EMPLOYMENT TRIBUNALS

Claimant: Ms S Shah

Respondent: Seth Law Ltd

Heard at: Manchester **On:** 16 August 2019
1 November 2019

Before: Employment Judge Feeney

REPRESENTATION:

Claimant: In person
Respondent: Mr Fogharty, HR Consultant

JUDGMENT

The judgment of the Tribunal is that the claimant's claim of unlawful deduction of wages in respect of the training cost deduction made from her final salary payment succeeds. The claimant is awarded and the respondent ordered to pay £1700.

REASONS

1. The claimant brings a claim of unlawful deduction of wages contrary to Part II of the Employment Rights Act 1996 section 13 in respect of the deduction of the cost of a CIPD course from her final salary by the respondent on the termination of her employment.

Claimant's Submission

2. The claimant submits that the respondent had no contractual right to make a deduction from her wages. She submitted that she had never received a contract but further that she had never seen the letter of 21 May which set out that her training costs would be deducted if she ceased employment.

Respondent's Submission

3. The respondent submitted that the claimant had received a contract which allowed deduction of training costs and further that the letter of 21 May stated that training costs would be deducted from final salary or any other monies owing to the

claimant if she ceased employment during the course or within 12 months of its completion, irrespective of whether she left voluntarily or whether she left as a result of being dismissed.

Witness and Evidence

4. The claimant gave evidence for herself and for the respondent Mrs Samira Seth owner of the respondent business.

5. The matter was then adjourned due to the respondent indicating they had other documents which would show the claimant's evidence she had given at the hearing so far as untruthful. I allowed the respondent's application to adjourn in order that they could obtain these further documents on the basis that there was no indication previously that the claimant disagreed with the respondent's points, the respondent having sent some documents with their response form to the Tribunal but apparently these documents not having been passed to the claimant. Therefore she had no opportunity to object to them and at the same time the respondent was unaware that the claimant was going to assert she had never seen them.

6. Accordingly the matter was adjourned to today, 4 November 2019, and the respondent produced new bundles which I had assumed contained all the documents from the first hearing plus the additional documents the respondent wished to rely on.

7. The respondent had indicated that they had documents including a signed contract from the claimant, a new contract in the claimant's name and an email to show that the letter had been sent to the claimant. I had assumed this was an email to the claimant however the email referred to was one from Nayomie Spencer, the relevance of which will be apparent below.

8. I allowed further evidence to be given by both witnesses in respect of the new documents. I also recalled Mrs Seth to give evidence following my initial deliberations regarding the Nayomie Spence email of 24 May 2018.

Findings of Fact

My findings are as follows:

9. The claimant began working for the respondent on 7 September 2017. She was recruited as a Fee Earner for the respondent Solicitors' Practice, mainly concerned with road traffic accidents. At the time of the claimant's appointment Nayomie Spence was undertaking the Office manager role. She then relocated abroad but continued to undertake some HR work from 'offshore 'although later Mr Fogharty was appointed to undertake this role.

10. The claimant indicated an interest in the office managers post when it became vacant and she was appointed to this in March. She passed her probation in this post and her position was confirmed. She was also advised that the respondent would increase her pay to £19,000 a year from 1 June and pay for her to undertake a CIPD HR course which she had requested to undertake.

11. The respondent said that the claimant had a contract from the beginning of her employment, obviously in a different role, but was not able to produce such a

contract, either electronically or on paper. The respondent said this was because they had fallen out with their previous HR provider (a company I will refer to as CN) who had stored these contracts and they were being refused access to the electronic copies. Mrs Seth maintained that there were paper copies in each employee's personnel folder but no such paper copies were produced as a sample. The respondent asserted that the claimant's contract was missing and they believed the claimant had removed this herself or not put it in her folder herself as it was her responsibility once she was the Office Manager to make sure personnel files were up-to-date, and only she and one other person had a key to the room in which this information was kept. The claimant said that Nayomie Spence had talked about giving her a contract but had never actually provided one for the fee earner role. I accept the claimant's evidence on this particularly as the respondent brought no other similar contracts and had not obtained any evidence from Nayomie Spence.

12. On 21 May a meeting took place between the claimant and the respondent. The respondent said a letter had been given to the claimant at this meeting and that she had folded it and out it away. The claimant agreed such a meeting had taken place but she disagreed that any letter had been given to her in this meeting. Further she said she had never seen the letter until the first bundle was produced.

13. The letter was addressed to the claimant's home address and said as follows:

> "We are pleased to confirm that you have successfully competed your probationary period for the role of HR and Office Manager. In reward of your hard work and ongoing achievements we have taken steps to increase your annual salary to £19,000 from 1 June 2018 and pay for your CIPD HR course. However, if you cease employment during the training course or within 12 months of completing the training course 100% of the cost paid by us will be repaid. You agree that any cost repayable may be deducted from your salary or other remuneration due to you by us. We would like to thank you for your continuing achievements in Seth Law."
>
> The claimant said she had never seen this letter. In addition of relevance is that Mrs Seth said today that the claimant had said post was not to be sent to her home address, hence the respondent hand delivering letters to the claimant.

14. In the reconstituted bundles there was an email (dated 24 May 2018) from the respondent's HR consultant, Nayomie Spence (who worked "offshore" and therefore all business was conducted by email) to Samira Seth. The subject was "Samera Shah HR and Office Manager Probation Letter" and the attachments were recorded as "HR and Office Manager Probation Letter". The content of the email was:

> "Hi Samira
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> Please find attached Samera's probation letter. All that needs to go in is the date of the meeting you had with her. Please let me know if anything needs changing. Thanks"

15. I recalled Mrs Seth to ask her about this as if that letter was sent to her on 24 May then it could not be the letter that she gave to the claimant on 21 May and it cast doubt on whether any letter was given to the claimant on 21 May. Mrs Seth said

that there definitely was a letter given to the claimant on 21 May and that there must have been an earlier email with a draft letter sent by Ms Spence to herself which she had used on 21 May. I asked Mrs Seth if that was the case, why was Nayomie Spence bothering to send her another copy of the letter and advising her to put the date in on 24 May. Mrs Seth had no cogent explanation. She thought it was just part of an email thread. Mrs Seth thought that this email had been in the previous bundle and therefore nothing had changed. I was unaware of whether it had been as all the previous bundles were returned to the respondent for updating with the additional documents they wished to rely on. I gave the respondent's representative the opportunity to submit anything to show whether that email was previously in the bundle or not irrespective of how probative that ultimately might be, but he said he was not in a position to do so. In any event it was not relevant ultimately whether it was in the first bundle or not, although if there had been an earlier email that would have been relevant. The respondent had no authority to remove anything from the first bundle they were simply instructed to add any additional documents to it between the two hearing dates. If Mrs Seth meant the earlier email had been removed that had been done by the respondent.

16. The CIPD course started in September and the respondent started making monthly payments towards the cost of it.

17. Accordingly the claimant began working as Office Manager and in October 2018 Mr Fogharty began advising the respondent on their HR and a new contract was drafted.

18. On 5 October Mr Fogharty had written to the claimant and Mrs Seth enclosing the employment contract and stating:

> "For your information the amends I have made are in yellow. Removed a couple of items that are no longer legal. Changes to GDPR. Main changes are holiday. It now says minimum six weeks' notice to be given, and disciplinary procedures now has reference to 'the company reserves the right not to follow the disciplinary procedure for those who have less than a minimum amount of time in the business' (this is currently two years) but before you get excited that you can just fire (ha, ha) you would serve contractual notice of one month if you don't want to follow DP.
>
> Sam [the claimant] - I will email over to you a link that has all the contracts ready for us to deliver today. We will give them two copies, ask them to go away and read it, and will meet them again on Wednesday to collect and answer any questions."

19. All the changes suggested by Mr Fogharty were sensible and relevant.

20. The claimant had replied later in the morning copying to the respondent also the following:

> "Vince,
>
> In the contracts I think we need to mention company policy on:
>
> (1) No holidays to be taken around Bank Holidays to form a long weekend;

(2) No holidays to be taken in December (all holidays must be taken between January and November);

(3) Medical appointments – one week's notice and to provide appointment card (Samira asking if we are ok to say, 'we reserve the right to call the GP surgery to confirm the appointment'?);

(4) No car park facility available – pay and display car parks available;

(5) No mobile phone policy;

(6) Bonus – if the employee makes a mistake which costs the firm, the firm can take back the bonus;

(7) Solicitors – if the director renews a practising certificate and the solicitors leave they need to pay back the fee paid by the company for renewal of the practising certificate."

21. It was put to the claimant that although at the first hearing she said she had nothing to do with the new contracts it was clear that she had from this email. The claimant stated that this was Mrs Seth's comments on the contract, which she discussed with Mrs Seth who then asked her to convey the points to Mr Fogharty. I accept the claimant's evidence on that as it was apparent from the text of the email and the content and sentiment that these comments came from the business owner.

22. The claimant at the first hearing had said, however, that she had not received a contract in her own name although she accepted she had seen the draft contracts to other employees. However, in the interim (which was the purpose of the adjournment) the respondent produced an email from Mr Fogharty to the claimant with all the contracts attached including a contract for herself and evidence that she had personally downloaded this. Further, that for some reason on 14 November she had emailed her own employment contract to herself along with certain other documentation. The claimant said this was in order to work on them at home. However, she had never worked on her own contract at home and never got back to the respondent with any queries about her contract. The claimant said that she did not mean in the last hearing that she had not seen a contract for herself, only that the same procedure was not followed as had been followed with the other employees., namely that she had a sit down meeting with Mr Fogharty to go through the contract.

23. The claimant clearly had said when I checked my notes that she had seen the contracts but she had never seen one in her name. Accordingly the claimant was not credible on this point.

24. Obviously the respondent was unaware at the time that the claimant had sent these documents to her personal address. They did not suggest there was anything untoward about this save that it was probably a breach of GDPR rules.

25. The new contract stated at paragraph 24:

"<u>Deductions</u>

> For the purposes of the Employment Rights Act 1996 (Part II) you authorise the employer to deduct from your pay any sums which you may owe the employer, including without prejudice to the generality of the foregoing, any overpayment or loans made to you including but not limited to payments for training, DBS checks and uniform…."

26. In February 2018 the claimant was off sick and it appears that while she was off sick something was reported to Mrs Seth that the claimant had said about a client and Mrs Seth which was in the earshot of members of the public at lunchtime. Mrs Seth stated this was why the claimant had been dismissed on 8 March.

27. The letter to the claimant regarding the termination of her contract actually said, "Sam Shah hand delivered 8 March". It was an unsigned copy. It said:

> "Termination of Contract
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> As per our conversation please accept this letter as notification that we are giving you notice of termination of your employment contract with Seth Law.
>
> In line with your contract you are being one month's notice. This will be paid to you direct and you will not be required to attend the workplace again and therefore your final day of employment will be 8 March 2019. Your final pay including any outstanding holiday pay due to you will be paid in the normal way. In regard to your studies with CIPD the company will also cease to make any further payments towards this. However, should you wish to continue paying for this on a personal level we will of course advise CIPD to make contact with you direct."

28. In evidence as related above Mrs Seth had said that this letter and the previous letter of 21 May were given to the claimant by hand because the claimant had asked that no post be sent to her home address. It should be noted that the letter of 21 May did have the claimant's home address written on it unlike the letter of 8 March.

29. The claimant's evidence was that she did understand that if people left they would have to pay back some outstanding costs and she would accept the possibility that this included training costs: she certainly knew that solicitors would have to pay back the cost of their practising certificate if they left during its currency.

30. Having seen the letter of 21 May at the Tribunal the claimant said she still thought the "cease employment" would only refer to leaving voluntarily and not dismissal.

31. The claimant was also asked at the previous hearing about the respondent's previous HR providers CN and her knowledge of them and the fact that they kept the contracts electronically in 'cyber' space. Emails were produced between the claimant and Ms Spence where the claimant was saying that she had not changed the password and that she only had admin access. The respondent therefore challenged the credibility of her previous evidence. The claimant explained today that she had never actually managed to get on the site to be extent of being able to look at anything and Nayomie Spence was working on that to try and get her access when the arrangement with the previous provider then ended, so she was not aware that contracts were in that space nor could she access it. When it was suggested

that she must have known there were outside HR providers because this was clear from the emails the claimant said that that was not a matter that she had recalled if she had in fact known it, and the name referred to was not a name that she would remember just from it being part of one email from Nayomie Spence.

32. The claimant's final payslip showed that £1700 had been deducted for 'training costs'.

The Law

33. Section 13 of the Employment Rights Act 1996 states that:

> "(1) An employer shall not make a deduction from wages of a worker employed by him unless –
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> (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; or
>
> (b) The worker has previously signified in writing his agreement or consent to the making of the deduction.
>
> (2) In this section 'relevant provision' in relation to a worker's contract means a provision of the contract comprised:
>
> (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
>
> (b) in one or more terms of the contract, whether express or implied, and if express whether oral or in writing, the existence and effect and combined effect of which in relation to the worker the employer has notified to the worker in writing on such an occasion.
>
> (3) Where the total amount of the wages paid on any occasion by the employer to a worker employed by him is less than the total amount of the wages properly payable by him to the worker on that occasion (after deductions), the amount of the deficiency shall be treated for the purposes of this part as a deduction made by the employer from the worker's wages on that occasion."

34. Determining whether there has been a deduction involves determining whether the wages are properly payable to the worker, the contractual provisions applying to the claimant and the respondent.

35. In **Yorkshire Maintenance Company Limited v Farr EAT [2009]** the Judge cautioned against employers acting as Judge and jury when requiring an employee to repay certain costs and expenses and considering that such terms should be "subject to a considerable degree of scrutiny" because of the vast disparity in economic power between the employer and the employee.

36. In respect of section 13(2)(a), applying to written terms authorising deductions which have been entered into before the deduction has been made, the provision is satisfied if the employer gives a copy of the contract containing the relevant term to the worker. There would however appear to be no requirement that the employee's attention is drawn to the specific contractual provisions authorising the deduction. This can be contrasted with section 13(2)(b) which provides that the employer must notify the worker about the existence and effect of specific terms.

37. In addition, it may not be sufficient to have simply a contractual provision: deduction must actually have been made under that provision (**London Underground Limited v Jaeger EAT [1997]**). Clause 3 of J's contract provided that he would forfeit his right to company sick pay if he failed to comply with departmental requirements regarding prompt notification of absence and provision of medical certificates. Clause 4 gave the employer the right to withdraw company sick pay at management's discretion. The employer purported to rely on clause 3 to stop the claimant's sick pay when it was discovered he had attended a picket line when off sick. The EAT upheld the Employment Tribunal's decision that the deduction was not authorised by clause 3 and was therefore unlawful. It made no difference that the employer could have exercised unfettered discretion under clause 4 to stop the employee's sick pay as this had not been done.

38. Section 13(2)(a) makes clear that the worker must have been given a copy of the written contractual term prior to the deduction being made, or a copy of the contract containing the relevant term. The deduction is unlawful if the contract is given after the deduction.

39. Section 13(2)(b) permits deductions authorised by a contractual term if its existence and effect the employer has notified to the worker. Unlike section 13(2)(a), there is no need for the contractual term itself to be in writing. Such terms may be express or implied, however the existence and effect of the relevant term must have been notified to the worker in writing prior to the deduction. Thus an oral agreement to a deduction will satisfy section 13(2)(b) so long as the worker is given written notification before the deduction is made.

Credibility

40. Credibility in this case proved to be extremely important as ultimately the issue came down to whether or not the letter which was said to have been given to the claimant on 21 May 2018 had indeed been given to her on that day.

Claimant's Credibility

41. The respondent submitted that the claimant's credibility was severely in question because at the first hearing she had said she had not seen a contract in her name, when it was clear now that she had. Further, she said she had had no involvement in the contract but they pointed to the email to Mr Fogharty. Further, she had said she was unaware of the previous HR provider but it is clear that she was aware; and finally, that she did know there was a requirement to pay back costs albeit she believed this only arose if someone left voluntarily: so how did she know that if she had not been given the letter of 21 May?

42. The claimant's position was that she had not meant that she had never seen a contract in her name but that the same process was not gone through with her as with the others. I found this unconvincing.

43. In respect of the claimant's involvement in the new contracts, I did accept her evidence that she was passing on information from Mrs Seth as I found it far too detailed and to be honest somewhat oppressive in parts for this to arise from the mind of someone who was not only unqualified in HR but not the owner of the business. It was much more plausible that these were matters Mrs Seth wanted to see whether she could put them into the contract.

44. In respect of whether the claimant knew of the previous HR providers, I accept the claimant's evidence that she would not have remembered the name of the previous HR providers and that she did not have access to the cyberspace where the contracts were kept. This is corroborated from the emails to some extent which just say, "I only have admin access".

Respondent's Credibility

45. The respondent stated that it was implausible that they would not be telling the truth given the reputational damage that could ensue from them not telling the truth. I explained that I could not just rely on that assertion but had to look at all the information in front of me. In addition, it was not necessarily the case that a party was lying to me but they may have forgotten some information or recalled things erroneously.

Conclusions

46. I find that the respondent had sent the contract to the claimant in October and that she had notice of clause 24 as far as that went.

47. I find that prior to that there was no written contract and nothing to establish any terms of an oral contract relevant to this issue as section 13 requires written confirmation of any terms relied on for a lawful deduction.

48. Clause 24 of the October contract, while it would allow recoupment of training costs where they were "owed to the employer", until the claimant left there would be no question whatsoever of owing the employer the training costs: the training costs had been willingly paid by the respondent in order to develop the claimant. Accordingly, that clause by itself only enabled the respondent to recoup the money if the claimant owed it to them. She only owed it to them if, as in accordance with the letter of 21 May, she ceased employment during the training course or within 12 months of completing the training course. I find that ceased employment includes the claimant being dismissed and does not just refer to the claimant voluntarily leaving.

49. Accordingly, it became extremely important as to whether the claimant was given that letter on 21 May as it would comprise notice given in writing of a deduction which would enable the respondent to rely on section 13. It would also be potentially a contractual term so that the CIPD fees were not properly payable once the claimant 'ceased employment.'

50. I have considered at length whether the fact that the respondent has been able to show that the claimant was not wholly truthful in respect of her own personal

contract means that I should believe Mrs Seth's version of what happened on 21 May. However, this has been the only issue in my mind that has cast doubt on the claimant's credibility. I have accepted her explanation of the other matters raised.

51. In respect of the letter of 21 May I cannot accept that this was given to the claimant on 21 May in the light of Nayomie Spence's email of 24 May. Far more plausible on the balance of probabilities is that the claimant and Mrs Seth had a meeting where she was congratulated on passing her probationary period and she was advised that her salary would be increasing to £19,000. Given the claimant had some recollection of the possibility she might have to repay training costs, but only if she left voluntarily, I conclude that there was some discussion in this meeting about the clause which eventually appears in the letter and this explains why the claimant did not consider the circumstances where she was dismissed would be included in such a clause.

52. I cannot accept, however, that the claimant was given this letter on 21 May as the documentation corroborates that it was not sent to Mrs Seth until 24 May. Accordingly, I can only conclude that Mrs Seth overlooked providing a copy of the letter to the claimant. It is also strange that the claimant's address was on the letter whereas the dismissal letter clearly stated it was given to the claimant by hand. This also leads me to believe it was not given to the claimant by hand as claimed.

53. I am unaware of how Mrs Seth obtained this letter as the situation should have been that a copy of this would have been in the claimant's personnel file, the claimant having been given the original. Mrs Seth was adamant the claimant's personal file had been emptied. I did not question Mrs Seth about this, neither did the claimant, and therefore I can draw no conclusions from that scenario.

54. However, I rely mainly on Nayomie Spence's email but also on the fact that in the termination letter no mention is made of this letter of 21 May and the fact that the respondent would be deducting the training costs: quite the opposite. It appeared that they were giving the claimant a friendly warning that she would have to carry on paying these if she wished to carry on on the course, and that she would be getting relevant holidays and her one month's notice pay. It seems implausible to me that if that letter had been given to the claimant on 21 May that it would not have been mentioned in the dismissal letter.

55. Accordingly, it is likely this letter was somewhere to be found in a copy form but that is not proof that it was given to the claimant on 21 May, and although there have been queries about the claimant's credibility that does not always mean that a witness is not telling the truth in respect of other matters.

56. In respect of section 13 it is clear the respondent cannot rely on 13(1)(b) as there is nothing signifying agreement to the deduction in writing.

57. Therefore the issue is then whether the respondent can rely on the latter part of 13(1)(a) regarding a relevant provision of the claimant's contract relying on the October contract. The October contract refers to sums 'owed' to the employer by the employee, however the claimant only owed the training costs if the terms of the letter of the 21 May were met.

58. If she had been given that letter it would be sufficient to be a contractual term by operation of 13(2)(b) i.e. that the letter was recording an oral agreement at the meeting on 21 May, (however that would also require establishing that there was such an oral agreement) However that pathway will not apply in this case as I have found that the letter was not given to the claimant on 21 May. Accordingly, the respondent had no authority to make the deduction in question.

59. I have considered whether if the letter had been given to the claimant it could be a relevant provision of the claimant's contract for the purpose of 13(1)(a) by virtue of 13(2)(a). This would have to be an addition to the claimant's oral contract as I have found that the claimant had no contract in writing before October 2018, and I believe this would be possible however I have found that the letter was not given to the claimant therefore this is only hypothetical.

60. Accordingly, the respondent did not have authority to make this deduction and the claimant's claim succeeds. The amount in question is quantifiable from the final pay slip as £1700 and the respondent is ordered to pay the same to the claimant.

Employment Judge Feeney

Date: 5 November 2019

JUDGMENT AND REASONS SENT TO THE PARTIES ON

25 November 2019

FOR THE TRIBUNAL OFFICE

NOTICE

THE EMPLOYMENT TRIBUNALS (INTEREST) ORDER 1990

Tribunal case number: **2405794/2019**

Name of case: **Miss S Shah** v **Seth Law Ltd**

The Employment Tribunals (Interest) Order 1990 provides that sums of money payable as a result of a judgment of an Employment Tribunal (excluding sums representing costs or expenses), shall carry interest where the full amount is not paid within 14 days after the day that the document containing the tribunal's written judgment is recorded as having been sent to parties. That day is known as "*the relevant decision day*". The date from which interest starts to accrue is called "*the calculation day*" and is the day immediately following the relevant decision day.

The rate of interest payable is that specified in section 17 of the Judgments Act 1838 on the relevant decision day. This is known as "the stipulated rate of interest" and the rate applicable in your case is set out below.

The following information in respect of this case is provided by the Secretary of the Tribunals in accordance with the requirements of Article 12 of the Order:-

"the relevant decision day" is: **25 November 2019**

"the calculation day" is: **26 November 2019**

"the stipulated rate of interest" is: **8%**

For the Employment Tribunal Office