EMPLOYMENT TRIBUNALS

Claimant		***Respondents***
Mr P Bennett	**AND**	Simmons Gainsford LLP

Heard at: London Central **On**: 3 January 2020

Before: Employment Judge Nicolle

Representation

For the Claimant: In person
For the Respondent: Mr G Baker, of counsel

JUDGMENT

1. The claim for an authorised deduction from wages in respect of tuition fees for modules undertaken in the period 30 April 2018 to 22 June 2018 is upheld and the Respondent is ordered to pay the Claimant the sum of £1,053.17.

2. The claim for an authorised deduction from wages in the sum of £600 attributable to examination fees undertaken in November 2018 fails and is dismissed.

REASONS

<u>The Issues</u>

1. In a claim form dated 29 July 2019 the Claimant contends that unauthorised deductions were made for his wages paid in June, July and August 2019. The Respondent made a total deduction of £3,878 from the Claimant's wages which was apportioned with £1,639 being deducted in each of June and July 2019 and the remaining £600 in August 2019. The Claimant accepts that the Respondent was entitled to make deductions in respect of those tuition fees which were referable to courses undertaken in the twelve months prior to his resignation on 9 August 2019 but not in respect of courses undertaken prior to this period. The Claimant further disputes that the Respondent was entitled to deduct the sum of £600 in respect of the final examination he undertook in November 2018. The total disputed amount which the Claimant contends constitutes an unauthorised deduction from his wages is therefore £1,653.17.

2. The issue the I need to determine is whether under the Claimant's contractual terms of employment the Respondent had the right to make deductions in respect of the full sum of £3,878 or whether the correct interpretation of the relevant contractual provisions is that the Respondent's contractual entitlement was to make deductions only in respect of the sum the Claimant accepts of £2,225. Alternatively, that a distinction exists between deductions made for course fees, where work was undertaken outside the period of twelve months prior to the Claimant's resignation, and the payment of the £600 for examination fees.

Findings of Fact

3. The Respondent is a firm of Chartered Accountants providing accountancy and business advisory services to organisations and individuals.

4. The Respondent recruit's graduates (audit trainees) in January and August each year to join a three-year training programme to become ICAEW ACA Chartered Accountants.

5. The Claimant commenced employment with the Respondent as a graduate trainee on 8 August 2016.

6. As part of the Claimant's training he, along with the other graduate trainees, was required to enrol via the HAT Accountancy Group which provides compliance and training for accountancy firms. The external training provider, which is set up by HAT, is Kaplan. The cost of this training is met by the Respondent.

7. An audit trainee has to pass all exams and complete 450 practical workdays during the three-year training programme in order to become qualified. On qualification, the audit trainee applies for membership to the ICAEW.

Contractual Provisions

8. The Claimant was sent an Offer Letter dated 27 June 2016 (the "Offer Letter"). Relevant provisions within this letter are as follows:

- As part of this offer you agree that you will participate in the full HAT Group training programme and, as such, the Firm will meet the costs of your course fees, examination fees and study leave for the first attempt at each professional examination. The firm is a member of the HAT Group of Accountants who will monitor these studies.

- If, for any reason, an agreed study package is terminated without your completing the course and the related examination sitting, the tuition costs incurred by the firm will be repayable by you. Additionally, if you leave the firm within twelve months of qualifying, you will be required to reimburse the previous twelve months' tuition costs.

9. The Respondent seeks to rely on the second limb of the above paragraph. It is acknowledged that the Claimant had completed the course and passed the related examinations in November 2018.

10. The Claimant signed the Respondent's statement of terms and conditions of employment dated 27 June 2016 (the "Employment Contract"). Clause 4 of the Employment Contract entitles the Respondent to make deductions from wages in

various circumstances but of potential relevance for the purposes of the claim before me in respect of "training or course fees".

11. As a graduate training the Claimant was also required to enter the ACA Training Agreement which was also dated 27 June 2016 (the "Training Agreement"). I do not consider that the provisions of the Training Agreement are of assistance to determining the issue before me.

12. The Claimant gave three months' notice of his intention to resign from the Respondent's employment in a letter dated 9 May 2019. His final day of employment with the Respondent was therefore 9 August 2019.

13. In a letter from Kate Garvie, HR Manager (Ms Garvie), dated 21 May 2019 the Claimant was advised regarding various sums to be deducted from his remaining salary payments and the letter set out the sum of £3,878 for tuition costs and examinations fees with a breakdown as to how the Respondent proposed making those deductions with £1,639 being deducted both in June and July 2019 and the final £600 in respect of examination fees in August 2019. In an email of 4 June 2019, the Claimant responded to Ms Garvie and challenged the extent of the deductions proposed. There then followed an ongoing exchange of emails between the Claimant and Ms Garvie in the period up to 12 July 2019. It is not necessary for me to refer to these emails given that they merely set out the issues of dispute which I have already identified.

14. The Respondent relies on invoices from Kaplan dated 30 April 2018 in the sum of £2,070.80 and 15 October 2018 in the sum of £1,207.20. These invoices were included at pages 41 and 43 of the bundle. The Claimant does not dispute any of the entries contained in the 15 October 2018 invoice and therefore I do not need to consider this further.

15. The Claimant disputes the Respondent's ability to deduct from his wages in respect of those modules where he attended courses prior to 9 August 2018. The courses are individually itemised on Kaplan's invoice dated 30 April 2018. The courses and payments which the Claimant contends are not properly repayable by him are as follows:

- SBM Technical Knowledge undertaken between 30 April and 1 May 2018 £235.72
- CS Technical Knowledge undertaken between 2 May and 4 May 2018 £234
- SBM Applied Workshop undertaken between 18 and 19 June 2018 £235.72
- CR Technical Knowledge undertaken between 20 and 22 June 2018 £347.73

16. The Respondent's position is that whilst attendance at these modules was outside the period of twelve months that the entirety of the 30 April 2018 invoice related to the November 2018 examinations. Each of the individual modules (to include those disputed by the Claimant) refer to Nov 18. The Claimant accepts that the examinations he undertook in November 2018 included these modules.

17. Mr Baker originally referred to a difficulty of pro rating the fees attributable to individual modules to include fees payable for ongoing online access to Kaplan's training materials for the purposes of examination preparation. However, this distinction between course and online training fees was subsequently dropped on the basis that the Kaplan invoices included separate, and not disputed, entries for open book entry.

18. The Respondent's position is that a distinction exists between Kaplan fees prior to the 30 April 2018 invoice on the basis that the earlier fees were for courses already completed as part of the certificate and professional levels whilst fees from 30 April 2018 onwards were for the advanced level which formed part of the final November 2018 examination. Ultimately, a trainee needs to complete the entirety of the course with progression to a higher level being conditional on passing all required modules and examinations at proceeding stages.

<u>The Law</u>

19. If the employer reduces salary in breach of contract the relevant legislation is Sections 13 and 27 of the Employment Rights Act 1996 (the "ERA").

S.13 Right not to suffer unauthorised deductions.

(1) An employer shall not make a deduction from wages of a worker employed by him unless—

(a) the deduction is required or authorised to be made by virtue of a statutory provision or a relevant provision of the worker's contract, or

(b) the worker has previously signified in writing his agreement or consent to the making of the deduction.

(2) In this section "relevant provision", in relation to a worker's contract, means a provision of the contract comprised—

(a) in one or more written terms of the contract of which the employer has given the worker a copy on an occasion prior to the employer making the deduction in question, or

(b) in one or more terms of the contract (whether express or implied and, if express, whether oral or in writing) the existence and effect, or combined effect, of which in relation to the worker the employer has notified to the worker in writing on such an occasion.

(3) Where the total amount of wages paid on any occasion by an employer to a worker employed by him is less than the total amount of the wages properly payable by him to the worker on that occasion (after deductions), the amount of the deficiency shall be treated for the purposes of this Part as a deduction made by the employer from the worker's wages on that occasion.

S.27 Meaning of "wages" etc.

(1) In this Part "wages", in relation to a worker, means any sums payable to the worker in connection with his employment, including—

(a) any fee, bonus, commission, holiday pay or other emolument referable to his employment, whether payable under his contract or otherwise.

20. The case turns on the interpretation of the relevant clause in the Employment Contract. Mr Baker in his submissions stated that in interpreting the provision in the Employment Contract I needed to consider the background knowledge which would have been available to the parties in the context of understanding what the contract meant in practice see Arnold v Britton [2015] AC 1619. He also referred to the Judgment of Lord Hoffman in Investors Compensation Scheme v West Bromwich Building Society [1998]

1WLR 896 in which he said that "the meaning of the document is what the parties using those words against the relevant background would reasonably have been understood to mean".

21. Also in Investors Compensation Scheme Ltd v West Bromwich Building Society Lord Hoffman said:

> "The meaning which a document (or any other utterance) would convey to a reasonable man is not the same thing as the meaning of its words. The meaning of words is a matter of dictionaries and grammars; the meaning of the document is what the parties using those words against the relevant background would reasonably have been understood to mean".

22. The principles applied by the courts to the construction or interpretation of commercial documents were helpfully summarised by Popplewell J. in Lukoil Asia Pacific Pte Ltd v Ocean Tankers (Pte) Ltd (The "Ocean Neptune") 249 in the following terms:

> "The court's task is to ascertain the objective meaning of the language which the parties have chosen in which to express their agreement. The court must consider the language used and ascertain what a reasonable person, that is a person who has all the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of the contract, would have understood the parties to have meant. The court must consider the contract as a whole and, depending on the nature, formality and quality of drafting of the contract, give more or less weight to elements of the wider context in reaching its view as to the objective meaning of the language used. If there are two possible constructions, the court is entitled to prefer the construction which is consistent with business common sense and to reject the other".

23. I need to identify the objective meaning of the language which the parties have chosen and to ascertain what a reasonable person would have understood the parties to have meant. I'm not concerned to identify the

subjective understandings of the parties to the contract or the meaning which they subjectively ascribe to the term in dispute and such evidence is therefore inadmissible. Thus, the contract must be interpreted objectively.

24. Every contract is to be construed with reference to its object and the whole of its terms, and accordingly, the whole context must be considered in endeavouring to interpret it, even though the immediate object of inquiry is the meaning of an isolated word or clause.

25. A word or phrase in a contract may be open to more than one potential meaning or interpretation. In such a case the court will consider the language used and ascertain what a reasonable person, that is a person who has all the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of the contract, would have understood the parties to have meant. In doing so, the court must have regard to all the relevant surrounding circumstances. If there are two possible constructions, the court is entitled, but is not obliged, to prefer the construction which is consistent with business common sense and to reject the other.

26. The Claimant argued that the contra proferentem principle should apply given what he contends is ambiguity in the relevant provisions of the Offer Letter and the Employment Contract.

27. Under the contra proferentem principle of construction a contract shall be construed more strongly against the grantor or maker thereof. This principle is only to be applied to remove (and not to create) a doubt or ambiguity and as a last resort where the issue cannot otherwise be resolved by the application of ordinary principles of construction.

28. Mr Baker’s position is that the application of the contra proferentem principle is not applicable to this case as in his submission the words of the Employment Contract are clear in the context of the parties’ background knowledge.

Conclusions

29. I will address the issues relating to examination fees and tuition fees outside a twelve-month period separately.

Examination Fees

30. I consider it to relevant that when read together paragraphs 4 and 5 of the Offer Letter refer to both course fees and examination fees. Paragraph 4, in terms of fees which the Respondent will meet, refers to both course fees and examination fees. The following paragraph refers to a requirement for an employee to reimburse "tuition costs" in the event of their leaving the Respondent's employment within twelve months of qualifying.

31. I consider that the term "tuition costs" is wider than the references to "course fees" and "examination fees" in the previous paragraph and that the most logical interpretation of these provisions in their entirety, given the background knowledge of the parties, is that the Respondent would seek reimbursement for both course and examination fees.

32. Further, in reaching this decision I place reliance on clause 4 of the Employment Contract which refers to "training or course fees" as a potential subject for a deduction. Whilst this clause does not make specific reference to examination fees, I find that the most logical interpretation of this provision, in conjunction with the relevant paragraphs in the Offer Letter, is that both course fees and examination fees would be deducted.

33. I also consider it relevant in reaching this decision that undertaking the course without doing the final examination would in most instances be without end purpose. The course fees are incurred as a necessary precursor to the successful completion of the examinations and therefore it would be illogical for the Respondent to seek reimbursement of the course fees but not those fees in respect of the final examination. I therefore find that the Respondent

was entitled to deduct the sum of £600 for examination fees from the Claimant's wages.

Tuition Fees

34. The Respondent's position is that all tuition fees for courses undertaken as part of the final examinations in November 2018 are within the period of twelve months of the Claimant's resignation notwithstanding that some of the course modules were undertaken outside this twelve-month period. The Claimant's position is that a logical interpretation of the Employment Contract and the Offer Letter is that any such deductions would be limited to fees pertaining to courses actually undertaken in that period of twelve months.

35. The Claimant referred to a potential inconsistency with the approach adopted by the Respondent in respect of other employees. He also referred to other employees apparently regarding the reimbursement provisions as ambiguous. I do not consider that either of these contentions are relevant to the issue I have to determine. My interpretation is based solely on the wording of the Offer Letter, Employment Contract and background position.

36. I need to consider the provisions in the Offer Letter and Employment Contract in the context of the parties' background acknowledge and what they would have understood them to mean.

37. The relevant provision in the Offer Letter refers to "reimbursing the previous twelve months' tuition costs". I find that the most logical interpretation of this provision is that it is confined to those tuition costs where the elements of Kaplan's invoice related to courses undertaken in the period of twelve months prior to the Claimant's resignation.

38. I consider that any alternative interpretation would be subject to considerable ambiguity. I reach this finding based on the uncertainty which would exist regarding what tuition fees were reimbursable depending on the timing of an employee's resignation. If the Respondent's position were to be accepted any resignation by the Claimant within a period of twelve months of

the examinations, he undertook in November 2018 would result in an obligation to reimburse tuition fees for the entirety of the final course modules starting with effect from 30 April 2018. This hypothetical example would therefore result in a repayment obligation arising for tuition fees dating back for a period of up to nineteen months from a November 2019 resignation and I do not consider that this is consistent with the wording of the clause in the Offer Letter.

39. If it had been the Respondent's intention that all tuition fees in respect of an examination undertaken within the period of twelve months of any employee's resignation were reimbursable, I consider that this should have been expressly stated. The terms of the Offer Letter and the Contract of Employment do not expressly state this to be the position and I therefore find that the most logical interpretation is that reimbursement only applies to those elements of the Kaplan tuition fees where the modules were undertaken in the period of twelve months prior to the Claimant's resignation. I find this to be consistent what the most natural interpretation of the wording in the Offer Letter and Employment Contract and what the parties against the relevant background would reasonably have understood them to mean.

40. In reaching this finding I did not need to apply the contra proferentem principle of construction but rather reached my finding on the interpretation of the documents and the relevant background.

41. I therefore find that the deduction of £1,053.17 from the Claimant's wages in respect of modules undertaken by him in the period 30 April 2018 to 22 June 2018 were outside the scope of the repayment and deductions provisions in the Offer Letter and Employment Contract and therefore constituted unauthorised deductions from wages under s.13 of the ERA.

Employment Judge Nicolle

Dated: **6 January 2020**

Sent to the parties on:

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For the Tribunal Office