THE EMPLOYMENT TRIBUNALS

Between:

Claimant: **Mlle M Malmonté**

Respondent: **Mrs L Kewley**

Hearing at London South on 11 May 2018 before Employment Judge Baron

Appearances

For Claimant: **The Claimant was present in person**

For Respondent: **The Respondent was present in person**

JUDGMENT AT A PRELIMINARY HEARING

It is the judgment of the Tribunal as follows:

1 It is declared that the Respondent made an unlawful deduction from the wages of the Claimant and the Tribunal **orders** the Respondent to pay the sum of £582.50 to the Claimant;

2 That the claim by the Claimant for repayment of expenses in the sum of £192.40 be dismissed.

REASONS

1 The parties will be surprised to read this judgment. Following delivering an oral judgment at the hearing I commenced setting out the judgment out in writing and also writing the reasons for it. I also gave further consideration to the matter. The reason for the change in my decision is dealt with more fully below.

2 The Respondent runs a business of After-School Clubs providing lessons in French, and possibly other languages also. She hires rooms from the schools in question and markets the Clubs to parents. The Clubs were run on a term-by-term basis, usually starting in the second week of a term.

3 To put it briefly, the Claimant worked for the Respondent from the Spring Term 2016 until the end of October 2017 as a Club Leader. She was not paid for the classes she ran during the first half of the Autumn Term 2017. She brings a claim for those payments, and also for some expenses she says she expended in running some classes.

4 The principal issue I have to decide is the legal nature of the relationship between the parties. Section 203 of the Employment Rights Act 1996 provides as follows insofar as is relevant:

230 Employees, workers etc

> (1) In this Act "employee" means an individual who has entered into or works under (or, where the employment has ceased, worked under) a contract of employment.
> (2) In this Act "contract of employment" means a contract of service or apprenticeship, express or implied, and (if it is express) whether oral or in writing.
> (3) In this Act "worker" (except in the phrases "shop worker" and "betting worker") means an individual who has entered into or works under (or, where the employment has ceased, worked under)—
>
> (a) a contract of employment, or
>
> (b) any other contract, whether express or implied and (if it is express) whether oral or in writing, whereby the individual undertakes to do or perform personally any work or services for another party to the contract whose status is not by virtue of the contract that of a client or customer of any profession or business undertaking carried on by the individual;
>
> and any reference to a worker's contract shall be construed accordingly.

5 There are therefore three categories:

5.1 An employee;

5.2 A worker;

5.3 A person carrying on a profession or business, referred to at this hearing as self-employed.

6 Often an employee is referred to as being under a 'contract of / for service' and a worker or self-employed person having a 'contract for services'.

7 If the Claimant were an employee then the Tribunal would have the jurisdiction to consider the claims for both unpaid pay and also expenses. It would also potentially have the jurisdiction to consider any employer's contract claim by the Respondent. Such claim could only be brought if the Claimant were making a claim of breach of contract herself. If the Claimant were a worker then the Tribunal would have the jurisdiction to consider the claim in respect of unpaid pay, but not for expenses. If the Claimant were self-employed then the Tribunal would not have the jurisdiction to consider either claim.

8 I find the material facts to be as below. It is not necessary to recite all the details of the evidence provided to me.

9 On 2 February 2016 the parties entered into what is headed as 'Self Employed Teachers Agreement'. Rather than try to summarise it a copy is appended to this document. Any potentially material provisions are in the sections headed 'Rights Granted' and 'Duties'. I will refer to it as 'the Agreement'. It is not necessary for me to make any findings on most of the provisions.

10 After a short period of 'shadowing' another Club Leader at the beginning of 2016 the Respondent offered the Claimant the responsibility for various Clubs, which the Claimant accepted. She ran classes, invoiced the Respondent and the invoices were paid up to and including the Summer Term 2017.

11 The Claimant was offered the opportunity to run other Clubs, some of which she accepted, and some of which she declined, principally because they were too far away from her home to make running them worthwhile. There was no obligation on the Respondent to offer the Claimant the

opportunity to run any Clubs, nor was there any obligation on the Claimant to run any Clubs which were offered to her by the Respondent.

12 The Respondent supplied some basic teaching materials and also lesson plans. The Claimant, and other Club Leaders, were at liberty to provide other materials or 'props' and were expected to do so. Although the Agreement referred to the 'Le Club Francais methodology' the manner of teaching was not prescriptive. There was no evidence that in practice there was any supervision of the Claimant or her colleagues.

13 The Claimant could, and did, on the odd occasion arrange with another Club Leader for a class to be covered if the Claimant were otherwise committed, and she also covered on the odd occasion for that Club Leader.

14 There were some emails and discussions between the parties in the middle of October 2017 concerning a termination of the Agreement. The Claimant obtained other full time employment. The end result was that during a conversation in the early evening of 20 October 2017 the Claimant informed the Respondent that she would not be continuing with any classes after the half-term break which was just commencing.

15 It is on that basis that I must decide into which category the relationship fell. From oral evidence of the Respondent, and from the heading to the Agreement it is apparent that the desire of the Respondent was that the Claimant should be self-employed, and not be either a worker in relation to, or an employee of, the Respondent. The Respondent also showed me a letter from HM Revenue & Customs of 14 March 2012 to a firm of accountants saying that evidence which had been provided was 'on the whole inconsistent with a contract for service'. I do not know what evidence was supplied. The decision of HMRC obviously does not relate to the Claimant specifically, and it does not mean that therefore anyone working for the Respondent is self-employed.

16 It is abundantly clear that the Claimant cannot have been in business on her own account so as to fall within the exception in section 230(3)(b). Apart from anything else the wording of paragraph 5 under the heading of 'Rights Granted' purports to exclude the Claimant from providing tuition for any other organisation. How therefore, I ask myself rhetorically, can it possibly be said that the Respondent was a client or customer of a business if she was prevented from providing her service to other 'clients'?

17 I also find that at the other end of the spectrum the Claimant was not an employee within section 230(1). There must be mutuality of obligation between the parties. The Respondent must be obliged to provide work, and the Claimant to undertake that work. Further, the Respondent must have sufficient control over the Claimant. Those conditions have not been satisfied.

18 I find that the Claimant was a worker in relation to the Respondent within section 230(3)(b). There was an obligation to provide work personally. I do not accept that any arrangements made for cover between Club Leaders was sufficient to affect the matter. Each class was clearly assigned to a Club Leader for a school term who then had the responsibility for running the classes during that term. As the Claimant was a worker then she had the right to make a claim for unlawful deductions from wages within Part II

of the Employment Rights Act 1996. The relevant provision is section 13(1) as follows:

> **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.

19 Paragraph numbered 7 in the 'Rights Granted' section of the Agreement requires either party to give ten working weeks notice to terminate the agreement. It is not in contention that the Claimant did not comply with that provision and that therefore she was in breach of the contract. The provision continues by saying that any '[f]ailure to give adequate notice will result in forfeiture of half a term's fees in lieu of notice.

20 I have now concluded that that latter provision is void on the basis that it is a penalty for the failure to give the contractual notice, and not a genuine pre-estimate of the loss which the Respondent might suffer as a result of the breach of contract. If a party to a contract is in breach of contract then the innocent party may recover the loss flowing from the breach. It is possible for parties to agree in advance what damages would be payable in the circumstances of one or other party being in breach of contract. No evidence was given by the Respondent as to any losses she had actually suffered, nor how this period of five weeks was arrived at, and she contented herself by saying that it had been applied in many other cases. Be that as it may, I have to decide the case before me.

21 Not only was there no evidence on the matter, I fail to see how forfeiture of half a term's pay can be a genuine pre-estimate of any loss to the Respondent. The same provision would apply whether a Club Leader gave notice of one week or nine weeks. The point of law involved is more fully set out in the judgment of the Employment Appeal Tribunal in *Giraud UK Ltd v. Smith*, a copy of which is appended to this judgment.

Employment Judge Baron

Dated 14 May 2018

GIRAUD UK LTD (appellants) v. SMITH (respondent)

[2000] IRLR 763

The facts:

Mr Smith was employed by the appellant transport company as a driver. His contract of employment required him to give four weeks' notice of termination. It also provided that, "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."

When Mr Smith terminated his employment without notice on 23 February 1999, the employers refused to pay him payments which would otherwise have been due to him on that date claiming that, in accordance with the provision in his contract, they were entitled to a payment from him equivalent to four weeks' pay.

An employment tribunal concluded that the provision was not a lawful liquidated damages clause since it bore no relation to any actual loss which the employers might suffer as a result of the employee's failure to give due notice. According to the tribunal, the intention of the clause was to deter employees from leaving without giving notice and to impose a penalty upon them for doing so. As such, it was an illegal provision which would not be enforced. The employers appealed against that decision.

The Employment Appeal Tribunal (Mr Justice Maurice Kay, Mr P R A Jacques CBE, Mr K M Young CBE) on 26 June 2000 dismissed the appeal. Leave to appeal to the Court of Appeal was refused.

The EAT held:

The employment tribunal had correctly concluded that the clause in the employee's contract of employment which provided that "failure to give the proper notice and work it out will result in a reduction from your final payment equivalent to the number of days short" was an unlawful penalty clause rather than a lawful liquidated damages clause.

As a matter of general principle, a contract of employment may contain a lawful liquidated damages clause, provided that it is a genuine pre-estimate of loss or damage and not a penalty. The clause in the present case, however, did not represent a genuine pre-estimate of loss. It did not seek to place any limitation on the right of the employers to recover damages for actual loss in the event of its being greater than that specified in the clause and the calculation which it laid down. Accordingly, the employee was in a position where if the actual loss turned out to be nil, he would be liable for the calculable sum, but if the actual loss was greater than the calculable sum, he could face an unlimited claim for the balance. The clause was oppressive because it took a form which could be described colloquially as "heads I win, tails you lose."

Cases referred to:

Dunlop Pneumatic Tyre Co Ltd v New Garage & Motor Co [1915] AC 79 HL
Elsey v J G Collins Insurance Agencies Ltd [1978] 83 DLR Supreme Court of Canada
Phillips Hong Kong v AG of Hong Kong [1993] 61 BLR 49 PC

Appearances:

For the Appellants: JOHN STILES, instructed by Legal Personnel and Management Services

For the Respondent: No appearance or representation

1 The origin of the case is that Mr Smith, the applicant in the employment tribunal, had been employed as a driver by the appellant company, which is a transport company. He started to work in November 1996.

2 We do not need to go into the detail of a problem that arose between Mr Smith and the appellant company. Suffice it to say that circumstances arose in February 1999 which led to Mr Smith resigning from the company. His case in the employment tribunal was that he had been driven to that by way of constructive dismissal as a result of a dispute about a bonus. The application to the employment tribunal was by Mr Smith as applicant claiming that he had been unfairly dismissed and relying upon the alleged

constructive dismissal. In the event, the employment tribunal found that there had been no dismissal and that his unfair dismissal claim therefore failed.

3 What this appeal is concerned with was a secondary issue before the employment tribunal. It was a term of Mr Smith's contract of employment that in the event of his not giving notice of termination and working it, he would have to forgo some monetary benefit. The clause was in this form:

> '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.'

4 Under his contract, Mr Smith was required to give four weeks' notice. Following his resignation on 23 February 1999, Mr Smith did not present himself for work again and the appellant company refused to pay him payments which would otherwise have been due to him on that date, because the appellant company claimed a payment from Mr Smith equivalent to four weeks' pay.

5 The issue that arose in relation to this in the employment tribunal was whether that contractual provision was a lawful liquidated damages clause or an unlawful penalty clause.

6 The employment tribunal concluded that it was a penalty. The tribunal had heard evidence from a director of the appellant company, Miss Toothill. The decision of the employment tribunal contains this passage:

> '13. ... As accepted by Miss Toothill it bears no relation either in the manner of calculation or in value to any loss that the respondent may suffer which, because they are able to obtain other drivers relatively easily, is likely to be small. Moreover, as the contract does not restrict the respondent's loss just to the employee's wages for four weeks, it cannot be seen as a liquidated damages limit. Under the contract as drawn, the respondent would be entitled to claim not only this sum but any actual loss that it may suffer. We consider in the context of this contract, as made at the outset, the intention of the clause is to deter employees from leaving without giving notice and to impose a penalty upon them for doing so. As such it is an illegal provision, which will not be enforced.'

7 As a matter of general principle, a contract of employment may contain a lawful liquidated damages clause, provided that it is a genuine pre-estimate of loss or damage and not a penalty. Contracts of employment are governed by the same general principles set out in the authorities, the best known of which is *Dunlop Pneumatic Tyre Co Ltd v New Garage & Motor Co* [1915] AC 79, where Lord Dunedin set out a number of well-known principles at p.86. We refer to some but not all of those principles. The ones to which we refer are as follows:

> '1. 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.
>
> 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 ...
>
> 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 at the time of the breach ...'

See also the decision of the Privy Council in *Phillips Hong Kong v AG of Hong Kong* [1993] 61 BLR 49, in the course of which Lord Woolf, giving the opinion of the Privy Council, referred to the judgment of Dickson J in the Supreme Court of Canada in *Elsey v J G Collins Insurance Agencies Ltd* [1978] 83 DLR at p.15 where he said:

> 'It is now evident that the power to strike down a penalty clause is a blatant interference with freedom of contract and is designed for the sole purpose of providing relief against oppression for the party having to pay the stipulated sum. It has no place where there is no oppression.'

8 It is an inherent risk of a lawful liquidated damages clause that the sum specified or calculable and recoverable may be more or less than the loss sustained. How then do these principles apply to this present case?

9 This is a case in which the clause in question did not have attached to it the express label of either 'liquidated damages' or 'penalty'. It is a matter of pure construction of the contract.

10 It is of significance that the clause in this case did not seek to place any limitation on the right of the employer 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. Thus, in the present case, the employee is in a position where if the actual loss turned out to be nil the employee is liable for the calculable sum, but if the actual loss is greater than the calculable sum he may face an unlimited claim for the balance. This is a matter which weighed heavily on the employment tribunal. It also weighs heavily on us.

11 In our judgment, it is difficult to see how in these circumstances the clause can represent a genuine pre-estimate of loss. Moreover, we agree with the implicit finding of the employment tribunal that the clause, by reason of this aspect of its application, is an oppressive clause because it takes a form which can be described colloquially as 'heads I win, tails you lose'.

12 In all the circumstances, we have come to the conclusion that the finding of the employment tribunal about this clause was correct. It did not represent a genuine pre-estimate of loss. It was a penalty clause and, as such, unenforceable.

13 In those circumstances, we find ourselves at one with the reasoning of the employment tribunal and this appeal is dismissed.

14 Leave to appeal to the Court of Appeal is refused. The appellant company can adapt their clause in the light of our judgment. Of course if they wish to they can ask the Court of Appeal for permission.