EMPLOYMENT TRIBUNALS

Claimant: Ms K Dunne-Mason

Respondent: Climbing High Nurseries Limited

HELD AT: Norwich (Via CVP) **ON:** 27th February 2023

BEFORE: Employment Judge Anderson

REPRESENTATION:

Claimant: In Person
Respondent: Ms Sodhi

JUDGMENT having been sent to the parties 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. The Claimant, Ms Kitty Dunne-Mason brings a claim of unlawful deduction from wages against her former employer Climbing High Nurseries Limited.

2. The fact that the Respondent made a deduction from the Claimant's wages was not in dispute. There was no written list of issues, however the parties were able to agree that the issues to be determined were as follows:

    a. Whether the deduction was authorised by the contract of employment (s.13(1)(a) ERA 1996)
    b. Whether the deduction was authorised by the Claimant signing a document in January 2020 (s.13(1)(b) ERA 1996)

3. Both the ET 1 and the ET 3 referenced a range of other points that went beyond the above. The parties agreed before me that the only live issues were the ones identified above. The other points were either not relevant or were not pursued.

Procedural Matters

4. There was an agreed bundle of documents totalling 307 pages with a separate index.

5. Witness statements were provided by the Claimant and for the Respondent by Ms Simpson and Ms Jones.

6. The majority of facts in this matter were not in dispute between the parties. In light of this the parties were agreed that this was a case that did not require extensive cross-examination. Where appropriate, the parties gave live evidence and there was the opportunity for cross-examination.

7. Following initial deliberations, there was an outstanding point regarding the interpretation of the contract. I permitted the Respondent to give further evidence on the type of course undertaken by the Claimant and how that relates to pages 155-156.

Facts

8. The Claimant was employed by the Respondent between 25th July 2019 until 8th April 2022.

9. The Training in question was with Forest School Training and the course was called 'Forest School – Level 3.' The Claimant sent the re-enrolment forms for the course in February 2021. The purpose of the course was to enable the Claimant to be a 'Forest School Lead'.

10. At page 189 of the bundle is a document from January 2020. It is on headed paper and contains a table of handwritten employee names and signatures with the date of the signature in a third column. The text states

    Dear Employee

    In signing the below, document, I acknowledge that as of the 22nd of January 2020 Climbing High Nurseries Ltd has altered their staff handbook. Significantly, I also recognise that should I leave the company's employment within 24 months of completing a course I will be subject to either partial or full repayment of the course costs incurred by Climbing High Nurseries.

11. There was an initial statement of terms and conditions (pg 100-105). Clause 6.3 states “The Company is authorised to deduct any sums due to it from your salary.”

12. On 8th October 2021, this was replaced by a new statement of terms and conditions. (The bundle index notes this as August 2021). That statement included the following:

    “The Nursery has the right to deduct from your pay, or otherwise to require repayment by other means, any sum which you owe to the Nursery including, without limitation, any overpayment of pay or expense, loans made to you by the Nursery, or any other item identified in this Statement and/or the Employee Handbook as being repayable by you to the Nursery.”

13. However, this variation occurred only after the Claimant commenced the course in question.

14. Three versions of the employee handbook were placed in the bundle. One dated 10-06-2019 (pg 30-95) and one dated 21-01-2020 (pg 125-186)

15. A third Handbook (191-270) has various dates attributed to it. The Bundle index suggests, February 2021, the ET 3 refers to it being in March 2022. The witness statement of Ms Jones refers to April/May 2021.

16. During the course of submissions, the Respondent accepted that it was not able to prove that the third handbook was in force, in the sense that it had been provided to the Claimant and consented to at the time the Claimant commenced the Course. (c.f.s.13(5) ERA 1996).

17. The Respondent further accepted that the June 2019 Handbook is not the relevant handbook for the purposes of this case. Therefore, the hearing proceeded on the basis of the second handbook (pg 125-186).

18. The Respondents position throughout this case is that the handbook has contractual effect.

19. The handbook (pages 154-156) under the main heading of ‘Leaving the Company’ includes the sub-heading of ‘Other Conditions on Leaving’. Under the further sub-heading of ‘Other Courses’ it states:

    “**Other Courses:** As an employee of Climbing High Nurseries you will be presented with opportunities to take on further learning and a variety of different courses. Should you leave during or after completion of any course where Climbing High Nurseries have financially contributed towards the costs of the course, then repayment plans will be put into place.”

20. In response to the point being raised with the Respondent, it was initially submitted that this was a Level 3 Early Years Diploma. However, the Respondent was permitted to call further witness evidence on the point which resulted in the point being conceded. The Respondent accepted following the evidence being heard on the point that the course in question was not a Level 3 Early Years Education Diploma and that the Tribunal was not concerned with the courses referenced on the top half of page 156. This was 'Other Courses'.

21. Following the Claimant giving notice to the Respondent, the Respondent deducted the sum of £1074 from her pay of 31st March 2022. Her payslip was marked 'Training Course'.

22. In its ET 3, the Respondent accepted that the Claimant should not have had the VAT sum deducted. £179 was refunded to the Claimant on 31st May 2022. The outstanding deduction therefore is £895.00.

The Law

23. S.13 Employment Rights Act 1996 provides

(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.

(3) Where the total amount of wages paid on any occasion by an 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.

(4) Subsection (3) does not apply in so far as the deficiency is attributable to an error of any description on the part of the employer affecting the computation by him of the gross amount of the wages properly payable by him to the worker on that occasion.

(5) For the purposes of this section a relevant provision of a worker's contract having effect by virtue of a variation of the contract does not operate to authorise the making of a deduction on account of any conduct of the worker, or any other event occurring, before the variation took effect.

(6) For the purposes of this section an agreement or consent signified by a worker does not operate to authorise the making of a deduction on account of any conduct of the worker, or any other event occurring, before the agreement or consent was signified.

(7) This section does not affect any other statutory provision by virtue of which a sum payable to a worker by his employer but not constituting "wages" within the meaning of this Part is not to be subject to a deduction at the instance of the employer.

24. In respect of contractual or written authorisations for a deduction, neither the statute nor case law requires that the specific sum to be deducted is specified.

25. In Yorkshire Maintenance Company Ltd v Farr UKEAT/0084/09 HHJ Pugsley noted the respective lack of economic bargaining power and suggested that authorisation or repayment clauses should be "subject to a considerable degree of scrutiny."

26. In Potter v Hunt Contracts [1992] ICR 337 it was held that any written authorisation relied upon must be clear that any deduction is to be made from the wages of the employee. i.e. the deduction must be authorised to be taken from the source which it taken from in order to give effect to the true meaning of the statute.

Conclusions

27. The Respondent relies upon its handbook as having contractual effect. I accept that submission. The Handbook is expressly stated to have contractual effect. The contents of the Handbook are contractual in nature, they contain obligations that the parties intend to be able to rely upon in legal proceedings. For example, page 156 goes on to purport to impose restraint of trade clauses on the Claimant. The main statement of terms and conditions is expressed as a s.1 statement rather than the whole contract and there is no entire agreement clause in the written statement of terms and conditions.

28. Proceeding on the basis that the second handbook is the correct handbook, pages 155-156 contain clauses regarding 'other conditions on leaving'.

29. Following the evidence, the Respondent accepted that the course undertaken by the Claimant could only fall within 'other courses'. It is an express term and obligation that a repayment plan will be put into place. The language is not permissive, it is mandatory 'will' is used rather than 'may' or 'at its absolute discretion' or similar.

30. The Respondent did not put in place or attempt to put in place a repayment plan.

31. Given the contractual effect of the handbook, it is necessary to read the broad clauses regarding deductions in the s.1 statement alongside the specific contractual clauses in the Handbook regarding courses. The specific scenario in this case is that of a deduction relating to a training course undertaken. That is dealt with by a specific term and when construing a contract, where a specific scenario is addressed specifically within the contract, that is the best and clearest statement of the intention of the parties.

32. The Respondent having failed to comply with this mandatory element of its obligations as part of the contract of employment means that the deduction is not in accordance with the contract of employment of the Claimant and is therefore not authorised by the contract within the meaning of s.13(1)(a) or s.13(2)(b) ERA 1996.

33. It should be noted that the Claimant expressly pleaded her ET 1 on this basis. I find that the contract does not authorise the Respondent to deduct this sum from the Claimant in the way that it has.

34. Turning to the second issue before the Tribunal, the Respondent is not able to rely upon the January 2020 signature as authorising this deduction. This point does not appear to have been pleaded in the ET 3. Most importantly, it falls foul of the point in Potter (above). Nowhere in this document does it state that the sum will be deducted from wages.

35. The Respondent submitted that it was implied from this document that the sum would be deducted from wages. I rejected this submission. It is open to the employer drafting this letter to explicitly refer to a deduction from wages. Repayment is not the same as deduction. It is not appropriate to imply this word 'deduction', and none of the bases upon which it would be necessary to imply such a word were identified.

36. The wording of s.13(1) ERA 1996 explicitly refers to a 'deduction from wages' with that deduction then being referenced in s.13(1)(b). A generalised document indicating that a sum must be repaid does not satisfy the wording of the statute in that s.13(1)(b) must be a prior written agreement to the fact of the deduction, not just a general acceptance of liability for a sum.

37. The parties agree that the Claimant has already received the VAT element back following the submission of her ET 1, which results in an outstanding deduction of £895.00.

38. The Respondent is unlawfully deducted the sum of £895.00 from the Claimant's wages and is therefore required to pay that sum to the Claimant.

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Employment Judge Anderson

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Date 14th March 2023

REASONS SENT TO THE PARTIES ON

24 March 2023

FOR THE TRIBUNAL OFFICE