EMPLOYMENT TRIBUNALS

Claimant: Mr D Suppo

Respondent: Sheldon Phillips Ltd

Heard at: Watford, by video **On:** 24th April 2023

Before: Employment Judge Reed

Representation
Claimant: In person
Respondent: Mr Mordey, Representative

RESERVED JUDGMENT

1. The Claimant's claim for unlawful deduction of wages is well-founded and succeeds. The Respondent is ordered to pay the sum of £995 to the Claimant.

REASONS

Introduction

1. Mr Suppo worked for the Respondent, Sheldon Phillips Ltd. He attended a training course that Sheldon Phillips paid for. When he was dismissed, the cost of that course, £995, was deducted from his final wages.

2. Mr Suppo claims this deduction was unlawful.

Procedure

3. The Tribunal heard evidence for Mr Suppo, the claimant and Mr Jamie Trick, the Owner and Director of Sheldon Phillips. There was an agreed bundle of 61 pages. References to page numbers in this decision refer to that bundle unless otherwise indicated.

4. At the beginning of the hearing, I raised with the parties the potential relevance of the law relating to the National Minimum Wage. It seemed to me from reading the papers that training fee deduction meant that Mr Suppo had been paid below the headline rate of the NMW. I would therefore need to consider whether the NMW regime had any impact on the operation of the repayment clause.

5. Both parties agreed this issue could be dealt with within the original listing and made oral submissions. Both had the opportunity to make further written submissions, which Mr Mordey did on behalf of the respondent.

Findings of fact

6. Based on the oral and documentary evidence I made the following findings of fact. These findings are made on the civil standard of proof, which is the balance of probabilities. This means that I have concluded that these facts are more likely to be true than not.

7. Sheldon Philips is a recruitment agency, operating within the social work sector. It supplies qualified social workers for both locum and permanent roles.

8. Mr Suppo was employed from 23rd May 2022 by Sheldon Phillips as a Trainee Recruitment Consultant. He was recruited by Mr Trick, the Owner / Director.

Terms of agreement

9. On, 17th May 2022, before beginning work Mr Suppo had been sent a written statement of particulars of employment, p30-34. It includes provisions relating to salary (an annual salary of £19,000) and hours of work (8.30am to 5.30pm, Monday to Friday, with an hour lunch break).

10. The statement also contained:

    a. A clause providing that hours may vary and that Mr Sappo may be expected to work such additional hours as may be necessary for the proper discharge of his duties, see ¶6.2, p31.
    b. A probationary period of six months, ¶4, p30.
    c. A clause allowing Sheldon Philips to deduct money owed to the company by Mr Suppo from any payment due to him, see ¶7.3, p 31.

11. Mr Trick and Mr Suppo agreed that Mr Suppo would attend training, which would be initially paid for by Sheldon Phillips.

12. On 6th June 2022 Mr Trick also sent an addendum to the written particulars, which dealt with the foundation course Mr Suppo would attend. It set out the cost of the course (£995) and that this would be paid by Sheldon Philips.

13. The addendum goes on to deal with the circumstances that the cost of the course might be deducted from Mr Suppo's salary. The relevant paragraph reads:

You have agreed that should you leave employment with Sheldon Phillips Ltd within 6 months of the start of your employment, which was Monday 23rd May 2022, the full cost of the Qualification will be deducted from your salary.

14. Both the particulars and addendum were signed by Mr Suppo on the 6th June 2022.

15. There is a significant dispute between the parties as to the discussions they had around the training course costs and the circumstances in which they would have to be repaid.

16. Mr Suppo says that around the 16th May he had a telephone conversation with Mr Trick about the job offer. He says that, Mr Trick told him that he would need to go on training which Sheldon Phillips would pay for, but this money would have to be repaid if he left the company within six months.

17. He says he was concerned about the possibility of having to repay the fee, which he could ill afford. He says, in particular, that he did not want to be required to repay the fee if Mr Trick dismissed him, since that would be outside his control. He says he requested that the probationary period be changed from 12 months to 6 months and raised his concerns about the repayment of the training fee.

18. Mr Suppo says that Mr Trick agreed to reduce the probationary period and also said, in relation to the repaying of the training fee, words to the effect of 'I can't take money off you if I sack you, it's only if you leave'. Mr Suppo said that this reassured him, since he felt that, whatever happened, he could stick out the employment for six months.

19. Mr Trick agrees that there was phone conversation occurred around this time. He agrees that they discussed training and that Mr Suppo raised concerns about the repayment aspect. But he says that there was no suggestion of a 12 month probationary period; it was always 6 months. He says that, in reply to Mr Suppo's concerns, he told him that the repayment of training fees if an employee left was a standard term and that it would be set out in an addendum to the particulars. He says that he expressly refused to change the agreement so that repayment would only be due if Mr Suppo resigned.

20. He says he went on to say that if Mr Suppo was worried about being sacked at this early stage it was possible that the role was not for him. He says that Mr Suppo accepted his reassurance that the term was a standard one and did not raise further concerns.

21. Both Mr Suppo and Mr Trick agree that no change was made to the wording of the addendum after it was sent to Mr Suppo and that he did not raise concerns about the wording. Mr Suppo says that, following the earlier reassurance from Mr Trick, he took the reference to 'leave' to refer only to a resignation by him, rather than a dismissal by Mr Trick.

22. There is no direct documentary evidence as to these conversations that assists in resolving this dispute. It is therefore a matter of considering the credibility of the evidence of Mr Suppo and Mr Trick.

23. There was nothing their manner of giving evidence that points to dishonesty or lack of reliability. Both maintained their accounts under cross-examination. I, in any event, bear in mind the well-known difficulty of drawing conclusions as to veracity from the way in which a witness gives their evidence.

24. Overall, I accept Mr Trick's account, because it seems to me to be, in the circumstances, the more plausible one. Mr Trick appeared to me to be a manager with firm views about the way his business should be run and generally wished those to prevail. In part this was apparent from his evidence, but in addition it is clear from the way he handled events around Mr Suppo's dismissal.

25. If Mr Trick had initially proposed a 12-month probationary period I do not think he would have been happy to alter it at the suggestion of the candidate for the role – particular one as junior as Mr Suppo. Further, if he had done so, he would have been likely to refer to it himself in his evidence. Such a change plainly had no bearing on the subject matter of the claim itself, so there would be no reason to conceal it. Mr Trick would have been likely to emphasise it, as evidence of his reasonableness and, as he would see it, Mr Suppo's intransigence / poor attitude.

26. I therefore find Mr Trick's account that the probationary period was always set at six months and was not changed at Mr Suppo's request, a plausible one. This does not prove that his account is accurate in other respects, but does suggest that it is, in general, the more reliable one.

27. Further, both Mr Trick and Mr Suppo agreed that Mr Trick expressed the view that, if Mr Suppo was worried about being fired in the first six months of employment, it was possible the job was not for him. There is nothing inherently incompatible with Mr Trick expressing that view while also saying that repayment would only occur if Mr Suppo resigned. It is, however, a statement that flows more naturally from Mr Trick taking a firm view that repayment would be necessary regardless of why the employed ceased. Again, this makes Mr Trick's account somewhat more plausible than Mr Suppo's.

28. I therefore conclude that Mr Trick had told Mr Suppo that the training fee would have to repaid if he was dismissed within the first six months of employment and that he expressly refused to change the terms of the contract so that repayment would only occur if Mr Suppo resigned. It follows from this that both parties understood the agreement to be that the sum would have to be repaid if Mr Suppo was dismissed.

Events during employment

29. On 15th August 2022 Mr Trick sent Mr Suppo an email regarding his toilet breaks, p48. It is not disputed that Mr Suppo has a medical condition which means that he requires more frequent breaks than an average person.

30. Mr Trick's email acknowledged that, but notes that the breaks 'are racking up again this morning'. In particular, Mr Trick objected to Mr Suppo taking his phone to the toilet.

31. Mr Suppo replies, thanking Mr Trick for understanding that he needs more frequent breaks, p49. He writes that 'I take my phone everywhere I go' and that 'I don't think you can force me to leave it at my desk, especially if I'm going to the toilet where you know I have problems'.

32. Although neither is directly rude, it is fair to describe these emails as prickly. Mr Trick says that he accepts that the breaks are necessary, but there is a clear implication that they are excessive. The references to the phone being unnecessary also suggest that Mr Suppo was taking breaks to use his phone, rather than genuine bathroom breaks.

33. At the same time, Mr Suppo's response is equally blunt.

34. The two then had a conversation in the office. Mr Trick asked Mr Suppo why he was being confrontational over a simple request. Mr Suppo replied that he could not be forced to leave his phone and said that he did not have to 'bow down to you [Mr Trick]'.

35. In his evidence Mr Trick said that Mr Suppo's tone was inappropriate and confrontational. Mr Suppo, in cross-examination, agreed that he was challenging Mr Trick and that he was annoyed with him, but denied that he did anything inappropriate.

36. Overall, I find that both Mr Trick and Mr Suppo were annoyed with each other. Mr Suppo was aggrieved that his toilet breaks, which were medically required, were being scrutinised and did not see why he should not bring his phone. Mr Trick felt he was making a simple enough request regarding the phone and did suspect that Mr Suppo was taking more breaks than he actually needed.

37. The next day, the 16th August 2022, Mr Trick proposed to his staff that they should work an additional 15 minutes at the end of the day to make a few more calls. The business was going through a quiet period and he felt that putting in a little extra time for a few months would generate additional work. During cross-examination Mr Trick agreed that there was no suggestion that anyone would receive additional pay for this work.

38. This suggestion was made in a group meeting of the three employees, including Mr Suppo. Nobody, including Mr Suppo, made any objection at that time. I accept, however, Mr Suppo's evidence that this was presented as something that was going to be happening, rather than a proposal for discussion.

39. On the 17th, however, Mr Suppo left work at 5.30pm as usual.

40. Mr Trick was on annual leave that day, but rang Mr Suppo in the evening at 6pm. He accepts that he was angry about Mr Suppo leaving, as he saw it, early. He wanted to know why Mr Suppo had not stayed the extra 15 minutes. Mr Suppo said that his contracted hours finished at 5.30pm. Mr Trick said in evidence that he was not happy with that attitude and felt that Mr Suppo was challenging a simple request. He told Mr Suppo that they would meet to discuss the matter the following day.

41. Mr Trick met with Mr Suppo on the morning on the 18th August 2022. At the beginning of the meeting Mr Suppo said that he was going to record the meeting on his phone. Mr Trick was unhappy about this, but did not feel he could refuse. He did ask a colleague to attend as a witness.

42. At that meeting, Mr Trick sought to address, as he saw it, Mr Suppo's poor attitude and failure to follow reasonable instructions. At the same time, Mr Suppo maintained his own position that he had done nothing wrong, because he was entitled to push back against Mr Trick's unreasonable requests that he leave his phone at his desk and that he work additional time over his contracted hours.

43. In his evidence, Mr Trick describes Mr Suppo's demeanour during this meeting as obtuse and difficult. He says that the points he was making were met by Mr Suppo shaking his head and, at one point, laughing. He viewed this response as a poor attitude to work that crossed the line into misconduct.

44. In the course of the meeting, Mr Trick concluded that they were not going to able to resolve these issues and that he would therefore dismiss Mr Suppo. He informed Mr Suppo of this and the meeting ended.

45. Mr Trick wrote to Mr Suppo confirming the dismissal, p51. The letter describes the reason for the dismissal as being 'attitude and demeaner towards me as your employer'. It also confirms that Mr Suppo has been dismissed on a week's notice, but will not be required to work during that period. The letter also indicates that Sheldon Philips will be deducting £995 from Mr Suppo's final pay, in respect of the training fee.

46. Mr Suppo was paid in accordance with his final payslip, p52. This covered the month of August 2022 and included:

    a. Salary of £1023.08, from which a deduction of £146.15 was made in respect of two days unpaid sick leave, leaving £876.93. Mr Suppo agreed that he had been off sick and this deduction was correct
    b. A payment in respect of accrued holiday pay and pay in lieu of notice, which both parties agreed was correct.
    c. A deduction of £995 in respect of the training fee.

The law: Unauthorised deduction of wages

47. Section 13(1) of the Employment Right Act 1996 requires that an employer not may a deduction for a worker employed by them, unless that deduction is either required or authorised by a statutory provision statute or by the worker's contract; or that worker has pervious signified in writing their agreement to the deduction.

48. Section 13(3) establishes that a deduction will occur whenever the total amount of wages paid to a worker is less than the total amount of the wages properly payable on that occasion.

49. This means that, in considering a claim for unauthorised deduction of wages, the Tribunal may have to consider and apply principles of contract law, in order

to identify what wages were properly payable, see *Cleeve Link Ltd v Bryla* [2014] ICR 264.

50. In this case, that requires consideration of the penalty clause doctrine. This is set out, in its modern form, by the Supreme Court in *Cavendish Square Holding BV v Talal El Makdessi* [2015] UKSC 67.

51. Essentially, the penalty clause doctrine forbids contractual terms which, upon a contract ending or being broken, impose a detriment on one party that is out of all proportion to any legitimate interest that the other party has in the primary obligations under the contract. In most cases these arise where one party has broken the contract (for example a worker who resigns without giving notice), but I am satisfied that the doctrine may apply equally to cases, such as this one, where the contract ends without any breach of contract.

52. The doctrine is also often described as a rule against clauses that are penal – that is those that seek to punish one party to the contract. A party to a contract has no legitimate interest in merely punishing the other party. A Court or Tribunal will therefore not enforce a clause of that nature.

53. To avoid a clause being a penalty clause and therefore unenforceable, a party must be able to show that there is a commercial justification for it. That may include an intention that a clause have a deterrent effect – i.e. that it encourages compliance with the contract.

54. If there is a commercial justification for a clause, it will still be unenforceable if it is in all the circumstances extravagant, exorbitant, or unconscionable. In considering this question, however, I must bear in mind that it is not for the courts to save a contracting party from having made an unwise bargain or one that turns out to be onerous. It is also relevant, although not determinative, to consider to what extent any payment required in a contract is a genuine pre-estimate of the potential loss to a party.

The law: National Minimum Wage

55. In general, a worker is entitled to be paid no less than the National Minimum Wage, in accordance with the National Minimum Wage Act 1998 and the National Minimum Wage Regulations 2015. References to sections and regulations in what follows are references to this legislation, unless otherwise indicated.

56. Section 17 implies into the contract of any worker who is entitled to the NMW a clause to the effect that they will be paid at a rate that is no lower than the hourly rate of the NMW. Any contractual clause that purports to exclude or limit the operation of the NMW law is void, see regulation 49.

57. That hourly rate depends on the worker's age and when the work is carried out (since the rate normally increases each year). At all relevant times, the NMW rate applicable to Mr Suppo was £9.18 per hour – being the 21-22 age rate.

58. Although the broad intention of the NMW law is simple, its implementation and application is often complex. It must deal with many different working patterns, pay mechanisms and myriad other factors affecting pay.

59. For the purpose of this case, it is sufficient to set out a summary of the general approach, before dealing with the particular kind of deduction concerned in more detail.

60. NMW is considered in terms of individual pay reference periods. A pay reference period is either a month or, if the worker is paid by reference to a shorter period that period, see regulation 6. For each pay reference period, the total remuneration attributable to that period is divided by the hours of work during that period and then compared to the NMW rate, see regulation 7.

61. The hours of work during a pay reference period is determined according to the type of work as set out in regulations 17 to 50. There are four types of work: salaried, time, output and unmeasured. This case concerns salaried work and the number of hours within a pay reference period is therefore calculated according to regulation 22.

62. The remuneration attributable to a pay reference period is dealt with in regulation 9. This case does not raise any particular issue in relation to that.

63. In general, deductions made by an employer for the employer's own use or benefit are treated as reductions to the remuneration received by the worker, see regulation 12(1).

64. In particular, this provision aims to ensure that payment, so far as the NMW is concerned, is made in cash rather than through benefits in kind.

65. There are, however, a number of exceptions to this general rule, set out in regulation 12(2). In particular regulation 12(2)(a) provides that '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'.

66. Guidance on the approach to this issues has been provided by the Court of Appeal in *Revenue and Customs Commissioners v Leisure Employment Services Ltd* [2007] IC 1056 and by the Employment Appeal Tribunal in *Revenue and Customs Commissioners v Lorne Stewart plc* [2015] ICR 708.

67. I draw the following principles from those cases:

    a. The regulations should be approached in a purposive manner, bearing in mind that the purpose is the elimination of payment by benefits in kind and to ensure that workers receive cash in hand for at least the NMW, save in limited exceptions (see ¶7 *Lorne Stewart* and ¶14 *Leisure Employment).*

    b. That the regulations are intended to protect those in the less advantaged areas of the workforce, who may have little job security. The legislator is likely to have sought to protect them through broad, but simple rules. (see ¶14 *Leisure Employment).*

c. Conduct by the worker, in this context, is likely to relate to misconduct, since that is what may give rise to a contractual liability on their part (see ¶12 *Lorne Stewart*).

d. 'Any other event', however, need not relate to something which amounts to misconduct. It must, however, have some relationship to conduct for which the worker is responsible (see ¶12 *Lorne Stewart*).

e. For example, in *Lorne Stewart* the EAT suggest that both a voluntary resignation or damage to property might amount to 'any other event', but dismissal by reason of redundancy or a request to be referred to Occupational Health would not. In the latter cases, the worker could not be said to be responsible for the event.

Conclusions

68. There is no dispute that there was a deduction from Mr Suppo's wages in the amount of £995 and that this was in reference to the training course that Sheldon Philips had paid for.

69. For the reasons set out above, I am satisfied that when both parties agreed to the addendum to Mr Suppo's statement of particulars of employment, they understood that it was intended to apply if Mr Suppo's employment ended in the first six months, whether that resulted from a dismissal or from his resignation. I have not accepted Mr Suppo's evidence to the contrary.

70. In any event, although the term 'leave employment' is somewhat ambiguous, on balance I would have interpreted it as including a dismissal as well as a resignation. In my experience, it is not uncommon for employees who have been dismissed to be described as having 'left employment' or in similar terms.

71. I have also considered whether the addendum amounted to a penalty clause. I find that it did not. Sheldon Philips had a legitimate commercial interest both in encouraging an employee to remain in employment and in recovering the financial cost of the training if they did not.

72. The burden of the clause on an employee, particularly bearing in mind that it might be triggered by the employer's decision rather than their own, is a moderately arduous one. I do not, however, consider that it was extravagant, exorbitant, or unconscionable. In particular, it applied only to the cost of the course itself and the period involved was relatively short. In addition, it only allowed Sheldon Philips to recover the sum from Mr Suppo's salary. If Mr Suppo's employment had ceased at a point where he was owed insufficient money to cover the fee, he would not have incurred any freestanding debt.

73. I am satisfied, therefore, that considering only the contract itself the deduction was authorised by a relevant provision of the contract.

National Minimum Wage

74. In relation to the National Minimum Wage, the case turns on the question of whether the deduction of wages in relation to the course fell within regulation 12(2)(a). If it does, it does not amount to a deduction for the purposes of remuneration under the NMW. If it does not, it does amount to a deduction, meaning that Mr Suppo's remuneration fell below the NMW in the relevant pay reference period.

75. Mr Mordey's argument, in brief, is that the deduction fell within regulation 12(2)(a) because it was made in respect of Mr Suppo's conduct, in particular the actions that led to his dismissal. Alternatively, he argues that there was another event that fell within the second limb of regulation 12(2)(a)

76. I am satisfied that the main reason that Mr Suppo was dismissed was his refusal to work additional time over his contractual hours on the 17th August 2022. This was not the only reason, in that Mr Trick's attitude to that incident was influenced by a) the previous argument over Mr Suppo's toilet use / refusal to leave his mobile phone and b) Mr Suppo's behaviour in the 18th August 2022 meeting.

77. I bear in mind, however, that as of the 16th August there was no intention or expectation on Mr Trick's part that he would dismiss Mr Suppo. There had been a disagreement and Mr Trick was undoubtedly unhappy. It may well have been in his mind that Mr Suppo's probationary period was not going well and that he might not complete it successfully. He did not, however, seek to take any disciplinary action and I do not think such action, at that stage, was in his mind as an immediate next step.

78. In contrast, on the 17th August, when Mr Suppo did not work late, Mr Trick interrupted his annual leave to make a phone call to him after work hours and had a meeting the next day. Although Mr Trick describes his motivation for dismissal as relating to Mr Suppo's attitude, particularly in that meeting, to a large extent that attitude comprised Mr Suppo's firm stance that he had done nothing wrong by leaving at the end of his contractual hours and that he did not intend to stay later in the future. I do not think Mr Trick would have gone so far as to summarily dismiss Mr Suppo either because he wished to record a meeting or because he behaved somewhat dismissively towards Mr Trick, for example by shaking his head or laughing. Rather, it was what lay behind that behaviour – Mr Suppo's refusal to do the additional work Mr Trick wanted.

79. Turning to the application of regulation 12(2)(a), I am satisfied that these matters – i.e Mr Suppo's refusal to leave his phone at his desk, his refusal to work late and his behaviour towards Mr Trick are all matters relating to his conduct.

80. That, however, does not satisfy the conduct limb of regulation 12(2)(a), which requires there to be a deduction in respect of the worker's conduct for which that worker is contractually liable. In other words, it must be the worker's conduct that leads to the contractual liability.

81. While Mr Suppo's actions led to his dismissal, they did not create any contractual liability. That was caused by the dismissal. Had Mr Trick decided not to dismiss Mr Suppo, the clause would not have been triggered and there

would have been no contractual liability. Equally had Mr Suppo been dismissed for some other reason the deduction would have operating in the same way.

82. I must therefore consider whether the dismissal amounted to 'some other event', bearing in mind the guidance in *Lorne Stewart* that such an event must have some relationship to conduct for which the worker is responsible for.

83. In principle, I find that a dismissal by an employer in response to a worker's conduct is capable to amounting to some other event. In particular, it seems to me that where a worker commits serious misconduct and is dismissed as a result, that dismissal should be considered 'some other event' with some relationship to conduct for which the worker is responsible. To say that a misconduct dismissal is not 'some other event' with some relationship to a worker's conduct requires a strained reading of the regulations and guidance in *Lorne Stewart*. If it is not, it is difficult to see what might constitute such 'other event'. It would also mean that certain kinds of contractual liability – those arising directly from misconduct – were treated differently from another kind – those arising on dismissal for misconduct.

84. At the same time, it is not sufficient to simply to show that a dismissal arose, in some general sense, from voluntary behaviour by a worker. In almost any dismissal, it will be possible to trace a causal link from some voluntary action by the worker. Further, on occasion an employer may, in response to conduct that is entirely innocuous, dismiss in a way that is disproportionate or arbitrary. To conclude that such a dismissal is 'some other event' with some relationship to a worker's conduct appears equally as strained.

85. The difficulty, inevitably, is dealing with cases that fall between these two extremes. In the absence of more detailed guidance, I conclude that the correct approach is to consider it as a question of fact and degree: is the decision to dismiss by the employer sufficiently connected to conduct by the worker to establish the type of connection envisaged in *Lorne Stewart*?

86. Because it was the subject of some discussion with Mr Mordey in oral submissions, I will also address the relevance of the contractual distinction between misconduct and gross misconduct (i.e. misconduct sufficiently serious to amount to a fundamental breach of contract).

87. This was a point I raised as possibly of importance. On reflection, however, I accept Mr Mordey's submission that the distinction does not have any legal relevance to the application of regulation 12. As he notes, the EAT in *Lorne Stewart* do not suggest that regulation 12, when it refers to conduct, requires gross misconduct. Given that gross misconduct is not required when considering conduct by the worker, it would be inconsistent to conclude that for a dismissal to amount to 'any other event' it must be in response to gross misconduct by the worker.

88. Further I have concluded that it is inappropriate to seek to apply to the contractual definition of gross misconduct to the statutory language of regulation 12. They are simply separate legal concepts.

89. In practice, I think it would be unusual for a dismissal for gross misconduct not to also be 'some other event' for the purposes of regulation 12. This, however,

is a matter of the underlying fact patterns of dismissals for gross misconduct. A dismissal for conduct that is not serious enough to amount to gross misconduct may, or may not, fall within the 'some other event' definition, depending on the circumstances.

90. Turning back to this case, I have concluded that there is insufficient connection between the dismissal and the conduct of Mr Sappo to bring the following contractual liability within the scope of regulation 12(2)(a) as 'any other event'.

91. In particular, I have had regard to the following factors:

    a. That the main motive for the dismissal was Mr Sappo's refusal to work late.

    b. In this regard, the provisions of the contract and their interaction with the National Minimum Wage law are important. Mr Sappo's contractual hours (5 days a week, 8.30am to 5.30pm, with an hour for lunch) meant that he was working 40 hours a week. He was paid £365.38 week, or £9.13 an hour, slightly below the applicable NMW rate of £9.18.

    c. It is also significant that, although the contract allowed for additional hours as might be necessary to discharge his duties, the situation here was somewhat different. This was not an isolated occasion where Mr Sappo was being asked to stay late to deal with a particular crisis or to complete a core part of his normal job role. Rather he was being asked to work an additional 15 minutes, consistently for a period of several months, to do additional work.

    d. All of this meant that Mr Sappo was entitled to refuse to work the additional time requested by Mr Trick. In my view, this refusal was somewhat analogous to the situation envisaged by the EAT in *Lorne Stewart* regarding a request to be referred to Occupational Health. This was not thought to be something falling within the concept of 'any other event' for these purposes. In both cases, a worker is taking voluntary action and has a form of agency, but are doing so for good reason as a result of circumstances for which they cannot be said to be responsible.

    e. I also consider that, bearing in mind the purpose of the NMW legislation and the need to protect potentially less advantaged workers, the exception in regulation 12 should be construed narrowly. In particular, it should not be construed in such a way that an employer is entitled to enforce a contractual deduction reducing remuneration below the headline rate of the NMW because the worker has refused an instruction that would itself reduce their remuneration below that rate. That would risk fundamentally undermining the NMW regime.

92. I have concluded that Mr Suppo was dismissed because he would not accede to Mr Trick's request that he work, unpaid, additional time to that he was contracted for. Some of his behaviour surrounding that refusal can be criticised as somewhat combative and difficult. But it was the refusal and the maintenance of that refusal that was the key motivation for dismissal. In my view, that takes it outside the scope of regulation 12(2)(a).

93. I am also satisfied that the deduction was for the employer's own use and benefit. It was monies retained by the employer to defray the costs they had incurred in training Mr Suppo. The money saved formed part of the general funds of the business.

94. It therefore follows that the deduction did reduce Mr Suppo's remuneration within the relevant pay reference period of August 2022.

95. It is obvious, given that reduction, that Mr Suppo's remuneration fell below that required by the NMW regime in that pay period.

96. His remuneration was:

    a. His salary of £876.93 (Calculated by deducting the unpaid sick sum from his salary of £1023.08)
    b. His pay in respect of his notice period of £365.38

97. This amounts to £1242.31. From which must be deducted the £995 training fee deduction, leaving £239.31.

98. The salaried hours work in the pay reference period is determined in accordance with regulation 22(2) by dividing the annual basic hours by 12. Mr Suppo contractually worked 40 hours a week or 2,080 hour annually. Divided by 12 that is 173 hours a month. From this figure must also be deducted those hours during the pay reference period for which the employer is contractually entitled to reduce the salary due to absence and does so. In this case that is the 5 working days (40 hours) left in the period after Mr Suppo's notice period ended on the 24th August when he was not employed and therefore not entitled to pay at all. This leaves 133 hours.

99. At the relevant NMW rate of £9.18 Mr Suppo was therefore entitled to be paid £1220.94 in the pay reference period

100. There was therefore an underpayment of £1220.94 minus £239.31, which is £981.63.

101. Since there has been an increase in the NMW rate since that period, it is appropriate to apply the calculation in s17(4). This seeks to calculate the proportional underpayment of the NMW by dividing the under payment by the NMW rate applicable at the time, before multiplying that figure by the current NMW rate. This means is that a worker is entitled to receive remuneration for the hours they have considered to be underpaid, at the same proportion of the current NMW rate.

102. The current NMW rate for those aged 21-22 is £10.18. In Mr Suppo's case, that calculation is therefore:

    (£981.63 / £9.18) multiplied by £10.18 = £1,088.56

103. Mr Suppo has not, however, brought a freestanding National Minimum Wage claim. His claim has only ever been for the deduction of £995. It is therefore appropriate to limit has award to that figure, as that is the only claim.

Employment Judge Reed

2nd June 2023

Date

RESERVED JUDGMENT & REASONS SENT TO THE PARTIES ON

5 June 2023

GDJ
FOR EMPLOYMENT TRIBUNALS