Case No: 2602354/2018

EMPLOYMENT TRIBUNALS

Appellant: **Capulet Spa Limited**

Respondent: **The Commissioners for HM Revenue and Customs**

Heard at: **Nottingham** **On: 18 December 2018**

Before: **Employment Judge Moore**

Representation
Claimant: In Person
Respondent: Mr J Meichen, Counsel

RESERVED JUDGMENT

The appeal does not succeed.

REASONS

Background

1. This is an appeal lodged on 25 July 2018 against a National Minimum Wage ("NMW) Notice of Underpayment, dated 6 July 2018. The hearing was listed for 2 hours on 18 December 2018. Witness evidence was heard from Chantelle Watson, proprietor of Capulet Beauty Spa and Sam Powdrill, National Minimum Wage Compliance Officer. There were two separate bundles; the respondent's bundle ran to 162 pages and the claimant's bundle, whilst not paginated was tabbed into 20 separate items. There was insufficient time to reach a decision and the Judgment was therefore reserved.

The Law

2. Section 1 (1) of the National Minimum Wage Act ("NMW Act") 1998 provides:

1 Workers to be paid at least the minimum wage

(1) A person who qualifies for the national minimum wage shall be remunerated by his employer in respect of his work in any pay reference period at a rate which is not less than the national minimum wage.

3. Section 17 provides for underpaid workers to be paid in arrears at current minimum rates even if a lower rate was in place at the time of the underpayment. Section 19 of the NMW Act 1998 deals with the powers to issue a NMW Notice of Underpayment. Section 19 provides that the NMW Compliance Officer has power to serve a notice requiring the employer to pay to the worker, within the 28 day period, the sum due to the worker as calculated in accordance with Section 17. Once that notice has been issued Section 19C sets out when an appeal should be allowed. Section 19 C provides:

19C Notices of underpayment: appeals

(1) A person on whom a notice of underpayment is served may in accordance with this section appeal against any one or more of the following—

(a) the decision to serve the notice;

(b) any requirement imposed by the notice to pay a sum to a worker;

(c) any requirement imposed by the notice to pay a financial penalty.

(2) An appeal under this section lies to an employment tribunal.

(3) An appeal under this section must be made before the end of the 28-day period.

(4) An appeal under subsection (1)(a) above must be made on the ground that no sum was due under section 17 above to any worker to whom the notice relates on the day specified under section 19(4)(a) above in relation to him in respect of any pay reference period specified under section 19(4)(b) above in relation to him.

(5) An appeal under subsection (1)(b) above in relation to a worker must be made on either or both of the following grounds—

(a) that, on the day specified under section 19(4)(a) above in relation to the worker, no sum was due to the worker under section 17 above in respect of any pay reference period specified under section 19(4)(b) above in relation to him;

(b) that the amount specified in the notice as the sum due to the worker is incorrect.

(6) An appeal under subsection (1)(c) above must be made on either or both of the following grounds—

(a) that the notice was served in circumstances specified in a direction under section 19A(2) above, or

(b) that the amount of the financial penalty specified in the notice of underpayment has been incorrectly calculated (whether because the notice is incorrect in some of the which affect that calculation or for some other reason).

(7) Where the employment tribunal allows an appeal under subsection (1)(a) above, it must rescind the notice.

(8) Where, in a case where subsection (7) above does not apply, the employment tribunal allows an appeal under subsection (1)(b) or (c) above—

(a) the employment tribunal must rectify the notice, and

(b) the notice of underpayment shall have effect as rectified from the date of the employment tribunal's determination.

4. NMW Regulations 2015 provides at Regulation 12 (2) (a):

12 Deductions or payments for the employer's own use and benefit

(1) Deductions made by the employer in the pay reference period, or payments due from the worker to the employer in the pay reference period, for the employer's own use and benefit are treated as reductions except as specified in paragraph (2) and regulation 14 (deductions or payments as respects living accommodation).

(2) The following deductions and payments are not treated as reductions—

(a) deductions, or payments, in respect of the worker's conduct, or any other event, where the worker (whether together with another worker or not) is contractually liable;

5. The Tribunal was referred by both parties to the case of ***Commissioners for Revenue and Customs v Lorne Stewart Plc UKEAT/0250/14.*** This was a case where the employer paid for employees to attend courses on condition they signed an agreement to repay all or part of the cost of the course if they left within two years and provided the money could be deducted from their final salary payment. The deduction for the course fee led to the final salary payment of a number of employees being prima facie below the NMW.

6. The issue was whether the money deducted came within regulation 33 (a) NMW Regs 1999 (now contained in Regulation 12 (2) (a) of the NMW Regs 2015) and in particular whether the liability to repay was “in respect of conduct of the worker, or any other event, in respect of which he is contractually liable”.

7. It was held that a voluntary resignation was “any other event” and therefore Lorne Stewart were entitled to make the deduction. In that case there was no issue that the subjects of the deductions were contractually liable for the training course fees.

Findings of Fact

8. I make the following findings of fact on the balance of probabilities.

9. The appellant is a small business, operating as a beauty salon, and at the relevant time employed four staff. The appellant was a member of the Federation of Small Businesses. The appellant provided staff with a contract of employment and sought advice from the Federation on legal employment matters.

10. The subject of the NMW notice was a Ms Portia Lundie. Ms Lundie worked for the appellant between December 2016 and April 2017. Ms Lundie’s contract contained a term requiring Ms Lundie to provide two weeks’ notice to terminate her employment. Further, at paragraph 13 the contract provided as follows:

13. TRAINING AND STAFF DEVELOPMENT

13.1 The Company believes in the value of each employee developing his or her skills for the benefit of both the company and the individual employee's career and Continuous Professional Education (CPE). On occasion, the Company judges it to be in their own interest to fund specific training course fees and associated costs. A condition of any such agreement is that the employee will repay these fees and costs on termination of employment according to the sliding scale below:

13.1.1 Less than 6 months since completion of training – 100%

And

13.2 Wherever possible the repayment is deducted by off-setting against the due salary in the final settlement on termination of employment.

11. On 19 April 2017 Ms Lundie resigned without giving her contractual (or any) notice. This resulted in problems for the appellant who had to cancel or rearrange appointments. In Ms Lundie's letter she enquired as to training costs owed. There was no question that Ms Lundie was of the view that training costs were owed to the appellant having specifically requested how much she owed in her letter of resignation.

12. The appellant acknowledged her resignation by a letter dated 21 April 2017. In that letter, Ms Lundie was advised she owed 100% of costs incurred for training. The course attended were cited as "Elemis Training" for four days in January and one day in April 2017. The costs were set out as follows:

"*Course cost or associated costs as discussed per day*
£18 travel per day
£144.64 employee absence cost
£162.64 x 5 days = £813.20

The cost to have an employee away from the business per day is worked out at the average daily takings of the employee since employment began".

13. A further deduction of £115 was set out for an eyelash lifting course in January 2017. The total outstanding was set out as £928.20.

14. Ms Lundie's final pay slip was due to be paid on 28 April 2017. Ms Lundie had earned £506.19 gross for 71.8 hours @ £7.05 per hour. The deduction amount on the pay slip differed to that set out above in the acknowledgement of resignation letter and was £910.20. This led to Ms Lundie receiving no pay and a minus showing of £404.01.

15. HMRC select certain businesses to assess in respect of NMW enforcement based on risk profiles. The appellant was selected as part of this process and Mr Powdrill make initial contact in September 2017, and arranged to meet Ms Watson, owner of the appellant on 23 January 2017. Ms Watson freely volunteered that she had made a deduction to a former worker's pay, in the name of Ms Portia Lundie. Ms Lundie has not made any complaint regarding this deduction. I accepted Ms Watson's evidence

that she had taken advice and had been informed the deduction was lawful.

16. Mr Powdrill conducted an investigation into the deduction and subsequently interviewed Ms Lundie on 23 February 2018 who confirmed that she was required to attend the training. (This was subsequently disputed by Ms Watson who asserted that the courses were optional.)

17. On 5 March 2018 Mr Powdrill wrote to Ms Watson advising that he had identified that Ms Lundie had not been paid the NMW and enclosed a calculation. This was not a formal notice but draft calculations to enable the appellant to comment. The reason being that the training courses were mandatory and consequently any deduction made to recover the training costs reduced the workers pay for the purposes of NMW as per Regulation 13 of the NMW Regulations 2015. Alternatively, the letter stated that if this did not apply, Regulation 12 (1) would so apply.

18. The amount of underpayment was specified as £506.19 and the penalty under S19A NMW Act 1998 was specified at £1012.38. The letter stated that if the appellant paid the arrears and penalty within 14 days, the penalty would be reduced by 50%.

19. On 12 March 2018 the appellant sent a response challenging the findings. The appellant cited the case of HMRC V Lorne Stewart and advised (in summary) that in her view this case applied as Ms Lundie had voluntarily resigned. Ms Watson disputed that the training was mandatory. On 22 March 2018 Ms Watson provided contact details of 6 ex-employees who Ms Watson said would confirm the training was not mandatory.

20. Mr Powdrill sent a detailed response on 1 April 2018. He repeated his view that the training was mandatory and distinguished the Lorne Stewart case on that basis, however he agreed to consider the matter further and requested further details.

21. Ms Watson duly replied on 4 April 2018 and as a result Mr Powdrill further interviewed Ms Lundie on 20 April 2018 who informed Mr Powdrill that she expected to pay for some eyelash training however the Elemis Training she had attended was free of charge and the deduction had been in respect of her train fares and time out of the office.

22. Mr Powdrill asked Ms Watson to confirm how she had therefore arrived at the Elemis training costs as outlined in her letter acknowledging resignation dated 21 April 2017. In that letter, as set out above, the course cost had been described as “employee absence cost”. Ms Watson subsequently provided an average of Ms Lundie’s takings during her four-month period of employment. She confirmed there had been no actual training costs i.e. a charge by Elemis; instead she had calculated the cost of the business of Ms Lundie’s absence.

23. Mr Powdrill concluded that this deduction did not fall within the definition of the contract term relied upon by the appellant either as a training course fee or an associated cost therefore the appellant’s reliance upon the contract clause at paragraph 13, and in turn Regulation 12 (2) (a) could not apply. He did however accept that the train fares to attend the free

courses were an "associated cost" under the contract term.

24. Ms Watson sought to then argue that the Elemis course was not free as she had to purchase stock from Elemis to gain free training places. This was not an explanation accepted by Mr Powdrill as he concluded the business would have to purchase stock in any event and following further exchanges the appellant was issued with a Notice of Underpayment and covering letter dated 6 July 2018.

25. The grounds of the appeal lodged by the appellant were brought under S19C (1) (a), (b) and (c). Further grounds were set out as follows:

- The charge had been made after the appellant sought legal advice and that advice is correct
- The investigation had been poorly managed and antagonizing.
- Having taken advice, it was not fair to have to pay the penalty.

26. The appellant submitted new evidence at the hearing that the calculations she had provided in her acknowledgement letter dated 21 April 2017 had been incorrect. The evidence was in the form of a training record for Ms Lundie that set out she had attended three courses as follows:

15 January ("lash perm") - under column headed "travel" the costs is described as £115
13 March ("intimate waxing") – under travel the cost is described as £115
15 March ("lash express") – Under travel the cost is described as £65

27. In total this amounts to £295.00.

28. Also new evidence provided at the hearing was an invoice dated 19 January 2017 provided in the sum of £180.00; £65.00 of which was for a course described as "Course Lash fx express lashes" from Adel Professional Ltd Derby and £115.00 of which was for advanced waxing. This did not tally with the 13 March 2017 date Ms Lundie was said to have done the waxing course on the training record. In addition, there was a print out of what looked like a text message sent from an iPhone from someone called Mel Squire confirming Ms Lundie had attended a training course for eyelash lifting on 15 January 2017 at the cost of £199.00. This is a different amount to that mentioned on the training record under "lash perm".

Conclusions

29. Whilst I have set out the background leading up to the Notice of Underpayment, in order to provide some context, the appellant's grounds for the appeal are to a large extent not relevant to the issues I must determine. Under Section 19C NMW Act the Tribunal does not have any jurisdiction to determine the context in which the deduction was made and the conduct of the investigation. What is relevant is whether the notice is properly served, whether there has been an underpayment to the worker and whether a penalty is due.

30. It is evident that the nature of the investigation changed from a focus on

whether the training was mandatory (and therefore would reduce pay for the purposes of the NMW Regs 2015 (Regulation 13) as being in connection with her employment) to whether it could be classed as a deduction that would not be treated as a reduction of the NMW Regs 2015 under Regulation 12 (2)(a). However the reason the focus changed is that Ms Lundie informed Mr Powdrill in April 2018 that the training that led to the reduction was at no costs to the appellant (subject to the purchase costs which I deal with below).

31. The deduction that was made from Ms Lundie's salary on 26 April 2017 was described as "training costs" on the pay slip.

32. Under paragraph 13 of the contract of employment, if this deduction did indeed represent training costs then in accordance with the EAT decision in the Lorne Stewart case, the deduction would not reduce Ms Lundie's pay pursuant to Regulation 12 (2) NMW Regs 2015 as she would have been contractually liable to repay the training course fees.

33. The question in relation to the Elemis training, for which there was no direct charge to the appellant in the normal sense, is whether it can be said to fall within the definition contained in Section 13 of the contract of employment. I have set this out in full above but the relevant words are "specific training course fees and associated costs". There was no specific training course fee and therefore, in my judgment, the employee absence costs which formed the deduction do not fall within the definition of a "training course fee" and therefore should be treated as a reduction in pay.

34. As to whether Ms Lundie's time attending the course (described by the appellant as an "employee absence cost") can be deemed as an "associated cost" under paragraph 13 of the contract; I also reject this interpretation of this express written term. I accept this could cover costs such as travel to a training course but does not in my judgment stretch this definition to mean that the worker should bear the costs that were incurred as a result of the worker being out of the business as an associated cost to the worker attending training. In construing the regulations, a purposive approach should be taken.

35. I also reject the suggestion that as the appellant had to purchase Elemis goods in order to secure a place on the training courses, that this amounted to a training course fee. The link is too tenuous and further the only evidence of this was an assertion by the appellant in an email to Mr Powdrill dated 25 June 2018. Whilst there was no reason to doubt this may be the arrangement between the appellant and Elemis it would not in my view fall within the definition of a "training course fee" as set out in paragraph 13 of the contract of employment.

36. I therefore have concluded that the deduction for the Elemis training was not one for which Ms Lundie was contractually liable.

37. I have also considered whether the new evidence submitted to the Tribunal regarding other training attended by Ms Lundie would fall within paragraph 13 of her contract of employment and therefore not be treated as a reduction to her wage under Regulation 12 (2) (a) NMW Regs 2015. Although the documents I have described at paragraphs 26 above were

not available to the Respondent until the hearing, there was reference in the appellant's letter dated 21 April 2017 to an eyelash lifting course in January 2017 at a cost of £115 which formed part of the deduction.

38. Ms Lundie is recorded as having accepted that an eyelash training course would have to be repaid during her call with Mr Powdrill on 20 April 2018. Counsel for the Respondent accepted in his written submissions that if there had been a training course fee the appellant would have been entitled to deduct it as that is what the contract allowed.

39. Had the appellant have produced better evidence of the January 2017 eyelash training course fee, then I may have concluded that this element of the reduction was a lawful one under Regulation 12 (2) (a) NMW Regs 2015. The employer has responsibility to keep sufficient records to show that the NMW has been paid (Section 9 NMWAct). I have not been able to identify how much the appellant incurred for this course. The letter dated 21 April 2017 does refer to an eyelash listing course in January 2017 however in the additional evidence submitted to the Tribunal the only document available to confirm the costs was a text message print out from someone called Mel Squire. This is not in my view sufficient records to show this amount was actually incurred by the appellant. I therefore conclude that the appellant has failed to show sufficient records to show that such a training fee was incurred, and it must follow that the appellant cannot rely on such a course to allow them to make a contractual deduction under paragraph 13 of the contract of employment.

40. Having concluded that the deduction suffered by Ms Lundie did constitute a reduction in pay for NMW purposes the notice of underpayment and the requirement to pay a penalty is correct. There was no evidence that the amount was incorrectly calculated. NMWA S19A (5A) provides that penalties arising on or after 1 April 2016 has a percentage of 200% applied of the underpayment (£506.19 x 200% = £1012.38).

41. For these reasons the appellant's appeal on all three grounds fails and is dismissed.

42. As I have concluded that the deduction was not a reduction for which Ms Lundie was contractually liable I do not need to consider the issue as to whether the training was mandatory. Nonetheless, based on the evidence before me, I would have concluded that it was not possible to determine which training was mandatory and which was not.

Employment Judge Moore

Date: 15 February 2019

RESERVED JUDGMENT & REASONS SENT TO THE PARTIES ON

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FOR EMPLOYMENT TRIBUNALS