EMPLOYMENT TRIBUNALS

Claimant: **Miss H Mellor**

Respondent: **Rosemead Limited trading as Whiterose Pharmacy**

Heard at: **Leeds** **On:** **9 January 2023**

Before: **Employment Judge Bright**

Representation
Claimant: In person
Respondent: Mr D Ganatra, Managing Director

RESERVED JUDGMENT

The respondent made unauthorized deductions from the claimant's wages. The respondent must pay the sum of £673.70 gross to the claimant.

The respondent did not fail to pay the claimant her holiday pay and that complaint is dismissed.

REASONS

Claims

1. Miss Mellor presented her claim on 13 October 2022. It is for unauthorized deductions from wages and a failure to pay holiday pay which was accrued but untaken on termination of employment.

Issues

2. The issues are:
   2.1. Where the wages paid to the claimant on 30 September 2022 less than the wages she should have been paid?
   2.2. Was any deduction required or authorized by a written term of the contract? In particular:
      2.2.1. What deductions, if any, was the respondent entitled to make under

the term(s) of the contract and in what circumstances?

2.2.2. Did the claimant breach her contract of employment?

2.3. If the respondent made unauthorized deductions, how much is the claimant owed?

Evidence

3. The parties produced a number of documents which were not organized into a file of documents for the hearing. However, I ensured that copies were made and both parties and myself had access to all of the documents referred to in the course of the hearing.

4. Neither party having prepared a witness statement, evidence in chief was given orally, each party was given the opportunity to cross examine the other and to say anything further in support of their own case and/or make submissions.

Facts

5. I make the following findings of fact, on the balance of probabilities, on the evidence before me.

6. Miss Mellor was employed by the respondent from June or July 2019 as a dispensing assistant. She was contracted to work 24.75 hours per week and was paid £1018.88 gross (or 998.93 net) per month according to her ET1 form, plus any overtime worked. At the end of August 2022 she received £1049.96 net of tax and national insurance.

7. Miss Mellor's contract of employment, dated 29 July 2019 contained the following relevant clauses:

> ***HOLIDAYS***
>
> *…*
>
> *On termination of employment you will be paid for any holiday in the current leave year that has accrued but not been taken. If on the termination of your employment you have received pay in respect of holiday taken in excess of your entitlement you will either be required to repay this sum to us or this sum may be deducted from any monies (including salary) due to you on the termination of your employment.*
>
> *…*
>
> ***TRAINING***
>
> *…*
>
> *If your work regularly includes selling medicines you will be required to undergo an accredited training course if you have not already done so. Where we agree to sponsor training, you will be asked to sign a letter agreeing to the repayment of training costs should you terminate your employment during, or within a prescribed period after completing the training programme. Full details will be given to you if training sponsorship is agreed.*
>
> *...*
>
> ***TERMINATION OF EMPLOYMENT***
>
> *…*
>
> *If you terminate your employment without giving or working the required period of notice as indicated in your contract of employment,*

you will have an amount equal to any additional costs of covering your duties during the notice period not worked deducted from any termination pay due to you.

…

DEDUCTION OF REMUNERATION

…

The Company reserves the right at any time during or in any event on termination to deduct from your remuneration any monies owed to the Company by your including but not limited to any missing property including petty cash that was in your control or was your responsibility, excess holiday, outstanding loans, advances and the cost of repairing any damage or loss to the Company's property caused by you.

8. The holiday entitlement in the contract of employment mirrored the regime in the Working Time Regulations 1998 ("WTR").

9. Miss Mellor undertook a Dispensary Assistant Course ("DAC") and received a certificate dated 26 August 2021.

10. I was shown a document entitled Dispensing Asst Course (DAC) Training and Agreement ("the DAC agreement"), which was dated 24 March 2020. It states "I understand and accept that I shall have to remain in employment with Rosemead Ltd for 24 months after successfully completing and passing the DAC course". That agreement does not contain any reference to wages or deductions from wages. The agreement is signed by Mr Ganatra and contains a signature next to Miss Mellor's name. Miss Mellor gave evidence at the hearing that the signature was not genuine and that she had not seen the agreement before these proceedings, nor signed it. She produced copies of her passport and driving licence with samples of her signature. While the signature on the contract of employment looks, superficially to be similar to that on Miss Mellor's DAC agreement, the signature on the driving licence and passport looks, superficially to be different. However, I am not an expert on handwriting. I am not therefore able to make a finding as to whether the signature on the DAC agreement is that of Miss Mellor or not. Miss Mellor also produced a text message exchange with her former manager, Kay Dilks in which Ms Dilks denied seeing the DAC agreement and stated that, as far as she was aware the contractual 'tie in' was for 12 months. Ms Dilks was not called to give evidence, however, so that evidence has less weight than the evidence of the witnesses at the hearing.

11. Mr Ganatra put to Miss Mellor in cross examination that she had been mistaken about the calculation of her wages on a number of occasions and might therefore be mistaken in her failure to recollect signing the DAC agreement. It is not uncommon for employees to forget signing or seeing documents shown to them in the course of their employment. It is evident from the clause regarding training in the contract of employment that there was an intention to have a document such as the DAC agreement in place for employees who underwent training. The claimant did have that training, as shown by the DAC certificate. Mr Ganatra produced similar DAC agreements for a Jayne Spencer dated 27 September 2022, Jane Pratley dated 11 November 2022 and an NVQ3 Training and ACT Agreement for Bethan Linge and accompanying email chain from 2019 referring to a contractual requirement to work 2 years after qualification, as examples of the agreement

he says all employees are asked to sign. While two of these agreements post-dated the presentation of the claimant's claim and the third was for a different training course, it was not disputed that they were genuine documents. The documentary evidence available to me, excluding the disputed DAC agreement, therefore supported Mr Ganatra's evidence that the respondent required all employees undergoing training to agree to those terms. Even Ms Dilks' evidence refers to a contractual 'tie in', albeit of a different length of time. I find, on the balance of probabilities, that Miss Mellor did sign the DAC agreement, although she may have forgotten doing so.

12. Miss Mellor worked up to 9 September 2022, was off sick with Covid on 12 September 2022 and 14 September 2022 and worked for 8 hours on 15 September 2022.

13. On 15 September 2022 Miss Mellor emailed Mr Ganatra to tender her resignation. She identified in that email that her last working day would be 5 October 2022. She also wrote "Can I just confirm that I finished my course in July 2021 and received my certificate in aug 2021 which means it has been over a year since completion meaning no money should be deducted from my wage. Can you confirm this please? Also any holidays that you may deduct".

14. Mr Ganatra replied the same day saying "Your contractual notice period is 4 weeks from 15/9/22 THIS MEANS YOUR LAST WORKING DAY WILL BE 12 OCTOBER 2022. Anything other than this will mean you will be in Breach of Contract".

15. Miss Mellor replied on 16 September 2022 to say "Yes that's totally fine". Mr Ganatra gave evidence that he understood Miss Mellor's agreement to be agreement to her understanding that the respondent was entitled to make deductions from her wages because of her breach of contract by leaving without giving her proper notice period. Miss Mellor gave evidence that she was agreeing to her last working day being 12 October 2022.

16. On an analysis of the wording of the email exchange, I find that Mr Ganatra's reference to "anything other than this will mean you will be in Breach of Contract" is not a statement which invites agreement. Nor does Mr Ganatra reply to Miss Mellor's questions about possible deductions from her wages. It is clear that, when Mr Ganatra corrects Miss Mellor by telling her that her last working day will be 12 October 2022, her agreement is to work her full notice period until 12 October 2022, not that she is intending to breach her contract. I find that any reasonable person, knowing the circumstances of the exchange, would understand reading this that Miss Mellor's was agreeing to work her notice until 12 October 2022. I find that there was therefore agreement between the parties that the termination of Miss Mellor's contract would be on 12 October 2022.

17. Following anxiety at work on 16 September 2022, Miss Mellor was signed off sick from 16 September 2022 with a sick note for two weeks. She expected to receive her wages for September on 30 September 2022.

18. I find that the claimant had worked 50 hours between 1 and 30 September 2022, at a gross hourly rate of £9.50, totaling £475.00 gross. She was also off sick from 12 to 14 September 2022 during which period she was not entitled to statutory sick pay. From 16 September 2022 to 30 September

2022 she was entitled to receive statutory sick pay of £99.35 per week, totaling £198.70.

19. She was therefore expecting a net payment to reflect that sum to arrive in her bank account on 30 September 2022. When her wages were not paid into her bank account she emailed Mr Ganatra, saying

> *I have been trying to get in touch with you all day in regards to you not paying me my wage today. It was AGREED on the previous email that my last working day would be the 12th October. I have had no choice to take legal action with my union rep and ACAS as you have continued to ignore my phone calls & text messages. BY LAW you cannot hold my wage. If I have taken any holidays which is over the required amount then please can you give me a breakdown of this and we can agree on it been taken of my wage.*
> *I have not breached my contract in anyway as I have worked my contracted hours and put a sick note in due to work related stress. My back to work date would of been Monday 3rd October, but due to you not paying me a wage I will not be returning UNLESS you pay me what iam entitled to.*

20. On 1 October 2022 Miss Mellor wrote to the respondent raising a formal grievance, saying:

> *I have a problem with your decision not to pay me for the hours I have worked between 19/08/2022 to 19/09/2022. These hours add to a total of 96 hours which doesn't include the sick days I had on the 12/09/2022 and the 14/09/2022 due to covid.*
>
> *I have evidence in the form of an email from yourself on the 16/09/2022 stating my period of notice otherwise I would breach my contract. I handed a sicknote to my manager Emily Sykes on the 15/09/2022. This was from the advice of my Dr Wright. Therefore, there has been no breach of my contract. I would be grateful if you could let me know when I can meet you to talk about my grievance. I would like to be accompanied at the meeting by Daniel Beagley. I will give you 7 days from today's date to either respond to this grievance or pay me the full wage I am entitled to otherwise I will have no option but to take legal action.*

21. I accepted Miss Mellor's evidence that, having heard nothing further about her wages for September 2022 or her grievance, she did not return to work for the respondent and, instead, brought forward the commencement of her new role.

22. Miss Mellor says she was owed 73.5 hours' holiday up to the end of September, but had only taken 72 hours. She claims that the respondent failed to pay her for 1.5 hours of accrued but untaken holiday on termination of her employment, amounting to £14.25. However, it was not explained to me how that sum was calculated and, given her various miscalculations of her wages and the uncertainty expressed in her email on 16 September 2022, I find that she has not shown on the balance of probabilities that she was entitled to accrued but untaken holiday on termination of her employment.

23. Miss Mellor says she miscalculated her wages in her grievance. She is now

claiming £673.70 unpaid wages for the period 1 September 2022 to 15 September 2022 and 2 weeks' sick pay at £99.35 per week from 16 September 2022 to 30 September 2022. However, her calculations were somewhat confusing and did not appear to tally with those set out in her ET1 claim form or her account of her hours worked provided to the Tribunal on 12 December 2022, according to which she worked 50 hours between 1 September 2022 and 30 September 2022, and was off sick on 12 September 2022 and 14 September 2022 and then from 16 September 2022 to 30 September 2022 and entitled to statutory sick pay only.

24. Miss Mellor is also claiming for the £500 lent to her by her mother on 30 September 2022 and her missed mortgage payment of £495.93. However, it was clear to me from her evidence that these sums were a) a sum of money loaned to her by her mother which she would be re-paying and b) a missed mortgage payment which she did not pay, but in respect of which she did not incur any financial penalty. These sums are not therefore financial losses sustained by the claimant. She has not shown that she has suffered any immediate financial loss, merely a potential for future impacts as a result of a poorer credit rating.

25. Mr Ganatra says that the respondent was entitled to claw back the cost of Miss Mellor's training under the DAC agreement and the contract of employment and the cost of replacement cover during Miss Mellor's notice period. Mr Ganatra calculated that, once the deductions were made from Miss Mellor's wages at the end of September 2022, the remaining balance was £6 owed by the claimant to the respondent.

The Law

26. Section 13 of the Employment Rights Act 1996 ("ERA") says:

> ***13 Right not to suffer unauthorized 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.*

27. To determine whether there is a 'relevant provision of the worker's contract' it is necessary to determine what the terms of the contract mean. The primary source for determining what the terms of the contract are or what the parties meant when the entered into their agreement are the words used in the contract, interpreted in accordance with conventional usage. Extrinsic

evidence is not admissible to help interpret a written contract and construction of a written document is a question of law.

28. In **Arnold v Britton and ors** [2015] AC 1619, the Supreme Court said the general principles that apply to the interpretation of express contractual terms are: "what a reasonable person having all the background knowledge which would have been available to the parties would have understood them to be using the language in the contract to mean". The Tribunal must focus on the meaning of the relevant words in their documentary, factual and commercial context. The Supreme Court said "that meaning has to be assessed in the light of (i) the natural and ordinary meaning of the clause, (ii) any other relevant provisions of the [contractual agreement], (iii) the overall purpose of the clause and the [agreement], (iv) the facts and circumstances known or assumed by the parties at the time that the document was executed, and (v) commercial common sense, but (vi) disregarding subjective evidence of any party's intentions".

29. Where contractual provisions and written agreements authorize deductions from the wages of an employee, the courts have held that they must be drafted precisely in order to be enforceable. Employers are unlikely to be able to rely on ambiguous or widely drafted clauses and any ambiguity will be construed against the employer, because they are the party seeking to rely on the clause to avoid obligations under the contract. Thus, a clause which simply provides that an employee is liable for losses incurred by an employer is unlikely to be sufficient to authorize deductions to make up such loss.

30. In **Potter v Hunt Contracts Ltd** 1992 ICR 337, the Employment Appeal Tribunal held that a loan agreement stating 'Should you leave the company within 24 months from the date of your joining, you shall be required to return the [training] fee on a diminishing basis based on £22 per month" did not indicate with sufficient clarity that the repayment would or could be made by way of a deduction from wages. It is not sufficient that a term of the contract makes the worker liable to the employer for a sum of money. There must be a specific right to deduct payments from the employee's wages.

31. If it can be established that there is a contractual provision or written agreement authorizing the type of deduction in question, the Tribunal will then consider whether the actual deduction is in fact justified. This will include looking at whether the deductions that were made were of the type authorized and whether the amount of the deduction was justified. This requires concrete evidence.

32. In analysing deductions which occur because of a breach of contract, it is necessary to asses whether there has, in fact, been a breach of contract. A breach of an employment contract occurs when an employee or employer fails to fulfil an obligation imposed on them by the terms of the contract. Some breaches of contract are so serious that they go to the root of the contract or repudiate it, i.e. they are so fundamental they are capable of terminating the contract of employment. Following the case of **Geys v Société Générale, London Branch** 2013 ICR 117, the contract of employment is only terminated if the repudiation is accepted by the other party to the contract. Acceptance can be by conduct.

Determination

33. What were the relevant terms of the contract and did they authorize the deductions made? The respondent argued that the terms of the contract were that the respondent was entitled to deduct:
    33.1. The cost of replacement cover from Miss Mellor if she did not give proper notice;
    33.2. The cost of Miss Mellor's DAC training.

34. I have looked carefully at the words actually used in the contract and how they can be understood in accordance with conventional usage. I find that the clause headed 'Termination of Employment' in Miss Mellor's employment contract gives the respondent authority to deduct "an amount equal to any additional costs of covering" the claimant's duties during her notice period, in the event that she does not give or work the proper notice. The clause entitles the employer to make the deduction from any "termination pay" due to the claimant. That clause is problematic in two regards: Firstly, it is ambiguous, in that it is unclear what is meant by 'additional costs' and therefore in my view too unclear to be enforceable.

35. More significantly, however, even if the clause is enforceable, on the facts of this case the actual deduction made was not authorized by that term for the following reasons. I find as a fact, above, that it was agreed on 16 September 2022 that Miss Mellor's contract would end on 12 October 2022, at the end of her four week notice period. She therefore gave the proper notice. Her termination pay would therefore have been paid on 30 October 2022. When Mr Ganatra made deductions in respect of replacement cover from the claimant's wages on 30 September 2022 those deductions were not required or authorized by that term of the contract for two reasons. Firstly, the claimant was not in breach of her contractual notice at that stage and, secondly, the deductions were not made from her termination pay, but the pay packet prior to that. In my judgment, the fact that Miss Mellor subsequently did not work the final two weeks of her notice because of the respondent's failure to pay her is not relevant to the question of whether the deduction was authorized, because her actions post-dated the deduction by the respondent and were a result of it.

36. I find that the clause in the claimant's contract of employment headed 'Training', does not of itself authorize any deductions from the claimant's wages. It reads "*you will be asked to sign a letter agreeing to the repayment of training costs should you terminate your employment during, or within a prescribed period after completing the training programme. Full details will be given to you if training sponsorship is agreed."* In my judgment, this clause merely refers to an intention to create contractual authorization for deductions in the form of a 'letter agreeing to the repayment of training costs'. The fact that 'full details will be given to you' at an uncertain future date contingent on sponsorship being agreed, indicate that this clause, in and of itself, does not set out the specifics of any deductions. A further point is that the clause does not authorise deductions, but rather refers to 'repayment'. Following cases such as **Potter**, it is clear that these are different things and a mere liability or requirement to 'repay' money is not sufficient to authorize deductions. I therefore find that this clause of the contract of employment did not authorize the respondent to make deductions from the claimant's wages for this purpose.

37. I find that the DAC agreement does not authorize the respondent to make deductions from the claimant's wages. The wording of the DAC agreement is such that the employee agrees to remain in employment with the respondent for 24 months after completing and passing the DAC course. There is no mention of deductions from wages nor any other penalty if the employee does not remain in employment for 24 months. In my judgment, neither the contract of employment nor the DAC agreement, taken individually or in combination, contain a term authorizing the deduction of training costs from an employee's wages.

38. The clause headed 'Deduction of Remuneration' is a generic clause saying that the respondent "*reserves the right at any time during or in any event on termination to deduct from your remuneration any monies owed to the Company by you including but not limited to any missing property including petty cash that was in your control or was your responsibility, excess holiday, outstanding loans, advances and the cost of repairing any damage or loss to the Company's property caused by you".* In view of the case law on the specificity required to authorize deductions, I consider that this clause is too general to cover any deductions for training costs or replacement cover in the present case.

39. I therefore conclude that the deductions made on 30 September 2022 were not authorized by any term of the contract. Subsequent events are not strictly relevant to the issues, but for completeness, I find that the respondent's unauthorized deductions on 30 September 2022 were a fundamental breach of Miss Mellor's contract of employment. Her email to the respondent on 1 October 2022 warning that she would not be returning to work on 3 October 2022 unless the respondent paid her, indicated that she intended to accept the breach on 3 October 2022, unless the wages were paid in the meantime. When the respondent did not pay her wages she did not return to work on 3 October and instead started her new role. From both her words in the email on 1 October 2022 and her actions on 3 October 2022 I conclude that she therefore accepted the respondent's breach on 3 October 2022 and her contract of employment terminated on that date, by law.

Conclusion

40. I find that the sum of £673.70 was therefore properly payable to Miss Mellor on 30 September 2022. The respondent was not authorized to make the deductions which is made from her wages on 30 September 2022. The respondent made unauthorized deductions and must pay the sum of £673.70 to Miss Mellor.

41. Miss Mellor was not able to show, on the balance of probabilities, that she was entitled to payment on termination for 1.5 hours' accrued but untaken holiday. That complaint therefore fails.

Employment Judge **Bright**
Date: 11 January 2023