EMPLOYMENT TRIBUNALS

Claimant: Miss N Sandhu

Respondents: BVM Medical Limited

Heard at: Leicester **On:** 16 August 2018

Before: Employment Judge R Clark

Representatives

Claimant: In Person
Respondents: Mr Meichin of Counsel

JUDGMENT

The judgment of the tribunal is that:-

1. The claim for unlawful deductions from wages **succeeds in part**. The respondent shall pay the claimant £245.66.

2. The claim of breach of contract **fails and is dismissed.**

REASONS

1. **Introduction**

1.1. This is a claim of breach of contract, in respect of the claimant's termination of employment without notice, and of unlawful deductions from wages.

1.2. I have heard from Miss Sandhu in support of her own case and Mr Tailor for the respondent. I received a very small bundle to which both parties added further documentation at the start of the hearing. Both witnesses were questioned on their written statements. Both parties made oral closing submissions.

2. **Background**

2.1. I have set out below my specific findings of fact as they arise against the

particular issues in the case. By way of general background to the case, I make the following findings of fact on the balance of probabilities.

2.2. This employment relationship was short lived. The respondent sells healthcare products to doctors and other clinicians. The claimant was employed from 10 July 2017 as a Clinical Product Specialist. This is a sales type role. It is based from home, largely self-directed with a great deal of travel. It is a role that gives a great deal of freedom and autonomy, which can easily be abused.

2.3. The employment was terminated summarily with effect from 14 November 2017 and during the initial probation period of 6 months. The stated reason was gross misconduct arising from a list of 12 concerns set out in the subsequent letter confirming dismissal [24].

2.4. The employment was governed by a very detailed written contract [48] which I find was accepted and signed by the claimant on 17 July 2017 [64]. It is clear that a great deal of thought has gone into precisely defining the employment relationship and the matters that will, or could, arise within it. I suspect this has been drafted by lawyers, an unqualified draftsman being less likely to incorporate matters such as an "entire agreement" clause as is present in this document. Its interpretation, therefore, will demand the same degree of precision and I have to respect that it means what it says.

2.5. It refers to a staff handbook. By the terms of the contract, such extraneous documentation expressly incorporated forms part of the contract Some terms depend for their meaning on further explanation found in the staff handbook. That document has not been adduced and I cannot say what effect it has on the interpretation of other clauses. I will deal with the terms of the contract as are relevant as they arise in the issues to be resolved.

2.6. The claimant was appointed to the North West region. I accept that the boundary of that region was described to her orally at the time of her appointment and during induction and that it was, broadly, Birmingham to Preston, along the M6 Corridor. I do not accept that there was a more detailed written definition provided. First, nothing has been adduced before me. Secondly, Mr Tailor's oral description of this region, and the other 5 regions, was equally variable and imprecise. It is understandable that a new employee could make mistakes on the boarders between regions as happened when the claimant was challenged for working in Coventry and Worcester. However, I find the claimant knew that she was one of 6 regions and she also knew, in broad terms, where those other regions operated. Though there may be uncertainty at the margins, I do not accept that the claimant could have made a mistake to the extent that Leicester formed part of her North West patch. That finding is relevant only because the claimant has given two conflicting accounts of why she was in Leicester on the last day of her employment. During live evidence, she initially advanced evidence to suggest her working in Leicester (and also Nottingham and Lincoln) was legitimate as her patch had not been defined with sufficient precision. On cross examination, that position was abandoned and she reverted to a case based on some sort of personal emergency, described with varying degrees of severity up to and including one of "life and death", but which she declined to expand upon. There may be reasons for that but they were not at all apparent. I found the claimant's evidence in many respects to be lacking in credibility.

2.7. I find the claimant was a poor performer. Some of that could be down to starting a new job with a new product, her background being pharmaceuticals. I find the employer had specifically arranged at least two meetings with the claimant about its concerns about her performance. Mr Tailor and her manager, Emily, both made clear that the claimant needed to engage with the expected standards of work. That included her following up after her appointments, to copy her follow up emails to Emily, to keep her online diary updated, to log in to the system regularly and to be contactable, there being an issue about getting hold of the claimant. If she was finding things difficult she was asked to raise it so that support could be offered. I find the concerns went further than a new employee getting to grips with new systems.

2.8. In the days running up to her dismissal, Mr Tailor had become increasingly frustrated with the claimant. She had not been contactable for two whole days and had not returned emails or phone messages. Hospitals and clinicians, in particular one District Nurse with an urgent need for a replacement product, had begun calling the head office as they had not been able to get a response from the claimant. Mr Tailor had learned through another employee, Chetne Chiklia, that the claimant had two Facebook pages. One was a personal or social one. The other was set up to focus on her activity in respect of her involvement in a foreign exchange trading business called IMarketsLive. This raised concern that the claimant was engaged in some other business or employment. I return to the detail of those posts and that business below. The claimant was still not responding to the employer's attempts to contact her on 14 November 2017. The respondent tried to track her down through her company mobile phone which has a means of locating it. It showed she was in Leicester. Mr Tailor went to the location. He found her company car but not her. He decided enough was enough and decided that her employment would be terminated. He recovered the claimant's car using the spare set of keys. In the boot of the car were two marketing display banners for IMarketsLive and various business receipts.

2.9. In response to what the claimant believed was the theft of her company car, she did eventually make contact with Mr Tailor to be told that she was dismissed. A letter confirming her termination was sent the same day. It gave the employer's reasons for dismissal. It asserted that this was gross misconduct and as such no notice would be given or paid in lieu. It asserted that no pay would be paid for 13 or 14 November. Finally, such pay as was otherwise due from 6th of the month would be offset by various deductions that it said it was entitled to make. The money said to be owing from the claimant to the respondent totalled £6,930.77.

2.10. The respondent operated a monthly payroll which ran from 6th to 5th of each month, payday being on or around 5th.

2.11. There was no disciplinary procedure adopted, no exchange to understand the facts of the claimant's situation, to hear her response to the concerns, nor was there a right of appeal. The claimant did receive the reason for dismissal in writing.

2.12. The Facebook entries discovered by Chetne Chiklia establish a number of matters which I find would be of obvious concern to the respondent generally and particularly in the circumstances then known. That, and her evidence before me, lead me to make the following findings of fact about her activity with IMarketsLive.

a. IMarketsLive operates an "app" based platform for trading in foreign currencies (forex). It appears to operate through some sort of collective structure amongst those that use it.

b. The claimant traded on this app. She would make losses and gains from trade to trade. The overall value of this trading has not been established save to say that in one month recently, she lost around £4000 in trades.

c. She could use the app at any time of day but I find she did use the app, and make Facebook posts about her trading activity, during her working hours for the respondent.

d. The claimant had established a second Facebook page focused solely on her activity with IMarketsLive (this was separate to her personal/family Facebook page in respect of which she maintained higher security settings so it was not public). I find her involvement with the app was something more than a mere user. She had a degree of investment in the product (in her time and commitment to it) for which I find she received some sort of benefit.

e. In the absence of any contrary explanation, that is the only sensible way to explain the degree of investment of time and energy the claimant put into the product. I reject the claimant's contention that her use of the app was a hobby and no different to someone who gambles, or goes to the casino or the gym. Whilst it may be possible to use the app in that way, I find her involvement went further.

f. In itself, the Facebook post of 7 November at 14.31 [82] would not disclose anything concerning save for the fact it was posted on the claimant's dedicated forex Facebook page. It does tend to suggest a notice to other IMarketsLive users that the claimant was available in the Manchester area on a day that she should have been working for the respondent.

g. The entry on 9 November 2017 [83] discloses her trading for that morning under the comment "when your day has just begun but you have already hit your daily target…how shall I spend the rest of my day". I accept that it may be possible to pre-set the trades at any time of day and the fact many appear to have occurred during working hours is not necessarily indicative of her actually placing her bids during that time, but her use of the Facebook page clearly was. On balance, it seems to me more likely than not that she was using the app during working hours in order to have known the outcome of those trades.

h. The entry on 4 November 2017 is too unclear to make any clear findings. The picture is apparently a video of a city scape taken the night before. The post was posted at 11:04 am on a Saturday.

i. The claimant posted a picture of her presenting at an IMarketsLive seminar on Sunday 22 October 2016. The marketing, or presentation, banners found in her car are identical to the ones that can be seen in the picture. She is one of three people on stage. The audience appears large, possibly in the region of 100.

j. There is a further post at a similar IMarketsLive seminar on Monday 23 October at 18.49. Again, the claimant is speaking to a large group. The same banners can be seen. She appears to be the only person on stage. The post is covered with the caption "*I love what I do. Empowering and educating people on how to build a*

residual revenue income stream." She followed this up with a further post about 10 minutes later [92] in which she said "*Hello all, I am getting a lot of interest from people who want to learn how I help people earn an additional income stream through forex trading. Please send me a direct message with your number and I will be in touch with you all shortly…*"

k. There is a further similar picture posted on Friday 27 October at 19:48 [90]. Mr Tailor was additionally concerned about the time the claimant must have taken out of her working day in order to even be at such an event in Kensington, West London in time. On balance, I am satisfied the claimant must have set off before the end of her working day with the respondent to be at this event in time. I am satisfied on balance that she was actively involved in the event and would have had to be there prior to it commencing and to set up her banners.

l. On Wednesday 8 November 2016 there is a similar post of the day's trading [91]. This was posted at 12:37 under the caption "daily profits".

2.13. I found the claimant's knowledge of Forex trading to be extensive. She was able to explain the corporate and personal tax implications of such trading. She was less convincing in suggesting that she was not involved in this business in some more integrated way and that she just happened to have the banners in the boot of her company car as a favour to another.

3. **Breach of Contract**

3.1. It is common ground that clause 18 of the contract of employment entitled the claimant to 4 weeks' notice of termination increasing by one week for each completed year of services to max of 12 weeks. By clause 18.1, that basic right is made subject to variation during the probationary period.

3.2. Clause 2.3 defines the first 6 months of employment as a probationary period. In this case, that is 11 July 2017 to 11 December 2017. Termination during that period was subject to only one week's notice. The claimant was dismissed summarily on 14 November 2017, by phone, within that probation period. That dismissal is prima facie in breach of the contractual term as to notice.

3.3. The legal burden therefore falls to the respondent to show that there was a repudiatory breach of contract by the claimant prior to 14 November 17 in order to avoid liability for its breach of contract. There is no employer's contract claim advanced as a means of offsetting any damages that otherwise are due. As no notice was given, there were no wages paid during any notice period from which any deduction may have been applied. Nor was any payment said to be notionally paid in lieu of notice which would, in any event, not amount to wages for the purpose of s.13 and 24 of the Employment Rights Act 1996.

3.4. The only question before me, therefore, is whether the respondent was entitled to dismiss without notice. If I am satisfied on the balance of probabilities that the claimant was guilty of gross misconduct, her claim fails. It does not matter whether that misconduct, or the full nature or extent of it, was known to the respondent at the time of dismissal or not (**Boston Deep Sea Fishing And Ice Co V Ansell (1888) 39 ChD 339**). If the respondent fails to satisfy me of

that, then the breach of contract claim succeeds in full.

3.5. The quantum is one week's gross pay. That is £576.92

3.6. The crux of this case is whether the claimant is guilty of conduct in response to which the contract entitles the employer to dismiss summarily. That is usually restricted to conduct said to amount to gross misconduct but need not always be so (**Farnan v Sunderland Athletic football Club [2015] EWHC 3759 (QB)**)

3.7. In this case, the contractual power to terminate without notice is set out in clause 18.3. It provides that :-

> ***the employment of the employee may be terminated by the Company without notice or payment in lieu of notice in the event of serious or persistent misconduct by the Employee. A copy of which is in the Staff Handbook.***

3.8. The staff handbook has not been adduced in evidence. The effect of that further provision on clause 18.3 is, therefore, not known. At first blush, the respondent is therefore unable to prove that the conduct alleged against the claimant falls within the clause 18.3 as the document is incorporated into the contract as a whole by virtue of the entire agreement clause 30.1.1.

3.9. However, in its pleaded case (para 8 ET3), the respondent relies on the more traditional formula of conduct which it says amounted to gross misconduct. "Serious and persistent misconduct" is conduct falling short of "gross" misconduct (**Farnan**, per Whipple J at paragraph 65). It also has a different legal quality and effect. By its very nature, conduct which is gross misconduct entitles the employer to dismiss without notice. As a matter of law, this is not a case of the employer *performing* the contract, but accepting the employee's repudiatory breach. As such, the fact I do not have the incorporated staff handbook before me does not prevent me from considering whether the contract was repudiated by the claimant's gross misconduct. Had the contractual right to terminate without notice for serious or persistent misconduct been relied on, that conclusion could well have been different.

3.10. I must then turn to consider what constitutes gross misconduct. The classic statement of the meaning is that of Lord Jauncey in **Neary v Dean of Westminster [1999] IRLR 288** that to constitute gross misconduct, the conduct in question

> ***'must so undermine the trust and confidence which is inherent in the particular contract of employment that the master should no longer be required to retain the servant in his employment'****.*

3.11. It is therefore a matter for me to assess whether the allegations against the claimant are, firstly, made out in fact such that I accept them on the balance of probabilities and, where they are made out, that their nature and gravity is such as to fall within the ambit and meaning of gross misconduct.

The Allegations of Gross Misconduct

3.12. The employer's reasons are set out in the letter confirming dismissal [24]. It lists 12 matters which it says cumulatively, or in its words "in aggregate" (et3 para15) amount to gross misconduct. Individually and in isolation some clearly

do not amount to gross misconduct. Others seem to be without particularisation. Some, however, clearly are capable of amounting to gross misconduct if they are established in fact. I am asked to consider the totality of the picture as passing the threshold. I start by summarising each allegation in turn and as necessary making further specific findings of fact. I have numbered each of the 12 allegations sequentially for ease of reference.

(1).Neglect of your duty to your employer.

3.13. I do not regard this a separate allegation in fact. It is not particularised and it seems to me it is a summary of the matters which are found in the particulars of the other allegations. In short, on 14 November 2017, the respondent had reached a conclusion that the claimant was devoting her working time to matter unconnected with her duties in her employment.

(2)Ignoring calls from clinical customers and (3) not returning calls from customers

3.14. In his evidence, Mr Tailor states this as occurring in the lead up to the claimant's dismissal. I am satisfied the respondent was itself finding it difficult to contact the claimant and that she was not returning calls and communication to her manager. This allegation arises because in the same time frame, the head office began receiving calls from customers complaining of a similar difficulty in making contact with the claimant. I am satisfied this was the case.

3.15. Deliberately, as opposed to incompetently, ignoring calls from the customers could potentially amount to gross misconduct. On the balance of probabilities, I am satisfied that he claimant was not responding to the requirements of her duties within a reasonable time and has not satisfied me of any just explanation as to why that was the case. I have to conclude it was a deliberate choice.

(4) Not answering messages left by her immediate line manager (5) Continuously ignoring request by your line manager to send follow up emails to field appointments (6) Continuously ignoring request by your line manager to enter appointments in your Outlook Calendar

3.16. I am satisfied these allegations accurately reflect the claimant's lack of engagement with her duties. It was part of the increasingly concerning picture that led the employer to meet with the claimant on two occasions. I do not accept that, on those occasions, she was issued with warnings in a disciplinary sense, but I am satisfied that on both occasions it was made clear to her what was expected of her and this was done in strict, albeit supportive terms, with encouragement for her to come forward if she was experiencing difficulties.

3.17. In isolation, these appear to be matters of performance and it would not be possible to determine whether it went any further into deliberate conduct. As such, in isolation, it would not amount to gross misconduct. Taken as part of the entire evidential picture, there is enough to conclude that these failings arose through the claimant's conscious actions as to how she was spending her time.

(7)Not replying to Mr Tailor's emails

3.18. Whilst this allegation is consistent with the other failings, and therefore on balance an email from Mr Tailor was as likely to have suffered the same lack of

response as one from Emily, it seems to me it adds nothing to what is alleged already.

(8)Not logging onto email service to check emails

3.19. I am satisfied that the claimant was not regularly checking her emails and was not logging into the respondent's email server to download emails. It forms part of the concerns about her general lack of engagement with the systems expected of employees in her position. In isolation, I am not satisfied that this is capable of amounting to gross misconduct although such conduct that did occur may very well lead to a decision to terminate. It does, however, form part of the wider picture.

(9)Being off territory without notifying your line manager when you should be working on your own territory visiting customers.

3.20. To the extent that the other two occasions (Coventry and Worcester) were relied on in this allegation, while made out in fact they do not amount to gross misconduct. Firstly, I am satisfied there was some scope for misunderstanding so far as Worcester and Coventry are concerned. Secondly, the respondent accepted it was a mistake.

3.21. The respondent says (§12-14) it noted through the tracker on her company mobile phone that she was off territory. She was in Leicester. It says she failed to answer her phone and decided she was AWOL and that it should go and collect the company car in case it had been stolen. The claimant sought to suggest her territory was not made clear to her. I reject that as a fact so far as Leicester is concerned. In any event, the claimant then accepted she was in Leicester for personal reasons, the nature of detail of which was not disclosed at the time or before me in evidence. This is a serious issue on its own and particularly when seen in the context of the picture emerging.

3.22. The mere fact of being off territory is not in itself a matter of gross misconduct. As with other allegations, it is what this adds to the overall evidential picture that has to be assessed.

(10)For working for another organisation during BVM paid time

3.23. The respondent says (§11) how Mr Tailor became aware the claimant was also involved in another business. He believes she was working in some way for IMarketsLive. I have no direct evidence of employment and conclude that the nature of the engagement with IMarkets live was something short of a contract of employment. I am, however, satisfied that the claimant was actively engaged in the business, that she devoted a large proportion of her time to the business and that she had some form of economic benefit from that personal investment over and above her own trading activity when using the app.

(11)On 13 and 14 November you were checking your personal phone on numerous occasions but not the work phone and were not contactable on both days

3.24. I find this allegation of misconduct in isolation has not been proved.

(12)14th you spent all day of (sic) territory

3.25. This is conceded. The reasons for this have not been advanced by the claimant. I am satisfied she was not engaged in the business of the respondent

at all that day. On the balance of probabilities, I am satisfied that her presence in Leicester was in respect of her activities with IMarketsLive. I am satisfied that the day before, Monday 13th November, she had equally not been engaged at all in the business of the respondent. However, unauthorised absence is not, in itself, a matter of gross misconduct. The contract provides for this eventuality in clause 16.6 and contemplates some opportunity to explain the situation before it is considered as a disciplinary matter, albeit that it leaves open the possibility that the circumstances might warrant summary dismissal. As always, the question is not what this matter establishes in isolation, but what it contributes to the overall picture.

3.26. Before considering whether the total picture is one which establishes gross misconduct, there are some further relevant clauses in the contract of employment to take notice of.

3.27. Clause 4.3 explicitly requires the employee:-

> ***to provide weekly schedules of their itinerary for the following week and a report of their weekly activity or as requested by the Sales manager.***

3.28. Clause 4.4.1 requires that the employee shall:-

> ***"unless prevented by incapacity, devote the whole if his time, attention and abilities to the business of the Company".***

3.29. Clause 26.1 provides:-

> ***"Employees may not without the prior written consent of the Company engage in any form of business or employment other than employment with the Company whether inside or outside your normal hours of work."***

3.30. Clauses 26.2 and 26.3 go on to deal with the procedure for obtaining consent for and the warranty that the employee must give that the secondary employment does not conflict with the respondent's activities and will not adversely affect their own performance. Clause 26.4 deals with the situation where the secondary employment is in place prior to the commencement of employment with the respondent. Interpret it to be implicit in this provision that the secondary employment is disclosed to the respondent at the time the parties are contemplating entering into a contract.

3.31. I am satisfied that the overall picture the evidence establishes is that the claimant was engaged in another business, namely IMarketsLive. The prohibition in the contract is to be "engaged" in any business. I do not regard it as necessary that the claimant was an employee, a shareholder or some other office holder of that business. The requirement is being engaged in any form of business. I am satisfied that she was. I would not reach that conclusion if she was doing no more than using the app for trades in her own time. In that case, it would be akin to someone using a gambling app, or doing some selling on ebay and the focus then would be misuse of work time. But in this case, I am satisfied she was significantly more integrated in the IMarketsLivev business model.

3.32. Secondly, and in any event, I am satisfied that this was a significant distraction to her duties to the employer as her activities with IMarketsLive was being undertaken at times she should have been working for the respondent and devoting the whole of her time and attention to the business of the respondent. It

was losing time to IMarkets Live. This was manifesting in her failure to engage with the respondent's standards of communication of a remote worker. It was showing in the complaints being received from her customers and it crystallised in the drastic measures the respondent had to take to recover the car on 14 November.

3.33. All of those matters give grounds to dismiss the claimant. The question is whether the respondent was entitled to dismiss without notice. I have reached the conclusion that it was. I am satisfied on the balance of probabilities that he claimant was guilty of misconduct which breached express terms of the contract and so undermined trust and confidence necessary in a contract of employment that the respondent was entitled to dismiss summarily. The claim of breach of contract therefore fails.

4. **Unauthorised Deduction**

4.1. It is common ground that the claimant is owed wages for the pay period starting on 6 November 2016. The party's respective schedules and counter schedules do not set out the basis of their calculation for this loss. I find the figure which is prima facie due to be £583.33. I arrive at this figure in this way. There is a period of 9 days until termination of employment. I have found the claimant was not working for the respondent on 13 and 14 November due to her unauthorised absence. She is therefore entitled to pay for only 7 of those 9 days. Her annual salary was £30,000. There are 30 days in November which results in a day rate of £83.33. (30,000 / 12 / 30) This gives a gross pay due of £583.33 subject to any deductions which can lawfully be made from those wages. For a deduction to be lawful, the consent to it must be given at a time before both the deduction and the need to make the deduction arises. I must be satisfied not only of the prior authorisation, but also that the facts of the purported authorisation are actually engaged. Where that is so the deduction will be lawful.

4.2. The respondent has set out the deductions it purported to make to the wages due to her in the letter of dismissal. They total £6930.77 and are made up of the following:-

a. The £300 cash float
b. A sum of £75 in respect of a car valet
c. £302.40 in respect of "Who are you" and "MIA" membership
d. £360 training cost for July 9-11
e. 485 training cost 12/7 , 31/7, 1/8, 8/8
f. £88 training cost for July 2
g. £480 cost for September 31 – Oct2
h. Recruitment agency costs of £5400

4.3. It relies on prior authorisation of those deductions set out within the contract of employment. The relevant section is clause 8. Clause 8.1 provides:-

> ***The company shall at any time be entitled during the employment or in any event on termination, to deduct from the Employee's remuneration hereunder any monies due from the Employee to the Company, including but not limited to, any outstanding loans, advances, the cost of repairing any damage or loss to the Company's property caused by you (and of recovering same), excess holiday and any other monies owed by you to the Company.***

4.4. In respect of the cash float the respondent relies on clause 9.1 of the

contract of employment which provides:-

> ***the employee will be issued with an expense cash float of up to £300. This will be deducted from the employee's final salary upon termination of employment, however terminated.***

4.5. I have also seen a signed authorisation receipt [P90] in respect of which the claimant acknowledged the float remained the property of BVM and will be repayable in full in the event of termination.

4.6. I am satisfied therefore that as a matter of construction of the contract any sum of cash float not accounted for by way of expenses duly receipted remains the property the respondent and, for the purposes of clause 8.1, was prior written authorisation of the circumstances in which such a deduction would be made which renders it lawful. It is common ground that the cash float is replenished to the same level each month. At the time the car was recovered by the respondent it contained various expenses receipts which total £37.33. At the date of the termination of employment, the claimant was in credit in her cash float in the sum of £262.67. The employer is entitled to deduct that from her final wages due.

4.7. In respect of the car valet cost, the respondent relies on clause 11.1 to establish the basis of liability for a stamp big says is due from the employee to the company. It provides:-

> ***It is the staff responsibility to ensure that you clean/valet the car before returning it to BVM otherwise £100 will be deducted from your final salary.***

4.8. The claimant argues in response that the manner in which the car was recovered meant she had no opportunity to clean or valet the car in advance. As such she says she should not interpret the facts to be her "returning it". In the circumstances in which the claimant was in breach of her fundamental obligations to the employer, and in which I have found it was therefore entitled to terminate summarily, I am reluctant to apply her interpretation. I also note that notwithstanding the circumstances of the termination, the employer does not seek to recover the full amount this authorisation warrants. I accept it may be strained to say "return" when something is "recovered" but the act of returning a chattel can arise as much in the act of relinquishing control to the party as it does in the act of physically handing over control. I am also influenced by the fact that the general authority to deduct arising in respect of any damage or loss caused by the employee. The circumstances of her termination entitled the employer to recover the car forthwith without her having opportunity to clean it in advance and to the extent that it then suffered a loss in having to have it cleaned brings it within the scope of a sum owed by the employee to it. I am therefore satisfied that the respondent does have authority to make the deduction of £75.

4.9. In respect of training costs, the respondent relies on the provisions at clauses 8.2 and 8.3 which provide, respectively:-

> ***The company will provide the employee with training to effectively carry out training and in consideration of which the employee undertakes that he will not resign from his employment with the company for a period of six months from the date on which the last of the training courses is completed.***

4.10. And

If the employee does resign from the company service before the expiry of the agreed period (or before completion of the last of the set training courses) the employee undertakes to repay to the company that part of the cost incurred by the company as a result of funding the employee's attendance on the training course as is proportionate to the remaining part of the agreed period.

4.11. Whether the deductions claimed are lawful and in accordance with the contractual terms depends on a number of findings and matters of construction. Firstly, I am satisfied that the costs incurred in funding attendance on a training course is wider than the cost of the training course itself and is capable of amounting to travel and accommodation related to training. Secondly, I have to be satisfied as a fact that the training costs claimed were in fact training costs "incurred by the company". I am satisfied that all those claimed were incurred in respect of training save for the £480 claimed in respect of accommodation for 31st September to 2nd October. I am satisfied that this was in respect of a sales conference attached to a learning event for doctors. In other words, the claimant's participation was entirely in the performance of her duties and she was not in receipt of training herself. Thirdly, the costs claimed include VAT. I am satisfied this respondent is VAT registered and able to offset its VAT expenditure when accounting for VAT. It is not therefore a cost "incurred" by the company. Only the net figure could be recovered from the employee. Fourthly, it is clear by the final sentence of clause 8.3 that each cost incurred has to be adjusted pro rata to the remaining period of the six months retention promise as remains at the date the sum falls due. Where it falls due the day after the course, 100% of the cost incurred is recoverable. Where it falls due six months after the course, 0% is recoverable. But in this case, it is not necessary to perform the arithmetic due to the final factual finding, namely that the claimant did not resign. I am invited by the respondent to construct Clauses 8.2 and 8.3 in such a way as to bring the circumstances of the claimant's dismissal in this case within the concept of a resignation. I am unable to do so. This is a contract which has been drafted with apparent precision. The draughtsmen has chosen to use the word resign which must be given its ordinary and natural meaning in the context of this contractual relationship. Not only was it open to the draughtsman to frame the circumstances in which repayment would fall due to be "termination of employment, howsoever terminated"; the very fact that clause 9.1 does use that form of words must lead me to the conclusion that the draughtsman deliberately intended there to be a distinction between the circumstances in which the expenses float would be recoverable and the circumstances in which the training costs would be recoverable.

4.12. As the claimant did not resign, clauses is 8.2 and 8.3 do not provide the prior authorisation to make the deduction from her final wages that the respondent seeks to rely on.

4.13. In respect of the recruitment costs of £5400, I can see this was apparently incurred by the respondent as a matter of fact. However, I can see no relevant prior authority within the contract to render this sum as monies owed by the employee to the respondent. I would therefore not have found any deduction relying on this to have been lawful but, in the event, the respondent abandoned its case in respect of this sum.

4.14. The total amount of deductions for which authority existed totals £337.67. There is therefore a positive balance due to the claimant in respect of her final salary for the pay period commencing 6 November 2017 in the sum of £245.66

(£583.33 - £337.67) and the claim succeeds in part to that extent.

4.15. The claim of unauthorised deduction from wages is a relevant claim for the purposes of section 207A of the trade union and labour relations bracket Consolidation) Act 1992. In this case there has been next to no compliance with the ACAS code of practice in respect of discipline grievance procedures. However, although the circumstances of this deduction arises on termination of employment, I am not satisfied that the question of deductions necessarily engages that code of practice in any event but if I am wrong in that conclusion, I am satisfied that the failure was not unreasonable in the circumstances of this case. For that reason, I make no adjustment to the award in respect of unauthorised deduction from wages.

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Employment Judge Clark
Date 23 August 2018

JUDGMENT SENT TO THE PARTIES ON

25 August 2018

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FOR THE TRIBUNAL OFFICE