



EMPLOYMENT TRIBUNALS

Claimant: Miss N Wilsdon

Respondent: Circus Day Nursery Limited

Heard at: Bristol **On:** 1 October 2020

Before: Employment Judge Midgley

Representation

Claimant: Mr McGinty, lay representative

Respondent: Mr Johnson, Solicitor

JUDGMENT

1. The claim for unlawful deduction of wages is well founded and the respondent is ordered to pay the sum of £397.06 to the claimant.

REASONS

The claim

1. By a claim form presented on 9 December 2019, the claimant, Miss Wilsdon, brought claims for unlawful deduction of wages and accrued but unpaid holiday leave.
2. At the outset of the hearing the parties clarified that there was an agreed sum that the claimant had earned in respect of wages and holiday pay which was reflected in her final payslip of £782.55. It was that sum that was pursued in the claim. The respondent defended the claim.

Procedure, hearing, and evidence

3. I had the benefit of an agreed bundle running to approximately 57 pages and a witness statement from the claimant on her behalf and from Mrs Wilson-Porterfield for the respondent. I heard evidence from both the claimant, Miss Wilsdon, and Mrs Wilson-Porterfield and they were asked questions and both by me and by the parties' representatives. I had the benefit of and brief

written submissions from Mr McGinty who appeared for the claimant and I heard oral submissions from Mr Johnson and Mr McGinty at the end of the evidence.

4. During the hearing a photograph of the final page of the claimant's contract was added by agreement to the bundle. In consequence, the parties agreed that the claimant had signed a contract on 30 January 2019.

Factual background

5. I turn then to the facts. These are the findings that I make on the balance of probabilities. I can say at the outset that I found both the claimant and Mrs Wilson-Porterfield to be truthful and candid witnesses and I have allowed for that fact in the findings that I have made.

The Respondent

6. The respondent business is a nursery which offers provision for early years learners; at the time in question it had 119 children on its register. It employs approximately 40 staff on a full-time, part-time and bank basis. In terms of the recruitment of staff, the respondent follows a safer recruitment policy and practice because it is registered with Ofsted and is subject to the statutory regulation. It has to ensure that all those who are appointed have completed the necessary DBS check. That process increases the time taken in the recruitment process
7. Insofar as the operation of the respondent is concerned, Mrs Wilson-Porterfield is the Managing Director and she has been referred to with two titles during these proceedings, both as Tribunal 'The Early Years Manager' and as 'The Nursery Manager.' The Nursery Manager at the relevant time was Lisa Bruton.
8. The nursery operates, as I was told by Mrs Wilson-Porterfield, three terms which were aligned with the council's funding for nurseries. The first runs from January – April, the second from May – August and the third from September – December.

The claimant's appointment and the terms of her contract

9. The claimant was successful in her application for a post as a Nursery Practitioner. She signed a contract on 30 January 2019. The circumstances in which she did so are pertinent to this claim. She met with Mrs Bruton, who as Miss Wilsdon described it to me and as I find, showed her the first page of the contract and said that she would not 'bore' the claimant with the details of the rest, given its length, and then took the claimant to the last page and asked her to sign it. The claimant had not therefore read all of the terms of the contract at the time that she signed the document, but she took it home and she read it that evening. She told me quite candidly that because she was optimistic about her future with the respondent, she did not look in detail or perhaps with concern at the content of the contract itself. The relevant terms of the contract for the purposes of this claim are as follows:

10. Firstly, there is a clause within the contract which specifies deductions from wages. It reads: "If during or on termination of your employment you owe any money to the Nursery, you agree that the Nursery has the right to deduct this sum from your wages or any other money it owes to you. By signing this agreement, you expressly consent to such deductions pursuant to Part II of the Employment Rights Act 1996". Examples of such deductions are set out in the contract, which states "examples of deductions which may be made by the employer include, but are not limited to the following..." It is accepted by the respondent that the deductions in this case for the cost of agency staff and associated costs are not expressly identified within the contract.
11. Later in the contract, however, is a term relating to notice periods. That provides: "Notice period to be given by the employee to the employer from the commencement of your employment - one term's written notice to the employer". Then later, under a section entitled "General," is stated "If you leave without giving and working your full notice, any additional cost in covering your duties during the notice period not worked will be deducted from any termination pay due to you".
12. The word "term" as used in the Notice section of the contract is not defined anywhere within the contract.
13. I was told by Mrs Wilson-Porterfield (and I accept) that the respondent has a handbook and within the handbook there is a provision that deals with the circumstances in which notice will be given and accepted, in the sense that notice must be given by the last Friday of one month in order to be effective from the following month, as I understand it. As it happens, nothing in this case turns upon that provision, although I observe for future reference that there is nothing within the contract that draws any parties' attention to that provision of the handbook and it would be unlikely to have contractual force in any event.

The events leading to the claim

14. The claimant had signed the contract albeit that she had not looked at it in any detail. When she did read it on the night of 30 January 2019, she did not understand what the reference to "term's" meant within the notice provision. She told me, and I accept, that she asked other members of the nursery staff, but they were unable to tell her.
15. For reasons which are not relevant to this claim, the claimant decided that she would resign. Subsequently she spoke to the floor supervisor who advised her that the terms operated in the way which I have described in paragraph 8 above and that the term in question would run from September – December.
16. On 16 August 2019, the claimant handed her notice to Mrs Wilson-Porterfield and Mrs Bruton in a sealed envelope. Miss Wilsdon told me quite candidly that she knew when she did so that her notice would expire at the end of December. There is some ambiguity as to whether that would be 24 or 31 December but again nothing turns upon it in the context of this claim.

17. Miss Wilsdon had at that stage considered the effect of the notice provisions of the contract. As she told me, she understood that if she did not work her notice and it was necessary for the respondent to engage someone to provide cover, she would need to pay the cost of that. However, she did not believe that cover would be needed in the circumstances as, whilst she had been told that she would need to work her notice was on sickness absence and unfit for work, having previously been on sickness absence for a significant period, and thus she believed that the respondent would have cover arranged and would not in fact require her to fulfil that obligation.
18. On 27 August, the claimant attended a meeting with Mrs Bruton during which the claimant explained that she was sick, her health was poor, and she would not be working the remaining period of her notice.
19. Unfortunately, at or about that time the nursery was short staffed; the claimant referred to resignations amongst what I understand to be nursery practitioners in her evidence. The consequence was that Mrs Wilson-Porterfield and Mrs Bruton were required to work on site in the roles that were vacant. In order to cover the claimant's absences, the respondent engaged agency staff and also a recruitment agent, Mrs Lucia Silver, to recruit staff to make up the shortfall.
20. Mrs Silver subsequently submitted an invoice dated 30 August 2019 for her work. It identifies the work that was undertaken as "meeting on 29 August with the owner to discuss urgent recruitment consultancy due to an employee leaving and not working any of the contracted notice period, finding full-time qualified level 2 and 3 employees to avoid agency workers selection, search, interviewing, shortlisting in line with recruitment policy at the setting".
21. One aspect of the task undertaken by Mrs Silver was to search recruitment websites identifying CV's for potential candidates that could be shortlisted and interviewed. The reason for that was because at that time there were difficulties in recruiting as many staff had been taken on to agencies' books and therefore there was a significant delay between making approaches through agencies, and reaching the position to conduct shortlisting and appointment replacements. The other factor affecting the time needed for recruitment was the quality of the candidates that were available.
22. The invoice of Mrs Silver and also invoices in respect of agency costs were included in the bundle. The agency invoices were dated:
 - a. 10 November 2019 in respect of services on 6 November 2019, although they are not specified.
 - b. An invoice on 4 December 2019 in respect of three agency staff on 26 November, 27 November and 28 November.
 - c. An invoice dated 11 December 2019 in respect of agency staff on 4 December 2019 ; and
 - d. Finally, an invoice dated 18 December 2019 in respect of agency staff provided on 9 and 10 and again, it appears, on 9 December 2019 (Miss Beamore).
23. The claimant's challenge to those documents is two-fold. Firstly, dealing with the invoice of 18 December 2019, the original date on which the agency staff,

Miss Beamore, attended appears to be 9 December. The invoice itself is dated 18 December but way of handwritten annotation, the date of the provision of Miss Beamore has been changed to the 20 December 2019 which postdates the date of the invoice. There was not any evidence before me as to who made that change (although Mrs Wilson-Porterfield thought it must have been Mrs Bruton) or whether the date of 20 or 9 December is correct date.

24. The second challenge is in respect of costs of the agency worker on 28 November in the invoice of 4 December. Miss Wilsdon's evidence, which was not challenged, is that that was a Thursday and that she did not work on Thursdays. Consequently, the cost of the agency staff on that day should not have been deducted from her wages.
25. I turn to the consequence of those matters. The total agency costs that Mrs Bruton calculated were due to the claimant's absence amounted to £1,000.55. Offset against that, were the costs that would have been occurred by the respondent had the claimant remained in employment for 54.25 hours at £7.50 or £7.70 an hour, constituting a deduction of £417.72. The balance was therefore £582.83 to which was added the cost of the recruitment agent fees of £399. The total sum of deductions therefore was in excess of £1,000 as against the agreed figure that would otherwise have been paid to the claimant of £782.55.
26. Accordingly, in the claimant's final payslip the sums above were set out and the claimant received nil pay. Other matters in relation to payslips were raised during the hearing but they are not material to my decision. I note, however, in passing that the agency staff appeared to be engaged in October, November and December following the recruitment agent's instruction in August in respect of a resignation where the last day of work was the end of August.

The Law

27. The relevant law is set out in the Employment Rights Act s13 and at the outset of the hearing the parties assisted me in clarifying precisely what was in issue. S13 provides the right not to suffer unauthorised deductions and provides as follows:
 - “(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 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.”
28. The parties agreed that the claimant had not provided written consent to the deduction in question because the sums of the deduction were not known prior to her resignation or the effective date of her termination. Consequently, the relevant provision here was (1)(a) - namely whether there was a relevant

provision within Miss Wilsdon's contract that permitted the deduction to be made.

29. Where s.13(1)(a) is relied on subsection (2) is engaged, which requires the employer to give the worker a copy of the relevant provision prior to the employer making the deduction in question.
30. It is not enough for an employer to show that it has made a deduction and the contract permits it, it must also prove that objectively the deduction was justified Fairfield Ltd v Skinner [1992] ICR 836,EAT,
31. I drew to the parties' attention at the outset of the hearing to the following principles of contractual construction which apply:
32. First, where a contract has been drafted by a party that has the greater bargaining power, any ambiguity in the terms of the contract must be construed against the interest of the party who drafted it. That rule is known as the *contra proferentem* rule.
33. The golden rule in relation to the construction of any contract is that the contract should be interpreted in its grammatical and ordinary sense in context, except to the extent that some modification is necessary to avoid absurdity, inconsistency or repugnancy ie an interpretation that is contrary to the contract itself or its unambiguous express terms.
34. In Harlow v Artemis International Corporation [2008] EWHC 1126 (QB) Mr Justice McCombe observed that contracts are designed to be read in an informal and common-sense manner in the context of a relationship affecting ordinary people in their everyday lives. The effect of that is the correct meaning of a word is to be found from that commonly attached to it by the users of that word and in the relevant context unless, as was identified in Cosmos Holidays Plc v Dhanjal Investments Ltd [2009] EWCA Civ 316, the term in question has a particular meaning within the nature or category of employment in question - eg, a particular word may have a particular meaning within education. In Cosmos Holidays Sir Anthony Clarke said "the general rule is that the particular provision must be construed in the context of the clause as a whole and the clause itself must be construed in the context of a contract as a whole which must in turn be considered in its factual matrix or against the circumstances surrounding it".
35. That assessment must take place at the time the parties entered into the contract (see Arnold v Britton [2015] UKSC 36, where Lord Neuberger summarised the general principle saying

"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 be available to the parties would have understood them to be using the language in the contract to mean. By focussing on the meaning of the relevant words and the documentary, factual and commercial context, that meaning has to be assessed in light of the natural meaning of the clause. Any other relevant provisions of the agreement, the overall purpose of the clause and agreement and the facts and circumstances known or assumed by the parties at the time that the

document was executed and finally, commercial common-sense. The parties' subjective evidence as to what their intentions were, is to be disregarded".

Discussion and conclusions

36. I turn then to my conclusions, applying the law as I have enunciated it to the facts as I have found.
37. I start with the terms of the contract itself and deal firstly with the deduction clause.
38. I note the clause is "If during and on termination of your employment you owe any money to the nursery, you agree that the nursery has the right to deduct this sum from your wages or any other money it owes to you". The relevant phrase in that clause, as it would be understood relates to the phrase '*owing any money to the nursery*' at the point of termination. The usual application of such a clause is where there were training costs, uniform costs etc that are to be borne by the employer in relation to the claimant's employment. Indeed, a number of those such costs are set out beneath the clause in question.
39. It seems to me that the construction does not attach to costs that may be caused by the termination of the employment. If that were the case one would expect it to be expressly stated. There is nothing within that clause that is of assistance to the respondent in that regard.
40. However, the clause on "Notice" does support the respondent's argument. I deal firstly with the clause relied upon for the purpose of the deduction, separate to the period of notice in question. The clause in question is:

"If you leave without giving and working your full notice, any additional cost in covering your duties during the notice period not worked will be deducted from any termination pay due to you".
41. It seems to me that the phrase most relevant to my conclusion on this issue is the phrase "*any additional cost in covering your duties.*" It does not say "*any additional cost in recruiting your replacement.*" The clause given its ordinary English and grammatical meaning relates to the cost of covering the role during the notice period and not any cost in relation to replacement after the end of the notice period. Again, if the contract were intended to catch such costs, I would expect the clause to specify it.
42. I turn to the clause relating to notice periods. This is a contract relating to a nursery practitioner within a regulated form of business. It is common within the industry for the providers of such care to receive funding from the local Council. Whilst it may not have been understood by the claimant that the phrase "term" related to the 'terms' adopted by the Council as part of its funding structure, I accept that in the context of this commercial business it would reasonably have been understood by anyone operating in the Nursery sector in that way. Moreover, at the point that Miss Wilsdon made her decision to resign, she knew and understood the effect of the term and that in consequence her notice period would last until the end of December.

43. I apply the terms of the contract as I have construed it to the facts of the case.
44. It is not enough for the respondent to simply to show that there is a clause and there was a deduction. The nature of the deduction must also be justified. It seems to me that the agency costs incurred during the period of the claimant's notice period are recoverable subject to two exceptions. Firstly, the costs of the 28 November 2019 which was a day which the claimant did not work, the deduction is not therefore justified. The costs were £89.70 net and £17.94 VAT.
45. The second invoice in respect of which I find that the respondent has not justified the deduction is the invoice dated 18 December in respect of the costs recovered relating to Miss Beamore with the handwritten annotation "20 December". In order to satisfy me that such a cost was justified on the balance of probability, I would have needed to some evidence, either from Mrs Bruton or for there to be some evidence from Mrs Bruton on the point. The invoice sum in respect of that day was £74.75 with £14.95 VAT owed.
46. The total sum across those two invoices which I find not to be justified is £197.34.
47. I turn then to the total sum of the deductions that was made for agency fees. That was £1,000.55 from which I deduct £197.34 leaving a balance of £803.21. From that the claimant must be given credit in respect of the saving to the respondent in respect of her own wages which was £417.72. The total deduction which I find to be permissible under the contract which was justified was £385.49.
48. Insofar as the fees of Mrs Silver are concerned, I do not find that those are justified for the following reason. Firstly, the work that was done was the recruitment of a replacement. As far as I can see and I have heard no evidence to the contrary, the replacement did not start their employment prior to the end of the notice period because there are still days in October, November and December through which agency fees were being incurred. There was no evidence when the individual was recruited, the number of days that they worked or what impact that had upon cover and agency costs.
49. Secondly, and more importantly, those costs have not been established on the balance of probabilities to relate to covering the claimant's duties during her notice period, rather than replacing her post after the end of it, because I have heard no evidence on that point.
50. The effect of those matters is that the respondent was entitled to deduct the sum of £385.49 from the claimant's final salary of £782.55, meaning that the balance due to the claimant is £397.06.

Employment Judge Midgley

Date 26 November 2020