THE INDUSTRIAL TRIBUNALS

CASE REF: 4211/17

CLAIMANT: **Veronika Gyanyi**

RESPONDENT: **Galeton Limited t/a Ailsa Lodge Nursing Home**

DECISION ON REVIEW

The decision of the tribunal is that the claimant's application for a review is not upheld and the tribunal confirms the decision as promulgated in its entirety.

Constitution of Tribunal:

Employment Judge (sitting alone): **Employment Judge Leonard**

Appearances:

The claimant appeared and was represented by her son, Adrian Gyanyi.

The respondent did not appear and was not represented.

REASONS

1. The decision of the tribunal ("the Decision") was promulgated by the tribunal on 2 May 2018. The Decision provided, firstly, that the claimant's claim for unlawful deduction of wages was dismissed and, secondly, that the respondent's claim against the claimant for breach of contract was upheld and the tribunal Ordered the claimant to pay to the respondent the sum of £105.00.

2. By document ("the Review Request") dated 11 May 2018 sent to the Office of Tribunals on 14 May 2018 the claimant requested a review of the Decision on the single ground stated, "(e) the interests of justice". The claimant set forth in the Review Request the basis upon which it was contended that the Decision ought properly to be reviewed, for the reasons stated.

THE APPLICABLE LAW

3. The applicable law in connection with review of a non-default judgment is contained within Rule 34 of the tribunal's Rules of Procedure ("the Rules") which Rules are set forth in Schedule One to the Industrial Tribunals (Constitution and Rules of

Procedure) Regulations (Northern Ireland) 2005. Rule 34(3)(e) of the Rules provides that a decision of a tribunal may be reviewed on the ground that the interests of justice require such a review. It is upon that specific ground, alone, that the application on behalf of the claimant is now made in this case. Under Rule 35 of the Rules the application to have a decision reviewed is first considered by the Chairman of the tribunal (now an Employment Judge) and that person shall refuse the application if he or she considers that there are no grounds for the decision to be reviewed under Rule 34(3) or if there is no reasonable prospect of the Decision being varied or revoked. In this matter the Employment Judge deemed it appropriate that the matter, under Rule 35(3), proceeded to a review hearing. The review was accordingly conducted on foot of the provisions of Rule 36 of the Rules. The oral hearing under Rule 36 took place on 27 July 2018.

4. In relation to the specific ground upon which a review has been sought in this case by the claimant, the judicial interpretation of that specific ground by the courts and tribunals has, to a degree, been refined and altered over recent years. That is especially so since the introduction of the statutory overriding objective; that latter is a fundamental requirement of justice and is, as a consequence, enshrined and accorded prominence within the Rules. Accordingly, to take one example, there is no longer any "exceptionality hurdle" (as it was known) required to be traversed by any applicant for review on the "interests of justice" ground. Before that, it had been the commonly accepted view that there was required to be some manner, for example, of "procedural mishap" occurring, or something akin to that, which constituted a denial to a party of a fair and proper opportunity to present a case (see ***Trimble v Supertravel Ltd [1982] ICR 440***). The judgment of Mr Justice Underhill in the Employment Appeals Tribunal case of ***Council of the City of Newcastle Upon Tyne v Marsden [2010] UKEAT 0393_09_2301*** provides a very useful, detailed and thorough analysis of the contemporary position. It is that position which is properly to be followed by this tribunal. From the judgment in ***Marsden*** and with the assistance of other leading cases (see for example ***Williams v Ferrosan Ltd [2004] IRLR 607, Sodexho v Gibbons [2005] IRLR 836*** and ***Jurkowska v HLMAD Ltd [2008] IRLR 430***, providing an authoritative interpretation of the earlier cases of ***Flint v Eastern Electricity Board [1975] IRLR 277*** and ***Lindsay v Ironsides Ray & Vials [1994] ICR 384***), the following principles may be distilled and are to be appropriately applied:-

4.1 In the exercise of the discretion vested in the tribunal in conducting a review based upon the interests of justice ground, a significant factor to be borne in mind is one of finality in regard to any proceedings. Mere dissatisfaction with the outcome of any matter, where a party perhaps seeks to revisit issues arising from such dissatisfaction, of itself, can never be a proper reason to review a decision, in the interests of justice.

4.2 The ground of the interests of justice is a residual category intended to confer a wide discretion upon tribunals.

4.3 Justice requires that an equal regard shall be had to the interests and to the legitimate expectations of both parties. The successful party should, in general, be entitled to regard a tribunal's determination upon substantive issues as being final, subject to any right of appeal afforded.

4.4 The principles that emerge from the cases of ***Flint v Eastern Electricity Board*** *and* ***Lindsay v Ironsides Ray & Vials*** do remain valid and subsisting. Although those cases should not be regarded as establishing propositions of law giving a conclusive answer in every apparently similar case, such cases are nonetheless valuable for drawing attention to those underlying principles requiring to be considered and applied justly and appropriately.

4.5 It is unjust to give a losing party a "second bite of the cherry", as it has often been referred to. Justice requires accordingly that there shall be had an equal regard to the interests and to the legitimate expectations of both parties. The statutory overriding objective must be borne in mind and applied.

4.6 In respect of the pertinent statutory provisions of the National Minimum Wage Regulations 2015 which bear upon this case, these are further mentioned, in brief, in the tribunal's determination below.

5. The claimant's submissions are set forth by the claimant in the Review Request and these, with the assistance of her son, where amplified in the course of the oral review hearing in this matter. The review application was unopposed by the respondent. It is perhaps worth mentioning that, at the outset of the review hearing, the tribunal sought confirmation from the claimant and from her son that she was fully enabled to participate in the proceedings as, although English is not her first language, the claimant had some degree of understanding of English and she was most fully and ably assisted at all times by her son, who has a complete command of the English language and who was afforded by the tribunal an opportunity to translate any part of the proceedings to ensure that the claimant had a full understanding. Accordingly, the tribunal took care to ensure that the claimant and her son were afforded full participation in the hearing process. The tribunal heard oral submissions by and on behalf of the claimant and documentation was introduced, being extracts from NI Direct advice concerning wages deductions. No statutory provisions or legal authorities were expressly referred to by or on behalf of the claimant. The tribunal, nonetheless, drew to the claimant's attention and to that of her son the relevant statutory provisions and one specific case law authority from the Employment Appeal Tribunal and invited any submissions, specifically, in respect of these provisions and the authority.

6. The tribunal will now summarise the arguments advanced by and on behalf of the claimant.

6.1 The first contention advanced was that the Decision contained an Order that the claimant was to pay to the respondent the cost of training expended by the respondent on behalf of the claimant in the period of two years prior to the effective date of termination of the employment contract. This was represented by the sum of £105.00. It was contended that this was an error on behalf of the tribunal to make an Order requiring the claimant to repay this sum. As such Order had the effect of bringing the claimant's final instalment of wages below the level of wages protected by the statutory National Minimum Wage provisions. Here, it is understood that the claimant is referring to the National Minimum Wage Regulations 2015 (the "NMW Regulations"), which came into force on 6 April 2015. Thus the NMW Regulations were the applicable regulations in force at the time of the employment contract coming to an end. The tribunal had determined in the Decision that the effective date of termination was 24 April 2017.

6.2 The second argument advanced on behalf of the claimant was that the deductions made by the respondent from the final instalment of wages otherwise payable to the claimant under the contract terms, likewise, had the effect of bringing the wages to a level below that protected by the NMW Regulations.

6.3 The third argument advanced on behalf of the claimant was that the tribunal had made an error in determining that the employment contract terms giving rise to the deduction, in other words the clause in the contract of employment numbered 3.7 (as mentioned in the Decision) which provided that the claimant was obliged to provide to the respondent a period of three weeks' notice of termination of contract, did not constitute a penalty clause.

6.4 The fourth argument advanced on behalf of the claimant was that work-related training was provided by the respondent to employees, including to the claimant, on a year-by-year basis. The claimant's argument was that, whilst she had put her signature on the contract document providing for the specified terms, she had not really understood the legal implications. In particular, she had not understood the provisions regarding the cost of training and the obligation to refund that cost of training incurred in the two years prior to termination of contract to her employer. The latter is a reference to clause 16.7 of the contract terms and Employee Handbook (as mentioned in the Decision) and to other associated terms in that respect. As the argument was articulated on behalf of the claimant by her son, Adrian, each year properly had to be seen in isolation. It was not permissible, it was contended, for the employer to seek to recoup money in respect of training costs in excess of the current year. This argument was advanced, presumably, notwithstanding the content of the contract term in that respect, mentioned above.

THE TRIBUNAL'S DETERMINATION OF THE APPLICATION FOR REVIEW

7. Taking account of the written and oral submissions made by or on behalf of the claimant, the tribunal is obliged to apply the by now well-settled principles of law such as are to be found in ***Council of the City of Newcastle Upon Tyne v Marsden***, cited above. The purpose of the review procedure is not to afford to a dissatisfied party a chance to re-argue the case nor to have re-opened issues which have been properly and judicially determined upon the weight of the evidence and by proper application of the law to any determined material facts.

8. Addressing then the various elements of the submissions advanced, firstly, the tribunal notes the provisions of the NMW Regulations. The material provision is Regulation 12 (2)(a) which provides a statutory exception concerning certain deductions and payments which are not to be treated as reductions. The express wording of Regulation 12 (2)(a) (providing for the statutory exception where these are not to be treated as reductions) reads as follows: "*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*". The tribunal discussed the content of this statutory provision with the claimant and her son and afforded them an opportunity to make submissions on this point in the light of the interpretation of the phrase "*or any other event*" in the case of ***Commissioners for Revenue and Customs – v – Lorne Stewart Plc UKEAT/0250/14/LA***. In that case, His Honour Judge Shanks in the Employment Appeal Tribunal ("EAT") examined the provisions of NMW Regulations, (in that case the legislative

predecessor to Regulation 12 (2)(a) but otherwise following the same wording) and the proper interpretation of the phrase "*any other event*". The examination of that phrase was conducted by the EAT in a factual context which is indeed not dissimilar to this case. In ***Lorne Stewart*** there had been a contract term which provided for the employer to recoup the (apportioned and reducing) cost of training for a period of up to 2 years prior to the employee leaving the employment. This was a case where the deduction (or reduction) made by the employer under the contract term was challenged by the Commissioners for Revenue and Customs on the basis that this brought the wages below the national minimum wage. The EAT in ***Lorne Stewart*** determined that the employer had indeed properly taken the apportioned cost of training from the final instalment of wages and that this was not an unlawful deduction. In a voluntary resignation of an employee (in that case as in this) whilst the word "conduct" in the statutory provision is very likely to amount to "misconduct", the next expression, "any other event", provides additionally for an event which is not in any way akin to "conduct" (or indeed "misconduct"). Thus a voluntary resignation (as in this case) can amount to such an "event". It falls within the ambit of the statutory provision. On this basis the EAT in ***Lorne Stewart*** determined that there was no unlawful deduction (or reduction) by the employer. Decisions of the EAT are not binding upon this tribunal. However, they are persuasive. They are normally followed in this jurisdiction unless there is good cause to depart from the reasoning. That being so, the tribunal follows the EAT's determination in ***Lorne Stewart.*** The tribunal does not accept the argument advanced that the tribunal is in error in determining that the cost of training is properly recoverable by the respondent from the claimant. In this case the figure of £105.00 has been determined by the tribunal. Accordingly, the tribunal's Order stands and is affirmed, requiring that sum to be paid by the claimant to the respondent and the application for a review on this ground is dismissed.

9. The second and third arguments under the "interests of justice" ground, may be taken together, for the argument made by the claimant is that deductions made from the final instalment of wages otherwise payable to the claimant, under the contract terms, likewise, had the effect of bringing the wages to a level below that protected by the NMW Regulations. It is, additionally, contended that the tribunal has made an error in determining that the relevant contract term did not constitute a penalty clause. That was the term giving rise to the deduction, being the clause in the contract of employment, numbered 3.7, which provided that the claimant was obliged to provide to the respondent a period of three weeks' notice of termination of contract. Dealing with these contentions, in the Decision the tribunal has set forth the current law concerning penalty clauses and has explored the issue of whether the specific contract term under scrutiny might be deemed a penalty clause. Applying the current law to that issue, the tribunal's determination in the Decision was that this was not a penalty clause. The clause in the contract was thus enforceable by the respondent against the claimant. Furthermore, the argument was advanced by the claimant at the original hearing that in some way the claimant was not contractually bound by the contract terms. That latter argument was rejected by the tribunal. It cannot be re-litigated in this review. The settled law is that the purpose of the statutory review process is not to afford a party a second opportunity to advance an argument that has failed in the first instance. To argue that an employer who has a perfectly valid and enforceable contractual provision (which is not a penalty clause) and which that employer consequently seeks to invoke is deprived of a remedy against an employee who has, of their own volition, severed the contract, is not a sustainable argument in the view of this tribunal.

There is nothing in the provisions of Article 45 of the Employment Rights (Northern Ireland) Order 1996 prohibiting this. As mentioned, a voluntary resignation (again, as in this case) can amount to such an "event". On the same basis as was determined by the EAT in ***Lorne Stewart*** there is no unlawful deduction (or reduction) by the employer. The respondent is entitled to enforce the terms of the contract against the claimant, including this specific contractual provision regarding notice required to be given by the employee. There has also been an argument advanced in this review hearing that if the claimant had known the full force and effect of this contractual term about notice, she would indeed have given due notice. The inescapable fact is that she was bound by these contractual terms. The tribunal has made that clear determination in the Decision. The claimant had failed to give due notice. The respondent is entitled to rely upon the contractual term. Accordingly, the submission is not upheld by the tribunal and the tribunal's Decision in that regard is confirmed.

10. The fourth and final argument sought to be advanced on behalf of the claimant is that work-related training was provided by the respondent on a year-by-year basis. The claimant's argument was that she had not really understood the legal implications regarding the cost of training and the obligation on her part to refund the cost of training incurred in the two years prior to termination of contract to her employer. However, clause 16.7 of the contract terms and other associated terms are clear; the tribunal has already determined that the claimant is bound by these contract terms. The tribunal cannot accept the argument that, for some reason, each year had to be seen in isolation and that it was not permissible for the employer to seek to recoup money in respect of training costs covering the two years provided for in the contract. This argument stands no prospect of success as a ground for review of the Decision. Accordingly, the argument is not upheld by the tribunal.

11. The tribunal, in general terms, is obliged to determine each case upon its own merits and upon the basis of the evidence adduced and by the proper and proportionate application of the law. In this case, the tribunal can observe no basis upon which the Decision might properly be set aside or upon which the Decision might otherwise be in any way altered or amended, upon the interests of justice. Accordingly, the application for a review made by and on behalf of the claimant is refused. The tribunal upholds and affirms the Decision in its entirety, as promulgated.

Employment Judge:

Date and place of hearing: 27 July 2018, Belfast.

Date decision recorded in register and issued to parties: