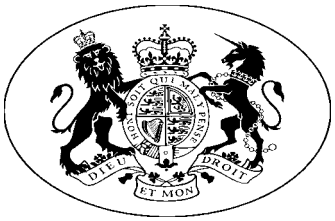

EMPLOYMENT TRIBUNALS

Between

Claimant	**and**	**Respondent**
Mr N Ofonagoro		**Sparta Global Limited**

This has been a remote hearing which has not been objected to by the parties. The form of remote hearing was fully video. A face to face hearing was not held because it was not practicable and specific issues could be determined in a remote hearing.

HEARING

Heard at: Croydon **On: 2 November 2020**

Before: Employment Judge Truscott QC

Appearances:

For the Claimant:	**Mr P Michell of Counsel**
For the Respondent	**No appearance or representation**

JUDGMENT

1. The respondent unlawfully deducted the sum of £2203.20 from the wages of the claimant contrary to section 13(1) of the Employment Rights Act 1996.

2. No award is made as the respondent has paid said sum.

REASONS

Preliminary

1 The claimant gave evidence on his own behalf. He was represented by Mr P Michell, barrister. The respondent did not participate in the hearing. There was a bundle of documents including correspondence from the respondent's solicitors to which reference will be made where necessary.

3. By an ET1 presented on 14 November 2019 [3], the claimant sought:
   i. A declaration pursuant to section 13 ERA that the respondent unlawfully deducted wages of £2,203.20.
   ii. The return of that sum.

4. The claimant asserts that the various contractual provisions relied upon by the respondent to justify the deduction ("the clawback provisions") were (a) an unlawful restraint of trade; and/or (b) a penalty clause.

5. In the Grounds of Resistance [32], the deductions are admitted, and the claimant's assertions of unlawfulness are denied. The respondent has repaid the £2,203.20 on a 'no liability' basis.

6. The issues for this hearing were discussed in a case management hearing on 18 May 2020. By the time of this hearing, the issue had become whether the claimant was entitled to a declaration from the Tribunal.

Findings of Fact

1. The respondent is a technology and business consulting services company, which provides its clients with consultants to deliver IT projects. The claimant is a 26 year old engineering graduate who wanted to work in software development. In order to do so, he knew he would require training and started self-teaching. He started looking for companies that would take on someone with limited experience like himself. He applied to the respondent via one of the job search websites and it reverted to him quickly.

2. On or around 27 April 2018, he attended a recruitment event run by the respondent in Richmond where he was told that the training would last for 3 months, during which time he would have to support himself. He would then be required to sign a 2-year fixed-term employment contract with the respondent. If he left within 2 years, he would be charged a training fee of up to £22,000 depending on when he left. He was told that the training would be unpaid. The respondent explained to him that the course and training were free and that it cost them £22,000 to deliver, but they made it back up by loaning himself and his fellow "Spartans" out to other companies. The respondent said he would be unpaid for a minimum of 3 months and then potentially another 3 months whilst they attempted to find a placement.

3. The interview process was initially a phone conversation with a people manager, then an assessment centre which consisted of a group interview at the office and then individual interviews after.

4. After the assessment day, he did a few tests online, which he passed. The respondent phoned him to congratulate him and asked him if he was happy to join. He agreed and was sent the training documents. He was told it was a very intense course, that not everyone would make it through and that they retained the right to cancel the

contract. The claimant was aware that one or two people from each course did not graduate. He was told the salary would start at £23,000, but if a contract finished, he would wait on the 'bench' and his wage would go down. This policy changed by the time he started, so those on the bench did not have a reduction in salary. The respondent said that they had a lot of clients, often too many for the number of Spartans that they had so they would definitely find a suitable placement. They advised that the whole process should be quick and said other groups were often found placements before the end of their 3-month training period. They said that it was very rare for it to take more than a month.

5. On 30 April 2018, the claimant entered into a training contract with the respondent [90]. The training contract contains reference to various clause numbers, but does not itself have clause numbers. The claimant chose to participate in an "SDET [software] course", the cost of which was described as £22,000 [99]. The Training Period is defined as "from the Training Commencement Date to the date when the Company issues the Trainee with a Certificate" [92]. However, the duration of the training contract was much longer- "for the Training Period, the Placement Period, and 24 months from the start of the Placement Contract unless this Contract is terminated earlier by the Company" [92]. The training contract states that the claimant could be required to take a Placement prior to completion of training/the issue of a Certificate, albeit the respondent was not at such time obliged to find a Placement [93 & 94].

6. The claimant had no right to terminate the training contract except in the first 14 days and then, providing the claimant had not started any Placement [96]. Thus, for example, if the claimant had resigned on day 15, according to the training contract, he would be liable to repay £22,000. In contrast, the respondent had broad discretion to terminate the training contract - e.g. it could do so if the claimant "resigns from any employment with a Client" or "terminates the Placement Contract" I.e. "the fixed term contract to be entered into by the Company and the Trainee upon issue of the Certificate and the agreement of a Placement" regardless of why the claimant resigned/terminated [96]. The parties agreed that unless the claimant had paid all training fees in advance or was employed under a Placement Contract for 24 months, upon termination of the training contract "for any reason" the respondent could "demand repayment of and the trainee agree[d] to repay the Training Fees in full or in part" [93]. Any question of partial repayment was determined by reference to how long the claimant had been employed prior to termination. He would be charged in respect of the training costs calculated as 100% if he finished within 6 months of starting, 75% if he finished from 6-12 months, 50% if he finished from 12-18 months, 25% if he finished from 18-24 months and 0% after 24 months.

7. The training contract provided that the claimant would be sent "an employment contract" upon placement with a client project and that his annual gross salary would be £23,000 reducing to £18,000 between the first and second placement [94]. The training contract also contained various post termination restrictions which are in very broad terms [95].

8. The claimant attended the SDET training course at the respondent's 'IT Academy' from 14 May 2018 to 10 September 2018. All training was provided in-house by the respondent and none procured from any external supplier. The trainers did not have any specific level of qualification. The claimant's allocated 'coach' had been coding for 18 months. Most of the training was self-learning. The claimant was not paid during that period.

9. The respondent said that all training fees were incurred by the end of the first 3 months. Although the respondent claimed that the trainee would continue to be trained, in practice, at the end of 3 months, the training effectively ceased. The claimant was provided with access to online resources like Pluralsight and Udemy. The claimant was assigned to someone who was supposed to look after the trainees in between clients and help with learning but this did not happen in practice. Theoretically the trainees could talk to teachers and get help but in the claimant's experience, they were mostly too busy to help. Plus, every job role or placement was different, requiring different things to learn. The onus was on the trainee to learn rather than be taught.

10. . The claimant considers that the respondent cannot justify a cost of £22,000 for what he received over such a comparatively short time period.

11. The claimant was issued with a certificate of completion [100]. After this he was on a 'pre-bench' awaiting his first training placement. He spent almost 3 months on the pre-bench awaiting his first placement. He was unpaid for this period.

12. He was provided with an Employment Contract by the respondent for a fixed period of 24 months [105]. The term provided for in the contract was for 21 months starting on 12 November 2018 and ending on 11 August 2020. The Employment Contract said that his salary was £23,000 per year. The Employment Contract provides that the claimant could be required to travel to or work at "any location". Clause 2.7 of the Employment Contract provides that "notwithstanding the signing of this agreement, the training contract shall remain in effect until terminated in accordance with the terms of the training contract. The employee acknowledges that upon termination of the training contract he may be liable to repay the Company some or all of the Training Fees as defined therein, including but not limited to where the employee resigns before he has been employed for 24 months under this agreement". Clause 6.3 of the Employment Contract provides that the employee "authorises the company to deduct from the Employee salary, any sums due from the Employee to the Company, including without limitation any overpayment of salary, holiday or sick pay, repayment of training costs or any bonus or commission" [107].The Employment Contract also continues broadly drafted post termination restrictions [95].

13. For personal reasons, the claimant asked the respondent if he might stay in or near London as his last two placements had been outside of London. His request was rejected. The claimant explained the personal reasons related to the health of his mother. The respondent threatened to terminate the contract and pursue him for the money due to them.

14. The claimant was not offered a placement in the London area. He sent in his resignation by email on 17 June 2019 [116]. The respondent replied by letter of 19 June 2019 accepting his resignation and stating that the last day of his employment would be 15 July 2019. He was told that he wouldn't have to serve his one month's notice. The letter informed him that he would be required to pay an "early termination fee" of £15,000 [117] and deduct £2,645.83 of that sum from his accrued salary etc [117]. In June/July 2019, the respondent then made deductions totalling £2,203.20 from his June [88] and July [89] pay cheques.

15. In a letter from the respondent's then-solicitors Waterfront Solicitors LLP ("Waterfront") dated 5 July 2019 [118], Waterfront stated: "as a consequence of your breach of the training contract [by terminating the Employment Contract] our client has terminated (or hereby terminates) the training contract and accordingly is entitled to demand repayment of the Training Fees". Waterfront also sought to increase the sum claimed to £15,285.46, on the basis that the claimant had had a 21 month contract, was required to repay 75% of the "Training Fees", and had worked about 8 of those 21 months.

16. The claimant submitted a claim to the Employment Tribunal and the respondent submitted a response. On 18 May 2020, the Employment Tribunal made various directions, including for disclosure by 13 July 2020 [48]. The respondent made only very limited disclosure (e.g. of contractual documentation). No disclosure was given of any documentation which might have evidenced how much the provision of training had/would cost the respondent, or when any such cost arose during the training period. This was so, despite the claimant's agreement to various extensions of time for the respondent's disclosure.

17. By a letter dated 19 June 2020, the claimant's solicitors made a request for specific disclosure of documentation which would evidence the cost of training to the respondent [123]. The request set out why it was being made and what was required. The respondent did not provide a substantive response to that letter. On 27 July 2020, the respondent repaid the claimant the £2,203.20 it had deducted from his wages about a year previously. The respondent changed solicitors from Waterfront to Mishcon de Reya ("MdR").

18. By a letter dated 12 August 2020 [52] MdR asked the claimant to withdraw his claim. The claimant declined to do so. By a letter dated 12 August 20200 [51], MdR applied to strike out the ET claim on the basis that the £2,203.20 payment had been made. MdR also sought another extension of time for disclosure, pending the outcome of the strike-out application. For the reasons set out in the claimant's solicitors' 21 August 2020 letter, the application was resisted [61]. The ET rejected the application on 22 September 2020. The ET also declined to vary its previous disclosure order [65].

19. By a letter dated 1 October 2020 [67], MdR came off the record, and informed the ET of the respondent's intention, on the basis of cost and COVID-19 not to "take any further steps in relation to the claim". MdR stated that the claimant had lawfully been asked to repay "a sum equal to part of the cost of the training". MdR did not assert that the actual cost to the respondent of the claimant's training was £22,000. MdR asked the

ET to take into account the "final submissions and representations" in its 1 October 2020 letter. MdR did not provide details or any corroborative documentation to support any actual costs expended on the claimant's training under the training contract.

Law

20. Section 13 of the Employment Rights Act 1996 provides:

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.

…

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

21. Sections 23, 24 and 25 provide:

23 Complaints to employment tribunals

(1) A worker may present a complaint to an [employment tribunal]—

(a) that his employer has made a deduction from his wages in contravention of section 13 (including a deduction made in contravention of that section as it applies by virtue of section 18(2)),

Determination of complaints

(1 Where a tribunal finds a complaint under section 23 well-founded, it shall make a declaration to that effect and shall order the employer—

(a) in the case of a complaint under section 23(1)(*a*), to pay to the worker the amount of any deduction made in contravention of section 13,…

Determinations: supplementary

(1) Where, in the case of any complaint under section 23(1)(a), a tribunal finds that, although neither of the conditions set out in section 13(1)(a) and (b) was satisfied with respect to the whole amount of the deduction, one of those conditions was satisfied with respect to any lesser amount, the amount of the deduction shall for the purposes of section 24(a) be treated as reduced by the amount with respect to which that condition was satisfied.

22. A claimant may rely on common law rules in order to establish that a deduction is unlawful and therefore in breach of section 13 ERA according to **Cleeve Link Ltd v. Bryla** [2014] ICR 264 EAT at para 20. There it was held "… that the deduction contemplated

by the contract must be a lawful deduction. If it is a penalty clause, it is not a lawful deduction".

23. As regards what constitutes a penalty clause, **Dunlop Pneumatic Tyre Co Ltd v. New Garage and Motor Co Ltd** [1915] AC 79 HL established that at common law, any fine or deduction should be a genuine pre-estimate of the loss suffered by the employer as a result of the employee's breach. Anything in excess of this would be a penalty, void at common law. So, for example, in **Giraud UK Ltd v. Smith** [2000] IRLR 763 EAT, a term in the employee's contract allowing his employer to deduct a sum from his final payment in the event that he failed to give notice and work out his notice period was held to be a penalty clause, as it was not a genuine pre-estimate of the loss that the employer could suffer in the event of the employee's breach. In **Yorkshire Maintenance Company Ltd v. Farr** unreported EAT 0084/09, the employer had argued it was entitled to make deductions from the employee's wages because he had failed to comply with a contractual requirement to obtain the signature of clients as proof of work done. The EAT held that contractual terms like this should be subject "to a considerable degree of scrutiny" due to the possible disparity in economic power between employers and employees and the potential for abuse by an employer of such power. Moreover, courts had to be alert to employers being "judge and jury" when they had included in a contract of employment an express term requiring an employee to repay certain costs and expenses.

24. The legal test has been revisited in **Makdessi v. Cavendish Square Holdings** [2016] AC 1172 SC at paragraph 32. The Supreme Court held that the issue was whether the impugned provision is a secondary obligation which imposes a detriment on the contract-breaker out of all proportion to any legitimate interest of the innocent party in the enforcement of the primary obligation. The innocent party could have no proper interest alternative to performance. In the case of a straightforward damages clause, that interest would rarely extend beyond compensation for the breach. Compensation was not necessarily the only legitimate interest that the innocent party might have in the performance of the defaulter's primary obligations. Whether or not a contractual provision was a penalty had to depend on the nature of the right of which the contract-breaker was being deprived and the basis on which he was being deprived of it.

Discussion and decision

Penalty clause

25. The Tribunal noted that:

a. As **Makdessi** makes clear, the test from **Dunlop Pneumatic Tyre Co** should still be treated as setting out factors which may be relevant to the determination of the issue.

b. **Makdessi** was not an employment case. The leading judgment considered the law as it applies to parties of "comparable bargaining power". As is put in the IDS brief, "such is not the case in most employment relationships and it is therefore arguable that the Court's reformulation of the test is not intended to apply to contracts of employment".

26. The claimant's alleged obligation to repay fees arises on his alleged breach of contract (i.e. early termination of the Employment Contract, causing the respondent to terminate the training contract). The figures in the claw back provisions cannot, applying **Dunlop Pneumatic Tyre**, amount to a "genuine pre-estimate of loss". Applying **Makdessi**, the claw back provisions imposed a detriment on the claimant which was "out of all proportion to any legitimate interest" of the respondent in the "enforcement of the primary obligation". Properly construed, the claw back was not "compensation for the breach" (i.e. the claimant's resignation).

27. The clawback provisions had no or no proportionate correlation with "the benefits secured" by the claimant.

a. There was clear disparity in the parties' relative bargaining power. The claimant had to "take-or-leave" the respondent's standard business terms.
b. The respondent had thereby used its superior bargaining power to extract from the claimant unfairly onerous promises as regards (amongst other things) the fees clawback.
c. The fees at issue, up to £22,000, were wholly immoderate in comparison with the claimant's (gross) salary of £23,000.
d. The stated price of the course and clawback provisions appear to have had no or no reasonable correlation to any cost borne by respondent. As to this, it did not because:
    i. The onus was on the respondent to prove a correlation.
    ii. The respondent has had ample opportunity to prove the correlation in this case, in particular, by giving proper disclosure, and witness evidence, and taking part in the hearing. The respondent has deliberately chosen not to condescend to proof or be further involved. This, notwithstanding the claimant's 19 June 2020 request for specific disclosure on point [123].
    iii. In-house training of the kind described by claimant, over a period of a little less than 3 months, is highly unlikely to have cost the respondent as much as £22,000.
    iv. As observed above, the full £22,000 clawback would apply where for example an employee chose to resign, even in circumstances amounting to constructive dismissal, only 15 days after entering the training contract.
    v. The respondent has not shown any correlation between the 'repayment periods' fixed by the training contract and the periods it would have taken the respondent to recover any outlay, by making use of the claimant's acquired skills.

28. The Tribunal drew the inference that the respondent does not have the material sought of it under cover of the claimant's solicitor's 19 June 2020 letter or that the respondent's disclosure of any such material would damage its case.

29. The Tribunal decided to make a declaration under section 13 ERA that the deductions made by the respondent were unlawful. For the reasons set out earlier, the claw back provisions amounted to a penalty clause. The Tribunal did not find it necessary to address restraint of trade. As the amount deducted has been repaid, no award is made.

.....
I D Truscott QC Employment Judge
Date: 9 November 2020