not giving that explanation it suggests to the employee that only part of the fees may be deducted in relation to service up to two years. But the contract is silent on what part.

15. The practice of reducing in a straight line, month on month, the amount of fees that may be recouped recoupable, as a principle is understandable. I consider that such a practice would be the obvious inference that an objective bystander would draw, who knew of the term as drafted and agreed if that observer was asked as to what the parties had intended. That interpretation is not disputed by Mr Woodward. He conceded the point that if I am against on the fact that the employer is entitled to make a deduction at all the recoupment should be done on such a basis.

16. The employer simply relies upon the drafting of paragraph 2 of clause 14, as simply giving the employer, in whole or part, a discretion. Were this a contractual claim, giving a contractual discretion, which the employer could exercise, provided it did not do so perversely, then I think Mr McLeod's argument would have greater force. However, there are here statutory provisions, in relation to deductions from wages because these are considered a very important matter requiring of protection in the eyes of the law and have been for centuries. Therefore the circumstances in which you can make deductions are limited by the sections which regulate it in the Employment Rights Act 1996.

17. For the reasons that I have outlined above, I consider that clause 14 does not entitle the employer simply to exercise a general discretion. For example, a good employee who has given good and worthwhile service over a period of two years resigns at 1 year 11 months might have very little deducted from his final salary (even on the respondent's basis at 2 years and 11 months. By contrast somebody against whom the employer has a legitimate concern about attendance, method of

work or quality of work, leaves after two years and 11 months and the employer decides to deduct the entirety of the cost of the course from the final payment. Both of those would be exercising the discretion for which Mr McLeod argues.

18. In my judgment if that was intended to be done the contract must must spell it out in a clear written clause which explains to the employee the circumstaces and means by which deductions may be calculated.

19. For those reasons I find that the deduction that was made in these circumstances, and to the extent that I have explained it, was unlawful. Had it been deducted, as one would have implied or inferred from clause 14, on an amortisation over two years I consider that it would not have been unlawful because that would have been the expectation created by an ordinary reading of the clause.

20. It would be open to me in those circumstances to strike down the clause in its entirety. But that would not do justice between the parties. Both agree that some deduction over a period identified properly by the employer is legitimate.

21. In those circumstances I have come to the view that the appropriate amount that should be deducted should be worked out over a two year period and, having explained the basis of calculation to the parties as a calculation neither of them disputes that aspect.

22. For those reasons I consider that had the respondent deducted 3/24ths of the cost of the course i.e. the sum of £191.87, that would have been a deduction which, in my judgment, could lawfully and properly be made.

23. The difference between that sum and the amount deducted of £639.58 is £447.71. For the reasons that I have explained, I consider that that part of the deducted was unlawful and I order the employer to repay that latter sum to the claimant.

24. For the sake of completeness, we established at the outset of these proceedings that the proper title of the respondent was, as I have set out above, Northern Diver (International) Limited and I direct that the title of the respondent in these proceedings be amended to Northern Diver (International) Limited. Neither party objected to that amendment.

Employment Judge Tom Ryan

Date 19 June 2018

JUDGMENT AND REASONS SENT TO THE PARTIES ON

10 July 2018

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