Case Nos: 2303060/2019
2303650/2019

EMPLOYMENT TRIBUNALS

Claimants: (1) Mr M Bennett
(2) Mr C Day

Respondent: Geeks Ltd

Heard at: **London South Employment Tribunal (by remote video hearing)**

On: **2 & 3 December 2020**

Before: **Employment Judge Ferguson (sitting alone)**

Representation
Claimants: Mr J Platts-Mills (counsel)
Respondent: Mr T Welch (counsel)

RESERVED JUDGMENT

It is the judgment of the Tribunal that:

1. The Claimants' complaints of unauthorised deductions from wages fail and are dismissed.

2. The Claimants' pay statements in respect of their wages for April and May 2019 did not contain the particulars required to be included by section 8 of the Employment Rights Act 1996.

3. No monetary award is made under section 12(4) of the Employment Rights Act 1996.

REASONS

INTRODUCTION

1. These claims give rise to the issue of whether provisions in the Claimants' employment contracts which authorise the recoupment of training costs (so-called "claw-back" provisions) are enforceable.

2. The First Claimant's claim form was presented on 2 August 2019, following a period of early conciliation from 15 May to 4 June 2019. The Second Claimant's claim form was presented on 30 August 2019, following a period of early conciliation from 15 May to 15 June 2019. Both Claimants claim unauthorised deductions from wages and failure to provide itemised pay statements.

3. The First Claimant originally also claimed breach of contract and the Respondent brought an employer's contract claim ("ECC"). The ECC was never formally accepted by the Tribunal and the Respondent confirmed at the final hearing that it wished to withdraw it on the basis that the matter may later be pursued in the County Court. It was agreed that there was no need for the ECC to be dismissed.

4. An agreed list of issues was produced for the final hearing as follows:

A. **Unauthorised deduction from wages**

It is agreed that the Respondent made deductions from the Claimants' wages in May 2019 and June 2019, totalling £2,194.81 in respect of Mr Bennett and £2,754.65 in respect of Mr Day.

1. Were the deductions required or authorised to be made pursuant to section 13(1)(a) ERA 1996 by virtue of the provisions of the contracts entered into between the Respondent and each of the Claimants?

In its defence, the Respondent has raised provisions in the Claimants' contracts of employment. The Claimants' position is that those provisions purporting to provide for the repayment of training costs are void and unenforceable as unlawful restraints of trade and/or penalty clauses.

Jurisdiction

2. Does the Tribunal have jurisdiction to determine whether the relevant contractual provisions were unlawful restraints of trade and/or a penalty clause?

Restraint of trade

3. If so, were the provisions unlawful restraints of trade and therefore void and unenforceable?

Penalty clause

4. Were the relevant provisions unlawful penalty clauses and therefore void and unenforceable?

B. **Failure to provide itemised pay statement**

5. Did the Respondent fail to provide written itemised pay statements to each of the Claimants in breach of section 8 ERA 1996 in respect of the

deductions made in May and June 2019?

C. **Remedy**

6. Are the Claimants entitled to the following remedies:

   (a) in Mr Bennett's case:

      (i) a declaration that the Respondent unlawfully deducted wages of £2,194.81 and an order for payment of that sum pursuant to sections 24(1) and (2) ERA 1996;

      (ii) a declaration that the Respondent failed to provide him with an itemised pay statement in accordance with section 8 ERA 1996; and

      (iii) on the basis that the deductions were "unnotified deductions" pursuant to section 12(5) ERA 1996 and that unnotified deductions totalling £2,194.81 were made on 14 May and 14 June 2019, an order for payment of that sum pursuant to section 12(4) ERA 1996; and

   (b) in Mr Day's case:

      (i) a declaration that the Respondent unlawfully deducted wages of £2,754.65 and order for payment of that sum pursuant to section 24(1) and (2) ERA 1996;

      (ii) a declaration that the Respondent failed to provide him with an itemised pay statement in accordance with section 8 ERA 1996; and

      (iii) on the basis that the deductions were unnotified deductions pursuant to section 12(5) ERA 1996 and that an unnotified deduction of £858.58 was made on 14 June 2019, an order for payment of that sum pursuant to section 12(4) ERA 1996?

5. I heard evidence from both Claimants. On behalf of the Respondent I heard evidence from Lindsay Jessup and Joanna Clitheroe.

FACTS

6. The Respondent is a software development company based in Sutton. It was founded in 2007 and has grown quickly. By 2013 it had around 20 to 30 employees and by 2017 it had around 80 employees.

7. As at February 2017 the Second Claimant, Mr Day, was a 23-year old graduate of International Management with American Business Studies at the University of Manchester. He was living with his parents and working as a Project Officer in the NHS, on a salary of £26,302. He had hoped to develop a career in consultancy, but having applied for numerous consultancy roles without

success he decided to explore other opportunities. He decided that a project management role in the IT industry would suit his skills.

8. During February 2017 Mr Day applied for the position of Project Manager with the Respondent. He attended an interview and on 6 March 2017 Somayeh Aghnia, Managing Director of the Respondent, offered him the job. The offer email states, so far as relevant:

> "Many thanks for attending your interview at Geeks Ltd.
>
> Upon reviewing your application and potential to learn professional software project management, we are delighted to offer you a full-time training position at Geeks Ltd based on the following and subject to contract and reference checks.
>
> - Start date: ASAP (Please confirm, suggested date: 20th of March or earlier)
> - Job title: Project Manager
> - Initial contract: Minimum 2.5 years
> - Upfront investment in training you, costing us over £18,800
> - Salary of £23 per annum for the first 6 months (initial training)
> - Salary of £25 per annum for the next 12 months
> - Salary of £27 per annum for the next 12 months
> - Annual review thereafter
>
> …
>
> **Other terms include**
> - 6 months probationary period
> - 8 working hours per day, Monday to Friday 9am to 6pm including a full hour at lunch time for resting and socialising.
> - 28 days annual holidays, inclusive of Bank holidays
> - Addition of one day to holiday entitlement every year, following the completion of the first two years.
> - Private medical or dental insurance following the completion of the first two years.
> - Contributory pension scheme.
> - All standard Geeks employee benefits for free (our famous games room, daily breakfast, fruits, ice-creams, unlimited proper Nespresso coffee and teas, fizzy drinks and juices, company days out and parties...)
> - Permanent full-time contract with all statutory benefits and annual appraisals
> - Open door management policy, recognition system, and feedback encouragement
> - Friendly environment that values innovation and efficiency
>
> The job offer will be open and valid for two working days. If you have any questions or concerns regarding the offer please let me know to discuss."

9. On 7 March 2017 Mr Day spoke to Ms Aghnia over the phone and negotiated a more favourable salary structure. On 8 March 2017 she confirmed a revised offer as follows:

> "I've managed to speak with our board and below is the result:
>
> - Salary of £23K per annum for the first 6 months (initial training)
> - Salary of £26K per annum for the next 12 months
> - Salary of £28K per annum for the next 12 months
> - Annual review thereafter
>
> Please note that as I explained over the phone the prospect of building a career in IT with a forward thinking company such as Geeks is so much more valuable than the salary you receive. And you need to consider all the other usual benefits such as free breakfast, drinks, events, clubs etc as well. In addition to that, this is your salary for the training period and assuming you work hard and realise all your potentials you will be looking at salary of £50K for your 4th year (that's the sort of salary we are paying to our best PMs who have been here that long).
>
> I also confirm that 3rd of April is acceptable as your start date."

10. Mr Day accepted the offer on 9 March 2017. On 13 March he was sent two documents, a contract of employment and a document entitled "Contract of Training Investment".

11. The contract of employment contains the following clause:

> "4.3. The Company reserves the right at any time during employment or upon termination of your employment, to deduct from your salary or from any other sums due to you, any amounts owed to the Company by you, inducing but not limited to any overpayment of salary, outstanding loans or advances overpaid expenses, the cost of repairs to or replacement of property belonging to the Company or the Group and damaged by you or not returned to the Company. If the amount you owe exceeds the amount due to you, you will be expected to pay the balance on or before your last day of employment. In the event of unauthorised absence, the Company reserves the right to deduct salary pro rate for the hours lost."

12. The Contract of Training Investment states, so far as relevant:

> "**Introduction**
>
> You have been offered a training position by the Company. You have agreed to meet the Training Cost Debt that is the estimated financial cost of supporting you in this position. However, the Company has agreed to cancel the Training Cost Debt on your behalf on the basis that, if you work for at least the Minimum Length of Services as specified below, it will be an appropriate investment.

You will not be in breach of contract if you choose not to work the Minimum Length of Services or if your employment otherwise ends before you have worked the Minimum Length of Services. However, in those circumstances you agree that the Training Cost Debt is repayable by you as a debt within 10 working days.

Training Costs

Learning a project management job to become a capable and productive employee requires practical knowledge and experience in various situations and conditions. The costs that the Company will undertake in training you for this job are based on the Training Cost Calculations.

The Company agrees to provide you with the training support set out in the Training Cost Calculations.

Training Cost Debt

The Training Cost Debt is the Training Costs accumulated during the first 6 months of the Minimum Length of Services worked (or, if lower, by the time your employment ends).

Once you have worked 6 months of the Minimum Length of Services, the Training Cost Debt will be reduced by 1/24th per subsequent complete month of the Minimum length of Services worked, so that after the entire Minimum Length of Services it will be zero.

You agree that the Company may deduct from your salary and any other payments owed to you by the Company any Training Cost Debt outstanding at the time your employment ends.

Minimum Length of Services

The Minimum Length of Services is two years' work following the initial 6 months of training which is a total of 30 months.

This is 30 months of actual work (including training), rather than 30 calendar months and so this period will not reduce during any period of absence (other than annual holiday, sickness absence of 6 days a year and any compulsory maternity leave (currently two weeks)) whether that absence is authorised, unauthorised, paid, unpaid, contractual or statutory. For example in the event of 6 months' absence, the Minimum Length of Services will therefore take 36 calendar months.

Training Cost Calculations

First 3 months of the Minimum Length of Services				
	hourly cost	hours per day	daily cost	monthly cost (19 days per month)
Direct Mentor	£60	2	£120	£2,280
Company Director	£200	0.5	£100	£1,900
Subtotal – first 3 months				£12,540
Second 3 months of the Minimum Length of Services				
Direct Mentor	£60	1	£60	£1,140
Company Director	£200	0.25	£50	£950
Subtotal – second 3 months				£6,270
Total training Cost – first 6 months				**£18,810**

It is understood that this calculation is not designed to capture all the cost to the business, some of which are measurable (such as salary being paid against income produced), some of which are immeasurable (such as reducing time for key staff to pursue and develop new business opportunities). It is rather a basic calculation to reach an appropriate figure for the Training Cost Debt rather than a precise appraisal of the full cost to the business.

Note 1: The time spent by your Direct Mentor for training you will be spent on activities including but not limited to:

- Answering your questions
- Reviewing your project work including emails, AMP item updates, meeting minutes, agendas, and conference calls, with or without your presence.
- One to one or group training sessions (including preparations) on soft skills, technical, client management and team management,
- Regular one to one mentoring meetings
- Correcting your mistakes on the projects
- Discussing your performance, progress and training plans and mistake correction strategies with the directors.

Note 2: The time spent by a Company Director related to training you will be spent on activities including, but not limited to:

- Discussing your performance, progress and training plans with the Mentors.
- Analysing, deciding and implementing strategies for correcting your mistakes on projects including intervening the relationships with your allocated clients.
- Dealing with the side effects of your mistakes internally and externally.
- One to one feedback and training sessions (occasional).

Note 3: The actual time spent per day will vary from day to day and in different periods, so the costs for this calculation are based on the average time spent over time based on our historical records."

13. Mr Day said in his evidence that the covering email advised he seek legal advice before accepting the role, but it was not feasible to do so because he could not afford to pay for a lawyer and was under a strict time constraint. He did, however, discuss the issue with his family. He said:

> "I was slightly concerned about the terms and as this role would require me taking a financial cut to my salary. However, as the role fitted my needs and I figured I would gain experience and skills to succeed further in my career I felt I had to accept the offer."

14. Mr Day said in cross-examination that he considered the Contract of Training Investment carefully, including discussing it with his parents. He signed it, together with the contract of employment, on 23 March 2017.

15. Mr Day commenced employment on 3 April 2017.

16. As at March 2017 the First Claimant, Mr Bennett, was a 24-year-old graduate of Mechanical and Material Engineering at Birmingham University. Having worked as a graduate management trainee in Birmingham immediately after graduating, he then moved to London in 2016 with his partner. After moving to London he was unemployed for much of the time. He was living off inheritance from his father and was in receipt of Jobseeker's Allowance from 1 February 2017. He decided to pursue a career in software development and had some informal training from his brother. He also completed a one-week internship in software development. Sometime after that, in March or April 2017, he applied for a job as a Trainee Developer with the Respondent. He attended two interviews and undertook a two-week unpaid training and assessment course with the Respondent.

17. On 24 May 2017 Ms Aghnia made Mr Bennett an offer by email:

> "Many thanks for attending your interviews and course at Geeks Ltd.
>
> Upon reviewing your demonstrated talent and potential to learn professional software development, we are delighted to offer you a full-time training position at Geeks Ltd based on the following and subject to contract and reference checks.
>
> - Start date: ASAP (Please confirm)
> - Job title: Trainee Software Developer
> - Initial contract: Minimum 2.5 years
> - Upfront investment in training you, costing us over £15,900
> - Salary of £18,000 per annum for the first 6 months (initial training)
> - Salary of £20,000 per annum for the next 12 months
> - Salary of £23,000 per annum for the next 12 months
> - Annual review thereafter
> - Note: Following successful completion of your initial 2.5 years, your employment with us will automatically continue (unless terminated by either party) with negotiable salary which would be normally be over £30,000."

18. The "other terms" and acceptance period were identical to the terms in Mr Day's offer email.

19. Mr Bennett accepted the offer on the same day and a start date of 30 May 2017 was agreed. He gave evidence to the Tribunal as follows:

> "23. On considering whether to accept the position I assumed the training would consist of hands-on practical and substantial learning. At the time I considered the £18,000[1] worth of training helped justify the sacrifice of taking a gross starting salary of £18,000 per annum.
>
> 24. I did not at any point consider that I would be required to pay back the cost of the training and did not think it would be necessary to involve a lawyer, as this is not something one would do when considering whether to accept a job offer. Even if I had considered this, I would not have been able to pay for such services."

20. He was sent copies of the contract of employment and Contract of Training Investment on 24 May and signed them on 25 May. The contract of employment contained the same clause 4.3 as in Mr Day's contract. The Contract of Training Investment was largely identical to that given to Mr Day, except as indicated below:

> "**Introduction**
>
> [identical]
>
> **Training Costs**
>
> Learning the professional software development job to become a capable and productive employee requires practical knowledge and experience in various technologies, techniques, situations and conditions. The costs that the Company will undertake in training you for this job are based on the Training Cost Calculations.
>
> The Company agrees to provide you with the training support set out in the Training Cost Calculations.
>
> **Training Cost Debt**
>
> [identical]
>
> **Minimum Length of Services**
>
> [identical]
>
> **Training Cost Calculations**

[1] It is assumed that this is a typographical error. The training costs were said to be £15,900.

First 6 months of the Minimum Length of Services				
	hourly cost	hours per day	daily cost	monthly cost (19 days per month)
Your mentors – during the first 2 months	£60	1	£60	2 X £1,140
Your mentors – during the following 4 months after the first 2 months	£60	2	£120	4 X £2,280
Your **Employment Cost** during the first 2 months, spent purely on training (see note 1).				2 X (1.5 X £18,000 / 12)
Total training Cost – first 6 months				**£15,900**

It is understood that this calculation is not designed to capture all the cost to the business, some of which are measurable (such as salary being paid against income produced), some of which are immeasurable (such as reducing time for key staff to pursue and develop new business opportunities). For instance for the last 28 months of your contract you will receive additional weekly training, totalling to a significant paid time spent on pure training (the cost of which to the company will be equivalent to your gross salary, taxes and office expenses for the same duration).

Therefore the above table is rather a basic calculation to reach an appropriate figure for the Training Cost Debt rather than a precise appraisal of the full cost to the business.

Note 1: Your Employment Cost consists of your gross salary, taxes and share of office expenses (while spending your time on only training rather than billable tasks) and is calculated as 1.5 X your gross salary.

- Your monthly Employment Cost is calculated as £18,000 (annual salary) multiplied by 1.5 divided by 12 (months per year).

Note 1: The time spent by your mentors for training you will be spent on activities including but not limited to:

- Answering your questions
- Reviewing your written code, making changes and giving you feedback and sometimes redoing your task for you as a whole.
- One to one or group training sessions (including preparations) on soft skills, technical skills, such as technologies and techniques.
- Correcting your mistakes on the projects.
- Dealing with the side effects of your mistakes (internally and externally).

Note 2: The actual time spent per day will vary from day to day and in different periods, so the costs for this calculation are based on the average time spent over time based on our historical records."

21. Mr Bennett's evidence to the Tribunal was as follows:

> 27. It was in reading this document [the Contract of Training Investment] that I became aware of the repayment clauses. But, because I was so desperate for a job, I genuinely believed the training would be worth it and did not believe I would ever want to leave the role within 2 years. This was due to the way in which the Respondent had so highly acclaimed itself and its training, therefore, I did not think this would ever be an issue.
>
> 28. They implied the training would be better than any other training and made me truly believe it would be sensible to take the financial hit now, because, in the future, I would have obtained the skills to be a high earner. Ultimately, I was desperate and applying for entry-level roles in an industry with extraordinarily high numbers of applicants, so any position was an opportunity not to be squandered."

22. Mr Bennett commenced employment on 30 May 2017.

23. The Claimants contend that, in reality, once their employment started most of the time characterised as training was self-learning, in which they had to familiarise themselves with the Respondent's business model and the tools used to execute it. Mr Day says he spent a large amount of time in his first three months reading a sales document entitled "The Geeks Approach". Mr Bennett says the first two months consisted of a roughly even amount of time learning "M sharp", a software tool developed by the Respondent, and completing exercises on an internal platform called "Learn.net". The Claimants say they did not receive the level of "mentor time" specified in the Contract of Training Investment. They argue that, in reality, all they received was the sort of supervision and line management that any junior employee would expect and need to perform their role. Further, they say the skills they gained at the Respondent were not transferable to other employers in the IT industry because they were specific to tools developed and used exclusively by the Respondent.

24. The Respondent strongly disputes the Claimants' case in this respect. Lindsay Jessup, Chief Operating Officer for the Respondent, gave evidence that Mr Bennett's timesheets showed he spent around 3.5 months of his first six months in pure training, which far exceeds the estimate of 2 months in the Contract of Training Investment. As for mentor time, she gave an example of a project in which Mr Bennett received 23.5 hours of mentor time in one month. Ms Jessup's evidence in respect of Mr Day was as follows:

> "9. Based on my own first hand experience of mentoring him as well as weekly discussions with his other mentors, Ruth Thomas and Joanna Clitheroe, the sum of the direct and indirect mentorship activities actually provided, not only met, but also exceeded the estimated hours in this contract."

25. One of Mr Day's other mentors, Joanna Clitheroe, gave evidence that the purpose of the Respondent's training scheme was to give trainees exposure to

the job from day one, so at the end of six months they can do work that would normally take years to get to. She said that in addition to the one-to-one time, there was a large amount of "indirect time" spent on training, reviewing every item of work, rewriting work and giving feedback.

26. It is not in dispute that the Claimants were not awarded any qualifications or given certificates of training at the end of their training periods.

27. It is also not in dispute that neither of the Claimants raised concerns or complaints about the quality of their training until they were considering leaving the Respondent in 2019. Mr Day took part in promotional recruitment video, in which he says, "Here at Geeks you receive 30 to 48 months' training contracts. These are incredibly supportive and shows the investment that Geeks truly makes in its employees." There is a dispute as to whether these comments were scripted.

28. In August 2018 Mr Day requested a pay rise. In the request he stated:

> "I would like to take this opportunity to express how much I have enjoyed my time at Geeks thus far, and to thank you for all the training and opportunities l have been given to develop as a Project Manager. I have worked at Geeks for just shy of 1.5 years and obtained invaluable experience and skills during that time.
> …
> l am aware that I am still learning and growing as a Project Manager, and there are areas in which i can improve. Furthermore, I recognise that the successes outlined above are not solely my own, but the collaborative hard work and mentorship of many of the Geeks team."

29. In cross-examination Mr Day said that the first of those comments was not true, but he was "trying to build a relationship, make them think I had bought into the training". He accepted that he was writing untruths to get more money from his employer.

30. As a result of the request Mr Day's salary was increased for his third year, from £28,000 to £30,000.

31. Mr Day resigned on 25 April 2019. His evidence is that he had been unhappy for some time and would have resigned sooner if he had been able to afford to repay the training costs. One of the Respondent's directors, Mr Khamooshi, emailed Mr Day on 7 May 2019 saying that the training cost debt was £3,056.63 and this would be deducted from his salary in respect of April and May unless this would cause financial difficulty, in which case a payment plan could be arranged.

32. Mr Day had an offer of employment with a new company by the time he resigned, but says he still needed a loan of £1,000 from his parents to support him through the transition between the two jobs. He started a role as Technical Delivery Manager in May 2019 with a salary of £46,000. In cross-examination Mr Day denied that he left the Respondent for more money. He said he had been "incredibly unhappy" at the Respondent for a number of reasons, and that the salary was part of it. Mr Day became a Senior Project Manager in another

company in November 2019, on a salary of £60,000. He accepted in cross-examination that he was able to secure this job in part because of his training and experience at the Respondent.

33. My Bennett resigned from the Respondent on 3 May 2019, by which time he had been offered a role as a junior developer in another company, on a salary of £35,000. On 9 May 2019, Mr Khamooshi wrote to Mr Bennett saying that his outstanding debt from the training costs was £3,630.50 and that this would be deducted from his salary in respect of April and May unless this would cause financial difficulty, in which case a payment plan could be arranged.

34. Both Claimants disputed the validity of the deductions on the basis that the training had not been delivered as promised.

35. Deductions in respect of the training costs were made from Mr Bennett's wages as follows:

    35.1. April 2019 (pay date 5 May 2019): £1,629.61

    35.2. May 2019 (pay date 5 June 2019): £565.20

36. Deductions in respect of the training costs were made from Mr Day's wages as follows:

    36.1. April 2019 (pay date 5 May 2019): £1,896.07

    36.2. May 2019 (pay date 5 June 2019): £858.58

37. None of the above deductions were itemised on the relevant payslips.

LAW

38. The Employment Rights Act 1996 ("ERA") provides, so far as relevant:

> **8 Itemised pay statement**
>
> (1) A worker has the right to be given by his employer, at or before the time at which any payment of wages or salary is made to him, a written itemised pay statement.
>
> (2) The statement shall contain particulars of—
>
> (a) …
>
> (b) the amounts of any variable, and (subject to section 9) any fixed, deductions from that gross amount and the purposes for which they are made,
>
> …
>
> **11 References to employment tribunals**

(1) Where an employer does not give a worker a statement as required by section 1, 4 or 8 (either because the employer gives the worker no statement or because the statement the employer gives does not comply with what is required), the worker may require a reference to be made to an employment tribunal to determine what particulars ought to have been included or referred to in a statement so as to comply with the requirements of the section concerned.

(2) Where—

(a) a statement purporting to be a statement under section 1 or 4, or a pay statement or a standing statement of fixed deductions purporting to comply with section 8 or 9, has been given to a worker, and

(b) a question arises as to the particulars which ought to have been included or referred to in the statement so as to comply with the requirements of this Part,

either the employer or the worker may require the question to be referred to and determined by an employment tribunal.

…

12 Determination of references

…

(3) Where on a reference under section 11 an employment tribunal finds—

…

(b) that a pay statement or standing statement of fixed deductions does not, in relation to a deduction, contain the particulars required to be included in that statement by that section or section 9,

the tribunal shall make a declaration to that effect.

(4) Where on a reference in the case of which subsection (3) applies the tribunal further finds that any unnotified deductions have been made (from the pay of the worker during the period of thirteen weeks immediately preceding the date of the application for the reference (whether or not the deductions were made in breach of the contract of employment), the tribunal may order the employer to pay the worker a sum not exceeding the aggregate of the unnotified deductions so made.

(5) For the purposes of subsection (4) a deduction is an unnotified deduction if it is made without the employer giving the worker, in any pay statement or standing statement of fixed deductions, the particulars of the deduction required by section 8 or 9.

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.
>
> (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.
>
> …

39. Where the employer argues that the deduction is "required or authorised to be made by virtue of a … relevant provision of the worker's contract" under s.13(1)(a) ERA, the Tribunal must determine whether the applicable contractual term authorises the deduction in question. The term must be enforceable at common law if it is to authorise the deduction (Cleeve Link Ltd v Bryla [2014] ICR 264).

Penalty clauses

40. The doctrine of penalty clauses was overhauled and restated by the Supreme Court in Makdessi v Cavendish Square Holdings [2016] AC 1172. Mr Welch in his skeleton argument cited a summary of the principles arising from the Supreme Court judgment, set out by Nugee J in Holyoake v Candy [2017] EWHC 3397 (paragraph 467). Mr Platts-Mills did not take issue with the summary and I consider it both accurate and helpfully concise. It is as follows:

> "(1) In English law the doctrine of penalties applies only to contractual provisions operating on a breach of contract; the penalty rule regulates only the remedies available for breach of a party's primary obligations, not the primary obligations themselves: per Lords Neuberger and Sumption at [12]-[13], Lord Mance at [129], Lord Hodge at [241].
>
> (2) The question whether a contractual provision is within the scope of the penalty rule depends on the substance of the term and not its form: per Lords Neuberger and Sumption at [15]. If the substance of the contractual arrangement is the imposition of punishment for breach of

> contract, the concept of a disguised penalty may enable a court to intervene: per Lord Hodge at [258].
>
> (3) Nevertheless the Court recognised that the fact that the rule is limited to provisions operating on breach means that in some cases the application of the rule may depend on how the relevant obligation is framed in the instrument. The application of the penalty rule can thus turn on questions of drafting, or somewhat formal distinctions (per Lords Neuberger and Sumption at [14] and [43]); clever drafting may create apparent incongruities in some cases (per Lord Mance at [130]); the rule can be circumvented by careful drafting (per Lord Hodge at [258]).
>
> (4) Where the rule applies, the test for whether a contractual provision is a penalty is 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 (per Lords Neuberger and Sumption at [32]); what is necessary in each case is to consider first whether (and if so what) legitimate business interest is served and protected by the clause, and second, whether, assuming such an interest to exist, the provision made for the interest is nevertheless in the circumstances extravagant, exorbitant or unconscionable (per Lord Mance at [152]); the correct test is whether the sum or remedy stipulated as a consequence of breach of contract is exorbitant or unconscionable when regard is had to the innocent party's interest in the performance of the contract (per Lord Hodge at [255]).” (emphasis added)

41. The Supreme Court thereby reframed the definition of a penalty clause. Previously the courts had applied the test of whether the provision in question was based on a “genuine pre-estimate of loss”. In Dunlop Pneumatic Tyre Co Ltd v New Garage and Motor Co Ltd [1915] AC 79 the House of Lords established that a provision based on a genuine pre-estimate of loss could be valid. Lord Dunedin formulated four tests, including that the provision would be penal if “the sum stipulated for is extravagant and unconscionable in amount in comparison with the greatest loss that could conceivably be proved to have followed from the breach”, and that it would not be treated as penal by reason only of the impossibility of precisely pre-estimating the true loss.

42. In Cleeve there was a term in the contract providing for the employer to recoup costs of recruitment and training if the employee was either dismissed for misconduct or resigned within the first year of employment. The costs were repayable in full if the dismissal or resignation was within the first six months and thereafter there was a sliding scale whereby the costs were reduced by one-sixth for each further month of employment. In the EAT the employer argued that the Employment Tribunal should not concern itself with whether the term was enforceable; that was a matter for the civil courts. HHJ Hand QC disagreed:

> “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."

43. HHJ Hand QC noted that, according to the case law, the question of whether the clause was a penalty clause depended on whether, at the time the contract was entered into, the predominant purpose of the provision was to deter a party from breaking the contract or to compensate the innocent party for a breach, i.e. was it a "genuine pre-estimate of damage". He summarised the principles in the case law as follows:

> "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."

44. On the facts of the case HHJ Hand QC held that the relevant clause was a liquidated damages clause, not a penalty clause, and was therefore enforceable.

45. There is some academic dispute as to whether the reframed test in Makdessi, which is more generous to the party seeking to rely on the disputed clause, applies to employment contracts. The authors of *Harvey on Industrial Relations and Employment Law* suggest that it does. They say the "genuine pre-estimate of loss" test may be relevant, but is no longer determinative; the question is whether the clause was in all the circumstances extravagant, exorbitant or unconscionable. They suggest that a court or tribunal may be more willing to uphold the clause if it was subject to arm's length negotiation between parties of equal bargaining power and/or with legal advice. In typical employment cases the opposite principle will apply, i.e. the court or tribunal may need more convincing that it was not an unenforceable penalty. (Division AII, para 537.04)

46. The authors of the *IDS Employment Law Handbook on Contracts of Employment*, by contrast, suggest that the Makdessi test may not be applicable at all in the employment context:

> "[I]t is notable that Lords Neuberger and Sumption, who together gave the leading judgment, considered the law as it applies to parties of

> 'comparable bargaining power'. 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."

Restraint of trade

47. Covenants in restraint of trade are prima facie unenforceable at common law; they are enforceable only if they are reasonable with reference to the interests of the parties and of the public.

48. The authors of *Chitty on Contracts* observe (at 16-108):

> "The definition of a covenant in restraint of trade presents a peculiar conceptual difficulty. The reason for this is that to some extent all contracts are in restraint of trade by at least preventing the parties to them from trading with others."

49. The courts have resisted attempts to provide an exhaustive definition of what constitutes a contract in restraint of trade. In the leading House of Lords case of Esso Petroleum Co Ltd v Harper's Garage (Stourport) Ltd [1968] AC 269 Lord Wilberforce said that the doctrine was "one to be applied to factual situations with a broad and flexible rule of reason".

50. It is well established that the doctrine applies to contracts by which an employee undertakes not to compete with his employer after leaving the employer's service. Such agreements will always be subjected, under the doctrine, to the test of reasonableness. What is less clear is whether and to what extent the doctrine may apply to restraints which operate during the continuance of an employment contract.

51. The House of Lords confirmed in A. Schroeder Music Publishing Co Ltd v Macaulay [1974] 1 W.L.R. 1308 that the doctrine may in principle apply to restraints which operate during the continuance of a contract. There, the contract in question was an agreement by a young songwriter, Macaulay, to work exclusively for Schroeder for five years. He assigned to them full copyright of his existing works and future works composed during the five years. The five years was extended to 10 years if the royalties exceeded £5,000. There was no obligation on Schroeder to exploit any composition, and if they failed to do so, Macaulay could not do so even after the end of the contract. Their Lordships unanimously held that the contract was void as unlawful restraint of trade. Lord Reid commented:

> "Any contract by which a person engages to give his exclusive services to another for a period necessarily involves extensive restriction during that period of the common law right to exercise any lawful activity he chooses in such manner as he thinks best. Normally the doctrine of restraint of trade has no application to such restrictions: they require no justification. But if contractual restrictions appear to be unnecessary or to be reasonably capable of enforcement in an oppressive manner, then they must be justified before they can be enforced.

> In the present case the respondent assigned to the appellants 'the full copyright for the whole world' in every musical composition 'composed created or conceived' by him alone or in collaboration with any other person during a period of five or it might be 10 years. He received no payment (apart from an initial £50) unless his work was published and the appellants need not publish unless they chose to do so. And if they did not publish he had no right to terminate the agreement or to have copyrights re-assigned to him. I need not consider whether in any circumstances it would be possible to justify such a one-sided agreement. It is sufficient to say that such evidence as there is falls far short of justification. It must therefore follow that the agreement so far as unperformed is unenforceable." (1314G-1315A)

52. Lord Diplock put their Lordships' decision in the context of the public policy that gave rise to the restraint of trade doctrine:

> "My Lords, the contract under consideration in this appeal is one whereby the respondent accepted restrictions upon the way in which he would exploit his earning power as a song writer for the next ten years. Because this can be classified as a contract in restraint of trade the restrictions that the respondent accepted fell within one of those limited categories of contractual promises in respect of which the courts still retain the power to relieve the promisor of his legal duty to fulfil them. In order to determine whether this case is one in which that power ought to be exercised, what your Lordships have in fact been doing has been to assess the relative bargaining power of the publisher and the song writer at the time the contract was made and to decide whether the publisher had used his superior bargaining power to exact from the song writer promises that were unfairly onerous to him. Your Lordships have not been concerned to inquire whether the public have in fact been deprived of the fruit of the song writer's talents by reason of the restrictions, nor to assess the likelihood that they would be so deprived in the future if the contract were permitted to run its full course.
>
> It is, in my view, salutary to acknowledge that in refusing to enforce provisions of a contract whereby one party agrees for the benefit of the other party to exploit or to refrain from exploiting his own earning power, the public policy which the court is implementing is not some 19th-century economic theory about the benefit to the general public of freedom of trade, but the protection of those whose bargaining power is weak against being forced by those whose bargaining power is stronger to enter into bargains that are unconscionable. Under the influence of Bentham and of laissez-faire the courts in the 19th century abandoned the practice of applying the public policy against unconscionable bargains to contracts generally, as they had formerly done to any contract considered to be usurious; but the policy survived in its application to penalty clauses and to relief against forfeiture and also to the special category of contracts in restraint of trade. If one looks at the reasoning of 19th-century judges in cases about contracts in restraint of trade one finds lip service paid to current economic theories, but if one looks at what they said in the light of what they did, one finds that they

> struck down a bargain if they thought it was unconscionable as between the parties to it and upheld it if they thought that it was not.
>
> So I would hold that the question to be answered as respects a contract in restraint of trade of the kind with which this appeal is concerned is: 'Was the bargain fair?' The test of fairness is, no doubt, whether the restrictions are both reasonably necessary for the protection of the legitimate interests of the promisee and commensurate with the benefits secured to the promisor under the contract. For the purpose of this test all the provisions of the contract must be taken into consideration.
>
> My Lords, the provisions of the contract have already been sufficiently stated by my noble and learned friend, Lord Reid. I agree with his analysis of them and with his conclusion that the contract is unenforceable. It does not satisfy the test of fairness as I have endeavoured to state it." (1315C-1316B)

53. The authors of *Chitty* deduce the following principle from Macaulay: "Where the restraint operates to protect the legitimate interests of the employer and was not as one sided as that in the *Schroeder* decision, it will normally be upheld. However, the absence of reciprocal obligation may be a factor in determining whether a restraint is reasonable." (16-115)

54. In Electronic Data Systems v Hubble [1987] Lexis Citation 715, the employee's contract required him to sign promissory notes for the repayment of training costs if he resigned within 36 months. The Court of Appeal overturned summary judgment in favour of the employer on the claim for repayment. Mustill LJ considered that the defence raised, that the promissory notes formed part of an arrangement which was in unlawful restraint of trade, was arguable taking into account contentions that there was inequality of bargaining power, that the sum to be repaid represented about half of the employee's salary and also overstated the true cost of the training and its true value to the employee, and that it could be inferred that the true purpose of the promissory note was not to recover the costs but to deter staff who had been trained from then joining a competitor.

55. Hubble was relied upon in 20:20 London Ltd v Riley [2012] EWHC 1912 (Ch), which concerned a "golden handcuff" provision under which the defendant was required to repay a £1.5 million cash payment if his employment terminated in the first three years, with the amount to be repaid varying (after the first year) depending on whether he was a good or bad leaver. He was summarily dismissed after less than two years' employment. On a summary judgment application the court held that there was a triable issue as to whether the golden handcuff provision was void as being in restraint of trade. Relying on Hubble, the court concluded that public policy in relation to restraint of trade applied due to the disincentive effect of the repayment provision. A test was to be applied of whether the restrictions were reasonably necessary for protection of legitimate interests and commensurate with the benefits offered under the contract.

56. In Peninsula Business Services Ltd v Sweeney [2004] IRLR 49 the EAT considered an argument that an employment tribunal had erred in finding a

contractual provision void as being in restraint of trade. The provision in question stated that commission payments would only be paid if the sales representative was in employment at the end of the calendar month when the commission payment would normally become payable. The claimant argued, and the employment tribunal agreed, that this was an unlawful restraint of trade because it was designed to deter or discourage salesmen from leaving their employment and working elsewhere. Such a clause, the tribunal found, could not be objectively justified. The EAT overturned the tribunal and found that, applying the principles set out by the Court of Appeal in Marshall v N M Financial Management [1997] ICR 1065,

> "We do not consider it seriously arguable that the commission penalty that Mr Sweeney suffered on resignation arose under a contractual term involving an unlawful restraint of trade. His employment contract did not impose any restraint on him as to whom he might work for, or what he might do, after leaving Peninsula." (para 42)

57. In Marshall, the Court of Appeal had considered a clause which imposed two different conditions for the payment of commission, namely five years' service and a prohibition on employment with any competitor for one year after the end of employment. The Court of Appeal distinguished between the two and found the former was not in restraint of trade, but the latter was.

58. In Tullett Prebon Plc v MGC Brokers LP [2010] IRLR 648 the EAT held that provisions which provide for the repayment of "loyalty payments" where the employee does not serve out the full term were not provisions in restraint of trade. "They do not affect the employees' ability to work after leaving. They are substantial sums paid to highly paid employees as a reward for loyalty." (para 267)

DISCUSSION AND CONCLUSIONS

Unauthorised deduction from wages

59. There is no dispute that:

    59.1. The Respondent made deductions from the Claimants' wages in respect of April and May 2019 to recover the training costs pursuant to the Contracts of Training Investment.

    59.2. The deductions were on the face of it authorised by clause 4.3 of the Claimants' contracts of employment, read with the Contracts of Training Investment.

60. The Claimants argue that the relevant provisions are unenforceable as restraints of trade and/or because they amount to penalty clauses. This gives rise to the issues in the agreed list, which I address in the order set out therein.

Jurisdiction: Does the Tribunal have jurisdiction to determine whether the relevant contractual provisions were unlawful restraints of trade and/or a penalty clause?

61. The Respondent does not dispute that the Tribunal has jurisdiction, in light of Cleeve, to consider the penalty clause argument. It argues, however, that the Employment Tribunal does not have jurisdiction to consider an argument that a contractual term is unenforceable by virtue of the restraint of trade doctrine.

62. Mr Welch relies on the following in support of this submission:

    62.1. There is nothing in the ERA which confers jurisdiction on the Tribunal to declare contractual provisions void on public policy grounds, for the purposes of determining a deduction from wages claim.

    62.2. The Tribunal can construe contracts and apply contractual principles in determining whether a deduction was lawful (e.g. Cleeve), but restraint of trade arguments are not founded on contractual principles; they involve the application of public policy considerations. As such they are not apt to be determined under Part II of the ERA which was "designed for straightforward claims…to be a swift and summary procedure" (Coors Brewers Ltd v Adcock [2007] EWCA Civ 19 per Wall LJ at paragraph 56).

    62.3. The Tribunal's jurisdiction over contractual claims, pursuant to Art.3 of the Employment Tribunals Extension of Jurisdiction (England and Wales) Order 1994 ("the Jurisdiction Order") is expressly limited in Art.5 and excludes consideration of "a term which is a covenant in restraint of trade". That is a strong indication that Parliament intended to exclude restraint of trade arguments from being determined by tribunals.

    62.4. In Peninsula (paragraph 56) the EAT observed that clauses purportedly in restraint of trade will be treated the same way as deductions pursuant to any other contractual clause. The authors of *Tolley's Employment Handbook* suggest that the employee's remedy in such circumstances lies in a claim for breach of contract in the ordinary courts (Chapter 42, paragraph 41.1).

    62.5. That is consistent with the observation of Professor Craig in the headnote in Transocean Maritime Agencies SA Monegasque v Pettit [1997] SCLR 534 that "…of course a tribunal has no jurisdiction to hear common law actions based on legal grounds other than contract."

63. I do not accept that any of those arguments precludes the Tribunal from determining, in the context of an unlawful deductions claim, whether a contractual provision relied upon by the employer is void as being in restraint of trade. It is not in dispute, and nor could it be in light of HHJ Hand QC's comments in Cleeve, that the Tribunal has jurisdiction to consider whether a contractual provision, relied upon as authorising a deduction from wages, amounts to a penalty clause. There is no logical reason for any different approach where it is argued that the provision is an unlawful restraint of trade. As Lord Diplock explained in Macaulay, restraint of trade and penalty clauses are both species of the common law practice of "applying the public policy against unconscionable bargains to contracts generally".

64. Secondly, the argument based on the Jurisdiction Order is flawed. The Jurisdiction Order precludes the Tribunal from considering a claim for damages

by an employee (Art.3) or an employer (Art.4) for breach of certain types of contractual term (Art.5), including "a term which is a covenant in restraint of trade". It cannot be assumed that this implies Parliament intended to exclude "restraint of trade arguments" from being determined by tribunals in the context of other statutory complaints falling within the jurisdiction of the Tribunal. By that logic it must also have intended to exclude all arguments about terms requiring an employer to provide living accommodation for the employee (Art.5(a)), but there can be no question that such a term could be considered by the Tribunal if relied upon, for example, in a complaint of constructive unfair dismissal. To the extent that Parliamentary intention can be inferred at all from Art.5, I note that the types of contractual term listed are ones that are primarily enforced by injunctive relief. It may have been considered impractical or illogical for claims for damages arising out of such terms to be determined by a tribunal that has no power to award injunctive relief. There is no logical or practical problem with restraint of trade arguments being considered in the context of an unauthorised deduction from wages complaint.

65. Thirdly, the judgment in Peninsula does not go as far as Mr Welch suggests. It was not argued that the Tribunal did not have jurisdiction to consider a restraint of trade argument and Rimer J did not address that question. On the contrary, Rimer J determined the question of whether the provisions amounted to unlawful restraint of trade, applying the principles in Marshall. All that is said at paragraph 56 is that the claimant's counsel accepted the deductions from wages claim could not succeed if there was a finding that the relevant provisions were incorporated into the contract of employment (and were not in unlawful restraint of trade). To the extent that the authors of *Tolleys* suggest that Peninsula is authority for the proposition that the Tribunal does not have jurisdiction to consider restraint of trade arguments, I respectfully disagree with that view.

66. The Respondent has put forward no valid reason to distinguish, as regards the Tribunal's jurisdiction, between an argument that a provision is a penalty clause and an argument that it is void as being in restraint of trade. Cleeve established that the former could be considered in the context of a complaint of unauthorised deduction from wages. I conclude that the Tribunal also has jurisdiction to consider the latter.

Restraint of trade: Were the provisions unlawful restraints of trade and therefore void and unenforceable?

67. The Respondent argues that there are two stages to determining whether a clause is void as being in restraint of trade:

    67.1. First, it is necessary to decide whether the clause attracts the doctrine at all, i.e. does the clause amount to a restraint of trade?

    67.2. If it does, the party relying on the clause may raise the defence of justification. Then it is necessary to decide whether the clause is reasonable having regard to the interests of the party imposing the restriction.

68. This is an attractive approach from the point of view of legal certainty, but it is apparent from the authorities summarised above that the courts have not always clearly distinguished between these two stages. This is because determining whether the doctrine applies may involve consideration of whether the contractual restrictions "appear to be unnecessary or to be reasonably capable of enforcement in an oppressive manner" (Macaulay, per Lord Reid). There is inevitably some overlap between that assessment and the question of whether the restrictions are justified.

69. It is important to note that neither Hubble or Riley, on which the Claimants heavily rely, is authority for the proposition that claw-back provisions of the kind that applied to the Claimants are void as being in restraint of trade. In Hubble the Court of Appeal merely found that a defence on that basis was *arguable*, noting that there were arguments about inequality of bargaining power and whether the sum to be repaid overstated the true cost so it could be inferred the purpose was to deter staff from joining a competitor. Mustill J declined to express an opinion on the prospects of defendant succeeding, other than to say "I do not regard his case as so hopeless that he should not even be allowed to try".

70. Riley takes the matter no further. David Donaldson QC analysed the authorities and said,

> "I conclude that there is no authority binding upon me which decides that a repayment provision can never through disincentive or 'golden handcuff' effect amount to a restraint of trade requiring objective justification. Indeed, *EDF*[2] appears to suggest the contrary. Plainly, however, the point calls for resolution by higher authority than I can provide." (paragraph 47)

71. There has been no such "resolution by higher authority" to date. I must therefore apply the general principles as explained by Lords Reid and Diplock in Macaulay.

72. I have concluded that the claw-back provisions in the present cases are not void as being in restraint of trade. I consider the following factors are relevant:

    72.1. As in Peninsula, the provisions did not impose any restraint on the Claimants as to whom they might work for or what they might do after leaving the Respondent's employment. As it happens, their contracts of employment did include post-termination restrictions, but they are not in issue in these proceedings.

    72.2. While there was, of course, inequality of bargaining power between the Claimants and the Respondent, it was no more than in most employment relationships. Mr Day's situation is somewhat unusual in that his "bargaining power" was put to the test when he requested a more favourable salary structure before accepting the offer. The offer was not "take it or leave it", as is often said of employment contracts; he

[2] This is a reference to the Court of Appeal judgment in Hubble; "EDF" appears to be a mistaken acronym for "Electronic Data Systems".

successfully negotiated higher rates of pay. It is also notable that Mr Day chose to accept the revised offer, notwithstanding the salary was lower, at least for the first year, than his existing salary in a stable NHS job. He gave careful consideration to the contract of employment and Contract of Training Investment over a period of ten days, including discussing them with his family, and he understood their effect at the time of signing. Mr Bennett was perhaps in a less strong position because he was unemployed and had no relevant professional experience, but it is clear from his evidence that he also understood the effect of the Contract of Training Investment. He was looking for a way into the IT industry and willingly accepted the offer of the training role. In both Claimants' cases, the contracts offered a route into the IT industry by incorporating training into their employment. The Claimants are intelligent, well-educated young men who understood what they were agreeing to and considered it a worthwhile career move.

72.3. The Contracts of Training Investment included an obligation on the Respondent to provide "the training support set out in the Training Cost Calculations". This included the specific activities set out in the notes under the Training Cost Calculations. There was, therefore, a reciprocal obligation to the Claimants' obligation to pay back the training cost debt.

72.4. The amounts owed by the Claimants were not out of proportion to the benefit they obtained by taking up the offers of employment.

72.4.1. In Mr Day's case, the maximum sum repayable was £18,810. This was less than his starting annual salary of £23,000. It is relevant that he had no prior experience in the IT industry; he accepted the role on the basis that he expected to gain experience and skills to succeed further in his career. It is notable that that expectation was borne out by subsequent events; Mr Day accepted in his evidence that he had been able to secure his current job, on a salary of £60,000, in part because of his training and experience at the Respondent. The training period was six months, during which Mr Day was paid a salary which did not form part of the training cost debt, despite the fact that he was inevitably of limited value to the Respondent until he completed his training. As soon as the training period was completed the training cost debt reduced on a monthly basis over the following two years. By the time Mr Day resigned the debt was just over £3,000. Given that he immediately took up a higher paid role in another company, on £46,000 a year, the training cost debt was demonstrably not set at a level that prevented him from seeking employment opportunities elsewhere.

72.4.2. In Mr Bennett's case, the maximum sum repayable was £15,900. Again, this was less than his starting annual salary of £18,000. He had no relevant professional experience prior to working for the Respondent and was looking for an "entry level" role in software developing, which he said was extremely competitive. Again, his assessment that the training would be "worth it" is borne out to some extent by his subsequent employment history. He left the Respondent in order to take up a junior developer role in another company, on a much higher salary of £35,000. He did not accept in cross-examination

that he got the job because of his training at the Respondent, but he did accept that his experience at the Respondent helped him to get an interview. The training period was six months, during which Mr Bennett was paid a salary. The training cost debt included a sum to reflect his employment costs for only the first two months, despite the fact that he was inevitably of limited value to the Respondent until he completed his training. By the time Mr Bennett resigned the training cost debt was £3,630.50. Again, this was demonstrably not a sum that prevented him from seeking employment opportunities elsewhere.

72.5. I accept that the level of the training cost debt was such that there would have been a very strong disincentive to leave the Respondent straight after the training period, but this was a legitimate way for the Respondent to protect the investment it made in taking on the Claimants in training roles. That interest reduced over time because the Claimants, once trained, provided a benefit to the Respondent via their work. The sliding scale by which the debt reduced over time meant that the debt remained linked to the Respondent's interest in protecting its investment.

72.6. The Claimants rely heavily on the allegedly poor quality of the training they received, and Mr Platts-Mills spent a great deal of time cross-examining the Respondent's witnesses on their training records and the amount of mentoring time given. The relevance of what happened in practice is, however, very limited. There is no claim for breach of contract on the basis that the Respondent did not provide training that was promised in the Contracts of Training Investment. The only possible relevance is to the Claimants' arguments that the sums claimed overstated the true cost of the training to the Respondent and/or its value to the Claimants. It is not in dispute, however, that the provisions must be construed as at the time the contracts were entered into. I consider that factual findings as to what training was given to the Claimants in practice could only assist my determination on the restraint of trade issue if they demonstrated that:

72.6.1. The estimates of the cost of training in the Contracts of Training Investment were knowingly and deliberately overstated by the Respondent, and/or

72.6.2. The Respondent had no legitimate interest in recovering the costs because, in reality, the cost of the training was nil, or negligible, and it was of no or very little value to its employees.

72.7. I do not accept the Claimants' characterisation of the training they were given and I certainly could not make findings of fact that would demonstrate either of the above. The Claimants do not dispute that they received some one-to-one training from their mentors. Their argument that they received no more than the sort of supervision and line management any junior employee would expect was somewhat disingenuous. The Respondent offers a highly technical service, of which neither Claimant had any prior experience. It is not credible that the Respondent would permit employees in the Claimants' position to work from day one effectively under their own steam and without close additional supervision. I do not consider it necessary to make findings as to the precise level of training given.

72.8. The argument about the training being "non-transferable" is something of a red herring. The Contracts of Training Investment did not specify any particular type of training and it was never suggested to the Claimants that they would gain any formal qualification.

73. For those reasons I conclude that the bargain between the Claimants and the Respondent was fair, in the sense explained in Macaulay. It was not an entirely one-sided agreement, but rather offered benefit to both parties. Either the provisions are not properly characterised as being in "restraint of trade", or alternatively they are justified.

74. As an aside, I observe that the public policy considerations are not one-sided either. It may be true that employees, particularly at the start of their working lives, sometimes feel pressured to accept training contracts which tie them into employment with a particular employer for longer than they would like. But there is also a benefit to the public in employers offering employment opportunities that incorporate training, so that jobs are accessible to "entry level" applicants. Provided the employer does so in a way that is not oppressive, and the mechanism for protecting its investment in the employee is not wholly disproportionate, the Tribunal has no power to interfere with contractual obligations knowingly and freely made by the employee.

Penalty clause: Were the relevant provisions unlawful penalty clauses and therefore void and unenforceable?

75. Mr Welch argues that the training cost debt cannot be characterised as a penalty clause because it is not a "secondary obligation". The debt does not arise on breach of contract. The Contracts of Training Investment expressly state that the employee would not be in breach of contract if he or she chooses not to work the "minimum length of services". Mr Platts-Mills did not specifically address this point.

76. It is undoubtedly correct that the Contracts of Training Investment have the effect of imposing a debt on the Claimants which is not dependent on any breach of the contract by them. The debt is, on the face of the contracts, a primary obligation. Having said that, because the debt is effectively waived if the employee completes the "minimum length of services", the requirement to pay it, or a proportion of it, if the employee leaves sooner is characteristic of a secondary obligation. Given my conclusions below, I consider it unnecessary to determine this issue.

77. It is also unnecessary to decide whether Makdessi applies in the employment context. Whichever test is applied, I find that the claw-back provisions did not amount to a penalty. It is not in dispute that the provisions must be construed as at the time they were entered into. The Contracts of Training Investment each contain a clear attempt to estimate the costs to the Respondent of training the Claimants. I find the calculations therein are a genuine pre-estimate of the cost. The claw-back provisions do not impose a detriment on the Claimants out of all proportionate to any legitimate interest of the Respondent. I rely on the factors set out above at paragraph 72. The Contracts of Training Investment imposed an obligation on the Respondent to provide the training set out in the

calculation. The sums owed were not dipropionate to the Respondent's legitimate interest in protecting the investment it made in employing the Claimants in training roles. As explained in Cleeve, there is no need for the employer to be exact about the costs it seeks to recoup, provided the sum is not penal. I find it was not.

Conclusion

78. For the reasons given above the complaints of unauthorised deductions from wages fail and are dismissed.

Failure to provide itemised pay statements

79. The Respondent argues that the emails from Mr Khamooshi of 7 and 9 May 2019 setting out the total training cost debt satisfied the requirement in section 8 ERA to provide itemised pay statements. That is plainly not correct. The requirement in section 8 is to provide a written statement that contains "particulars of…any fixed deductions…and the purposes for which they are made". The deductions made from the Claimants' wages for April and May 2019 were not itemised on their payslips or set out in any other written document prior to the date on which they were paid.

80. The Claimants are therefore entitled to a declaration under section 12(3) ERA that their pay statements in respect of their wages for April and May 2019 did not contain the particulars required to be included by section 8 ERA.

81. The Tribunal has a discretion pursuant to section 12(4) ERA to make a monetary award in these circumstances. I consider that it is not appropriate to make an award in this case. The Claimants knew the amount they owed pursuant to the Contracts of Training Investment and Mr Khamooshi had offered to arrange for the amount to be paid in instalments. The Claimants have suffered no loss as a result of the Respondent's failure to itemise the deductions. In circumstances where I have found that the deductions were not unlawful, and noting that the amounts deducted did not account for the full debt owed by each Claimant, I consider it would be unjust to make a monetary award.

_____
Employment Judge Ferguson
Date: 23 February 2021