EMPLOYMENT TRIBUNALS

Claimant: **Mrs Nosheen Choudhary**

Respondent: **Emma Victoria Ltd T/A Farnham Beauty**

Heard at: **Reading Employment Tribunal (by video-CVP)**

On: **17 November 2022**

Before: **Employment Judge Millard**

Representation
Claimant: Noweed Choudhary (Husband)
Respondent: Rohit Vikal (Owner)

JUDGMENT having been given orally at the hearing on 17 November 2022 and written reasons having been requested in accordance with rule 62 (3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided:

REASONS

Introduction

1. These written reasons are provided at the request of the respondent in these proceedings.

2. They should be read in conjunction with the judgment of 17 November 2022.

Hearing

3. The hearing was conducted via the VHS video platform on Thursday 17 November 2022, with both the claimant and the respondent appearing by video.

4. The claimant was represented by her husband, Mr Noweed Choudhary. The respondent was represented by Mr Rohit Vikhal, who is the owner and director of the respondent company.

5. Both the claimant and Mr Vikhal gave evidence at the hearing. No other witnesses were called by either party.

6. The tribunal had access to a bundle consisting of 14 pages provided by the claimant, as well as a copy of her ET1 received on 27 January 2022. The respondent did not provide a bundle of documents to the tribunal nor did the respondent provide a witness statement. However, the tribunal had access to the respondent's ET3 response form, received on 29 March 2022 and a letter dated 11 March 2022, setting out the basis of their response.

Case Management Orders

7. The parties were notified of the hearing date by way of a letter of 26 May 2022. This letter contained the following case management orders and timetable, which the parties were both required to comply with.

    a. By no later than 7 July 2022, the claimant shall set out in writing what remedy the Tribunal is being asked to award. The claimant shall send a copy to the respondent. The claimant shall include any evidence and documentation supporting what is claimed and how it is calculated. The claimant shall also include information about what steps the claimant has taken to reduce any loss (including any earnings or benefits received from new employment).

    b. By no later than 4 August 2022, the claimant and the respondent shall send each other a list of any documents that they wish to refer to at the hearing or which are relevant to the case. They shall send each other a copy of any of those documents if requested to do so.

    c. By no later than 18 August 2022, the respondent shall prepare sufficient copies of the documents for the hearing. The documents shall be fastened together in a file so as to open flat. The file of documents shall be indexed. The documents shall be in a logical order. All pages shall be numbered consecutively. The respondent shall provide the other parties with a copy of the file. Two copies of the file shall be provided to the Tribunal at the hearing (and not before).

    d. By no later than 13 October 2022, the claimant and the respondent shall prepare full written statements of the evidence they and their witnesses intend to give at the hearing. No additional witness evidence may be allowed at the hearing without permission of the Tribunal. The written statements shall have numbered paragraphs. The claimant and the respondent shall send the written statements of their witnesses to each other. Two copies of each written statement shall be provided for use by the Tribunal at the hearing (and not before).

8. The respondent failed to comply with the case management orders for the 4 August, 18 August, and 13 October. The respondent did not produce a bundle of documents for the hearing, nor did they produce a witness statement. By contrast the claimant produced a 14 page bundle, including her witness statement and a document setting out the remedy she sought and a breakdown of how it was calculated.

9. Mr Vikhal said that he had not complied with the directions, because he had not understood them. This explanation lacked credibility. Mr Vikhal accepted that he had received the court letter of 26 May 2022 and that he had no difficulties reading or writing. The case management orders are quite clear. The respondent received the letter and had clearly chosen to ignore the case management orders. Further, the respondent chose to attend the hearing without any documentation at all in support of his case and repeatedly stated during the hearing that he could produce evidence on another day.

10. By contrast, despite the obligation being on the respondent to produce the bundle of documents for the hearing, having had no response from the respondent, the claimant had produced her own bundle, which was served on the respondent and provided to the Tribunal.

11. However, the respondent had completed an ET3 and had sent a letter to the Tribunal of 11 March 2022 setting out a detailed response. Included with that letter, the respondent also provided a copy of the Training Agreement with the claimant dated 14 October 2021, which was central to the issue in this case. To ensure a fair hearing and to deal with the case fairly and justly in accordance with the overriding objective as set out in Rule 2 of The Employment Tribunal Rules of Procedure 2013, ("The Rules"), the tribunal exercised its discretion under Rule 41, to allow the ET3 and letter of 11 March 2022 to form the respondent's evidence to the tribunal. Although the respondent had not complied with the directions and could not provide a good reason for their non-compliance, they had provided sufficient detail within both the ET3 and letter to set out a defence to the claim. Mr Vikhal had also attended the hearing. Having determined this issue, the tribunal adjourned for a short period of time to allow the respondent's letter of 11 March 2022 to be sent to the claimant and to give them time to consider it.

Claim

12. As per the claimant's claim form, and her remedy document, her claim was for unlawful deduction of wages totalling, £1,480.

13. The respondent's position was that the claimant had signed the Training Agreement, which authorised the respondent to deduct the full cost of training from the claimant's wages if she left their employment within 12 months.

Findings of Fact

14. On 8 October 2021 the claimant agreed to commence employment as a beauty therapist with the respondent on 1 November 2021. The claimant handed in her notice with her current employer at the same time. Prior to the commencement of her employment, the claimant was required by the respondent to attend onsite training at Farnham Beauty on 18 October 2021.

15. On 14 October 2021, the claimant attended Farnham Beauty to sign her contract of employment. On that occasion she was also required by the

respondent to sign the Training Agreement. She was given no time to consider this document or to take advice upon it. The Training Agreement referred to training with Lyndon, which was a reference to Lyndon Lasers Ltd. The training start date was given as 18 October 2021 and a training end date was given as 22 October 2021, a total of five days. The training in fact took place over only two days on 18-19 October. The total cost of the training is given as £1,480. The Training Agreement states,

> *In consideration of the training, I agree to remain employed by Emma Victoria Ltd t/a Farnham Beauty for a minimum period of two year (sic) after completion of the training.*
>
> *If I leave my employment at any time, for any reason, including dismissal, once the training has been agreed and paid for by my employer, I undertake to refund my employer the "Total Cost" as mentioned above (pre-estimate of cost of training, this includes leaving before commencement of the training if it has been paid for and during the training taking place).*
>
> *In addition, if I leave my employment at any time, for any reason, including dismissal, before the end of two year since my joining date. I undertake to refund to my employer total cost of training or a proportion based on the following scale.*
>
> - *Less than 12 months after completion of training 100%*
> - *12 months but less than 24 months after completion of training 50%*
>
> *In the event of my failure to pay I agree that my employer has the right as an express term of my Contract of Employment to deduct any outstanding amount due under this agreement from my salary or any other payments due to me on the termination of my employment in accordance with the legislation currently in force.*
>
> *I am also aware that funding can be withdrawn and I would have to repay the full amount received, save for exceptional circumstances discussed and agreed with the company owner, if I*
>
> - *Fail to take the relevant examinations;*
> - *Do not make satisfactory progress in my studies e.g. failure to attend lectures;*
> - *Non-completion of coursework; or*
> - *Discontinue the course before completion.*

16. This training agreement was signed by both the claimant and Mr Vikhal on behalf of the respondent, on the 14 October 2021.

17. The claimant attended the training at Farnham Beauty on 18 and 19 October 2021, whilst working her notice period at her previous employer.

18. The claimant then commenced employment with the respondent on 1 November 2021.

19. The training on 18 and 19 October 2021 was carried out by Lynton Lasers Ltd. The respondent has produced no documentary evidence as to what the training involved. In preparing her case, the claimant contacted Lynton Lasers Ltd who confirmed by email (PDF pages 7-9 of the claimant's bundle) that the training related to the use of their Promax Lipo system. The documentation confirmed that the respondent had purchased this system from Lynton Lasers for £20,000 + VAT, in order to provide treatments to customers. As part of that total system cost, Lynton Lasers provided the respondent with, *"certified clinical excellence training for up to 5 users, including all health and safety protocols, and techniques for best results."* (PDF page 9). This was the training which took place on 18 and 19 October. The training lasted only 2 days and not the 5 days set out in the Training Agreement.

20. There was no separate charge for training from Lynton Lasers and there was no cost per employee for the training. The training for up to 5 employees was included as part of the total system cost of £20,000 + VAT. There is no evidence as to how the respondent arrived at a figure of £1,480 for the cost of the training to the claimant. The respondent states that he was told by Lynton Lasers Ltd to charge each of his employees this sum for the training. However, he has produced no evidence in support of this, and the documentation provided to the claimant by Lynton Lasers Ltd, makes no reference of a cost per employee for the training, instead the total system cost included training for up to 5 employees. For the reasons set out above in relation to non-compliance with the case management orders, I do not find the respondent to be a reliable witness and I do not find his claim credible that he was told by Lynton Laser's that the cost per employee was £1,480. Had that of been the case then I would have expected the documentation from Lynton Lasers Ltd to have included a cost per employee for the training or a price per employee for the training of additional employees beyond the 5 included in the fixed cost or for training new employees at a later date. It is clear from the documentation that the training was provided as part of the total system installation cost and there was no additional cost to the respondent for the claimant's attendance.

21. Four employees, including the claimant attended the training on 18 and 19 October. This training was being carried out on these dates regardless of whether the claimant attended. At that time, she had not commenced her employment with the respondent and had she have been unable to attend, then I have no doubt that she would simply have been trained by the respondent to use the Lynton Lasers system, following their employees training with that company. I have been provided with no evidence that operation of the Lynton Lasers system required training by the supplier and that subsequent training could not be provided by colleagues who had already received training from the supplier. Had subsequent training by the supplier have been required for new users, then I would have expected evidence of a cost per user for this. Instead, there was just one installation cost which included training for up to 5 users.

22. The training itself was in relation to the use of the Promax Lipo system. There were no examinations required, no studies or lectures to attend, no coursework to be completed, and no qualification obtained by the attendees

at the end of the course. The training comprised just the two days on site at Farnham Beauty. It related to use of the Lynton Lasers equipment only and it was not portable to any other manufacturers system. Any employee commencing employment with a new employer would require training on their equipment if it was not the Promax Lipo system from Lynton Lasers.

23. When the claimant commenced employment for her new employer, she required training from them on their laser treatment equipment as it was supplied by a different manufacturer. This training was provided without charge by the new employer to the claimant as it was essential to her role and related to use of their already installed equipment. This is indicative of the industry standard, that further training is provided in house by employers, familiar with the operation of that system.

24. The claimant resigned from the respondent's employment on 24 November 2021 after suffering back pain which meant that she could not carry out massages.

25. The respondent alleges that the claimant left to run her own business and that she directly benefited from the training the respondent provided. The respondent refers to a website for the claimant's business. However, this was in existence for several years prior to the claimant commencing work for the respondent and the claimant's evidence is that she had stopped running the business prior to working for the respondent, with the business remaining dormant. The website remained online but was inactive. The respondent produced no evidence that the claimant was actively running her own business either at the time she worked for the respondent or afterwards. The existence of a pre-existing website is not evidence of an active business. In any event, the claimant did not have access to the Promax Lipo System from Lynton Lasers and the training was of no use to her.

26. The claimant was paid £10 per hour. In her document setting out the remedy she sought, the claimant set out her claim on the basis that she worked 3 days a week for 9 hours per day, totalling 27 hours per week. However, Mr Choudhary conceded on his wife's behalf that this did not take account of breaks and that the claimant in fact worked 7 hours per day, totalling 21 hours per week.

27. The claimant attended 3 days of training with the respondent in October. She then worked 3 full weeks ending 7 November, 14 November, 21 November. She then worked 2 days of the week ending 28 November. This is a total of 98 hours and a sum of £980 gross.

28. The claimant states that she was due £220 commission for the treatments provided to customers whilst employed with the respondent.

29. The respondent submits that the claimant worked only 75.75 hours. However, the table provided by the respondent for the hours worked by the claimant, includes only the time for training on 18 October and does not include the time for the training on the 19 October. The tribunal expects an employer to have an accurate record of the hours worked by an employee. Accordingly, the tribunal did not find it to be an accurate and reliable

document of the claimant's hours worked and places no weight upon it, preferring instead the claimant's evidence as to the hours she worked.

The Law

30. Section 13 Employment Rights Act 1996 states that an employer shall not make a deduction from the wages of a worker employed by them 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 their agreement or consent to the making of the deduction.

31. The respondent relies upon the clause in the Training Agreement, signed by both parties on 14 October 2021, that the total cost of the training would be payable by the claimant if she left within 12 months of undertaking the training and that this sum could be deducted from her wages.

32. Such a clause is enforceable where it does not amount to a 'penalty clause'. A contract may contain a lawful liquidated damages clause, provided that it is a genuine pre-estimation of loss or damage and not a penalty (Giraud UK Ltd v Smith [2000] IRLR 763).

Discussion

33. The Training Agreement gives a course start date of 18 October and an end date of 22 October, providing the impression that the course lasted for 5 days. It in fact lasted only two days from 18-19 October. The Training Agreement was signed by both parties only 4 days before the course commenced, when the actual length of the course would have been known by the respondent.

34. The Training Agreement provides a total training cost of £1,480. There is no evidence as to where this total comes from and how it has been arrived at by the respondent. The respondent's evidence is that he was told by Lynton Lasers Ltd that this is the sum he should charge his employees. However, the respondent has produced no evidence in support of this. The information from Lynton Lasers, provided by the claimant, refers to a total cost for installing the system of £20,000 plus VAT which included training for up to 5 users. It is quite clear from this documentation that there was no per-user cost for providing training. The training for up to 5 users was included as part of the installation costs. As it was the respondent only had 4 people attend the training and there was no discount provided for the respondent not taking up the full allocation. This provides further support to there being no training cost per user.

35. The training had been arranged for employees prior to the claimant joining the respondent and it was taking place regardless of whether the claimant was going to join the respondent. Had she have been unable to attend due to being still employed by her previous employer and unable to take time off that employment, then the cost would have remained the same for the respondent.

36. The benefit of the system and the course was to the respondent and not to the claimant, as it enabled their employees to use the system. The employees including the claimant, gained no qualification for attending the training. Were they to leave and work at another salon, then they would require training on that salon's system if it was not the same Lynton Lasers system. Indeed, the Claimant's current employers did provide her with training on their system as it was a different system, for which there was no training cost to her.

37. Further, the Training Agreement refers to funding being withdrawn where the claimant failed to take examinations, make satisfactory progress in her studies, fail to attend lectures, not complete coursework, or discontinue the course before completion. None of which applied to this system specific training. These conditions are more appropriate to a formal training course for which a qualification is obtained as opposed to this training, which was for the use of a specific piece of equipment for the benefit of the employer.

38. For all these reasons, the clause is not a genuine pre-estimation of loss or damage to the respondent. The sum claimed by the respondent of £1,480 is without any basis and was not paid by the respondent for the claimant to attend the course. Had the claimant have been unable to attend then the cost to the respondent would have been the same, the training being included as part of the system cost. As it was, only 4 employees attended, and the respondent received no discount for not taking up the full allocation. The course was also 2 days in length and not 5 days as stated in the Training Agreement. The reference to funding being withdrawn for a failure to complete the studies is a reference to formal training for which a qualification would be obtained by the claimant, which this course was not. Accordingly, the clause amounts to a penalty clause, solely to punish the claimant if she were to leave within a year and it is not enforceable by the respondent against the claimant.

39. Therefore, there was no written agreement from the claimant for making this deduction.

Conclusions

40. The Training Agreement clause amounts to a penalty clause and it is not enforceable by the respondent against the claimant. Therefore, there is no provision of the claimant's contract, nor is there written agreement or consent from the claimant for a deduction from her wages for the training course.

41. For the reasons set out above,

    a. The respondent has made an unauthorised deduction from the Claimant's wages and is ordered to pay her the gross sum of £1,200.

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Employment Judge Millard
Date: 18 December 2022
Sent to the parties 30.12.2022, GDJ