Case No: 1601680/2021

EMPLOYMENT TRIBUNALS

Claimant: **Hannah Snape**

Respondent: **Tooth Fairies Limited**

Heard at: **Cardiff (by video)** **On:** **16 February 2022**

Before: **Employment Judge E Sutton**

Representation
Claimant: Appeared in person
Respondent: Mr Munro (solicitor)

RESERVED JUDGMENT

1. The claim for notice pay is dismissed upon withdrawal.

2. The claim for the unauthorised deduction of the sum of £1,231.77 from the wages of the claimant contrary to section 13(1) of the Employment Rights Act 1996 is not well-founded and is dismissed.

REASONS

Preliminary

1. The claimant, Miss Snape, attended the hearing, and represented herself. Her father, although 'off camera', was able to provide her with moral support throughout the hearing. The respondent was represented by Mr Munro (solicitor). Ms Debbie Hill (owner of Tooth Fairies Limited), Miss Alex Hill (operations manager of Tooth Fairies Limited) and Carly Ellis (line manager within Tooth Fairies Limited) attended the hearing and gave oral evidence.

2. There was a bundle of documents and witness statements from the claimant and the respondent's witnesses. Having considered the written evidence it was necessary at the outset of the hearing to clarify what the extant claims were. The claimant confirmed that she did not seek to amend the claim to include allegedly accrued holiday pay or unpaid lunch breaks. The claimant initially confirmed that her claim was limited to that which was set out in the ET1, namely notice pay and the sum of £1,231.77 which she says was unlawfully deducted from her wages on 1 September 2021 as part reimbursement for a training course. When the claimant gave evidence however, she confirmed that she did not wish to pursue a claim for unpaid notice pay. I confirmed that that aspect of her claim would therefore be dismissed upon withdrawal.

The issues

3. By reason of the above, the only matter I needed to determine related to the alleged unauthorised deduction of wages. The parties agreed that the list of issues were:

    (1) What wages should ordinarily have been paid to the claimant on 31 August 2021?
    (2) Were wages paid to the claimant on 31 August 2021?
    (3) Was the deduction authorised by a written term of the contract?
    (4) Did the claimant have a copy of the contract which included the contract term before the deduction was made?
    (5) Did the claimant agree in writing to the deduction before it was made?
    (6) (*if an unauthorised deduction is found to have been made*) How much is the claimant owed?

4. The relevant contract signed by the claimant is dated 5 January 2021. The relevant provision is paragraph 7(d) which is set out fully below. The claimant did not seek to argue that the deduction was an unlawful restraint of trade and/or a penalty clause, however as Mr Munro referred to penalty clauses in his closing submissions, this is addressed more fully below.

5. The claimant accepted that she had signed the written contact on 5 January 2021, that she had a copy, and that she was liable to reimburse the respondent in accordance with paragraph 7(d). The two key factors relied upon the claimant in support of her claim were:

    (1) The amount deducted was part payment of a commercial charge in the sum of £2,999 and should not have been applied as she was an employee;
    (2) The deduction was taken on 1 September 2021 which was not her last wage as required by paragraph 7(d), as she received additional monies in the sum of £349.83 on 1 October 2021.

6. The respondent's case is straightforward. Mr Munro asserts that this was clearly a lawful deduction contained within the claimant's contract, and whilst she may not have known the exact amount to be repaid, she was aware that it was likely to be 'in the thousands'. The respondent says that the 1 September 2021 would have been her final pay, and that a payment made in October 2021 related to statutory sick pay and a tax refund only.

Background

7. The claimant began working for the respondent on or around 25 August 2018 as a dental nurse assessor and tutor. The respondent is a commercial dental training centre. At that stage, the claimant was contracted to work 28 hours per week (Tuesday-Friday) between the hours of 9am-5pm. Her rate of pay varied from £10 per hour (for training), £11.50 per hour (for assessing work) and £13 per hour (for tutoring work). She was paid each month, usually on the 1st of each month. The claimant explained to me in oral evidence what a typical day would look like for her. It was essentially the role of a dental nurse 'teacher' and provided her with a varied and busy schedule.

8. The initial written contract dated 25 August 2018 was unsigned, but contained a section regarding the requirement to reimburse training costs. The key provision is section 7(d) which explains that whilst the respondent would endeavour to ensure that the claimant received any necessary and proper training to enable her to perform her role, that the respondent:

   ' ….. will deduct a sum equal to the whole or part of the costs due from your final salary payment or from any other allowances, expenses or other payments due from the Company to You. If your final salary payment is not sufficient to meet the debt due to the Company, You agree that you will repay the outstanding balance to the Company within one calendar month of the date of termination of your employment, such payment to be made as agreed with the Company'

9. Thereafter, on 5 January 2021, a further contract of employment was signed and dated by the claimant. I clarified with the claimant why it was considered necessary for a further contract to be signed. She explained that she had increased her hours to 35 hours per week (Monday-Friday), between the hours of 8.30am-4.30pm.

Findings of fact

10. The relevant facts are as follows. Where I have had to resolve any conflict of evidence, I indicate how I have done so at the material point. References to page numbers are to the agreed bundle of documents.

11. I am satisfied that the reason for the second written contract was a consequence of the claimant's increased hours as opposed to a chance to 'reinforce the repayment provisions' of the written contract, as suggested by Ms Debbie Hill. It is right however to emphasise that the January 2021 contract contained *exactly* the same provision regarding the repayment of training costs [pg 36]. It had therefore been read, digested and accepted by the claimant for a number of years.

12. The claimant wished to pursue a Level 4 Internal Quality Assurance ('IQA') qualification which was agreed by the respondent. Ms Debbie Hill explained to me in oral evidence that the decision for the respondent to pay for this course was not taken lightly as there was no role within the respondent company in which she could utilise the skills learnt. She explained that she nevertheless wished to support the claimant. The claimant began the course on or around February 2020 and completed the course around 17 months later on 31 July 2021. Twelve days later on 12 August 2021 the claimant handed her notice in, by email, to Ms Debbie Hill [page 58]. By invoice dated 12 August 2021 [pg 89], the respondent sought payment from the claimant in the sum of £2,999 as reimbursement for the training course. Payment was requested by 1 September 2021.

13. The claimant was clear in her oral evidence that she was unaware of this cost when arrangements were made for a 'Leaving Meeting' to be held with the respondent to discuss her departure from the company and the course fees. I have seen an email from the claimant dated 24 August 2021 which explains that she was not leaving to join a rival company and where she asks for confirmation of the cost of the course [pg 60]. A meeting took place on 25 August 2021 attended by the claimant, Ms Debbie Hill and Ms Alex Hill. The claimant says that she was not provided with details of the course fees at this meeting. The evidence of Ms Alex Hill is that she was clear with the claimant that the usual fees for a Level 4 IQA course was £5,000 but that she was worried about the claimant's ability to pay and wanted to ensure that she only charged the Level 3 IQA course fee of £2,999.

14. The meeting appears to have been emotional for all concerned and it led to the claimant not wishing to work for the remainder of August 2021. I find that the claimant was aware that her wages were going to be deducted in part payment towards the cost of the course fees in her last pay, and that this was discussed with her at this meeting. Miss Alex Hill was very clear in her oral evidence that she was worried for the claimant and told her to speak to her parents regarding the money being deducted from her next pay. I prefer the evidence of the claimant that no *specifics* were discussed with her at this stage, save that that she was informed orally that repayment would be in the 'thousands'.

15. A document which appears to be a payslip for the period between 1 August 2021 – 31 August 2021 refers to a total pay of £1,231.77 [page 90]. Miss Alex Hill explained in oral evidence that this was actually calculated up to 25 August 2021 as the claimant provided a sick note following the meeting on 25 August 2021. In any event, it was accepted by the parties that the claimant did not receive £1,231.77. She in fact, received nothing as £1,231.77 was deducted from the training cost of £2,999, leaving a balance of £1,767.23 outstanding. Mr Munro accepted that if the respondent chooses to pursue the claimant for the outstanding balance, that it was not a matter for this tribunal.

16. The claimant says that she was provided with the invoice for £2,999 on 1 September 2021 (despite it being dated 12 August 2011). I accept the claimant's evidence on this issue as it was provided as an attachment to an email from Ms Alex Hill at 11.33am that day [pages 64-66]. The claimant said in oral evidence that she had to take out a loan to pay her bills as she was not expecting the August 2021 deduction. She later clarified that this was money borrowed from her father, as opposed to a bank loan.

17. On 3 September 2021 ACAS were notified and the claimant's P45 refers to her employment ending (following her notice period) on 9 September 2021 [page 91]. On 13 September 2021 the claimant started a new job. On 1 October 2021 the claimant received a repayment from the respondent in the sum of £349.83 which Ms Debbie Hill and Miss Alex Hill informed me related to statutory sick pay and a tax refund only. Miss Alex Hill explained in oral evidence that this could not be construed as money from the respondent. I accept the evidence of Miss Alex Hill in this regard.

18. Miss Alex Hill also said that it would have been obvious to the claimant that her last payment would be on 1 September 2021 as she had only worked during August 2021 and that as she had been employed with the company since 2018, it should not have been a surprise to her when payments were made by the respondent (ie, the 1st of each month). I am satisfied that the claimant was aware or should have been aware that her last payment to which a deduction would 'attach' would be the 1 September 2021.

19. In oral evidence, the claimant explained that whilst she had looked online regarding the associated costs of a Level 4 IQA qualification, explaining that this could be undertaken for as little as £300-£400, that she had not provided any written evidence to verify her research. Consequently, there was no contrary evidence to undermine the reasonableness of the training costs sought by the respondent.

20. In terms of what the course entailed and how £2,999 was quantified, the claimant explained that it involved sessions with an external trainer (Ellie Harries of the Three Elms Partnership) and a lot of self-learning. Ms Debbie Hill told me in oral evidence that she had spent over 59 hours of her own time

supporting the claimant in obtaining her qualification (as part of a supervisory role). This was not challenged by the claimant.

21. She explained that it was a 'massive business risk' to fund the course for the claimant as there was not actually a job available for the claimant in which she would be able to utilise her Level 4 skills. Miss Alex Hill explained in oral evidence that the cost to the respondent regarding Ellie Harris' involvement for an induction and attendances upon the claimant was £430 for 9 hours input, and that £100 was also spent regarding registration and certification. Ms Carly Ellis explained that she had regularly spent a Saturday morning each month (for around 5 hours at a time) supporting the claimant to undertake this course and that this was probably around 59 hours over a 12 month period, maybe more. This was not challenged by the claimant.

22. Miss Alex Hill explained in oral evidence that the cost of £2,999 was not unique to the claimant and that there were other occasions where this fee had been charged to persons seeking to undertake the Level 3 IQA course with the respondent.

The Law

23. Section 13 of the Employment Rights Act 1996 ('ERA') provides:

Right not to suffer unauthorised deductions

(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, 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, or combined effect, of which in relation to the worker the employer has notified to the worker in writing on such an occasion.

...

24. Sections 23, 24 and 25 of the ERA provide:

Complaints to employment tribunals

(1) A worker may present a complaint to an employment tribunal—

(a) that his employer has made a deduction from his wages in

contravention of section 13 (including a deduction made in contravention of that section as it applies by virtue of section 18(2))

Determination of complaints

(1) Where a tribunal finds a complaint under section 23 well-founded, it shall make a declaration to that effect and shall order the employer—

(a) in the case of a complaint under section 23(1)(a), to pay to the worker the amount of any deduction made in contravention of section 13 ,...

Determinations: supplementary

(1) Where, in the case of any complaint under section 23(1)(a), a tribunal finds that, although neither of the conditions set out in section 13(1)(a) and (b) was satisfied with respect to the whole amount of the deduction, one of those conditions was satisfied with respect to any lesser amount, the amount of the deduction shall for the purposes of section 24(a) be treated as reduced by the amount with respect to which that condition was satisfied.

25. A claimant may rely on common law rules in order to establish that a deduction is unlawful and therefore in breach of section 13 ERA according to *Cleeve Link Ltd v. Bryla* [2014] ICR 264 EAT at paragraph 20. There it was held *'... that the deduction contemplated by the contract must be a lawful deduction. If it is a penalty clause, it is not a lawful deduction'.*

26. As regards what constitutes a penalty clause, *Dunlop Pneumatic Tyre Co Ltd v. New Garage and Motor Co Ltd* [1914] UKHL 1 established that at common law, any fine or deduction should be a genuine pre-estimate of the loss suffered by the employer as a result of the employee's breach. Anything in excess of this would be a penalty, void at common law. So, for example, in *Giraud UK Ltd v. Smith* [2000] IRLR 763 EAT, a term in the employee's contract allowing his employer to deduct a sum from his final payment in the event that he failed to give notice and work out his notice period was held to be a penalty clause, as it was not a genuine pre-estimate of the loss that the employer could suffer in the event of the employee's breach.

27. In *Yorkshire Maintenance Company Ltd v. Farr* unreported EAT 0084/09, the employer had argued it was entitled to make deductions from the employee's wages because he had failed to comply with a contractual requirement to obtain the signature of clients as proof of work done. The EAT held that contractual terms like this should be subject *'to a considerable degree of scrutiny'* due to the possible disparity in economic power between employers and employees and the potential for abuse by an employer of such power. Moreover, courts had to be alert to employers being *'judge and jury'* when they had included in a contract of employment an express term requiring an employee to repay certain costs and expenses.

28. The legal test has been revisited in *Makdessi v. Cavendish Square Holdings* [2015] UKSC 57 at paragraph 32. The Supreme Court held that the issue was whether the impugned provision is a secondary obligation which imposes a detriment on the contract-breaker out of all proportion to any legitimate interest of the innocent party in the enforcement of the primary obligation. The innocent party could have no proper interest alternative to performance. In the case of a straightforward damages clause, that interest would rarely extend beyond compensation for the breach.

29. Compensation was not necessarily the only legitimate interest that the innocent party might have in the performance of the defaulter's primary obligations. Whether or not a contractual provision was a penalty had to depend on the nature of the right of which the contract-breaker was being deprived and the basis on which he was being deprived of it.

30. I was also referred to the case of *Strathclyde Regional Council v. Neil* [1984] IRLR 11 by Mr Munro which is a decision of the Sheriff Court. The court in that case held that if an employee agrees that, in return for time off to undergo a formal course of training, he or she will complete a minimum period of post-training service, the employer may recover damages if the employee leaves before completion of the service.

Conclusions

31. The sum of £1,231.77 should have ordinarily been paid to the claimant on 1 September 2017. No wages were in fact paid. Whilst I have every sympathy for the claimant, paragraph 7(d) of the written contract dated 5 January 2021 did not constitute a penalty clause. It did not impose a detriment on the claimant out of all proportion to the respondent's legitimate interest in ensuring that training course fees incurred by the company for its employees remained commercially viable.

32. Reimbursement of training courses was clearly set out as a written term of the contract, and was signed by the claimant. The cost of the course at £2,999 was not unreasonable having regard to the amount of time and resources utilised by the respondent to assist the claimant to obtain her certificate, was a cost charged by the respondent previously to others seeking to obtain a similar qualification (Level 3 IQA), and gave the claimant a clear benefit.

33. Whilst it would have been helpful for the respondent to have explained the breakdown of £2,999 to the claimant *prior* to the hearing and whilst it would have been helpful for the respondent to have specified at an earlier date what *exactly* would be deducted, that does not change the legal position.

34. The respondent has not made an unlawful deduction from the claimant's wages. The deduction was authorised by virtue of paragraph 7(d) of the written contract dated 5 January 2021 in accordance with paragraph 13(1)(a) of the ERA. The sum of £1,231.77 was lawfully deducted. As a consequence, the claim is not well founded and is dismissed. I wish the claimant the very best in her new employment.

Employment Judge E Sutton

Date: 16 February 2022

RESERVED JUDGMENT & REASONS SENT TO THE PARTIES ON 21 February 2022

FOR THE TRIBUNAL OFFICE Mr N Roche