EMPLOYMENT TRIBUNALS

Claimant: **Miss H Marsden**

Respondent: **Progressive Care Limited**

Heard at: **Nottingham**

On: **Friday 19 October 2018 (Hearing)**
21 December 2018 (Reserved Judgment)

Before: **Employment Judge Hutchinson (sitting alone)**

Representatives

Claimant: **Anne Thoday, Mother**
Respondent: **Toby Pochron, Solicitor**

RESERVED JUDGMENT

The Employment Judge gave judgment as follows: -

1. The Tribunal does have jurisdiction to hear the claim for unlawful deduction of wages.

2. The Respondent has made an unauthorised deduction from the claimant's wages and is ordered to pay to the Claimant the net sum of £280.21

3. The counterclaim fails and is dismissed

REASONS

Background and Issues

1. The Claimant presented her claim to the Employment Tribunal on 6 June 2018. She had been employed by the Respondent as a Support Worker between 29 April 2013 and 5 December 2017 when she resigned.

2. Her claim is for unlawful deduction of wages only.

3. The date of receipt by ACAS of the Early Conciliation ("EC") notification

was 16 May 2018. The date of issue by ACAS of the certificate was 21 May 2018.

4. The Claimant acknowledges that she presented her claim out of time. The alleged unlawful deduction took place out of her final pay salary which was due on 8 January 2018. The Claimant should therefore have notified ACAS about her claim by 7 April 2018.

5. As it is acknowledged that the claim was presented out of time the burden of proof is on the Claimant to establish that it was not reasonably practicable for the claim to be presented in the relevant period of time. If I am satisfied that it was not so practicable I then have to go on to consider whether the claim was presented within such further period as I consider reasonable.

6. If I am satisfied that I have jurisdiction to hear the claim I then must decide whether the Respondents made an unlawful deduction from the claimant's wages. It is accepted by the Respondents that they deducted the sum of £280.21 from the Claimant's wages on 8 January 2018. They say that the deduction was lawful. That it was made in accordance with a written term of the Claimant's contract of employment which was signed by the Claimant. They rely on section 13 (1)(b) of the Employment Rights Act 1996. That the deduction was lawful because;

> "the worker has previously signified in writing is agreement or consent to the making of the deduction "

7. The Respondents say that they invest significant sums in training staff members and they are expended with the reasonable expectation of having a fully qualified member of staff for a defined period. They say that they are required to ensure that all staff have a basic minimum level of training to ensure that they comply with its safeguarding obligations.

8. They go on to say that if the claimant had not left her employment she would have received training at no cost to herself, as was the case for all training provided outside the two-year repayment period.

9. Only training that is undertaken within the two-year period prior to the termination of her employment is recoverable from the claimant. The respondent says that in accordance with the terms of her employment they are entitled to recover the sums. The training costs also include incurrence of time spent by the Claimant at training and not therefore providing other productive work.

10. It is also contended that a deduction in wages for payment of training costs falls within regulation 33 (a) of the National Minimum Wage Regulations 1999. That provides;

> "any deduction in respect of conduct of the worker, or any other event, in respect of which he (whether together with any other workers or not) is contractually liable" should be excluded when calculating whether or not the employee has received the national minimum wage.

11. They contend that they have not breached any of its obligations to the Claimant and that they were acting in accordance with the terms of the contract and entitled to make the deduction from the Claimant's wages which were therefore lawful and appropriate.

12. Finally, they make a counterclaim in the sum of £60.36. They explain that the Claimant was due wages of some £310.21 at the date of termination of her employment and that the total amount deductible from the Claimant's wages in training fees was £340.57. The Respondents deducted from the Claimant's final wages £30 in respect of excess holiday taken by the Claimant and £280.21 training deductions and the balance of the training fees of £60.36 could not be recovered from the Claimant's final wages. They say this amount is also payable by the Claimant to the Respondent.

Evidence

13. I heard evidence from the Claimant only. I was satisfied with the truthfulness of the Claimant. What she said was consistent with the documents that were presented in support of her application and her explanations were credible.

14. There was an agreed bundle of documents and where I refer to page numbers it is from that bundle.

15. The Claimant was employed by the Respondent as a Support Worker from 29 April 2013 until her resignation with effect from 5 December 2017.

16. Her contract of employment (pages 29-36) includes provisions about training in Clause 12.

> Clause 12.1 During your employment you will be required to participate in training in connection with your job to enable you to better fulfil your duties under this contract. Where you are required to attend any lecture, seminar or workshop, you will be paid at your normal hourly rate of pay for the time you attended minus breaks.
>
> Clause 12.3 If you are not already qualified to work in Care to Level 2 diploma in Health and Social Care, or Child Care to level 3 or its equivalent, it is a condition of your employment that you undertake a Level 2 Diploma in Care or a Level 3 Diploma in Child Care and any other associated training when required to do so.
>
> Clause 12.5 Following satisfactory completion of the Induction and Foundation standard, you will be expected to undertake NVQ level 2 or 3 in an appropriate care discipline.
>
> Clause 12.7 If you leave the employment of the employer within a 2-year period following the completion of any other training that you have undertaken in connection with your job, or before that training has been completed, then, you will be required to repay to the employer the costs incurred by the employer in providing such training/procuring the provision

of such training, on a sliding scale.

12.8. The amount you will be required to repay is dependent upon how close you are to completing the 2-year period.

12.9. The cost of training to be reimbursed will be reduced by one twenty-fourth in respect of each full month of your employment with the employer during the 2-year period.

12.10. The employer is authorised and by signing this contract you authorise and agree that your employer is authorised and may deduct any such monies from any wages, salary or other money due to you."

17. A copy of the Respondent's employee training log (page 37) shows that the claimant undertook the following training during the last two years of her employment;

1. Team teach refresher 28th June 2016
2. Safeguarding adults (in-house) 3rd November 2016
3. Emergency first aid -Highfield 9th December 2016
4. Person centred thinking 9 (in-house) 20th January 2017
5. Fire safety awareness 9 (in-house) 20th January 2017
6. End-of-life care 17th of February 2017
7. Sensory awareness 11th May 2017
8. Epilepsy training 5th July 2017
9. Fire safety awareness 9 (in-house) 26th July 2017
10. Level 2 Health and Safety accredited 26th July 2017.

Some of these courses were provided in-house and others by outside agencies.

18. The Claimant's normal hours of work were 22 hours per week and the Claimant was paid the national minimum wage of £7.50 per hour. She was paid a flat rate of £25 for "sleep ins".

19. Whilst the Claimant worked for the Respondent she worked 40-50 hours per week and would undertake "sleep-ins" two to three times per week. The result of this was that she could effectively be working 24 hours at a time.

20. The Claimant was responsible for 5 residents who all had learning disabilities and some of these residents could be extremely difficult. The Claimant worked mainly on her own and was severely affected by the conditions of her work.

21. The Claimant contacted her doctor on 30 October 2017 and she received treatment for a depressive anxiety disorder as described in her doctor's letter (page 58). This treatment continued until April 2018. As described by the doctor:

"She was suffering from symptoms of general anxiety, poor concentration, being sweaty and clammy and experiencing palpitations at times. She was also having difficulty sleeping."

22. The Claimant was treated with anti-depressant medication ie Citalopram

and she was signed off work at the end of October 2017. She never returned.

23. Apart from the medication the Claimant also received counselling and this was at the end of July 2017 and she had 6 counselling sessions between August and October 2017.

24. Her medical condition also affected her relationship with her partner although they are still together and he has two children by a previous relationship.

25. The Claimant tells me and I accept that she always wanted to make a claim in respect of the unlawful deductions of wages. She just did not feel able to do so whilst she was suffering from depression and anxiety.

26. The Claimant had been suffering problems at work which she says had led to her medical condition. A colleague had made several complaints about her in May/June 2017 and on 24 October 2017 the Claimant found a letter which was a complaint about her. She was accused of having her partner coming to the unit every night. This was the final straw and she went off sick and never went back.

27. The Claimant gave notice to the Respondent on 13 November 2017. Her resignation letter is at page 62. It does not make any reference to any issues in her employment or give any explanation for her resignation. The Claimant had not raised any grievance about any issues although I am satisfied that she had spoken to her Team Leader about her problems.

28. The Respondents acknowledged her resignation on 22 December 2017 and she was told that she would be paid up until the last day of her employment which was 11 December 2017. A final salary payment was due on 8 January 2018 and from that final salary the Respondent's deducted the training costs of £331.19. This is set out at pages 64-5 of the bundle. The letter also required the Claimant to repay to them the sum of £50.98. They then subsequently instructed solicitors to recover this sum they said was due and the solicitor's letter is at page 66-9.

29. The Claimant did obtain alternative employment and commenced that alternative employment on 1 December 2017.

30. By April 2018 the Claimant's health had improved. She finally felt able to proceed with her claim.

31. With the help of her mother she contacted ACAS on 16 May 2018 and ACAS issued their certificate on 21 May 2018. The claim form was presented to the Tribunal on 6 June 2018.

The Law

32. The claim for unlawful deduction of wages is made under Section 13 of the Employment Rights Act 1996. This 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 workers 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 in which the employer has given the worker a copy on 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"

Section 23 deals with jurisdiction. It provides:

"(2) Subject to subsection (4) an Employment Tribunal shall not consider a complaint under this section unless it is presented before the end of the period of three months beginning with-
(a) in the case of a complaint relating to a deduction by the employer, the date of payment the wages from which the reduction was made, or
(b) in the case of a complaint relating to a payment received by the employer, the date when the payment was received.

(4) Where the employment tribunal is satisfied that it was not reasonably practicable for a complaint under this section to be presented before the end of the relevant period of three months, the tribunal may consider the complaint if it is presented within such further period of the Tribunal considers reasonable."

33. As Mr Pochron says in his submissions to me the burden of proof is on the Claimant to establish that it was not reasonably practicable to present the complaint in time.

34. As to "reasonably practicable" I referred myself to the leading cases of **Palmer and Saunders v Southend-on-Sea Borough Council** [1984] IRLR 119 and **Biggs v Somerset County Council** [1996] IRLR 203. The issue of whether it was reasonably practicable for a complaint to be presented in time is an issue of fact for me to determine taking all the circumstances of the case into account. As was said in the case of **Dedman v British Building and Engineering Appliances Ltd** 1974 ICR 53 the section should be given a "liberal construction in favour of the employee" In considering the circumstances, the matters I should

consider are: -

- The substantial cause of the failure to comply with the time limit
- Whether the Claimant had been physically prevented from complying with the limitation period because of illness
- Whether the Claimant was being advised at the material time

35. In considering whether the Claimant has suffered an unlawful deduction of wages I refer myself to Section 13 of the Employment Rights Act. That 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.

36. Mr Pochron relies upon two cases in support of his contention that the Respondents had not made an unlawful deduction of wages. In particular the case of: -

- **Commissioners for Revenue and Customs v Lorne Stewart Plc** UK EAT/0250/14/LA

- **Strathclyde Regional Council v Neil** [1984] IRLR 11

37. He also refers me to another Employment Tribunal case of **Lewis v Progressive Care Limited** UK ET/1800319/2016. He acknowledges that I am not bound by that decision but that the facts of the case are very similar to the facts of this case and he says I should follow the same course of action as my colleague Employment Judge Little who decided that case.

38. I refer myself to the National Minimum Wage Act 1999 (NMWA). This is supplemented by the National Minimum Wage Regulations 2015 (NMWR).
Section 1 of the NMWA provides;
"A person who qualifies for the national minimum wage shall be remunerated by his employer in respect of his work in any pay reference period at a rate which is not less than the national minimum wage".
The hourly rate of the national minimum wage is contained in the regulations 4 and 5 of the NMWR. At the time of the alleged deduction, i.e. January 2018, the minimum rate of pay under the regulations was £7.50 per hour.
The pay reference period is one month as defined in regulation 6 of the NMWR.
The method of calculation to determine whether the national minimum wage has been paid is dealt with by regulation 7. This provides;
"A worker is to be treated as remunerated by the employer in a pay reference period at the hourly rate determined by the calculation-
R/H
Where-
"R" is the remuneration in the pay reference period determined in accordance

with Part 4;
"H" is the hours of work in the pay reference period determined in accordance with Part 5
Regulation 8 NMWR provides;
"The remuneration in the pay reference period is the payments from the employer to the worker as respects the pay reference period, determined in accordance with Chapter 1 less reductions determined in accordance with Chapter 2"
Payments can count towards remuneration are dealt with in regulation 9 NMWR. In particular;

(c) where a worker's contract terminates then as respects the worker's final pay reference period, payments paid by the employer to the worker in the period of a month beginning with the day after that on which the contract was terminated."

Regulation 12 deals with deductions or payments for the employer's own use and benefit. It provides;

(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, 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 workers conduct or any other event, where the worker (whether together with another work or not) is contractually liable;

My Conclusions

Jurisdiction

39. I am satisfied that the claim was not presented in time. The unlawful deduction of wages alleged by the Claimant was made from her final salary which was due to be paid on 8 January 2018 as confirmed in the letter of that date from the Respondents. The Claimant should therefore have contacted ACAS by 7 April 2018 so she was approximately 5 weeks out of time in contacting ACAS.

40. I am satisfied that it was not reasonably practicable for the Claimant to present her claim within time.

41. I am satisfied with her explanation that she had been working under a great deal of stress and at the time of her dismissal she was suffering from anxiety and depression and was not able to face raising complaints or making a claim to the Employment Tribunal. That continued until the end of April 2018.

42. The Claimant did not have access to legal advice but with the support of her mother she decided to proceed to making a claim for the unlawful deduction of wages. I am satisfied that once she was feeling well she proceeded swiftly to make the claim contacting ACAS on 16 May 2018.

43. I am also satisfied that the claim was submitted within a reasonable time

thereafter. Although there was a short delay between 21 May 2018 when the ACAS certificate was issued until the claim was presented on 6 June I am satisfied that this was reasonable.

44. In all the circumstances of the case I am satisfied that the Tribunal does have jurisdiction to hear this complaint.

Liability

45. It is not in dispute that the claimant qualified for the right to be paid the national minimum wage. The national minimum wage at the relevant time was £7.50 per hour. That the claimant was paid at that rate.

46. In the last month the claimant undertook any paid work for the employer, i.e. in October 2017, the Claimant undertook 158.75 of paid work at the national minimum wage. For the months of November and December she was in receipt of statutory sick pay.

47. The final payment due to the claimant in the last month of employment was £310.21 which comprised statutory sick pay of £140.41 and a PAYE refund of £169.08. From this they made a deduction of £30 for annual leave overtaken and the balance of £280.21 was taken as a payment for the training provided.

48. It is not in dispute in this case that the Claimant's contract provides that she was required to participate in training relating to her job and that the contract provides that if she leaves she is required to pay the costs of any training taken within a previous 2-year period as per Clause 12.7.

49. As the Respondent's representative says the contract permits the deduction. In this case the training is not for the benefit of the Claimant. The training is entirely for the benefit of the Respondent and the Claimant had no choice about it. It is mandatory under her contract of employment.

50. I am satisfied that whenever the Claimant chose to leave her employment she would be required to make a payment in respect of training that she had undertaken in the last 2 years.

51. The Respondent relies on the **Lorne Stewart** case but the circumstances of that case are different from this. In that case the employee had signed a separate agreement for a particular course she wanted to study. In this case the training is dealt with as part of her contract of employment and not for her benefit but entirely for the benefit of the Employer.

52. In the case of **Lorne Stewart** the course undertaken was for a professional qualification which would continue to benefit the employee in the future beyond her employment with Lorne Stewart. That is not the case here. This is "mandatory training" as described by the Claimant and deals with matters such as company health and safety obligations and was of no use to the Claimant in the future.

53. I particularly note that if Ms Marsden had not agreed that clause in her

contract, i.e. agreeing to pay the costs of the training she would not have been offered the job and if she had not undertaken the ongoing training she would have been dismissed from her job. There is a specific clause in her contract (12.2) which refers to the refusal to undertake training constituting grounds for dismissal.

54. The Claimant was throughout her employment paid the minimum wage and if the Respondent can make this deduction it would mean that the Claimant had not been paid the minimum wage during her employment and, in particular, in the final period of her employment. In the final pay period the Claimant has not been paid the amount properly due to her. The last month the claimant worked for the respondent was October 2017 and the respondent is making a deduction which it is not entitled to make. I am satisfied that the Respondent was not entitled to make the deduction from her final pay and is ordered to repay that sum to the Claimant.

55. It follows from the above that the counterclaim also fails. I am satisfied this is because the respondents were not entitled to make the deductions that they did. In any event I am satisfied that this is a claim for non-payment of wages and so the Tribunal does not have jurisdiction to hear the counter claim which was to be made in respect of a claim for breach of contract

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Employment Judge Hutchinson

Date 26 March 2019

JUDGMENT SENT TO THE PARTIES ON

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FOR THE TRIBUNAL OFFICE