Appeal No. UKEATS/0045/13/BI

EMPLOYMENT APPEAL TRIBUNAL
52 MELVILLE STREET, EDINBURGH, EH3 7HF

At the Tribunal
On 4 March 2014

Before

THE HONOURABLE MR JUSTICE LANGSTAFF (PRESIDENT)

(SITTING ALONE)

MISS YIZHEN LI — APPELLANT

(1) FIRST MARINE SOLUTIONS LTD
(2) MR DAN MOUTREY — RESPONDENTS

Transcript of Proceedings

JUDGMENT

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APPEARANCES

For the Appellant	MISS YIZHEN LI (The Appellant in Person)
For the Respondents	MR STEPHEN HUGHES (Advocate) Instructed by: Bond Dickinson LLP Oceana House 39-49 Commercial Road Southampton Hampshire SO15 1GA

SUMMARY

CONTRACT OF EMPLOYMENT – Implied term/variation/construction of term

C (a project engineer) was subject to a contract which provided that if she did not work her notice, then to the extent that there was shortfall her employer would deduct a sum equal to the salary to be paid during the shortfall from her. The ET found she did not work her notice. The employer deducted a full month's salary from money otherwise due to her, in the reckoning of which he did not include the notice pay that would have been due had she worked. C accepted this was the effect of the clause and argued that it thus operated as a penalty. An ET found it was not, but was, rather, a genuine pre-estimate of the losses that might be incurred if at short notice a senior professional such as a project engineer had to be recruited to fill an important gap. Her appeal against this decision failed, as did a related appeal against the ET's refusal to consider documents tendered to it by the employer after the evidence had concluded but before submissions, which might have shown that the employer in this case had begun to recruit a replacement before C resigned.

Observations made about the proper construction of a clause such as an issue here in future cases: the EAT was not itself satisfied such a clause would usually be intended to operate as both parties here accepted it did in the present case, and did not wish this case to set an unfortunate precedent for later ones.

THE HONOURABLE MR JUSTICE LANGSTAFF (PRESIDENT)

1. This is an appeal against a decision of an Employment Tribunal at Aberdeen, (Employment Judge Hosie and Mrs McCabe and Mr Bowden) Reasons for which were given on 10 June 2013. No issue arises now in respect of any of its findings by which it dismissed the claims which the Claimant had brought except for an issue which has arisen in respect of Clause 12 of the contract of employment between her and the First Respondent.

2. The contention of the employer was that Clause 12 provided for a genuine pre-estimate of loss in the event that an employee did not work her notice. The employee's case was that the clause operated as a penalty. A subsidiary case which she makes to me is that the circumstances under which a deduction might be made under the clause had not arisen because on the facts, she says, she did not actually refuse to work her notice.

3. The underlying facts are these. They are relevant to the construction of the contractual clause, to which I shall come. The First Respondent, First Marine Services (FMS), was set up in 2009 by Mr Moutrey. Mr Moutrey knew Miss Li from having worked alongside her on a previous employment and valued her abilities as an engineer. He caused her to be engaged, in effect headhunted, with effect from 27 July 2009.

4. From 2011 onwards, she worked on a major contract. The business of FMS was to service the oil trade by providing mooring solutions and rig move and installation services. One such contract, in Egypt, was known as "the Maersk contract". Miss Li was the principal engineer responsible for that contract.

5. On an occasion when she had returned to the UK, a dispute arose between her and Mr Moutrey. It was said by her that what had happened, in effect, justified her in submitting her resignation. The Tribunal, having heard the facts, did not agree. They thought there had been no repudiatory breach. There was thus no constructive dismissal. There was simply a resignation.

6. The contract which the parties had entered into employed Miss Li as a project engineer. It provided for remuneration to be paid monthly in arrears. By clause 12 it dealt with termination. Where termination was by notice clause 12(1) applied. That provided:

> **"Either the Company or the Employee may terminate the Employee's employment hereunder by notice in writing of not less than a minimum period under-noted which may be from time to time adjusted. Reference to the employee's letter of offer should be made, if applicable."**

7. There is then a space, and in a line sitting on its own "1 months notice". Below that, and still part of clause 12(1):

> **"If an employee leaves, without working the appropriate notice, the company will deduct a sum equal in value to the salary payable for the shortfall in the period of notice."**

It was that clause, tersely expressed as it is, which was the focus of discussion below and on this appeal.

8. The Claimant said, in a letter which the Tribunal set out in full at paragraph 47, that she was giving four week's notice as clause 12 required, on the assumption which I am making that four weeks and a month were, in effect, little different in periods of time. She did, however, assert that she had worked so many days as to have outstanding holiday leave. That would exhaust the period of time in respect of which she had given notice and therefore she did not

need to work any longer. This was therefore an assertion of the right to receive her pay until 31 August 2012, that being the date at which her notice was said to expire. Had that been so, she would have received her salary, which was agreed to be £5,000 per month at the time, for that whole period.

9. Her entitlement to holidays was disputed. Mr Moutrey took the view that, far from having holiday owing to her, she had taken more days' holiday than she had been entitled to. So, rather than the company owing her an amount equivalent to working on until 31 August, she would owe it some money, but it did not propose to take any steps to recover that excess.

10. In a letter dated the day after her resignation, he set out that she was due £3,000 salary for the period to 18 July. On top of that were expenses, £2,835.62. He deducted from that a sum in respect of over-utilisation of holidays (that fell away during the course of the argument) and the sum on which this appeal is centred, a deduction under clause 12(1) for shortfall in the period of notice, that being one month's salary, £5,000.

11. If those contentions were right, then the Claimant was owed £835.62 but no more. The Tribunal decided that they were. I shall come to its reasoning in a moment. But to complete the factual record, it recorded that Mr Moutrey had asked her to work her notice and she had refused. She refused because she thought she had outstanding holiday.

12. On 25 July, therefore a week after her resignation, she sent an e-mail to Mr Moutrey to inform him that she was prepared to work her notice from that day. However, having accepted her resignation, Mr Moutrey had already engaged at considerable extra cost a consultant to

replace her on the Egypt project. He therefore responded, saying that it was, in effect, too late. The Tribunal concluded, paragraph 129, as follows:

> **"We were satisfied that Miss Li failed to work her one month's notice. She resigned without giving notice. She claimed erroneously that she was entitled to accrued holidays which would cover her notice period. We have made a finding that she was not entitled to accrued holidays."**

13. Accordingly, as a matter of fact, the Tribunal concluded that she fell within the terms of clause 12(1), as being someone who had left without working the appropriate notice.

The penalty clause issue

14. The parties took the same approach to clause 12(1) below in that, upon their own and joint understanding of it, it provided on its face for a right to the company to have a sum equal to the salary payable to deduct from whatever might be due to a Claimant who had not worked her notice period. Thus the sum referred to in the letter of 19 July 2012 was properly paid and no sum was due unless either the employee should have been treated as working the appropriate notice, as for instance if in an ordinary case she had been prepared to work but her employer had simply refused to let her, wrongly, and if, secondly, the clause was not a penalty clause. If it was a penalty clause, the courts, applying common law principles, would strike it down as unenforceable.

15. The penalty principle originates in **Dunlop Pneumatic Tyre Co Ltd v New Garage & Motor Co Ltd** [1915] AC 79 HL. Lord Dunedin set out the principles as follows:

> **"Though the parties to a contract who use the words 'penalty' or 'liquidated damages' may prima facie be supposed to mean what they say, yet the expression used is not conclusive. The Court must find out whether the payment stipulated is in truth a penalty or liquidated damages. This doctrine may be said to be found passim in nearly every case.**
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> **2. The essence of a penalty is a payment of money stipulated as in terrorem of the offending party; the essence of liquidated damages is a genuine covenanted pre-estimate of damage**

(*Clydebank Engineering and Shipbuilding Co. v. Don Jose Ramos Yzquierdo y Castaneda* [1905] A. C. 6).

3. The question whether a sum stipulated is penalty or liquidated damages is a question of construction to be decided upon the terms and inherent circumstances of each particular contract, judged of as at the time of the making of the contract, not as at the time of the breach (*Public Works Commissioner v. Hills* [1906] A. C. 368 and *Webster v. Bosanquet* [1912] A. C. 394)

4. To assist this task of construction various tests have been suggested, which if applicable to the case under consideration may prove helpful, or even conclusive. Such are:

(*a*) It will be held to be penalty if the sum stipulated for is extravagant and unconscionable in amount in comparison with the greatest loss that could conceivably be proved to have followed from the breach. (Illustration given by Lord Halsbury in *Clydebank Case* 1905] A. C. 6).

(*b*) It will be held to be a penalty if the breach consists only in not paying a sum of money, and the sum stipulated is a sum greater than the sum which ought to have been paid (*Kemble v. Farren* 6 Bing. 141)... This though one of the most ancient instances is truly a corollary to the last test...

(*c*) There is a presumption (but no more) that it is penalty when 'a single lump sum is made payable by way of compensation, on the occurrence of one or more or all of several events, some of which may occasion serious and others but trifling damage' (Lord Watson in Lord *Elphinstone v. Monkland Iron and Coal Co*. 11 App. Cas. 332) On the other hand:

(*d*) It is no obstacle to the sum stipulated being a genuine pre-estimate of damage, that the consequences of the breach are such as to make precise pre-estimation almost an impossibility. On the contrary, that is just the situation when it is probable that pre-estimated damage was the true bargain between the parties (*Clydebank Case*, Lord Halsbury; *Webster v. Bosanquet*, Lord Mersey)."

16. Some of the language used in 1915 may now seem somewhat archaic. Thus modern cases have replaced the expression "extravagant and unconscionable" with "excessive". An important point was made in the judgment of Arden LJ in **Murray v Leisure Play** [2005] EWCA Civ 963 at paragraph 69, where she noted that the burden of showing that a clause for the payment of damages on breach is a penalty clause is on the party who seeks to escape liability under it, not on the party who seeks to enforce it. That is because an agreement, once made, should be honoured. Agreements are made to be observed, not to be disregarded. However, that does not answer the question whether a particular clause is or is not a penalty as opposed to a genuine pre-estimate of damages.

17. The Judge was directed to the fact that in employment contracts it is not unknown for clauses as between employer and employee to be regarded as, on the one hand penalty clauses,

on the other as making provision for liquidated damages being genuine pre-estimates of the sum which might be incurred as a consequence of breach.

18. One such case was that of **Giraud UK Ltd v Smith** UKEAT/1105/99, a judgment of the Appeal Tribunal, Maurice Kay J presiding, delivered on 26 June 2000. There, the clause which the Appeal Tribunal considered provided:

> **"If you wish to terminate your employment with us you must give us the period of notice quoted in your contract statement and work it. Unless agreed otherwise, failure to give the proper notice and work it will result in a deduction from your final payment equivalent to the number of days short."**

It is reasonably similar to the clause in issue here. The facts of **Giraud** were that the employee who resigned was a driver in a transport company. There was no suggestion apparent from the report that as such he had any particular expertise, nor that there was any particular reason to think that he might be irreplaceable.

19. The essential reasoning of the Tribunal, having recognised the authorities of **Dunlop v New**, **Philips Hong Kong Ltd** v **Attorney General of Hong Kong** [1993] 61 BLR 49 and **Elsley v Collins Insurance Agencies** [1978] 83 DLR, is contained at paragraph 10. As the parties regarded that contract in **Giraud**, as the Tribunal found, it operated only one way: it did not prevent an employer seeking to recover damages for his actual loss in the event of its being greater than that specified in the clause and the calculation which it laid down. If the loss was nil, the employee would have to suffer the contractual deduction: if it was greater, he would be exposed to the risk of being ordered to pay more than the maximum payment under the contract. It was difficult, in those circumstances, to see how the clause could represent a genuine pre-estimate of loss.

20. A second employment case was **Murray** itself, in which the Judge, Stanley Burnton J, struck down a clause as being a penalty clause and the Court of Appeal reinstated the clause in its effect.

21. The third is again a decision at High Court or equivalent level, that of **Tullett Prebon Group Ltd v Ghaleb el-Hajjali** [2008] EWHC 1924 (QB). In that case Nelson J considered a penalty clause. He concluded, paragraph 71, that there was no reason why an employment contract should not contain a liquidated damages provision, as the cases of **Giraud** and **Murray** established, and he regarded **Giraud** as turning on its own facts. At paragraph 81 he commented that, as the claimants had foresworn any intention to sue for a sum greater than that provided for by the liquidated damages clause **Giraud**, which in any event turned on its own facts, was not applicable.

The Tribunal decision

22. The Tribunal began its discussion of the penalty clause question at paragraph 131. That, and the following paragraphs, read as follows:

> **"131. So far as the enforceability of the provision was concerned, we had to consider whether the provision was in nature properly a provision for liquidate[d] damages or properly a penalty clause, the difference being that a liquidate[d] damages provision is a genuine and reasonable attempt to fix by anticipation the loss which may be expected to follow on a specified kind of breach of contract, fixed to obviate the need to prove loss in a claim for damages, whereas a penalty is a sum to be exacted by way of punishment and not necessarily related to probable loss at all.**
>
> **132. In this regard we found favour with the submission by the respondent's Counsel. We were persuaded that the case of *Giraud* did fall to be distinguished. Unlike the position in the present case, the employer was not required to engage, as a matter of urgency, a highly skilled, qualified and experienced employee to fulfil a pivotal role in the employer's most important contract. The reality of the contract in the present case was that FMS placed a high value on retaining the services and loyalty of Miss Li and to that end included in her remunerative package a generous reassurance against the eventuality of her employment coming to an end at short notice.**
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> **133. At the time of her resignation Miss Li's salary was £50,000 per annum and we heard that in her new employment she is earning £65,000 per annum. FMS had to engage the same calibre of replacement for her to work abroad, at short notice through an Agency at extra cost. We were satisfied on the basis of the evidence which we heard and the level of earnings for an employee of this status, that the provision on the contract was a genuine pre-estimate of**

the loss likely to flow from any breach. It was not a penalty clause designed to secure performance of the contract or, to put it another way, to deter breach of contract.

134. We were also satisfied that £5,000 was not an 'extravagant and unconscionable' sum, and therefore did not offend the principle in *Dunlop*.

135. We were also persuaded that the submission by the respondent's Counsel concerning the relative bargaining power of the parties was well-founded. It was clear that when the parties entered into the contract of employment Mr Moutrey was not in a dominant bargaining position.

136. We arrived at the view, therefore, that the provision in Clause 12(1) was enforceable and that contractually FMS was entitled to make the deduction of £5,000."

23. The Notice of Appeal argued that there was no reason or evidence to support the fact that the Claimant's resignation had caused liquidated damages. It argued that the Tribunal had chosen to ignore crucial evidence showing that FMS had engaged a contractor to replace the Appellant a week before her resignation.

24. It then set out what it was said had happened on the last day of the hearing. The evidence was finished. Submissions were due. At that stage there was a late attempt by the employer to hand in an invoice to show what costs it had actually incurred in obtaining a replacement for Miss Li. The Notice of Appeal said that the invoice contained a date within it which, on the fact of it, showed that contact had been made between Mr Moutrey and the agency for a replacement for Miss Li a week before she resigned. The Appellant pointed that detail out to the Tribunal Judge and, after the Respondent failed to explain it, the Tribunal Judge suggested the Respondent take the piece of evidence out, although it had previously been accepted by the Tribunal and the Appellant.

25. That was explored in the usual way in accordance with paragraph 13 of the Practice Direction 2013. Affidavits were obtained from the Appellant and the Respondent, and on the Appellant's behalf, from a Mr Collin Smith. There were comments from the Tribunal and the members.

26. The conclusion to which I come, having regard to that material, is that legally the document was irrelevant, for reasons I shall explain. Factually, the Judge was suspicious of such a late attempt to add to the productions for the Respondent given the late hour at which they were produced. The evidence had finished. He was therefore unsure what status he should give to the documents, given that no-one could speak to them in evidence. The parties had conducted their cases without regard to that documentation. Accordingly he put it to one side. The evidence is all one way that the Tribunal did not consider its decision having any regard to that documentation.

27. The reason why I consider the document is irrelevant is, first, that if the issue is, as it is here, what a contract term means, that is not to be determined at the date of breach. It must be determined at the date that the contract was made. An agreement is made when the agreement is first instituted. It cannot change its meaning simply because there has been a breach. The meaning of the clause could not be affected by what was, in practice, the amount of loss actually incurred. Otherwise it would be open for the parties to consider that a supposed penalty clause was really a penalty if the amount actually expended by the employer was very little and, conversely, obviously not a penalty if the amount expended was very great. But that question, as the cases demonstrate, is not to be determined at the time of breach but at the time of making the contract. Accordingly the invoice was of no relevance to the issue whether there was a penalty clause.

28. Miss Li, at one stage in her arguments, sought to say that it showed that she had indeed been constructively dismissed. I imagine she had in mind that the employer, if seeking to replace her before she resigned, was in breach of its duty of loyalty towards her. But she did in

fact resign without any knowledge of the invoice and what it might show. The law as to constructive dismissal is that the resignation must be in response to a breach by the employer if the breach is to cause the resignation and thereby the dismissal effected by the resignation to be constructive. Since she did not rely upon it, because she could not, it could not show anything as to the fairness or otherwise or nature or otherwise of the dismissal.

29. Accordingly the Judge correctly, in my view, refused to examine the evidence, which could tell him nothing about either the case as to unfair dismissal or about the case as to penalty clause.

30. The issue as to what it might show, if anything, about credit never arose, because no questions were ever asked or answered about that particular document and what might have been the reason for it.

31. Accordingly I return to the Notice of Appeal. It is said by Miss Li that there was no evidence that there had in fact been liquidated damages. As I have just pointed out, that does not matter because the decision whether the clause is intended to operate as a genuine pre-estimate of loss, on the one hand, or penalty, on the other, is not to be determined in the light of any actual loss but by what was anticipated by the parties at the time they entered into the contract as being likely on termination. In any event, there was evidence, because Mr Moutrey gave evidence that he had incurred significant expense in replacing her. The Tribunal's judgment reflected that.

32. In the skeleton argument produced on behalf of Miss Li the argument is put rather differently. It repeats the argument about the absence of evidence and it seeks to rely upon the

case of **A & J Menswear Retail v Jacobs** [2011] UKEAT/0375/11/DA. That case was a decision by the Appeal Tribunal, presided over by Judge Peter Clark sitting alone, in which the issue was whether or not the claimant was entitled to be paid. She had been told not to return to work "until further notice". Accordingly her employer had told her not to work. Where someone is ready, willing and able to work, and contractually obliged to do so if asked, they are in general entitled to be paid in accordance with their contract. Here, however, the claimant had repudiated her contract by refusing to work under it, although she was obliged to do so, as the Tribunal found. The Tribunal's conclusion, at paragraph 129 set out above, is a conclusion of fact. It is not perverse. There was evidence which entitled the Tribunal to reach that conclusion. This was not a situation in which the employer was refusing to permit the Claimant to come back to work which she was contractually obliged to do, but the rather different situation in which she had, on the Tribunal's findings of fact, said clearly, distinctly, and definitively that she would not do so. It was only later, albeit after only a week, when she recognised that there was a real dispute over holiday pay, that she offered to return, and by then it was too late.

33. What was not argued before me were the legal points which might suggest that the clause was neither a penalty clause nor a genuine pre-estimate of loss, or that showed that the Tribunal might have made an error of law in its approach.

34. I confess to a very real concern about the way in which this particular clause was approached, as I shall express at the end of this judgment. But I have to deal with the arguments as they have been presented by the parties, and with the judgment of the Tribunal on the basis of the arguments which were presented to it. In respect of those arguments, there was

no dispute as to the effect of the clause. The question was simply whether or not it was enforceable so as to produce that effect.

35. The Tribunal distinguished **Giraud**. The Tribunal did not deal with the reasoning which appealed to Maurice Kay J and the members. That reasoning is powerful. Mr Hughes meets it by arguing that, upon a proper construction, in context here, there was no right to receive any sum greater than one calculated by reference to the period provided for by 12(1) in the event that an employee broke her contract by leaving service early and where the employee had incurred significant expense. Instead, he distinguished **Giraud** on the facts. I note that Nelson J, in **Tullett Prebon**, also thought that **Giraud** turned upon its own particular facts. The distinction was a real one. Whereas in **Giraud** the post was that of a driver, whom without more one would think to be fairly easily replaceable, at no particular expense, this contract, on the face of the contract itself, was for a very different type of employee. This was not just an engineer but a project engineer. She was engaged at a high salary compared to that which would apply to a driver. Engineers are not as common as are drivers, and to obtain one at short notice is always likely to be of particular difficulty. Significant expense might be incurred. When the contract as a whole is examined in the context within which it was made, to which reference must be had to decide what the parties intended at the time that they made the contract, it is plain that the fact that she was headhunted meant that the employer placed a particular value upon her services.

36. One passage which gave me concern was the last sentence in paragraph 132. To place a high value on retaining services and loyalty, and to that end include a "generous reassurance against" the employment coming to an end, looks to me logically very much as if the employer is contending that there should be a marked disincentive within the contract for the employee to

go. If so, this is something which seeks to penalise the employee for leaving and thereby dissuade the employee. It is not aimed at compensating the employer for the loss which will actually be incurred if the employee does go. I had, therefore, at one stage in the argument been inclined to think that the reasoning of this Tribunal could not be supported. But the language appeared redolent of an extract from case-law, and Mr Hughes pointed me to the judgment of Sir Richard Buxton in the Court of Appeal, in **Murray**, from which the words come. I note that they were repeated with no disapproval in the course of her earlier judgment in the same case by Arden LJ. Clarke LJ agreed with the judgment that Sir Richard Buxton gave in any event.

37. Accordingly this language comes from a case of high authority which, on matters of principle, binds me. I do not therefore think that the Judge in this case was adopting wrongly a view which showed that he was considering something which was in fact a penalty as though it were not.

38. The Tribunal expressed itself satisfied at paragraph 133 that the provision was a genuine pre-estimate of loss. It is in point to note that in this case, as the employee worked for longer during the period of notice, so the amount of any deduction would diminish. It is almost the reverse of the examples set out in **Dunlop v New**, where there was the same sum of damages to be paid for losses which might be of very different magnitudes. Here it was entirely conceivable that the costs additionally incurred in appointing a successor as a result of notice given would diminish as the notice that the employer actually had of the need to find a replacement increased, which would in practical terms materialise once the resigning employee had left.

39. There is nothing, on the face of it, which means that a sum of a month's salary is necessarily excessive, within the meaning of that phrase in **Dunlop v New** and the cases which have followed it by using more modern language. It was for the Claimant to show that this clause was a penalty clause and not a genuine pre-estimate of loss.

40. The Judge did not consider the construction for which Mr Hughes advances of clause 12(1), that it precluded any other sum being charged by the employer. He distinguished **Giraud** on a factual basis. I am not entirely persuaded that distinguishing it on a factual basis was a sufficient answer to the point of principle. But Mr Hughes's argument is not significantly controverted by Miss Li before me today. It seems to me implicit that, if the clause is to be construed as providing for a sum to be paid because an employee leaves early, then it will be only that sum and no other which will be paid in the event of breach. I accept, therefore, Mr Hughes' submissions to this effect.

41. It follows that, on the grounds upon which this appeal is now advanced, the appeal must fail. The Tribunal was entitled to conclude that this was not a penalty clause. It was the agreement between the parties. The agreement should be performed. The way of doing so was to deduct from the sums due to the Claimant the £5,000 which represented the month for which she did not work.

Observations

42. What was not argued before me was whether the clause should have been construed as having the effect it was said to have. It was that effect which led to the discussion as to whether it was a penalty clause or a genuine pre-estimate of loss. With hesitation, since a similar clause

was analysed in the same way in **Giraud** as being either a penalty, or genuine pre-estimate I would venture these views, which may be of importance in future cases.

43. First, an employment contract should be construed with the reality of employment circumstances in mind. If a Tribunal has a contract such as this to construe in future, it should ask itself whether the parties, in enacting a clause such as this, really intended that, if an employee left not having worked the full amount of notice – irrespective of whether the notice was given by the company or the employee – there should be paid by the employee to the employer a sum equal to the amount of time which was not spent working during that notice period, but should have been.

44. A different construction may better represent the realities of the workplace. Where salary is paid a month in arrears and the notice period is one month, it would normally be understood as fair between the parties that, if an employee were to leave early during that notice period, she would not be paid for the balance of the period. No work, no pay. Yet she would already be entitled to some payment at the end of the month. It is entirely conceivable in these days, when it is recognised that an employer may not make a deduction from sums otherwise due to an employee without there being express provision in the contract to that effect, that a contract should recognise the lack of entitlement to payment for that period by providing for a deduction from the salary cheque otherwise due at the end of the month, equivalent to the shortfall in the period of notice. Thus work two weeks, get paid for two weeks - but not the four weeks covered by the monthly salary cheque if the period of notice is four weeks.

45. This construction would avoid some of the problems which can occur under the clause as this one stands. The clause permits the company only to deduct. It does not entitle the

company to receive or demand a payment, nor oblige the Claimant to make one. When Mr Hughes was asked during the course of argument how it would work if, at the end of one salary period a claimant simply upped sticks and left, he acknowledged that, in the event there was no holiday or other payment due to the employee, there would be nothing to deduct the one month's shortfall from. That, he acknowledged, would put the employer in some difficulty. Similarly, if the employee were summarily dismissed by the employer for proper reason, then there would be no recompense for the employer, although the employee by definition would be at fault in the employer's eyes. This makes it unlikely that there would be a clause in the contract providing that, if she exercised contractual rights, the employee would have to pay, but if the employee simply did not give notice but instead simply failed to turn up to work, and was dismissed for that reason, the employee would have nothing to pay under this clause.

46. Next, I note there is nothing in the language of this clause which suggests, on the face of it, that the company had in mind the additional expenses of recruitment and replacement such as might result from early termination. It is not drafted as if to indicate that the parties had in mind "penalty" or "genuine pre-estimate of loss" at all.

47. Accordingly, I recommend to Tribunals who consider such a clause in future that they may wish to think carefully, in the light of the evidence before them in the particular case, whether the parties actually intended a clause such as this to operate as a penalty clause, liquidated damages clause, or simply as a provision that entitled the employer to withhold pay for the period of time not worked during notice. All will, of course, depend upon the particular conclusions and the particular facts, contracts of employment being individual.

48. That brings me back to where I began the analysis of this case, that the parties here did not dispute that the contract had the meaning which was ascribed to it by the Tribunal, as they had advanced it, the only issue being the legal one whether the Claimant had shown that it was a penalty clause and it should therefore be set aside. The result of this appeal is therefore not affected by the remarks I have just made. I make them only to ensure that this case does not operate as authority that in every similar case there will necessarily be seen to be a clause which operates as a genuine pre-estimate of damage.

49. With those observations, and for those reasons, this appeal is dismissed.