



EMPLOYMENT TRIBUNALS

Claimant

Mrs A Pavlova

v

Respondent

Williamson Morton Thornton LLP

PRELIMINARY HEARING

Heard at:

On: 22 September 2017

Before: Employment Judge Henry

Appearances:

For the Claimant: Mr M Firth - Husband (Counsel)

For the Respondents: Mr A Williamson - Partner

JUDGMENT

The Judgement of the tribunal is that:

The claimant has not suffered an unlawful deduction from her wage.

Reasons

1. The claimant by a claim form presented to the tribunal on 10 July 2017, presents a complaint for unlawful deduction from wages.
2. At the hearing, Mr Firth on behalf of the claimant, clarified the claim that, the claimant raises issues going to contract, being; an agreement for the provision of training being paid for by the respondent being void or otherwise voidable, and for which the respondent was then not entitled to enforce the term of the agreement for recovery of monies paid.
3. On the claimant's claim being clarified, Mr Firth was given the opportunity to make application to amend the claim to include a breach of contract claim, which after stating that he wished to do so, and on my expressing an inclination to so grant, Mr

Firth expressed that this was not the correct venue to address the contract claim and withdrew his application.

4. The tribunal has accordingly addressed the claim on the sole issue under section 13 of the Employment Rights Act, for an unlawful deduction from wages.
5. The claimant commenced employment with the respondent on 20 May 2015. The effective date of termination was 24 March 2017; the claimant having been employed for 22 months.
6. The issues identified for the tribunal's determination, are:
 - 6.1 Is the claim in respect of a wage?
 - 6.2 Has the respondent made a reduction?
 - 6.3 Was the deduction authorised by a relevant written contract provision or agreed in writing by the claimant before the event giving rise to the deduction?

Evidence

7. The tribunal heard evidence from Mrs Anne-Maree Dunn – partner, and Mr Andrew Williamson – partner, on behalf of the respondent. The claimant was not in attendance. The tribunal had before it a bundle of document exhibit R1.
8. The parties had prepared written statements, but the tribunal has not been referred thereto. The evidence presented to the tribunal was via the presentation of relevant documents, with Mr Williamson and Mrs Dunn taking the tribunal through the documents.
9. The parties informed the tribunal that the referred to documents were those on which they relied and on which the tribunal is asked to make a determination.
10. The tribunal was referred to the following documents; the first of which was the letter of appointment dated 27 March 2015, the relevant particulars of which I here set out.

“ 11 We will provide study support for you to undertake the CTA exams at a date to be mutually agreed. The study support package will consist of registration fees with a training provider, materials, tuition, a tailored revision package and examination fees for a first sitting of exams. The total package will be capped at £4,500. Study leave will also be provided for up to 15 days per annum on related revision courses. You will be asked to sign a training agreement, which will require you to stay with the firm for a period of two years post qualification, or some of the fees incurred will need to be reimbursed. You may need to utilise some of your annual leave to cover any additional study or training days that you may be (sic) require.”
11. By the statement of main terms of employment, signed by the respondent and claimant on 28 April 2015 and 4 May 2015 respectively, under the section headed “DEDUCTION FROM WAGES” it provides:

“The company reserves the right to require you to repay to the company, either by deduction from salary or any other method acceptable to the company:

- Any amount of remuneration, expenses or any other payments (statutory, discretionary etc), which are overpaid to you, whether by mistake or through any misrepresentation or otherwise, including holiday granted in advance of it being accrued;
- Any other sums owed to the company by you, including, but limited to, outstanding loans, uniforms, training, company equipment, advances, expenses;
- One day's pay for each excess day taken, if you have taken more holiday than you have accrued at the date your employment terminates."

12. On 22 July 2015, the claimant was written to regarding studying for CTA. The correspondence providing:

"As mentioned this morning for WMT to consider a training contract for you to study towards this CTA exams please can you outline to me the following regarding the exact amount, timings, detail of the CTA package:

- Outline a proposal
- What specialist papers you are considering
- Total cost of the whole CTA study – broken down with materials, exam fees and revision courses you want etc (including reimbursements of the registration costs you have already incurred). You may like to obtain such information for both Tolley and Kaplan, as the firm isn't tied into any particular training company for CTA.
- How many study days you think you will need to take in total the timings of the papers – what days and weeks you are looking at taking over the next period.

WMT will then draw up a "study contract" for you to sign post probation. This will agree the amount WMT will pay (invoices to come to WMT directly, so we can recover the VAT, do not pay personally, it will confirm the study leave WMT will provide and also confirm the period you need to remain in employment post passing the exams."

13. On 14 September 2015, the claimant responded advising,

"...in answer to your queries in the order raised:

1. Successfully completing CTA is my greatest professional ambition for the next two years. The course will provide me with the necessary knowledge and skills to become more efficient and confidence in corporate tax advisory work. The knowledge gained will boost my confidence, which is required to progress to a managerial role.
2. I would like to study the corporate tax route, which involves the following papers: Advanced corporate tax (ACT), Owner Managed Business (OMB) and Awareness. I will not be required to sit the Application and Interaction paper (exempted from it due to being ACT qualified) and I have already passed both e-assessments. Accordingly, I only need to complete the ACT, OMB and Awareness.
3. Total cost from Tolley came out at £5,153.00 excluding VAT. Please find a breakdown of this figure in the attached schedule. I chose Tolley over Kaplan, since Kaplan tuition starts late (in February) and I prefer study to be more spread out to balance work commitments.

4. I will need 29 days in total to attend college and sit these three exams. Extra revision time may also be required (I currently estimate at 5 days per paper), which I will take as holiday in the first instance – although this may be problematic in 2015/16 due to the existing holidays booked – and then unpaid.
 5. The days of college attendance are broken down in the attached schedule. The extra revision time may be requested as the need arises nearer the time.”
14. The claimant furnished a breakdown of her study programme which is at R1 page 37.
15. On 21 October 2015, the respondent set out the arrangements for the claimant’s training in correspondence, as follows:

“Further to recent discussions, I write to confirm that it has been agreed that WMT will support you studying for your CTA exam in 2015/16.

I am very pleased that you have decided to undertake the commitment to these exams. I am sure you will be successful and these will be of great benefit to you in your career development with us.

There are a few formalities however, that we need to put in place, given the commitment to costs we are making. Therefore, the offer of support has been made with the following provisos and will require you to complete a training agreement, please see enclosed.

The total cost of the Tolley registration, materials, tuition and the tutored revision package is £4,572.25 plus VAT. Exam entry fees are £580 in total. You have advised 29 days study leave will be required. It has been agreed that you will be allowed to take 29 days paid study leave within the next 12 months, subject to agreement which days are taken. Five revision days will be taken from your annual leave and up to ten revision days may be taken as unpaid leave.

...

Whilst we are happy to support you and cover the cost of your training, there is an expectation that there is a benefit to the WMT, therefore if you should leave WMT within 2 years of sitting the exam (or 3 years of us incurring the costs should this be sooner), then you would need to repay the cost incurred in full. Please see the aforementioned training agreement that you are required signed, along with the restricted covenant.

Please note that your employment with WMT is not conditional on you passing these exams. In addition, for clarity WMT will only cover the costs of your first attempt at each exam.

...”

16. The training agreement which is at R1 page 41, provides as follows:

“In consideration of the training which I will be receiving from WMT, I agree to remain employed by WMT for a minimum period of two years once I take my exams.

This training will end when I take my exams and if I leave my employment at any time, before the end of my agreed two year period (or 3 years of the company incurring the costs should this be sooner), I undertake to refund to WMT all fees that have been incurred in relation to my CTA qualification, which includes Tolley registration, materials, tuition, the tutored revision package, exam fees and travel costs to London to attend the courses and exam.

I have been advised that the estimated sum total of the training related fees are likely to be up to £5,152.25 plus travel costs of approximately £750, and that the final sum will be confirmed and demonstrated to me, should the need arise as costs are confirmed.

In the event of my failure to pay, I agree that my employer has the right, as an expressed 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 have been made aware that if necessary, action may be taken through a civil court to recover any outstanding amounts.”

17. This document was signed by the claimant dated 23 October 2015.
18. A breakdown of the training costs is at R1 page 105, the total sum paid excluding VAT recorded as £5,654.90. There is no dispute as to the sums incurred.
19. In February 2017, the claimant resigned from the respondent's employment on notice, the effective date of termination being 24 March 2017.
20. On 13 April 2017, the respondent wrote to the claimant enclosing her P45 and advising;

“...
With regards to the training agreement, I can confirm the amount outstanding after deductions from your final salary is £5,654.90 minus £2,037.19 equals £3,617.71.

If you would like to pay this in three consecutive monthly instalments, we are happy for you to do this, and look forward to receiving either the first instalment or the full amount by end of May 2017.”
21. The claimant's final salary statement is at R1 page 136, which provides: pre-salary exchange of £2,810.77, less a salary exchange of £28.10. A Total gross salary of £2,782.67, from which tax of £373.20, national insurance of £253.28, exam costs of £2,037.19 and student loan – plan 1 of £119.00; total deductions of £2,782.67, giving the claimant a nil net payment.
22. 17 May 2017 claimant wrote to the respondents stating:

“Thank you for your letter of 13 April 2017, I hope that things are well at the firm.

As you are aware from my previous letters, I do not accept that I have any liability to the firm. I have provided detailed reasons in support of my view and you have not responded to those reasons. It is disappointing that your most recent letter again simply ignores what I have said.

I note that you have not paid my wages from March 2017. I consider the steps you have taken to amount to unlawful deduction from wages. Reiterate, my view is that you had/have no legal right to any amount (see, in particular, my letters of 15 and 21 March 2017 for full details)

Unless this is resolved by the end of May I intend to take matters I have identified to the employment tribunal for the independent adjudication”

23. There was then correspondence between the parties, for which there was no resolve and for which the tribunal presented her complaints to the tribunal on 10 July 2017

Submissions

24. The tribunal received oral submissions from the parties.
25. The respondent's submissions are brief, in that, they submit that the claimant, having agreed and signed the training contract, for which particular provision was made for sums to be reimbursed on the claimant leaving the respondent's employ within two years of completing her exams, or otherwise three years from incurring the expense in accordance therewith, they have deducted the training costs from her final salary in circumstances where they were then entitled, pursuant to section 13 of the Employment Rights Act 1996.
26. It is the claimant's submissions that, the respondent was not entitled to the recovery of the training costs, in that the respondent had not satisfied the terms of the agreement, in that they did not provide full support as set out by the covering letter to the training agreement that, "*WMT will support you studying for your CTA exams in 2015/16*", namely that, she had not received the support that she was entitled to, Mr Firth submitting that the claimant was entitled to Awareness training, being the 25, 26, 27, 28 of the 29th day of support she was entitled to in respect of the Awareness course, and had not been allowed to sit the Awareness exam, being the 29th day of support, on the 1 November 2016, although he accepts that the claimant did sit an exam on 1 November 2016, but draws a distinction in that, this had been a re-sit of the OMB exam, and therefore not the appropriate exam, by the agreement, to be sat on the 29th day of support.
27. Mr Firth accordingly submits that, the claimant had not been allowed to take the 29 days paid study leave within the 12 month period, as set out at paragraph 4 of that correspondence, and that as a consequence of the above, the two year period within which recovery was to be operative had then not started and as such there was then no basis for a recovery to take effect.
28. With regards the deductions, Mr Firth further submits that the respondent had deducted the wrong amount, being that they have made the deductions subject to tax and has referred the tribunal to the authority of the commissioners for Her Majesty's Revenue and Customs v Julian Martin (2014) UKUT0429 (TCC) of the upper tribunal of the tax and chancery chamber.

Conclusions

29. I deal with Mr Firth's submission regarding the deductions from post tax income, first, which I deal with briefly in that, the submission is premised on there being "*negative taxable earnings*" being as Mr Justice Warren, in the Martin case expressed, as being; an item (typically a payment by an employee to his employer), which is brought into account in computing the total amount of earnings within the definition of taxable earnings and which reduces the amount of taxable earnings from what it would otherwise have been. The phrase is not,

or at least not always, used to describe the end result i.e. “*where taxable earnings is negative*”, that the deductions then made by the respondent were tantamount to the claimant making a payment to the respondent and therefore negative taxable earnings, and for which Mr Firth claims the **Martin** case is then authority for the sums to be taken out of the incidence to tax.

30. I am unable to find for the claimant in this respect, on the authority of **Martin**, the issues arising in Martin being one of tax law and the incidence to tax, where the individual there concerned had received a payment, which was then taxed as an emolument, which payment was to be repaid on conditions in the event of the employment terminating. Accordingly, on the employment terminating and the sum being repaid, the issue there arising was how was the tax deducted on the initial payment, as an emolument, to be accounted for on the repayment to the respondent. This is not the circumstance in the present case. There is no question of the claimant having received a benefit which was taxed as an emolument, which taxed benefit is then sought to be recovered by the respondent; the incidence of tax then being an issue. Mr Firth’s submission in this respect has no merit.
31. It is Mr Firth’s further submissions that, a criterion of the training agreement had not been satisfied and therefore the right to recovery did not arise, namely, of the claimant having 29 days study leave, as agreed on 21 October 2015, being “*subject to agreement which days are taken*” and that the respondent had prevented the claimant from sitting the Awareness exam on 1 November 2016.
32. In dealing with the issue of sitting the Awareness exam on 1 November 2016, Mr Firth accepts that the claimant did sit an exam on that day, although it being a re-sit of the OMB paper, but not the Awareness paper, in accordance with the schedule as set out by the claimant in September 2015. I am unable to accede to Mr Firth’s submissions here, the fact being that the claimant did sit an exam on the appropriate day, which is all that the agreement provided for.
33. Despite this, were I wrong in my interpretation of the agreement, giving further consideration to Mr Firth’s submission on this point, that by the schedule, the exam should have been that of the Awareness exam and that as that exam had not been sat, the agreement had not been satisfied. From a consideration of the correspondence, and the specific terms of the agreement qualified by the covering letter, I am unable to find any reference of there being such specific reference to particular exams being sat on particular days, otherwise than the facility to sit an exam on any identified day; the particular exam to be sat, being the sole preserve of the claimant, which the claimant has clearly exercised in respect of the exam on 1 November 2016, I find no merit in this submission.
34. Turning to Mr Firth’s final submission, as to the claimant not being afforded the full 29 days study leave. Apart from Mr Firth submitting that the claimant had not had the study leave identified at day 25 to 28 of the schedule set out by the claimant of September 2015, I have received no further evidence in support. The respondent in reply to Mr Firth’s submission, stating that the claimant had received all of the study leave requested, and that the sole issue of contention had been the claimant sitting an exam in May 2017. As best I am able from the

documents presented to me, I am unable to find evidence to support Mr Firth's submission that the claimant had not been afforded study leave for the period identified, or otherwise had not received 29 days study leave, whether those days were as stipulated by the schedule or otherwise being agreed.

35. In this respect, it is also worthy of note that, whilst Mr Firth has submitted that the claimant had not been afforded the 29 days or otherwise prevented from study, it is not the claimant's case that she has been prevented from pursuing her training as gleaned from the pleadings, in that the issue was one of exam preparation and her exam in May 2017, in circumstances where for reasons particular to the claimant's circumstances, as too business requirements, the particular dates in May 2017, could not be accommodated; circumstances which had come about on account of the claimant having to re-sit exams, and outside of the agreed schedule; the training schedule having been satisfied to all intents and purposes in respect of study leave and days to sit exams, be they first sittings or otherwise re-sits.
36. For the reasons above stated, I do not find any merit in the submissions on behalf of the claimant.
37. In turning to consider the issues arising under section 13 of the Employment Rights Act 1996, there is no dispute that the training agreement was a valid agreement entered into voluntarily by the claimant; the terms of which were clearly understood and agreed to in writing, that where the employment relationship terminates before the end of the period of three years from the date of incurring expense or otherwise two years of the claimant completing the training, whichever were the sooner, the cost would be recoverable from the claimant's final salary and/or recovery through the courts.
38. On the costs having been incurred in respect of the training agreement, and on the claimant terminating the employment relationship within the prescribed time periods, these were then sums which the respondent was entitled to recover from the claimant's final salary and/or through the courts.
39. On the respondent being entitled, pursuant to the claimant's agreement to recover expenses as incurred in respect of the claimant's training, agreed to be taken from the claimant's final salary where the claimant's employment is terminated within the period of two years from incurring the particular expense, the invoice for each expense having been furnished to the claimant, the first of which subject to recovery and due, to the end of September 2018, the claimant has not suffered an unlawful deduction from her wage, when the respondent deducted there from, the payments incurred in respect of the claimant's training.
40. I accordingly dismiss the claimant's claim.

Employment Judge Henry

Date: 1 December 2017

Sent to the parties on:

1/12/2017

For the Tribunal:

1 December 2017.