Case Number: 3201417/2018

RM

EMPLOYMENT TRIBUNALS

Claimant: Mr Daniel Gyori

Respondent: Goldex Investments (Essex) Limited T/a Costa Coffee

Heard at: East London Hearing Centre

On: 1 October 2018

Before: Employment Judge Jones

Representation:

Claimant: in person, with Ms R Kovacs, his partner,
With Ms M Oyeyele, Interpreter

Respondent: Mr M Bashir, Consultant (with Managing Director, Mr K Khan)

RESERVED JUDGMENT

The judgment of the Tribunal is that:-

1. **The Respondent has unlawfully deducted the Claimant's wages.**

2. **The Respondent is to pay the Claimant £121.77 as his outstanding wages for 16.5 hours work on the 7, 8 and 9 April 2018 at the rate of £7.38per hour.**

REASONS

1 The claim is for unlawful deduction of wages. The Claimant worked for the Respondent at Costa Coffee, Ilford on 7, 8 and 9 April 2018.

2 The Claimant started work for the Respondent as a trainee barista. He first attended the Respondent's Costa Coffee shop in Ilford on 6 April and met with the manager, Mr Aiyaz. He was given a company handbook and a document entitled terms and conditions of employment. The Claimant was told to sit at a table in the coffee shop to read and sign the documents. Mr Aiyaz did initially sit down with the Claimant and informed him that he could ask questions if he wanted to but Mr Aiyaz was busy and after a few minutes, left the Claimant alone with the documents. Mr Aiyaz did not explain the clauses in the contract in any depth to the Claimant. The Claimant remembered that Mr Aiyaz had to go to the Respondent's other café and that was possibly part of the reason why he left. The Claimant remembered being hurried to sign all the papers and that Mr Aiyaz asked him when he would be able to start. The Claimant remembered that he informed Mr Aiyaz that he wanted to work full-time.

3 The Claimant took the contract and the other documents that Mr Aiyaz had given him. The Claimant is a Hungarian national and speaks very little English. The Claimant did not have an interpreter with him when he went through the documents. The Claimant signed terms and conditions of employment on 6 April.

4 The Claimant worked for the Respondent at the shop on the following day, 7 April, when he was given company tee-shirt.

5 The Claimant recalled being shown how to work some of the machines when his colleagues were not so busy and on occasion, being asked to clean tables and tidy up. The Claimant's evidence was that he did not receive the training referred to in the Respondent's documents but that he was shown how the machine worked and how to make coffee. The Claimant denied that he got the training as set out in the Respondent's documents.

6 The Claimant worked from 6 hours on Saturday, 8 hours on Sunday and 4 hours on Monday. That was a total of 18 hours without breaks or 16.5 hours with breaks at the rate of £7.38ph. Those shifts were worked on the 7, 8 and 9 April 2018. The Claimant wanted to work full-time as he had stated to Mr Aiyaz on the day he signed the contract documents. Sometime on Sunday or Monday he noted that he was not being given full-time hours on the rota and this prompted his decision to resign from the Respondent's employment and find another job.

7 It is the Respondent's case that it costs up to £600 to train someone in its employment. However, the level of training that the Claimant described does not accord with that estimate. The Claimant only worked for three days and his evidence was that during that time he was shown how to make coffee and asked to clean tables. The Respondent produced a document entitled Team Member Training Check List which had been signed and completed by Mr Aiyaz. The Claimant denied that he received all the training set out in that document. There were no documents signed in the Claimant's hand concerning training. The Claimant also worked, cleaned tables and assisted his colleagues over those three shifts. This list referred to training in health and safety, food and drink, customer satisfaction, cleanliness, learning and documenting and other items regarding food and drink and customer service that the Claimant was given at the same time. The Tribunal found that unlikely.

8 On Thursday 12 April, the Claimant wrote a text to the Mr Aiyaz of the Respondent to resign from his employment.

9 The Claimant calculates that he is owed wages for a total of 18 hours worked over the 3 days, 7, 8 and 9 April; at the rate of £7.38 an hour. It is the Respondent's case that if he is owed any money, it would be for 14 hours. The Respondent did not challenge the Claimant on the shifts he stated that he had worked.

10 Once he submitted his resignation, the Claimant and the manager of the coffee shop began to correspond by text message as the Claimant wanted to know when he would get paid for the three shifts that he worked. The Claimant produced copies of those text messages at today's Hearing. There is a text message from the Claimant on 12 April informing Mr Aiyaz that he had found a new job and that he would not be returning to Costa. The Claimant requested his P45 and promised to return the Respondent's tee-shirt on the following day. On 16 April, there was a text message from Mr Aiyaz stating that the Claimant would need to sign his exit interview before he is paid. In another text to the Claimant dated 25 April, Mr Aiyaz stated the following:

> "*As I have informed you before that from store we have sent all your relevant information to Head Office and at the end of this month you will receive your payments after all necessary deduction and you will get your P45. Thank you."*

11 The Claimant has never been paid for the three shifts that he worked.

12 The Respondent's case is that it is entitled to withhold payment from the Claimant because of the terms of Clause 17 of the contract of employment. Mr Aiyaz did not inform the Claimant that any money will be deducted from his wages in respect of a clause in the contract. He did refer to *'necessary deductions'*.

13 Clause 17 stated the following:

> *"By signing this statement you agree to work for Goldex Investments (Essex) Limited for a minimum of six months. Should you wish to terminate your employment with Goldex Investments (Essex) Limited prior to the completion of six months, you agree to a deduction of your last working week's hours from your final wages which will contribute towards training given to you."*

14 Clause 16 of the contract referred to a probationary period of nine months.

15 The Claimant did not receive a P45 from the Respondent.

16 There was no written notification from the Respondent to the Claimant informing him that his wages had been retained in respect of Clause 17 of his employment contract.

17 The Claimant contacted ACAS to begin a conciliation process on 14 June. The certificate was issued on 5 July 2018.

18 In its ET3 response, the Respondent relied on a paragraph in its company handbook stating that "there will be a training deduction of £200 will be applied if your employment is terminated within the first six months of your start date". However, the version of the handbook that the Claimant was given did not contain such a clause.

19 The Claimant went in to Costa, Ilford to see Mr Aiyaz as he was asked to come in to sign exit documents. The Claimant was not allowed to sit with his partner, Ms Kovacs so that she could interpret the documents for him and ensure that he was informed of what he was signing. He was asked to sign without any assistance from her or any interpretation. The Claimant refused to sign the exit form. Mr Aiyaz completed and signed the termination form. The Claimant and Ms Kovacs did not recognise the termination form which was in the bundle of documents and were adamant that Mr Aiyaz had a different form in his possession on the day.

20 Mr Aiyaz is no longer employed by the company and so was unable to give evidence today on this matter. Mr Khan, the Respondent's Chief Executive was unable to comment on Mr Aiyaz's communications with the Claimant as he was not present at the time.

21 Since the Claimant left his employment, the Claimant and Ms Kovacs made numerous telephone calls to the shop to chase his unpaid wages. The Claimant was upset that Mr Aiyaz had embarrassed him in one of their telephone conversation when he stated that the Claimant had not worked there. They also telephoned the Costa Head Office, as they were not aware that the Respondent is a separate franchise of the Costa coffee range rather being part of main Costa organisation.

22 Mr Khan stated in the Hearing that the Claimant ought to have telephoned the Respondent to chase his outstanding wages but an inspection today of the contract documents that Mr Aiyaz gave the Claimant on 6 April did not reveal any contact information for the Respondent. The terms and conditions of employment, the handbook and the other documents contained no contact information for the Respondent. In the circumstances, the Claimant only had contact details for Mr Aiyaz and did his best to contact the Respondent by making telephone calls and sending text messages, the evidence of which was in the bundle brought before the Tribunal today.

23 The Respondent relies on paragraph 17 of the terms and conditions of employment it states that it would cost in excess of £600 to train a member of staff and therefore, they are entitled to withhold the Claimant's wages which are either £421.77 according to the Claimant's calculation or £103.32 according to the Respondent's calculations.

The Law

24 The Tribunal's consideration of this matter begins at Section 13 of the Employment Rights Act 1996 which states as follows:

> *"(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

(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 expressed or implied and, if expressed, whether oral or in writing) the existence and effect, or combined effect, of which in relation to the worker the employer has notified the worker in writing on such an occasion."

25 The facts of this case are very similar to the case referred to the Tribunal by the Respondent. The case of *Cleeve Link Ltd v Bryla* [2014] IRLR 86. In that case, an employer had deducted wages from an employee's final wages an amount representing recruitment and travel costs that were declared in the contract to be recoverable if the employee left within six months of her start date. The EAT held that the tribunal was able to determine the question of whether this was a bona fide liquidated damages clause or an un-enforceable penalty clause properly evidenced before it. The Tribunal had the power to have recourse to the general law in determining the clause and not just to apply Section 13 literally, as it stands. In that case, the EAT held that the clause was not a penalty and the employer had the right to withhold the amount that it did. The wages paid were not less than the sum that was properly payable and the action under Section 13 therefore failed.

26 By contrast, in the case of *Giraud UK Ltd v Smith* [2000] IRLR 763 the employee was required to give four weeks' notice of termination with a proviso that where this was not given, the employer was permitted to make a deduction from the employee's final payment, equivalent to the number of days shortfall. The EAT found this to be other than a genuine pre-estimate of loss and it was a penalty and unenforceable.

27 Recently, the Supreme Court has reconsidered the penalty clause doctrine in contract law. This was in the case of *Cavendish Square Holding BV v TALAL EL Makdessi* [2015] UKSC 67. In that case, the Supreme Court moved away from the simplistic approach of considering that if a clause was not a pre-estimate of loss, that meant it was automatically penal. The Court held that these were not the natural opposites or mutually exclusive categories. A damages clause may be neither or both. A deterrent provision in a contract is not inherently penal or contrary to the policy of the law. The question of whether it is enforceable, should depend on whether the means by which the contracting party's conduct is to be influenced are "unconscionable" or "extravagant" by reference to some norm. The main points, in the judgment for the purposes of application of the doctrine now in employment cases are summarised in para *456.02 of Harvey*s as follows:

"(1) The advantaged party (here the employer) must be able to show that there was commercial justification for the inclusion of a clause; this is not necessarily negated by the fact that the clause has (and indeed is intended to have) a deterrent

effect on that employee, if that can be justified in the circumstances but *on the other hand the employer does not have a valid interest in merely* punishing *the employee.*

(2) If there is such a commercial justification for including a clause, the question becomes whether this *clause was in all the circumstances extravagant, exorbitant or unconscionable; (or) to put it another way was the clause used out of proportion to the legitimate interest concerned? In relation to this crucial question, the issue of whether the clause contained a genuine pre-estimate of potential loss, while no longer determinative, may be in evidence.*

(3) A court or tribunal may be more willing to uphold the clause if it was subject to arm's length negotiation between parties on the equal bargaining power and/or with legal advice. That may be the case in some high-worth employment cases, but in more typical employment cases (involving the use of standard contracts on a take-it-or-leave-it-basis) it will be the opposite principle that will apply, namely that here a court or tribunal may be more convincing that it was not *an unenforceable penalty".*

28 Lastly, in the case of *Li v First Marine Solutions Ltd* UKEAT/0045/13 (4 March 2014 unreported) Langstaff P advised tribunals in future cases to consider carefully three possible interpretations of a repayment clause, i.e. is it:

(a) A penalty clause;

(b) A liquidated damages clause; or

(c) Simply a provision that entitles the employer to withhold payment for the period of time not worked during notice?

Judgment

29 The Claimant did not have English as his first language and needed an interpreter throughout this Hearing. The Respondent made no provision for the additional needs of an employee who does not have English as their first language. Although there was a cursory offer to answer any questions that he may have had on the contractual documents, he did not in fact have the opportunity to ask questions or seek advice before the document was signed. It was not pointed out to him that there were clauses that he should be aware of before signing. The Claimant was not aware of clause 17 when he signed the contract.

30 It is the Respondent's case that it costs up to £600 to train someone in its employment. However, the level of training that the Claimant described does not accord with that estimate. The Claimant only worked three shifts. During those shifts he served customers, was shown how to operate the coffee machine and cleaned tables. In this Tribunal's judgment, it is inconceivable that he could also have had £600 worth of training at the same time. It was not clear that the Training Check list that the Respondent produced related to the Claimant as he had not signed it or any document to show the training given to him. The Claimant denied that he received all the training set out in that

document. It is this Tribunal's judgment that the Claimant had not had £600 worth of training over his 3 shifts.

31 The Tribunal considered clause 17 of the contract and in particular, what was its purpose? The clause does not refer to a set amount that will be deducted if the employee leaves the employment within six months. This is what the Tribunal would expect if the purpose of the clause was to recoup the costs of training that employee who then leaves with all that training without giving the Respondent back some of his/her time. Instead, Clause 17 stated that the Respondent would seek to make a deduction from the employee's last working week's hours from their final wages, which could be a varied sum of money or all of his last week's wages; depending on how many shifts that particular employee worked during their last week. It does not appear to bear any relationship to the costs of training.

32 In its ET3, the Respondent stated that the amount that it was entitled to deduct was £200 but that does not appear in the Claimant's contractual documents before the Tribunal today. Clause 17 entitles it to deduct an unspecified sum.

33 In its communication with the Claimant, though Mr Aiyaz, the Claimant was never told about this clause; not even at the end of his employment. In his last text message to the Claimant Mr Aiyaz referred to 'any possible deductions', but he did not refer to Clause 17. The Claimant could have been understood that to be a reference to deductions for tax and national insurance rather than any particular deduction. This was extremely unhelpful to the Claimant as he was unaware of the Respondent's position and that they were relying on a clause in his contract to withhold all his wages it until he received the response to the claim.

34 In this Tribunal's judgment, Clause 17 was not the subject of arm's length negotiation between parties of equal power. The Claimant did not have the opportunity to seek legal advice on the clause or even to speak to his partner, Ms Kovacs about the clause before signing. The Claimant was not aware that such a clause existed in his contract and never drew it to Ms Kovacs attention until this claim had been brought and he received the Respondent's Response.

35 In a situation where as employee's does not have English as his first language and is not fluent in the language, the Respondent should ensure that the contract is understood at the time of signing.

36 But could it be enforced against him even though he had not understood it? Turning back to the wording of Clause 17 which the Respondent relies on for withholding the Claimant's wages, it is this Tribunal's judgment that it would not be possible at the time the employee is signing the contract to be able to quantify the amount that could be withheld if s/he left within 6 months. It is not easily quantifiable. In the Claimant's case the Respondent is seeking to withhold over one hundred pounds due to the Claimant. In this Tribunal's judgment, if the purpose of the clause was to recoup the cost of training then it should be possible to quantify the amount that would be recouped which would relate to the cost of training any barista spread over the training period. It is also the Tribunal's judgment that the training period is likely to be longer than 3 shifts. The Tribunal was not told how long it would usually last.

37 It is this Tribunal's judgment that the Claimant did not receive £600 worth of training from the Respondent. The Respondent had not been able to show what training he did receive. It is this Tribunal's judgment that the Claimant received limited training during the three shifts that he worked for the Respondent.

38 It is this Tribunal's judgment that this is a penal clause rather than a clause which seeks to recoup real costs of training. There was no evidence that £600 bore any relationship to the true cost of training a barista at Costa or that it had been adjusted to reflect the cost of the training that the Claimant had received. Instead, it was the Respondent's case that he had received £600 worth of training and that they were entitled to withhold all wages due to him.

39 In this Tribunal's judgment, Clause 17 was meant to punish an employee who leaves the Respondent within six months of employment. It is therefore a penal clause and not one that is seeking to recover liquidated damages from the Claimant.

40 It is this Tribunal's judgment, that this penal clause cannot be enforced against the Claimant.

41 The Claimant did not get paid for breaks. He worked a total of 18 hours and in entitled to be paid for 16.5 hours at the rate of £7.38 per hour. The Claimant is entitled to £121.77.

42 The Respondent is ordered to pay the Claimant the sum of £121.77 as his unlawfully withheld wages.

Employment Judge Jones

30 October 2018