Appeal No. UKEAT/0440/12/BA

EMPLOYMENT APPEAL TRIBUNAL

FLEETBANK HOUSE, 2-6 SALISBURY SQUARE, LONDON EC4Y 8JX

At the Tribunal
On 8 October 2013

Before

HIS HONOUR JUDGE HAND QC

(SITTING ALONE)

CLEEVE LINK LTD APPELLANT

MS E BRYLA RESPONDENT

Transcript of Proceedings

JUDGMENT

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APPEARANCES

For the Appellant	MR IAN SCOTT (of Counsel) Instructed by: Charles Russell LLP Compass House Lypiatt Road Cheltenham Gloucestershire GL50 2QJ
For the Respondent	MS E BRYLA (The Respondent in Person)

SUMMARY

UNLAWFUL DEDUCTION FROM WAGES

The principles enunciated in **Dunlop Pneumatic Tyre Co Ltd v New Garage & Motor Co Ltd** [1915] AC 1979 and re-stated in **Lordsvale Finance PLC v Bank of Zambia** [1996] QB 752, **Alfred McAlpine Capital Projects v Tilebox Ltd** [2005] EWHC 281 TCC, [2005] BLR 271 and **Murray v Leisureplay PLC** [2005] EWCA Civ 963, [2005] IRLR 946 are relevant to the issue of unlawful deductions from wages, because if the sum is a penalty then its deduction cannot be lawful; guidance offered to Employment Tribunals on their application. Here the Employment Judge had struck down a recoupment of expenses provision as a penalty but on the wrong basis. He did not address the position at the time the contract was entered into but at the time of breach. Moreover, he never considered whether there was an extravagant or unconscionable gulf that existed between the maximum amount that could be recovered in a common-law action for damages for breach of contract as opposed to the sum stipulated in the agreement.

HIS HONOUR JUDGE HAND QC

1. This is an appeal against the decision of an Employment Tribunal comprising Employment Judge Maxwell sitting alone at Bristol on 31 May 2012, the written Judgment and Reasons having been sent to the parties on 1 June 2012. The Employment Tribunal upheld claims in respect of unlawful deductions and untaken annual leave. This appeal is concerned with the former. The Judgment from which it is derived is Employment Judge Maxwell's analysis of whether a particular clause in the contract between the Appellant employer and the Claimant, Ms Bryla, was a liquidated damages clause or an unenforceable penalty. Mr Scott of counsel appears on behalf of the Respondent, and Ms Bryla has represented herself. At the outset Mr Greeff of the Charity Good4 you submitted a letter to the Tribunal, and my attention was drawn to earlier correspondence, referring to a decision made by HHJ McMullen QC as to an issue relating to the capacity of the Respondent.

2. I looked at Mr Greeff's correspondence and the reply by those instructing Mr Scott as well as to the letter to which I have just referred quoting the direction given by HHJ McMullen QC. Ms Bryla, however, told me that she was going to represent herself, had the capacity to conduct the proceedings, did not want Mr Greeff to represent her and felt well enough to conduct the matter herself. I therefore concluded that there was currently no issue as to her capacity.

3. There was also an issue at an earlier stage as to whether this Tribunal could appoint an interpreter. The Tribunal decided not to do so. In fact, Ms Bryla speaks clear English and understands English. The proceedings have, however, proceeded at a slightly slower pace than might otherwise have been the case in order to ensure that Ms Bryla did understand everything

that occurred. I have endeavoured to explain to her that the jurisdiction of this Tribunal is to decide whether the Employment Tribunal made an error of law in its decision. That is something that she has had some difficulty with. She has made a series of submissions to me, to which I shall turn in a moment, all of which, it appears to me, relate to the facts of the case.

4. There are two issues in this case raised by Mr Scott's submissions. The first is whether an Employment Tribunal should be concerned with such esoteric matters as to whether a clause in a contract is a penalty clause or a liquidated damages clause or whether, if the deduction comes within the parameters set by section 13 of Part II of the **Employment Rights Act 1996**, which I shall call "the Act", the Employment Tribunal should simply accept that the deduction made pursuant to those parameters – that is to say, either by the contractual agreement or by a specific agreement – is a lawful deduction for the purposes of Part II of the Act.

5. The second issue is whether a clause in the contract, or in this case an agreement that is said to become part of the contract, is valid as a liquidated damages clause or unenforceable as a penalty. That issue arises in a variety of contexts. It is an issue frequently encountered in sale-of-goods contracts of the kind involved in **Dunlop Pneumatic Tyre Co Ltd v New Garage & Motor Co Ltd** [1915] AC 1979. The issue is often encountered in what might be described as financial or commercial contracts, of which the case of **Lordsvale Finance PLC v Bank of Zambia** [1996] QB 752 is a prime example. As the case of **Alfred McAlpine Capital Projects v Tilebox Ltd** [2005] EWHC 281 TCC, [2005] BLR 271 illustrates, this issue also arises in construction contracts. From time to time, the issue can occur in what might be broadly described as an employment context. The case of **Murray v Leisureplay PLC** [2005] EWCA Civ 963, [2005] IRLR 946 provides an example of that.

6. As this appeal illustrates, the issue can arise in what might be described as a pure employment law context in litigation in the Employment Tribunal, but, as this appeal also illustrates, the subject of whether a particular clause is a penalty clause or a liquidated damages clause is by no means straightforward. It is for that reason that I hope that some of what follows might be of assistance to Employment Tribunals generally.

7. By the Notice of Appeal two points arise: firstly, whether a matter of this kind falls within the ambit of section 13 of the Act; and secondly, whether or not the repayment agreement, which is at the heart of this case and which is to be found at page 1 of the appeal bundle, amounted to an unenforceable penalty or whether it was a liquidated damages clause. A third potential issue arose as a result of a remark made by the then President, Underhill J, in the case of **MBL UK Ltd v Quigley** [2009] UKEAT/0061/08. In the case of **Quigley** at paragraph 4 of his Judgment Underhill J said this:

> **"Before I consider the grounds of appeal set out in the Notice of Appeal I should just say this about the Judge's reasoning. With respect to him, I am not sure that the analysis in terms of 'genuine pre-estimate of loss' is correct. That evokes a line of authorities about clauses which purport to liquidate future losses caused by a breach of contract. The £500 stipulated in the present case – as, NB, a maximum not a fixed sum – is to cover expenses incurred during the period of the employment and which will therefore have been incurred at the time that the clause operates."**

8. Mr Scott indicated that he did not wish to develop any arguments that this clause was neither a liquidated damages clause nor a penalty clause but something similar to the clause identified by Underhill J. It seems at least possible that what the President had in mind was that if the clause amounts to the recoupment of expenses that have actually been incurred as opposed to the costs that might arise as a result of breach of the contract in the future, then considerations as to whether or not it is an unlawful penalty do not arise. But because Mr Scott

did not take the point that is an argument, which will have to be left for another day and so I am faced with two matters to decide.

9. The Claimant is a Polish national and was employed by the Respondent for a short period of about 12 weeks between 20 September 2011 and 13 December 2011. She worked as a live-in care worker. She had been recruited by a company in Poland called Miracles Recruitment, and as part of the contractual agreement between the Respondent and Miracles Recruitment the Respondent had paid what is called a standard candidate fee of £400.00 to Miracles Recruitment. It had also paid the costs of the flight to bring the Respondent from Poland to the United Kingdom.

10. By the time that the agreement at page 1 of the appeal bundle is said to have been signed by the Claimant, quite a lot of the items of expenditure set out, in what is effectively an account, may well have already been incurred. The Employment Tribunal found at paragraph 11 of the Judgment at page 6 that Ms Bryla had undergone training on 20, 21, 22 and 23 September and later on 26 September 2011. It is impossible to know in what order the training was done and therefore precisely how much of it had been completed by the time she is said to have signed this agreement on 23 September 2011.

11. I should pause at this point in narrating the facts to say this. Ms Bryla in a cogent and clear series of points made to me took issue with the amount of transport costs or air fare costs, recruitment costs and training costs. She also said that she had never signed the agreement and that the signature that appears at page 1 is not her signature; she had signed there a different document, which was only half a page long; she had never resigned, nor had she been dismissed; she had been very badly treated, having worked excessive hours with very difficult

elderly people suffering from aggressive dementia; and she showed me her work schedule, which appeared to show that she had done 730 hours in a 28-day period. I cannot of course know the extent to which any of her remarks about the work is correct. I can imagine how difficult the work is, but the points that she made are simply all factual points, and, as I have tried to explain to her, my function in this Tribunal is to decide whether the Employment Judge made any error of law. He specifically found that she had signed the agreement, and I anticipate that the submissions addressed to me about her not signing the agreement were addressed to Employment Judge Maxwell. Nevertheless he found that she had been dismissed for misconduct and I cannot interfere with either of those findings.

12. The agreement itself, in the pertinent paragraph, reads as follows:

> **"If the employee's employment is terminated as a result of the employee's misconduct or at the employee's own request within six months of their date of commencement, the employer reserves the right to recoup these costs in full from the employee. This will normally be by deduction from the employees' [sic] final pay or any other monies due to the employee."**

13. The subsequent paragraph deals with a sliding scale, whereby after six months, for each month of completed employment, the costs reduce by one-sixth. As the Employment Judge found, on 13 December 2011, after a disagreement about her work roster, the Claimant was dismissed summarily by the Respondent on the alleged ground of gross misconduct. As I have just sought to explain that is a finding I cannot go behind.

14. At that time she was entitled to £1,203.35 on account of unpaid wages. I have seen the computation; Ms Bryla showed it to me. She disagrees with it, but, again, that is a finding of fact that I cannot go behind. The recruitment costs and so forth were then deducted from the amount owed to her with the result that she was not paid anything.

15. Before the Employment Tribunal Ms Bryla alleged that the deduction of that amount of money represented an unlawful deduction from her wages as provided for by section 13(1) of the Act, which reads:

> **"An employee 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 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."**

16. The Employment Tribunal found that the repayment agreement was a written agreement and thus capable of satisfying the requirements in section 13(1)(b) of the Act. At paragraph 33 of the Judgment the Employment Judge expressed the issue to be as follows:

> **"[…] whether the agreement is enforceable and in particular: whether the sums specified as due amounted to a genuine pre-estimate of the loss the respondent would likely suffer if the claimant resigned or was dismissed for misconduct at a point in time which triggered repayment, or whether instead it amounted to an unenforceable penalty clause."**

17. Twice in his Judgment Employment Judge Maxwell said that he regarded the repayment agreement as stating a genuine pre-estimate of the cost of recruitment. At paragraph 17 of his Judgment he put it in this way:

> **"I find that the figures in the repayment agreement represented a genuine pre-estimate of the cost to the respondent of recruiting the claimant."**

18. And he expressed himself in these terms at paragraph 34:

> **"Whilst I entirely am satisfied the various sums set out at page 25 were a genuine pre-estimate of the cost to the respondent of recruiting the claimant, I am not satisfied it follows from that that they were a genuine pre-estimate of loss. If the claimant had resigned the day after her training completed, then the figures would represent the loss to the respondent, since it would have expended these sums and obtain nothing in return. The Claimant did not, however, resign at that point, rather the respondent had the benefit of her service for 3 months before she was dismissed. Furthermore, the agreement provides for repayment in full where an employee has worked for up to 6 months. Only after 6 months does the amount repayable begin to reduce. This arrangement appears to overcompensate the respondent since it does not reflect the benefit of employing a live-in care worker for up to 6 months in the service of its clients. I find that the agreement does not amount to a genuine pre-estimate of loss and is**

unenforceable as a penalty clause. Accordingly I find the deduction made from the claimant's December pay was unlawful and she is entitled to £781.35 (the sum due for the month to dismissal of £1,203.35, less the payment of £422.50 for untaken holiday which I deal with separately below)."

19. Mr Scott's first point was that the Employment Tribunal should not concern itself with anything more than whether the contractual agreement fitted the parameters set out at section 13. The Employment Judge at paragraph 33 analysed this matter as a section 13(1)(b) case; he could equally, in my judgment, have analysed it as a 13(1)(a) case. Indeed, it could be said to be both; it matters not. Mr Scott's argument is that the Employment Tribunal is not concerned with whether the sum might be unenforceable. That is a matter that is the province of the civil courts, namely the County Court and the High Court. All that the Employment Judge is concerned with is the statutory rubric of section 13 and that once it is established that the agreement for the deduction falls within either subparagraph (a) or subparagraph (b) then that is the end of the matter under the statutory jurisdiction.

20. I do not agree. It seems to me that the deduction contemplated by the contract must be a lawful deduction. If it is a penalty clause, it is not a lawful deduction, and I cannot accept Mr Scott's argument that it is not within the province of the Employment Tribunal to decide this matter. This is no different to a number of other aspects of a contract of employment that fall to be considered, construed and adjudicated upon in the context of the statutory jurisdiction. Employment Tribunals, for instance, have to spend a great deal of time deciding whether somebody is employed under a contract of service or a contract for services; that is a matter of construction of the contract as well as the application of common-law principles. Quite frequently in that context and in other contexts issues of illegality and so-called sham contracts arise. The Employment Tribunal has to decide upon those issues. This issue, in my judgment, is no different.

21. Mr Scott then turned to the second point in the issue of whether or not this was a penalty clause. The law has been restated at page 762G of the **Lordsvale** case by Colman J. That is referred to at paragraphs 26-172 at pages 1,865-1,866 of Volume I of *Chitty on Contracts* in the 31st edition and has been approved by the Court of Appeal in **Murray** and **Euro London Appointments Ltd v Claessens International Ltd** [2006] EWCA Civ 385, [2006] 2 LR 286. In the course of argument I referred to paragraph 762G of **Lordsvale**:

> **"The speeches in *Dunlop Pneumatic Tyre Co. Ltd v New Garage and Motor Co. Ltd* [1915] A.C. 79 show that whether a provision is to be treated as a penalty is a matter of construction to be resolved by asking whether at the time the contract was entered into the predominant contractual function of the provision was to deter a party from breaking the contract or to compensate the innocent party for breach. That the contractual function is deterrent rather than compensatory can be deduced by comparing the amount that would be payable on breach with the loss that might be sustained if breach occurred. Thus the presumption of penalty arises where "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 ... " which is a citation of the speech of Lord Watson in *Lord Elphinstone v. Monkland Iron and Coal Co. Ltd* (1886) 11 App Cas 332. 342.."**

22. There was also reference to 763G-764A:

> **"It is perfectly true that for upwards of a century the courts have been at pains to define penalties by means of distinguishing them for liquidated damages clauses. The question that has always had to be addressed is therefore whether the alleged penalty clause can pass muster as a genuine pre-estimate of loss. That is because the payment of liquidated damages is the most prevalent purpose for which an additional payment on breach might be required under a contract. However, the jurisdiction in relation to penalty clauses is concerned not primarily with the enforcement of inoffensive liquidated damages clauses but rather with protection against the effect of penalty clauses. There would therefore seem to be no reason in principle why a contractual provision the effect of which was to increase the consideration payable under an executory contract upon the happening of a default should be struck down as a penalty if the increase could in the circumstances be explained as commercially justifiable, provided always that its dominant purpose was not to deter the other party from breach."**

23. This restatement by Colman J re-emphasises that the issue as to whether a particular clause in a contract is unenforceable as a penalty or valid as a genuine pre-estimate of damage is one of construction of the provision with the objective of discerning whether, when the contract was entered into, the predominant purpose of the provision was to deter breach or

compensate for it (see page 762G, quoted above). This derives from Lord Dunedin's famous speech in **Dunlop**, and it seems to me to be the appropriate starting point for any discussion of the issue. Of course, all matters of construction of contracts have to be approached from the contextual standpoint identified by Hoffmann LJ in the well-known five-page summary of the principles of construction of contracts in **Investors Compensation Scheme v West Bromwich Building Society** [1997] UKHL 28.

24. Mr Scott submits that the Employment Tribunal should have looked at the repayment agreement at the time the contract was entered into from the perspective of what was commercially justifiable at the time the contract was entered into and not from the standpoint of the particular facts of the particular breach. In the course of argument I mentioned paragraph 43 of the Judgment of Arden LJ in **Murray**:

> **"The usual way of expressing the conclusion that a contractual provision does not impose a penalty is by stating that the provision for the payment of money in the event of breach was a genuine pre-estimate by the parties to the agreement of the damage the innocent party would suffer in the event of breach. As Lord Dunedin said in the *Dunlop* case, the 'essence' of a liquidated damages clause is 'a genuine covenanted pre-estimate of damage' (at page 86). As the Dunlop case and the citation from the *Philips* case (in the *Cine* case) show, a contractual provision does not become a penalty simply because the clause in question results in overpayment in particular circumstances. The parties are allowed a generous margin."**

25. This is reinforced by paragraph 51:

> **"However in the normal situation, the test will be whether or not the parties genuinely pre-estimated the loss that would occur on breach. This is a relatively low level of review: see paragraphs 44 and 45 above. I agree with Mr Bannister that the parties do not have to make an accurate assessment of the damages that would have been awarded at common law. Indeed it may be very difficult for them to do so. That will frequently be the case in an employment contract. In ascertaining whether the parties have made a genuine pre-estimate of the damage, the court will consider the reasons which the parties had for agreeing to the clause in question at the time when the agreement was made."**

26. Arden LJ had distilled what she regarded as the essence of the judgment of the Court of Appeal in **Cine Bes Filmcilik Ve Yapimcilik and Anor v United International Pictures and**

Ors [2003] EWCA Civ 1169 at paragraph 42 of her Judgment and adopted it. She summarised her approach at paragraph 54 and set out five propositions, to which she added that the issue was not to be considered from the point of view of good faith but that of reasonableness.

27. That was echoed in the judgment of Jackson J in **Tilebox** at paragraphs 47 and 48:

> **47. In addition to the authorities which I have mentioned, counsel have also drawn my attention to the relevant passages in *Chitty on Contracts* (29th edition) and *Hudson's Building and Engineering Contracts* (11th edition). At paragraph 10-021 of *Hudson*, the editor states:**
>
> > **'It may be a consequence of producer influence, but there would appear in fact to be virtually no reported cases in the United Kingdom where periodical liquidated damages for delay in building contracts have been held excessive so as to constitute a penalty. Liquidated damages clauses in general are not looked on with the same disfavour at the present day, and modern disallowances seem to arise almost entirely in the field of hire-purchase where Lord Dunedin's principle 4(c) above has frequently been violated.'**
>
> **48. Let me now stand back from the authorities and make four general observations, which are pertinent to the issues in the present case.**
>
> **1. There seem to be two strands in the authorities. In some cases judges consider whether there is an unconscionable or extravagant disproportion between the damages stipulated in the contract and the true amount of damages likely to be suffered. In other cases the courts consider whether the level of damages stipulated was reasonable. Mr Darling submits, and I accept, that these two strands can be reconciled. In my view, a pre-estimate of damages does not have to be right in order to be reasonable. There must be a substantial discrepancy between the level of damages stipulated in the contract and the level of damages which is likely to be suffered before it can be said that the agreed pre-estimate is unreasonable.**
>
> **2. Although many authorities use or echo the phrase 'genuine pre-estimate', the test does not turn upon the genuineness or honesty of the party or parties who made the pre-estimate. The test is primarily an objective one, even though the court has some regard to the thought processes of the parties at the time of contracting.**
>
> **3. Because the rule about penalties is an anomaly within the law of contract, the courts are predisposed, where possible, to uphold contractual terms which fix the level of damages for breach. This predisposition is even stronger in the case of commercial contracts freely entered into between parties of comparable bargaining power.**
>
> **4. Looking at the bundle of authorities provided in this case, I note only four cases where the relevant clause has been struck down as a penalty. These are *Commissioner of Public Works v Hills* [1906] AC 368, *Bridge v Campbell Discount Co Limited* [1962] AC 600, *Workers Trust and Merchant Bank Limited v Dojap Investments Limited* [1993] AC 573, and *Ariston SRL v Charly Records* (Court of Appeal 13th March 1990). In each of these four cases there was, in fact, a very wide gulf between (a) the level of damages likely to be suffered, and (b) the level of damages stipulated in the contract."**

28. Then, at paragraph 54 of her judgment in **Murray** Arden LJ reduced what she had said to five propositions:

"With the benefit of the citation of authority given above, in my judgment, the following (with the explanation given below) constitutes a practical step by step guide as to the questions which the court should ask in a case like this:-

i) To what breaches of contract does the contractual damages provision apply?

ii) What amount is payable on breach under that clause in the parties' agreement?

iii) What amount would be payable if a claim for damages for breach of contract was brought under common law?

iv) What were the parties' reasons for agreeing for the relevant clause?

v) Has the party who seeks to establish that the clause is a penalty shown that the amount payable under the clause was imposed *in terrorem*, or that it does not constitute a genuine pre-estimate of loss for the purposes of the *Dunlop* case, and, if he has shown the latter, is there some other reason which justifies the discrepancy between i) and ii) above?"

29. In one respect, Buxton LJ took a somewhat broader view than had Arden LJ. Clarke LJ agreed with Buxton LJ, and so the judgment of Arden LJ might be characterised as a minority judgment. The scope of the difference covers paragraphs 108-115 of the Judgment in **Murray**, and it would certainly be wearisome to the reader were I to quote the whole of it. The essence can be gathered from paragraphs 110 and 111 and, I think, from the last three sentences of 113 and the first sentence of 114:

"110. That insight requires a recasting in more modern terms of the classic test set out by Lord Dunedin in *Dunlop* [1915] AC at p86:

> **'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'**

That recasting is to be found in the judgment of Colman J in [*Lordsvale*] at 762G, a passage cited with approval by Mance LJ in paragraph 13 of his judgment in the *Cine* case […]:

> **'whether a provision is to be treated as a penalty is a matter of construction to be resolved by asking whether at the time the contract was entered into the predominant contractual function of the provision was to deter a party from breaking the contract or to compensate the innocent party for the breach. That the contractual function is deterrent rather than compensatory can be deduced by comparing the amount that would be payable on breach with the loss that might be sustained if the breach occurred.'**

111. It is important to note that the two alternatives, a deterrent penalty; or a genuine pre-estimate of loss; are indeed alternatives, with no middle ground between them. Accordingly, if the court cannot say with some confidence that the clause is indeed intended as a deterrent, it appears to be forced back upon finding it to be a genuine pre-estimate of loss. That choice illuminates the meaning of the latter phrase. 'Genuine' in this context does not mean 'honest'; and much less, as the argument before us at one stage suggested, that the sum stipulated must be in fact an accurate statement of the loss. Rather, the expression merely underlines the requirement that the clause should be compensatory rather than deterrent. […]

113. […] That also, in my view, is as far as this court went in the *Cine* case itself. That was a summary judgment case, involving no more than the identification of a triable issue: I would draw attention in that connexion to the observations of Thomas LJ in his paragraph [50] and of Peter Gibson LJ in his paragraph [54]. The approach that should be applied at trial would be in more general terms than that suggested by my Lady in her paragraph 42, that always requires a comparison between the liquidated and the common law damages to see if the comparison discloses a discrepancy; and then requires that discrepancy to be justified as a genuine pre-estimate of damages, or by some other form of justification.

114. I venture to disagree with that approach because it introduces a rigid and inflexible element into what should be a broad and general question. […]"

30. This to my mind is a matter of emphasis rather than stark disagreement. Arden LJ was regarded by Buxton LJ as having come to what might be thought to be a narrow-computing approach to the issue by contrasting damages payable on breach and the damages stipulated by the contract. Buxton LJ took the view that this alone could not resolve the issue; his anxiety was that it would impose too detailed and too inflexible a constraint on what he regarded as essentially a broad and general question facing the Court. I think that it is easy enough to pull all the judgments together. Buxton LJ's difficulty was that on his reading of Arden LJ's judgment he regarded it as concentrating too much on the factual difference between the liquidated and the contractual damages. In fact, Arden LJ, in the fifth point of her summary, had referred to the need to consider whether the amount had been imposed in terrorem, and it might not be fair to regard her as focusing exclusively on the mathematical difference. But this is not the place in which to attempt any more detailed reconciliation of their views. Suffice it to say that in a broad approach whether or not a provision is intended to be deterrent can be considered by contrasting, amongst other things, the difference between the sum stipulated and the most that would be likely to awarded by way of damages for breach and what it comes down to, in my judgment, is that all the circumstances are grist to the mill when it comes to construing whether a stipulated clause amounts to a genuine pre-estimate or a penalty.

31. So things to be borne in mind are, firstly the contract falls to be construed at the time it was entered into. Secondly, it falls to be construed on an objective basis; the issues of genuineness and honesty of the parties are not a relevant consideration. Thirdly, the issue, broadly put, is deterrence or genuine pre-estimate but it can involve a question of comparison to be resolved by deciding whether the difference between the amount that could be recovered for loss of breach of contract and the amount stipulated in the contract as a fixed sum is so extravagantly wide of the mark – or, putting it another way, the gulf between them is so great – that is cannot be explained on any other basis than that it is a penalty to deter breach.

32. In my judgment, in this case the Employment Judge misdirected himself. He did not address the position at the time the contract was entered into. He looked at the matter as is illustrated by paragraphs 33 and 34 of his judgment at the time of breach. Moreover, he never considered whether there was an extravagant or unconscionable gulf that existed between the maximum amount that could be recovered in a common-law action for damages for breach of contract as opposed to the sum stipulated in the agreement.

33. Ironically, as Mr Scott has pointed out, he had in fact himself answered these questions in paragraphs 33 and 34 of the judgment. I accept Mr Scott's submission that had he directed himself correctly, his own findings must have led him to the conclusion that this was a liquidated damages clause and that there was a relationship between the amounts and the maximum loss that could be incurred. Employment Judge Maxwell put it himself in these terms:

> **"If the claimant had resigned the day after her training completed, then the figures would represent the loss to the respondent […]."**

34. Indeed, that is mathematically correct and illustrates that the maximum loss was reflected by the amounts stated in the repayment agreement at page 1. In those circumstances, it seems to me that not only has the learned Judge misdirected himself but that the answer is so clear that rather than remit the matter to the Employment Tribunal I should substitute my own judgment for that of the Employment Tribunal. I have all the findings of fact that are necessary, and I have come to the conclusion that this was a liquidated damages clause. The Judge should not have awarded any money to Ms Bryla, and therefore I shall substitute for his finding of penalty that the deduction was a genuine pre-estimate of loss and therefore lawful both at common law and under the Act.