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EMPLOYMENT TRIBUNALS

Claimant: **Ms A Khorenzhaia**

Respondent: **All Saints Retail Limited**

Heard at: **East London Hearing Centre**

On: **Wednesday 4 September 2019**

Before: **Employment Judge Jones (sitting alone)**

Representation

Claimant: In Person

Respondent: Mr M Humphreys (Counsel)
Ms S Layton (HR)

JUDGMENT

1. The judgment of the Employment Tribunal is that the Respondent has not made an unauthorised deduction from the Claimant's wages.

2. The claim is dismissed.

REASONS

1 This claim related to a clause in the Claimant's employment offer letter which stated that if she resigned her employment within two years of being with the Respondent she would then be required to repay 50% of all expenses paid by the Respondent in obtaining her work visa. It was the Claimant's case that the Respondent should be

prevented from withholding 50% of those expenses from her final salary for the following two reasons: Firstly, because the Respondent initially withheld incorrect charges from her wages which she believes should nullify the clause and secondly, because the expenses had been incurred before the clause had been put in the offer letter which should also nullify it.

2 It was her case that she had agreed to the clause as she had no choice at the time that it was proposed to her.

3 It was the Respondent's case that the Claimant signed to confirm her acceptance of that clause in her contract before taking up her employment, that it made an error in the initial reduction from her final salary but that this was rectified and that in any event, an additional clause in her contract also gave it the right to deduct from her salary any monies due from her to it, at the end of her employment. The Respondent's case was that this was all that it had done.

4 The Tribunal heard evidence from the Claimant during today's hearing and from Ms Layton who was not the HR business partner who dealt with the matter at the time but who is the person responsible for dealing with this case and with similar clauses in other employees' contract.

Law

5 Section 13(1) of the Employment Rights Act (ERA) states that an employer shall not make a deduction from wages of a worker employed by him unless –

13(1)(a) The deduction is required or authorised to be made by virtue of a statutory provision of a relevant provision of the workers contract, or

13(1)(b) The worker has previously signified in writing his agreement or consent to the making of the deduction.

6 Section 13(2) states as follows. In this section 'relevant provision', in relation to a worker's contract, means a provision of the contract comprised –

13(2)(a) 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, or

13(2)(b) In one or more terms of the contract (whether expressed or implied and, if expressed, whether all or in writing) the existence and effect, or combined effect, of which in relation to the worker the employer has notified to the worker in writing on such an occasion.

7 Section 13(6) states that for the purposes of this section an agreement or consent signified by a worker does not operate to authorise the making of a deduction on account of any conduct of the worker, or any event occurring, before the agreement or consent was signified.

8 In the case of *Potter v Hunt Contracts Limited 1992* IRLR 108, the EAT stated that to fulfil the condition the employee should have previously signified in writing his agreement or consent to the making of a deduction. There must be a document which clearly states that the deduction is to be made from the employees' wages. It must also make clear that the employee agrees to the deduction being made from that source. *Harvey* comments that the agreement or consent of the worker referred to in section 13(5) (ERA) quoted above, must be obtained not only before the deduction has been made but also before the incident which is said to justify that deduction has occurred. This is because the section provides that any agreement or consent signified by a worker does not operate to authorise the making of a deduction on account of any conduct of the worker or any other event occurring, before the agreement or consent was signified.

9 From the evidence containing the bundle of documents and given by Ms Khorenzhaia and Ms Layton, the Tribunal make the following findings and fact.

Findings of Fact

10 The Claimant had been in discussion with the Respondent about employment and was made a verbal offer of the work over the telephone by the Respondent on 23 August 2017. On 29 August 2017, the Claimant received an offer letter, the only mention of her visa in that letter was that the offer of employment was subject to her visa being approved. The Claimant accepted that original offer.

11 In an email dated 16 October 2017 Catherine Rogers of the Respondent emailed the Claimant to talk to her about her forthcoming employment. In that email the following sentence is seen *"I can tell you that All Saints will cover the visa application fee entirely, so there won't be any cost to you in relation to the visa".*

12 The Respondent engaged a specialist company to work on the Claimant's visa application on its behalf. Newland Chase is an expert in the field and there is correspondence from them to the Claimant confirming the work that they had done to obtain her visa. The documents show that Newland Chase billed the Respondent for the work that it did to obtain the Claimant's visa. Further emails show that it was agreed between the Claimant and Respondent that she should start her employment on 6 November and that she wanted to fly into London on or around 3 and 4 November. The Respondent was going to provide her with accommodation initially upon her arrival in the UK.

13 There was a further email confirming the offer of employment dated 24 October 2017 which does not mention visa expenses. It does refer to a number of other conditions of her employment as it confirmed that she would be entitled to life insurance, travel loans, a cycle to work scheme, childcare vouchers and access to the retail trust.

14 The Claimant was offered the role of digital project manager at the Respondent in a letter dated 24 October which the Tribunal finds was sent to her late in the day on 3 November 2017. It was written by the senior programme manager. In that letter, the Respondent stated that the job offer was dependent on the Claimant being able to supply satisfactory references and subject to her Tier 2 (General) Visa. The Respondent undertook to meet the costs of securing her Tier 2 (General) Visa. The letter also stated as follows *"as the cost of your Tier 2 (General) Visa has been paid by All Saints, the below terms and conditions apply:*

- *If you resign within one year of being with the company, then you will be required to pay 100% of all these expenses.*

- *If you resign within two years of being with the company then you will be required to pay 50% of all visa expenses.*

- *Should you leave All Saints through redundancy or ill health, no repayment will be required.*

- *If we terminate you contract because of poor performance or misconduct within one year of the courses completion, all expenses must be repaid. If the contract is terminated within two years of the courses completion, you are required to repay 50% of all the expenses."*

15 The Claimant had by this time booked her flight. She was due to fly to the UK on 6 November.

16 Late on 3 November, the Claimant replied to the email to confirm that she had no concerns regarding the additional clauses which had been entered into the offer letter. It was agreed between the parties that the additional clauses were those set out above. The Claimant signed a copy of the revised offer letter at the start of her employment, when she arrived in London. The Claimant's evidence today was that she was not entirely happy with the additional clauses but felt that she had no choice but to sign the letter and accept the terms of the revised offer letter at that time.

17 On 21 March 2019, the Claimant submitted a letter of resignation to the Respondent. She gave notice so that her employment would end on the 12 April. In its letter to her dated 25 March, the Respondent confirmed that the Claimant's last salary would be subject to a deduction of 50% of her visa costs, as set out in the offer letter. At that time the costs were calculated at £3,365.32. The Claimant eventually received a breakdown from the Respondent as to what those costs covered. This was reflected of the invoice sent to the Respondent by Newland Chase in November 2017. Newland Chase billed the Respondent for professional service fees in relation to their work in obtaining the certificate of sponsorship, immigration skills charge and dealing with the immigration health surcharge. The work also covered obtaining the certificate of sponsorship and the general visa, and the relevant surcharges. Newland Chase also used the priority visa service for which there was an additional charge. These were all in an email dated 30 April 2019, to the Claimant from Ms Layton.

18 The Claimant produced details on the immigration skills charge from the Home Office and a note on the same prepared by immigration solicitors, Doyle Clayton. The Tribunal also sections of the Immigration Skills Charge Regulations 2017. In the bundle were pages 16, 197, 198 and 199 of 208. There are therefore many more pages in this Guidance which the Tribunal has not seen. However, it is likely that as part of its license to operate or apply for Tier 2 and Tier 5 visa's, the Respondent is not to pass any part of the immigration skills surcharge unto the employee. The Home Office Guidance to employers stated in Annex 6 that an employer who asked a migrant who it is sponsoring to pay some/all the immigration skills charge could lose its licence. The Guidance made no reference to any other associated charges. After some correspondence on this matter

and by March/April 2019, the Respondent agreed that the immigration skills charge of £3000 should not have been split with the Claimant. The Respondent therefore refunded back to the Claimant some of what it had deducted from her final salary to reflect the fact that the Respondent was now going to bear the immigration skills surcharge on its own. The Respondent also, did not split the certificate sponsorship fee of £199 with the Claimant. All the other charges have been split with the Claimant.

19 In subsequent correspondence with the Claimant the Respondent accepted that it had incorrectly deducted the immigration skills charge and apologised for doing so. Ms Layton confirmed in the hearing that the Respondent believed that it could do so and after further research on receipt of the Claimant's letter it realised that it should not. The mistake was rectified as soon as it was discovered.

20 The final total calculation of the fees to be split with the Claimant after removing the immigration skills charge and the certificate of sponsorship fee is a total of £3,531.67. The final amount retained from the Claimant's salary was a total of £1,766. The exact amount of 50% of the total fees is £1765.82. The Respondent came to £1,766 as it rounded up some of the figures. £1,766 is 50% of the remaining costs which included professional fees to Newland Chase, immigration fees and VAT.

21 The fees included the total sum of £652 which was the Immigration Health surcharge. This was a sum that the Respondent as the sponsoring employer had to pay to the Home Office to reflect the employee's use of the National Health Service. In an email dated 30 April 2019 Ms Layton told the Claimant that if she was transferring her visa to another sponsor she should let the Respondent know and ask her new sponsor to get in touch so that they should support her. in a further email dated 15 May Ms Layton explained that the Claimant should let the Respondent know if she was transferring her visa to another employer so that it could coordinate with then and refund her the sum of £326 which represented 50% of the total Immigration Health surcharge which it had deducted from her final salary. The Claimant did not address this point in her response.

22 In her evidence she stated that the Respondent knew she was staying in the UK. It is likely that in order to get a refund of her share of the Immigration Health surcharge the Claimant would have had to provide the Respondent with the details of her new employer. The Claimant has not yet done so. Ms Layton's evidence was that this fee could have been passed to her new employer if she had done so. The Respondent confirmed in the hearing that it was still possible for this to be done should the Claimant choose to provide that information.

23 The Claimant was adamant that she should be refunded all the fees. The Claimant's evidence was that she made enquiries at the Home Office about the specific matter concerning her final salary but the Home Office was not able to put anything in writing that she could bring to the Tribunal. An email from the Home Office's Business Helpdesk which was in the bundle stated that the compliance team could not get involved in any dispute that she had with her former employer regarding final salary payments. She was advised that this was a matter of employment law.

24 It is the Claimant's case that by its action of deducting half 50% of the Immigration Skills charge from her in its first attempt to calculate her final salary, the Respondent had been in breach of its licence agreement with the Home Office and had miscalculated the amount refunded to her by 18p.

25 Clause 6.2 of the Claimant's contract with the Respondent, which was signed on 24 October 2017; stated as follows:

> *"The company shall be entitled at any time during your employment and on termination of your employment, to deduct from your salary any monies due from you to us including but not limited to any outstanding loans, advances, excess holiday pay, the cost of repairing any damage or loss of the company's property caused by you (and of recovering it) or overpayment of salary, benefits and/or expenses."*

26 The Respondent confirmed that it has a similar clawback agreement in the employment contract with every employee for whom it has had to pay visa expenses. She also confirmed that a similar clause is in the contract of anyone for whom the Respondent has paid training or professional qualification fees. She agreed that best practice would have been for a conversation to have taken place with the prospective employee before it is put in the contract. She was not the person who handled the Claimant's employment at the time.

Decision

27 The Claimant agreed to a clause in offer letter of employment which stated that visa expenses would be refunded if she left its employment within 2 years of her start date. That must be read with clause 6.2 of her employment contract which gave the Respondent the right to deduct any money owing to it from her final salary. The Claimant was clear about the clause when she signed the contract.

28 She had previously been told that the Respondent would bear all expenses relating to her visa and the Respondent did do so. Later, it decided to add this clause to her contract and she considered it and accepted it before starting her employment. The Claimant may not have been happy about this at the time and was likely in the process of moving to the UK at the time. However, it is this Tribunal's judgment that she voluntarily accepted and agreed to this clause in her contract and signed the revised offer letter at the start of her employment. She did not raise any queries about the visa fees – either when she got the revised offer letter or when she got to the UK and before she signed it.

29 The clause was specific in that it stated what would be deducted – i.e. the visa fees; how the clause would be triggered – by the Claimant leaving the Respondent's employment within 2 years or by being dismissed for misconduct or poor performance. Those were the acts that would trigger the payment.

30 Although the visa costs were incurred before the Claimant started her employment, they were not refundable at that time. If the Claimant had remained in the Respondent's employment for more than 2 years or if she had been dismissed due to redundancy or ill-health, the Respondent would not have been able to rely on the clause to deduct 50% of the fees from her final salary.

31 The trigger that made the clause active was the Claimant's decision to resign from the Respondent's employment before the expiration of the period of 2 years from the start of her employment.

32 The Claimant's contract gives the Respondent the power to deduct any money owing to it from her salary. That was clear. The deduction from the Claimant's salary was made under a provision of the Claimant's contract. The Claimant had previously signified in writing her consent to the making of the deduction. She did this on the 6 November 2017. That was after the fees had been paid but before the payment clause was triggered and before the payment became due.

33 In this Tribunal's judgment, the Respondent's deduction of 50% of the correct visa expenses from the Claimant's final salary was within the terms of the employment contract between the parties and satisfies the requirements of section 13(1) of the Employment Rights Act 1996.

34 The Claimant previously signified in writing her agreement or consent to the making of the deduction which had not yet become applicable as she was not yet leaving the Respondent's employment. The contract clearly started that the deduction was to be made from her wages. The Claimant signed her employment contract confirming her agreement to the deduction being made from that source.

35 It is this Tribunal's judgment that the Claimant's agreement to the clause in her contract and in the offer letter which forms part of her contract, was obtained before the incident which justifies the deduction has occurred. The incident which justified the deduction was the Claimant's resignation which occurred less than 2 years from the start of her employment. The deduction was because of the date of the Claimant's resignation and not on account of the visa expenses being incurred. This satisfies the requirement of section 13(6) of the Employment Rights Act 1996.

36 The next question for the Tribunal is whether the fact that the Respondent initially deducted 50% of the Immigration Skills Charge should nullify clause 6.2 of the Claimant's contract and the offer letter so that the Respondent could not rely on it.

37 The Claimant submitted that the Respondent should not be allowed to rely on clause 6.2 in her contract as it has been used for illegal deductions from her final salary. This was a reference to the deduction of 50% of the cost of the Immigration Skills Charge. Once the Respondent realised that it had done something that was against its licence arrangement with the Home Office it refunded the amount wrongly deducted.

38 In this Tribunal's judgment, the Respondent's deduction of 50% of the Immigration Skills Charge was a genuine error. The Respondent's HR and support staff are clearly not experienced in immigration matters which is why it engaged Newland Chase to assist in obtaining the Claimant's work visa. As soon as the Claimant pointed it out, the error was rectified and the money refunded to the Claimant.

39 In this Tribunal's judgment, the Regulations that the Claimant brought to the hearing relate to the licence agreement that the employer has with the Home Office rather than the relationship between employer and employee. The fact is that the Respondent initially deducted 50% of the Immigration Skills Charge from the Claimant's final salary. That may have put in jeopardy the Respondent's licence. However, it does not affect the clauses in the Claimant's contract. The Home Office have no power or authority over the contract between the Claimant and the Respondent.

40 Also, this was a genuine error and the Respondent immediately refunded the Claimant the 50% of the Immigration Skills surcharge and the Certificate of Sponsorship.

41 This is not an Immigration Tribunal and this Tribunal does not have jurisdiction to be able to say that the Respondent breached the terms of its licence with the Home Office. There may be other aspects of the Regulations that apply. However, even if it had it would not automatically invalidate a term of the Claimant's contract with the Respondent that she voluntarily entered into. The licence agreement gives the Respondent the ability to seek and obtain work visas for prospective employers from around the world. This is separate and apart from the contractual relationship between the Respondent as employer and the Claimant as employee.

42 The Claimant submitted that she should have been told what the costs were at the time she signed the contract. However, she also confirmed that at the time she did not ask what they were. This was a query that was open to her. Also, the Claimant signed her agreement to a clause in her contract that clearly set out that she would have to refund part or all of the visa costs if she left the Respondent's employment within 2 years. However, she did not ask the employer before submitting her resignation what those costs would be although she would have known that the clause would now apply.

43 It is this Tribunal's judgment that the Respondent deducted 50% of the costs of obtaining the Claimant's work visa from the Claimant's final salary in accordance with clause 6.2 of her employment contract and the offer letter sent to her on 3 November 2017. The Respondent made an error in deducting the Immigration Skills surcharge. As soon as it was made aware that it could not do so, the amount was refunded. The Respondent made good its error which was done out of ignorance rather than deliberately.

44 It is this Tribunal's judgment that the deduction complied with sections 13(1)(a) and 13(6) of the Employment Rights Act 1996.

45 The Respondent has not made any unlawful deductions from the Claimant's wages. The claim is dismissed.

Employment Judge Jones

24 September 2019