Case No: 2412214/2023

EMPLOYMENT TRIBUNALS

Claimant: Mrs I Turina

Respondent: Penny Davis T/A DPC Clinic

Heard at: **Manchester by CVP On: 7 August 2024**

Before: Employment Judge Kight

Representation
Claimant: Mr J Radcliffe, Counsel
Respondent: Mrs P Davis, respondent in person

RESERVED JUDGMENT

1. The Claimant's claim for unlawful deductions from wages is not well founded and is dismissed.

REASONS

BACKGROUND

1. The Claimant was employed by the Respondent as an Aesthetic Beauty Therapist. The Claimant resigned on 20 July 2023 with immediate effect. Early conciliation started on 10 October 2023 9 and ended on 21 November 2023. The claim form was presented on 5 December 2023.

2. The Claimant pursued a claim for unlawful deductions from wages in respect of her net final salary payment in the sum of £1228 for the period 1-20 July 2023, which was due to be paid on or around 31 July 2023 but was withheld by the Respondent. The Respondent's position was that the payment was lawfully withheld, with reliance placed upon two documents, the first the Claimant's contract of employment and the second a training agreement.

THE HEARING

3. The Claimant was represented by Mr Radcliffe of Counsel and the Respondent represented herself. I heard evidence from the Claimant and the Respondent. The Claimant had prepared a written witness statement, which stood as her evidence in chief and the Respondent relied upon the contents of the ET3 form she had completed. Both gave live evidence.

4. The Claimant had prepared a 43-page bundle of documents for the hearing. After a short adjournment I was also provided with a full copy of the Claimant's contract of employment, (only the signature page was contained in the bundle) and a copy of an email exchange between the Claimant and Respondent in August 2023.

5. I heard submissions from both Mr Radcliffe and the Respondent.

THE ISSUES

6. The issues which fell to be determined were identified as follows:

   6.1. Were the wages paid to the Claimant on or around 31 July 2023 less than the wages they should have been paid?
   6.2. Was any deduction required or authorised by statute?
   6.3. Was any deduction required or authorised by a written term of the contract?
   6.4. Did the Claimant have a copy of the contract or written notice of the contract term before the deduction was made?
   6.5. Did the Claimant agree in writing to the deduction before it was made?
   6.6. If not, how much is the Claimant owed?

FINDINGS OF FACT

7. The Claimant was employed by the Respondent as an Aesthetic Beauty Therapist. When she began her employment, her employer was Penny Dee Limited which traded under the name DPC Skin Therapy. She was provided with a 13-page written contract of employment dated 20 October 2020, which the Claimant signed on 22 October 2020.

8. That contract of employment contained the following terms relevant to this dispute (relevant extracts below only):

   *"**Deductions from Wages:***

   If, either during or on the termination of your employment, you owe the Company money as a result of any loan, overpayment training, default on your part or any other reason whatsoever, the Company shall be entitled to deduct the amount of your indebtedness to it from any payment or final payment of

wages which it may be due to make to you. Such deductions may include but are not limited to:

- *….*
- *Where you leave the Company the balance of any training assistance given.*
- *….*

Any amount deducted under this clause is a genuine attempt by the Company to assess its loss and is not intended to act as a penalty.

…

If, on the termination of your employment, your final payment of wages is not sufficient to meet your debt due to the Company, you agree that you will repay the outstanding valance 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.

….

Training requirements:

As part of your employment with the Company you will be expected to undertake any reasonable training related to your work as the Company deems necessary from time to time.

….

The costs of the required training will be met by the Company, but, subject to individual training agreements, you will be expected to reimburse the costs of training if you leave the Company within the 12 months preceding completion of a course….

9. The Claimant had already obtained several qualifications and certificates relevant to her role before her employment had commenced, including level 2 and 3. During her employment and again on 8 January 2021, the Claimant made enquiries of Mrs Davis about starting a training course to obtain a CIBTAC Level 4 certificate in Advanced Skin Studies.

10. Mrs Davis agreed to the Claimant's request and on 14 January 2021, the Claimant signed a training agreement, Mrs Davis also signing the agreement on behalf of "DPC Skin Therapy" which was identified as the Claimant's employer and defined in the agreement as "Employer". In evidence the Claimant accepted that she did receive and sign the training agreement. The operative terms of that agreement set out as follows:

1. Education and training

1.1. The Employer agrees that it will grant you reasonable (paid or unpaid) leave of absence for the sole purpose of attending training or courses that it has approved you attending ('Course') and sitting any examination required for the Course.

2. Course Fees

2.1. The Employer agrees to pay the course fees totaling £5940, which it will pay directly to the Course provider. Additionally, the Employer will pay the examination fees of £350.

3. Repayment of course fees

3.1. Where the Employer has agreed to pay the fees charged for you to attend any Course, or sit for any test or examination in respect of the Course, you agree that, if you should cease employment with the Employer before the second anniversary of your having completed such Course (or having failed to complete such Course) and sat all or any tests or exams associated with it, you will reimburse to the Employer (and you agree that the Employer will be entitled to recover all or part of such sum by deduction from any remaining instalments of salary payable to you or any other sum due to you from the Employer) the appropriate percentage of your Course and examination fees:

3.1.1. If your employment ceases during the Course or within six months after its completion, the appropriate percentage is 100%

3.1.2. If your employment ceases between six and 12 months after completion of the Course, the appropriate percentage is 75%

3.1.3. If your employment ceases between 12 and 18 months after the completion of the Course, the appropriate percentage is 50%; and

3.1.4. If your employment ceases between 18 and 24 months after completion of the Course, the appropriate percentage is 25%.

11. Shortly after signing the training agreement the Claimant was provided with log-in details to commence the training course, which she began to complete.

12. In evidence, Mrs Davis confirmed that the course fees were £5940 as set out in the training agreement and explained that the training course fee was invoiced in two parts. Half of the course fees were invoiced and became due at the time the course started. The remainder, together with exam costs were invoiced towards the end of the course. The Tribunal was not provided with copies of any invoices in respect of the course. Mrs Davis gave consistent evidence to the effect that the first half of the course fees were paid by Penny Dee Limited at the start of the course. The Tribunal accepts her evidence.

13. Owing to the impact of the COVID-19 pandemic on the operation of the business of the Respondent, Penny Dee Limited suffered financial difficulties

and in 2022, Mrs Davis was considering insolvency proceedings. She decided to become a sole trader, transferring the business of Penny Dee Limited to herself. On 19 December 2022, Mrs Davis sent a letter to the Claimant about her continued employment. The letter referred to recent discussions on the proposed transfer of Penny Dee Ltd to DPC clinic. It informed the Claimant that with effect from 22 December 2022 the transfer would be going ahead and that her employment would be transferred to her by operation the Transfer of Undertakings (Protection of Employment) Regulations 2006 (TUPE). The letter went on to explain what that meant in terms of the Claimant's continuing employment on her existing terms and conditions of employment. The letter also separately confirmed that with effect from 1 January 2023 the Claimant's job title and rate of pay would change, resulting in the Claimant receiving an increased hourly rate. It confirmed *"Everything else in relation to your employment will remain as it is now"*.

14. On 22 December 2022, the Claimant's employment, along with that of other Penny Dee Limited employees transferred to the Respondent by operation of Regulation 4 of TUPE. Mrs Davis' evidence was that the following day, she instructed insolvency practitioners in respect of the future of Penny Dee Limited. Save for Mrs Davis' oral evidence about the state of the finances of Penny Dee Limited during 2022 (she said that the company was insolvent technically for a year) and that ultimately Penny Dee Limited entered liquidation 4-6 months later, I have not been provided with further details or documentary evidence which demonstrates that Penny Dee Limited had entered any formal insolvency proceedings as at the date the Claimant's employment transferred or in the weeks immediately following such transfer. The only documentation produced, and referred to by the Claimant in her evidence is a summary of the Directors' Statement of Affairs as at 26 January 2023 demonstrating that at that point in time Penny Dee Limited had debts of around £65,500. The Tribunal therefore accepts Mrs Davis' evidence regarding the timing of events.

15. Mrs Davis also explained that because the Claimant was still in the process of undergoing her Level 4 training, she took on responsibility for it when the Claimant's employment transferred to her to enable the Claimant to complete the course. She explained that this was in part what motivated her to continue the business, which is accepted by the Tribunal.

16. Consistent with what Mrs Davis said in evidence, on 1 January 2023, the Respondent received an email from Skin Group International, confirming that following recent conversations between Mrs Davis and the writer, Candice, the training contracts between Skin Group International (Skin College) and Penny Dee Ltd transferred to the Respondent. These training contracts included the course which the Claimant was part-way through completing. The email confirmed that the course and exam fees were to be paid by the Respondent or the student as applicable. The Tribunal therefore finds as a fact that liability for the outstanding course fees and any exam fees associated with the

Claimant continuing her Level 4 course passed to the Respondent with effect from 1 January 2023.

17. The Claimant remained in employment with the Respondent following her transfer. Sometime in May 2023, the Claimant received an invoice for exam fees of between £250-£300 in respect of the course. This was passed to the Respondent and Mrs Davis told the Claimant that she was responsible for paying it. The Claimant completed the training course in June 2023 and received her certificates on 8 June 2023.

18. A month or so later, the Claimant asked to take a period of extended annual leave. A meeting took place on 17 July 2023 regarding the Claimant's leave, return to work after her leave and continued employment. During that meeting the possibility of the Claimant leaving the Respondent was discussed and Mrs Davis pointed out to the Claimant that she would owe the Respondent money for the training course. Mrs Davis referred to the training agreement which she and the Claimant had signed in January 2021.

19. On 20 July 2023, the Claimant resigned with immediate effect. When the Claimant was next due to be paid her final salary payment, the Respondent calculated the Claimant's final salary including any accrued but untaken holiday as amounting to £1288 net. However, the Respondent did not pay this sum to the Claimant.

20. The Respondent believed that because the Claimant had left employment within six months of completing the training course, according to the terms of the training agreement, the Claimant was responsible for reimbursing the Respondent for 100% of the course fees. As such and relying upon the terms of the training agreement and the deductions clause in the Claimant's contract of employment, it treated the £1288 net payment due to the Claimant as part payment of those fees.

21. There followed correspondence between the two parties about the Respondent withholding this sum and whether and how the Claimant might repay the remaining course fees before the Claimant presented her claim to the Tribunal.

LAW

22. The relevant statutory provision is section 13 of the Employment Rights Act 1996, which states:

13 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.

(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.

23. The case of ***Delaney v Staples (t/a De Montfort Recruitment) 1991 ICR 331 CA*** is authority that an employment tribunal has jurisdiction to resolve any issue necessary to determine whether a sum claimed under section 13 of the Employment Rights Act 1996 is properly, payable, including an issue as to the meaning of the contract of employment.

24. Lord Justice Underhill in ***Agarwal v Cardiff University and anor 2019 ICR 433 CA*** confirmed, in overturning the earlier EAT decision to the contrary, that Employment Tribunals have the power to interpret contractual terms to determine claims for unauthorised deductions from wages.

25. When an employer relies upon a contractual provision authorising a deduction, the tribunal is required to scrutinize the contractual term carefully to ensure that it authorises the deduction in question and the clause must also be enforceable at common law.

26. Also relevant to this claim are the following:

26.1. Regulation 12 of the National Minimum Wage Regulations 2015: which states:

12.

(1) Deductions made by the employer in the pay reference period, or payments due from the worker to the employer in the pay reference period, for the employer's own use and benefit are treated as reductions except as specified in paragraph (2) and regulation 14 (deductions or payments as respects living accommodation).

(2) The following deductions and payments are not treated as reductions—

(a)deductions, or payments, in respect of the worker's conduct, or ***any other event****, where the worker (whether together with another worker or not) is contractually liable;*

….

26.2. ***Commissioners for Revenue and Customers v Lorne Stewart plc [2015] IC 708 EAT*** in which the EAT concluded that an employer's deduction for the cost of a training course from the pay of an employee who had voluntarily resigned fell within "any other event" in regulation 33(a) of the National Minimum Wage Regulations 1999 (the Regulations which preceded Regulation 12 of the National Minimum Wage Regulations 2015) and did not therefore have the effect of reducing the employee's pay during the relevant pay reference period for the purposes of calculating the National Minimum Wage.

26.3. Regulation 4 of the Transfer of Undertakings (Protection of Employment) Regulations 2006 which provides:

4.- Effect of relevant transfer on contracts of employment

(1) Except where objection is made under paragraph (7), a relevant transfer shall not operate so as to terminate the contract of employment of any person employed by the transferor and assigned to the organized grouping of resources or employees that is subject to the relevant transfer, which would otherwise be terminated by the transfer, but any such contract shall have effect after the transfer as if originally made between the person so employed and the transferee.

(2) Without prejudice to paragraph (1) but subject to paragraph (6) and regulations 8 and 15(9), on the completion of a relevant transfer –

(a) All the transferor's rights, powers, duties and liabilities under or in connection with any such contract shall be transferred by virtue of this regulation to the transferee

….

26.4. Regulation 2(1) of the Transfer of Undertakings (Protection of Employment) Regulations 2006 which includes that *"contract of*

employment" means any agreement between an employee and his employer determining the terms of his employment.

CONCLUSIONS

27. It is not in dispute that the wages due to the Claimant on or around 31 July 2023 were not paid to her. Nor is the Respondent arguing that the deduction was required or authorized by statute. The key question for the Tribunal was whether the deduction was required or authorised by a written term of the contract which the Claimant had a copy or written notice of the contract term before the deduction was made, or alternatively whether the Claimant had agreed in writing to the deduction before it was made?

28. The Claimant accepted that she had signed both her contract of employment on 22 October 2020 and the training agreement on 14 January 2021. These agreements contained contractual provisions making clear that the employer would be entitled upon termination of the Claimant's employment, to deduct from the Claimant's final pay monies which the Claimant owed to the employer, including "the balance of any training assistance given" which according to the terms of the training agreement and based upon the Claimant resigning within 6 months of her completing the Level 4 training course, amounted to 100% of the course and examination fees.

29. Considering carefully the question of whether these provisions were lawful and enforceable at common law, a provision regarding reimbursement of course fees should the employee leave within a defined period is quite common in many industries and the reimbursement of money paid under such a contract will not automatically be a penalty. The contract is drafted in such a way as to reduce the sum owed over a period, in this case two years following completion of the course. I am satisfied that this was a genuine attempt to pre-estimate loss in terms of calculating the time it would take to recover the cost of allowing the Claimant to complete the course during work time and the financial cost of the course as against the benefit the Respondent would receive from the Claimant having the additional qualification. The Claimant had the benefit of the course, and the Respondent was liable to pay the remainder of the course fees, half of which had been paid by Penny Dee Limited in 2021. The Claimant has a CIBTAC Level 4 qualification she could use to advance herself in her chose field. The Respondent, having invested in her is also entitled to benefit from her acquired knowledge and skills for a limited period.

30. Whilst the Claimant did not accept that the course fees amounted to the sums stated by the Respondent, the Tribunal finds as a fact that they were as set out in the training agreement in line and therefore were at least the net sum of £1288 deducted by the Respondent from the Claimant's final pay.

31. In his submissions on behalf of the Claimant Mr Radcliffe accepted that the Claimant's employment had transferred to the Respondent by operation of

TUPE on 22 December 2022 but advanced the following propositions as reasons why the deduction of wages was nonetheless unlawful:

31.1. that the deductions clause in the contract of employment, which he accepted also transferred pursuant to TUPE, did not cover the present situation because the reference to training assistance related only to the situation where an employee leaves their employment in the 12-months preceding the completion of any course and in this case the Claimant left her employment after the course had completed.

31.2. that the terms of the training agreement did not form part of and were not incorporated into the Claimant's contract of employment, did not therefore transfer to the respondent by virtue of TUPE (and would therefore have required written novation of contract to transfer to the Respondent which had not been consented to by the Claimant). As such the Respondent could not rely upon the terms of the training agreement to authorise the deduction.

31.3. that Penny Dee Limited was insolvent at the time the Claimant's employment transferred and therefore could not have transferred the benefit of a deductions clause and the liability for the remainder of the training fees to the Respondent.

31.4. that the Respondent had not in fact paid the course fees and therefore could not lawfully recover such fees from the Claimant in any event pursuant to either agreement.

31.5. that in any event, the deduction itself had reduced the Claimant's pay below the National Minimum Wage threshold which was of itself unlawful.

32. I am not persuaded by any of these propositions for the following reasons:

32.1. The contract of employment itself includes in the "Training Requirements" clause "*The costs of the required training will be met by the Company, but, **subject to individual training agreements**, you will be expected to reimburse the costs of training if you leave the Company within the 12 months preceding completion of a course….*

32.2. It is clear, therefore that at the time the contract of employment was entered into there was an expectation that there may be other written training agreements which provided different terms in relation to the extent to which an employee would be required to repay the costs of training if they left the company.

32.3. Although not expressly stated in the training agreement, the fact that the words "subject to individual training agreements" appear in the contract of employment when combined with the fact that the training agreement itself

does not deal just with responsibility for the payment for training but also the granting of reasonable time off work to attend training, indicates that the training agreement was incorporated into the Claimant's contract of employment when it was entered into. In addition, there is no "entire agreement" clause in the contract of employment to suggest that other documentation cannot be incorporated into it, and the "Variation" clause on page 13, above the signature block, states "The Company reserves the right to make reasonable changes t**o these and any other agreed terms and conditions of employment**…." . This too indicates, and I find that the training agreement was incorporated into the Claimant's contract of employment.

32.4. When the Claimant's employment transferred to the Respondent on 22 December 2022, so too did her contract of employment, which incorporated the terms of the training agreement. That served to transfer the rights to make deductions from the Claimant's salary as set out in the contract of employment and the training agreement to the Respondent. There was no requirement for a separate written novation of contract. Even if I am wrong in relation to the terms of the training agreement being incorporated into the terms of the Claimant's contract of employment, Regulation 4(2)(a) TUPE does not just relate to the express terms of the contract of employment. It serves to transfer "*all the transferor's rights, powers, duties and liabilities under* ***or in connection with*** *any such contract"*. Given the analysis set out above, it is clear that the duty to allow the Claimant reasonable time off work to attend the training course and the right to recover the course fees from the Claimant's pay in the relevant circumstances were connected with "*any agreement between an employee and his employer determining the terms of his employment"* (definition of contract of employment in Regulation 2 TUPE).

32.5. At the time of the transfer Penny Dee Limited was not the subject of insolvency proceedings and there is no evidence before the Tribunal to demonstrate that on 1 January 2023 formal insolvency proceedings had been commenced. Mrs Davis did not instruct an insolvency practitioner in respect of the future of Penny Dee Limited until after the TUPE transfer had taken place and the Claimant had become employed by the Respondent. This was immediately followed by Christmas and the New Year. Therefore, absent evidence of formal insolvency proceedings having been commenced and/or the formal appointment of an insolvency practitioner, the fact that Penny Dee Limited could have been technically insolvent on 1 January 2023 when Skin Group College transferred future liability for the training courses of the Claimant and other transferring employees to the Respondent makes no material difference. It does not affect whether the Respondent was contractually authorised to make deductions from the Claimant's final pay. In any case, it is not disputed that the Claimant continued to receive the benefit of the training course and received at least

one invoice for exam fees which the Respondent told her it would pay following the transfer of her employment.

32.6. Whilst the deductions clause in the contract of employment and the terms of the training agreement used the terms "repayment" and "reimbursement" in the context of the recovery of course and exam fees this does not, on an objective interpretation require that at the time a deduction is made the Respondent must have already paid a sum in the amount deducted in respect of the fees due for the course. What is relevant is that in allowing the Claimant to continue the course, in entering into an agreement with Skin Group College to pay fees relating to the course which were due to be paid near the end of the course and in telling the Claimant that she would be responsible for paying those fees, the Respondent was liable to pay them. Mrs Davis gave honest evidence to the effect that she had not yet paid all the fees because she had been unable to but was nonetheless required to do so and remained liable for them.

32.7. Finally in relation to the deduction reducing the Claimant's pay below the National Minimum Wage, applying Regulation 12(2)(a) NMW Regulations 2015, as interpreted by the EAT in ***Commissioners for Revenue and Customers v Lorne Stewart plc [2015] IC 708 EAT*** the Claimant's resignation amounted to "any other event" where the worker is contractually liable meaning that the deduction of pay pursuant to the terms of the training agreement was not a deduction which is treated as a "reduction" for National Minimum Wage calculation purposes.

33. Considering all the above, the Tribunal is satisfied that the deduction was authorised by the written terms of the Claimant's contract of employment, which included the terms of the training agreement, the Respondent was entitled to rely upon it and which the Claimant had a copy of before the deduction was made. As such, the Respondent's deduction was lawful, and the Claimant's claim fails.

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Employment Judge Kight

10 August 2024

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Date: 13 August 2024

RESERVED JUDGMENT & REASONS SENT TO THE PARTIES ON

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FOR EMPLOYMENT TRIBUNALS

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