Case No: 2501699/2017

EMPLOYMENT TRIBUNALS

Claimant: **Mr J Stewart**

Respondent: **Expedient Training Services Limited**

Heard at: **North Shields** **On: 13 April 2018**

Before: **Employment Judge Arullendran**

Representation:
Claimant: **In person**
Respondent: **Mr M Atkinson**

REASONS

1 The issues to be determined by the Employment Tribunal are as follows:-

1.1 Is there a relevant provision in the claimant's contract of employment which authorises the respondent to make a deduction from the claimant's wages?

1.2 If so, were the actual deduction of wages in this case in fact justified?

1.3 If not, what is the amount of the unauthorised deductions?

2 I heard witness evidence from the claimant and Malcolm Atkinson, the Director of the respondent company and I was provided with a bundle of documents from the respondent consisting of 21 pages.

3 **<u>The facts</u>**

These findings of fact are made on the balance of probabilities on the basis of the witness evidence and documentary evidence produced in front of this Tribunal.

3.1 The claimant began his employment with the respondent on 2 May 2017 and was employed as a Training Facilitator; he was dismissed by the respondent on 3 November 2017. The respondent is a training company and employs 25 employees

3.2 The claimant was given a contract of employment by the respondent which he signed on 24 October 2017 and this can be seen at pages 10-13 of the bundle. Paragraph 21 of the contract states that "*The company may deduct from your pay … (d) the cost of any external training and professional membership if you leave the company within 18 months of receiving training*." The claimant says he was pressurized into signing the contract of employment by the respondent's Director, Malcolm Atkinson,

but he had previously delayed signing the contract because he had been told by other Facilitators that he would be charged for training courses and it was a standing joke that the Facilitators would be tied to the company and would never be able to leave because they would always be in debt.

3.3 The claimant says that, prior to signing the employment contract, he was starting to build up anxiety about having to pay back the training costs but he did not obtain any legal advice about the terms of the contract. The claimant says that he contacted ACAS about the terms of the contract and they said that paragraph 21 of the contract should say either "can" or "will" deduct the cost rather than "may" for it to be effective and the claimant was under the impression that the Health and Safety at Work Act 1974 also obligated the respondent to provide information, instruction, training and supervision to all its employees. The claimant did not tell the respondent that he was signing his contract under duress. The respondent says that the claimant was provided with information that he had requested about NPOSE accreditation for himself and that Claire Robinson and Phil Embleton had spoken to the claimant and advised him that the training cost would only be repayable if the claimant's employment came to an end.

3.4 The claimant's evidence in cross-examination was that he understood he would not have to pay back the training costs unless his employment came to an end. He says the respondent only took the final page from the contract signed by the claimant and they attached this to their own copy of the contract of employment. I asked the respondent whether the clause at paragraph 21 of the contract was discretionary and he confirmed that it was.

3.5 The claimant attended a meeting on 3 November 2017 at which his employment was terminated because of a breakdown of trust and confidence. It is common ground that the claimant had been employed by the respondent for less than two years. A copy of the letter of dismissal is at pages 1 and 2 of the respondent's bundle. The parties accept that the claimant's final salary, including holiday pay, came to a total of £1,282.53 before deductions of tax and national insurance and £1,135.19 net of deductions, as set out at page 3 of the bundle. The respondent deducted the whole of the claimant's salary in the sum of £1,135.19 under the provisions of paragraph 21 of the contract of employment on the basis that the claimant owed the respondent company the sum of £2,359.10 for training costs as set out at page 20 of the bundle. Although the claimant attended several training courses listed on page 20, the respondent only made charges in respect of ten of those courses, which gave a total of £2,359.10. All of the courses took place at the respondent's office with the exception of the IPAF Harness on 10 July 2017, which was conducted by an external training provider. All the reminder of the training courses were delivered by the respondent's employees. The cost of the IPAF Harness course is shown at page 20 as £182.13. The respondent says that, although the courses were provided by his company, the accreditation is from an external provider for which the company pays an annual fee. Further the respondent says that, had the claimant not attended the courses, the place would have been given to an external fee paying candidate and, therefore, the claimant has been charged the full commercial rate for attending the training courses.

3.6 The claimant disagrees and says that he was not consulted about which courses he wanted to attend and that he has not benefited personally

from attending them.

The law

4 Section 13 of the Employment Rights Act 1996 states at paragraph (1):-

> "(1) An employer shall not make a deduction from wages of a worker employed by him unless –
>
> (a) the deduction is required or authorised to be made by virtue of a statutory provision or a relevant provision of the worker's contract"

5 I refer myself to the Employment Appeal Tribunal case of **Fairfield Limited v Skinner [1992] ICR 836** in which it was established that, once it has been found that there is a contractual provision or a written agreement authorising the type of deduction in question, the Tribunal may then go on to consider whether the actual deduction is in fact justified. The Employment Appeal Tribunal found that the Tribunal's jurisdiction does not stop short at merely determining whether the employer's professed reason for making the deduction fell within section 13(1), rather it contemplates that where there is a dispute as to the justification of a deduction the Tribunal must embark upon a resolution of that dispute.

6 I refer myself to the guidance in **Arnold v Britton [2015] AC 1619** where Lord Neuberger PSC said

> "When interpreting a written contract, the court is concerned to identify the intention of the parties by reference to "*what a reasonable person having all the background knowledge which would have been available to the parties would have understood them to be using the language in the contract to mean*"…"

I note that this is an objective test and the Tribunal is not to ask what the parties subjectively intended.

Conclusions

7 Applying the relevant law to the facts I find that the claimant had entered into a valid contract of employment with the respondent when he began his employment with the company and that he agreed to the specific terms of that contract when he signed the contract at pages 10-12 of the bundle, having entered into discussions with the respondent prior to this date about the specific terms relating to his NPOSE accreditation and the fact that the training costs would be repayable only if he left the company. The fact that the respondent only took the final page of the contract from the claimant which bore his signature and attached it to their own copy of the contract is of no significance to the validity of the contract, particularly as the claimant has not argued that the wording in paragraph 21 of the original contract has been altered in any way by the respondent.

8 The respondent confirmed in cross-examination that the clause at paragraph 21 of the contract is discretionary and the company would not seek to recover training costs where an employee has been made redundant, for example. However, the contract does not provide any details of how this discretion is to be exercised and there is no indication of how the respondent would ensure the fairness or the reasonableness of its decision. I find that this clause appears to have been applied arbitrarily by the respondent, particularly as the respondent has not provided any evidence of how this particular deduction was in fact justified. Subparagraph (d) of paragraph 21 of the contract specifically states external training costs may be recovered and it goes on to state that "*They are recoverable if the employee leaves the company*".

9 This Tribunal must decide what a reasonable person having all the background knowledge of these parties would understand by the terms "external training" and "if the employee leaves the company". Taking into account the evidence presented today by the parties, I find that, on the balance of probabilities, external training means training provided by a company other than the respondent company, i.e. when the employee is sent elsewhere to be trained up and this results in a cost to be paid by the respondent company. Applying that definition there is only one training course that the claimant attended, which was the IPAF Harness course, on 10 July 2017 which resulted in a cost of £182.13 to be charged to the respondent. I do not accept the respondent's argument that training is external because the company purchases a licence of accreditation each year from a third party because the training itself is delivered by the respondent, at the respondent's premises by the respondent's employees, making this internal training. No extra cost has been incurred by the respondent in training the claimant as the respondent would have been running the training course in any event and would have paid its Facilitators to deliver the course in any event, even if the claimant had not been attending.

10 Therefore, I find that the respondent company did not have justification for charging the claimant for the training courses which were provided internally by the respondent. There is no justification for charging the claimant the commercial rate for the training when that was not a cost that was actually incurred by the respondent and there is no evidence that the respondent company turned away any fee paying clients in favour of giving the training place to the claimant. Therefore, at its highest, the respondent could only have deducted £182.13 from the claimant's final wages.

11 However, I also have to consider what a reasonable person having all the background knowledge of these parties understands by the phrase "*if the employee leaves the company*". Taking into account the evidence from the parties, I find that, on the balance of probabilities, a reasonable person would understand that to mean if an employee resigns. In the respondent's letter dated 29 November 2017, at pages 5 and 6 of the bundle, the respondent uses the phrase at the top of page 6 "*should an employee decide to leave or is dismissed*". Clearly the respondent is aware of the difference in an employee leaving and being dismissed and could have used that exact same phrase in the contract of employment if it wanted to convey that meaning. However, it chose not to use that phrase and only uses the words "*if the employee leaves the company*" which means to resign, not when an employee is dismissed. Therefore, as the claimant did not resign from his employment with the respondent, I find that the respondent did not have the authority or the justification to deduct any training costs from the claimant's final salary, including the external training.

12 On the basis of my findings I find that the claimant's claim for the unauthorised deduction of wages is well-founded and the respondent is ordered to pay to the claimant the sum of £1,135.19. This is net award and the respondent shall be liable to the Inland Revenue for any deductions of tax and national insurance thereon.

13 The claimant withdraws his claim for unfair dismissal on the understanding that he did not have the requisite two years continuous service and, therefore, he was not entitled to make this claim. Therefore, the claimant's claim for unfair dismissal is dismissed upon withdrawal by the claimant.

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Case No: 2501699/2017

Employment Judge Arullendran

Date__24 May 2018_____

Note

Reasons for the judgment having been given orally at the hearing, written reasons will not be provided unless a request was made by either party at the hearing or a written request is presented by either party within 14 days of the sending of this written record of the decision.

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