THE EMPLOYMENT TRIBUNAL

SITTING AT: **LONDON SOUTH**

BEFORE: **EMPLOYMENT JUDGE NASH (sitting alone)**

BETWEEN:

Claimant **Ms A Bidwell**

and

Respondent **Tomberries Nurseries Ltd**

ON: **3 November 2020**

APPEARANCES:

For the Claimant: **In person**
For the Respondent: **Mr Choudhary, HR Director**

JUDGMENT

The Judgment of the Employment Tribunal is as follows:-

1. The claimant's claims for notice pay and for unauthorised deductions from wages fail and are dismissed.

2. The respondent's counterclaim succeeds.

3. The claimant shall pay to the respondent the sum of £412.68 as damages for breach of contract.

REASONS

1. Following dismissal on 19.3.19, the Claimant undertook ACAS Early Conciliation from 4.4.19 to 4.5.19. She presented her application to the Tribunal on 3.6.19. The response, including a breach of contract counterclaim, was submitted on 13.9.19.

2. At this hearing, the Tribunal heard witness evidence from the Claimant on her own behalf. It also had sight of witness statements from Ms Du Preez (two statements), Dr Bassett, Ms Merefield, Ms Hughes and Ms Hartshorn. For the Respondent it heard from Ms T Choudhary, its Director, and from Mr H Choudhary, its HR Director. It also had sight of emails from Ms White (two statements), Ms Patel and Ms Romic.

3. The Tribunal had sight of a bundle prepared by the respondent. There were the following issues with the documents.

4. The Tribunal informed the parties that, from a brief perusal of the bundle, there appeared to be without prejudice documents included. The Tribunal did not see anything material in these documents. It explained the principles of without prejudice and legal privilege to the parties. It asked how they wished to proceed. The parties both wanted the hearing to proceed on the basis that the without prejudice material would be removed and not considered by the judge.

5. The Tribunal advised the parties that many documents appeared only to be relevant to allegations made to the local authority. The tribunal could not see how these were relevant to the issues in this case, as identified below, and advised the parties it would not consider these unless they explained how the documents were relevant to the issues in the case.

6. In the event the hearing went part heard and both parties provided written submissions after the hearing.

The Claims

7. The claims were as follows-

    a. Notice pay of four weeks;
    b. Unauthorised deductions from wages in the sum of £1203.32 from the final pay packet;
    c. A counter claim for breach of contract in the sum of £412.68.

The Issues

8. At the beginning of the hearing the Tribunal agreed the issues with the parties as follows:-

    <u>Breach of contract</u>

    (i) Was there a fundamental breach of contract by the claimant? The respondent relied on gross insubordination and bullying.

    (ii) It was not in dispute that, absent a fundamental breach by the

claimant, she was entitled to four weeks' notice. The respondent stated that it had already paid one week's notice, whereas the claimant said that no notice was paid.

Wages

(iii) It was agreed that the respondent had deducted £1171.32 as "agency fee recovery" and £35 "lost property", from the claimant's final pay packet.

(iv) The respondent contended that it was authorised under clause 24 of the contract of employment to deduct 50% of the agency fees it had incurred in recruiting the claimant and £35 for uniform from the claimant's wages if she was dismissed.

(v) Were these deductions authorised under section 23?

(vi) Was clause 24 an unenforceable penalty clause?

9. It was agreed that other remedy issues would be held over to any remedy hearing.

The Facts

10. The Tribunal found the following facts.

Background

11. The respondent is a small nursery with about 8 members of staff. The claimant started work on 22.10.18 as nursery cook/ assistant working from 7.30am to 4.30pm. The claimant was recruited via a recruitment agency which charged the respondent a "finders fee".

12. The tribunal had sight of a written contract of employment signed by both parties on 22.10.18.

13. The following clauses were relevant:-

a. The employee was entitled to four weeks' notice of termination during the six month probationary period.

b. At Clause 24 the respondent reserved the right to deduct from wages any costs arising from damage or loss of property. Further, if a uniform was provided, the employee was required to pay for this if it was lost or damaged.

c. Where employment was through a recruitment agency and the employee was dismissed, the employee "will be subject to

reimbursing [the respondent] costs for the agency introduction as appropriate". Where the employee was employed for between 7 and 56 weeks, the relevant percentage was 50%. Further, "in such cases where dismissal has taken place, you may still be liable to cover costs incurred at the discretion of [the respondent]. This may be the case where the reason for dismissal was misconduct…."

d. Any such deductions would be made from the final salary.

14. The respondent's explanation for the agency fee clawback was that it wanted to avoid losses incurred when, having paid an agency finder's fee, the employment did not work out. The agencies charged the respondent a fee for finding staff and operated a sliding scale by which the respondent could clawback some of the fee from the agency if the member of staff did not last 6 weeks in employment. Once an employee had been in 6 weeks, the respondent could not recover any of the fee from the agency.

15. The tribunal accepted the respondent's explanation for its motivation in including this clause in the contract of employment. The evidence was plausible and detailed and made financial sense in a small organisation.

16. The tribunal also had sight of the respondents' handbook which included amongst its expressly non-exhaustive examples of gross misconduct – serious bullying or harassment, gross negligence and serious insubordination.

17. Ms Choudhary, the director, prepared two probationary reports on the claimant on 6.11.18 and 11.12.18. On 6.11.18 the claimant was scored as needing improvement on, amongst other matters, working as a team. On 11.12.18 the claimant's scores were, overall, worse. She was scored as needing improvement on general attitude, working relationship with colleagues, and acceptance of management instructions. However, her score on working as a team had improved to, "good". The claimant signed each of the probationary reports.

18. Ms Choudhary stated the nursery manager had provided feedback on the claimant before the December probation meeting. The manager said that the claimant's attitude to her manager was poor, and the claimant did not take direction; further, the claimant was disrespectful to other staff who felt intimidated by her.

19. In December 2018, there was a disagreement between the claimant and another member of staff, Ms White. Ms White had wanted to wash an item which had become dirty in the washing machine in the claimant's kitchen. The claimant objected.

20. The matter was considered at a meeting. The respondent gave the claimant an informal warning. The claimant was told that the reasons for the warning were her negative attitude to management and colleagues and that she was belittling colleagues rather than building a positive working environment. The tribunal had sight of an email from Ms White stating that the claimant was confrontational and uncooperative with staff - including when she refused to assist with the washing machine. In her email, Ms White stated that during the meeting, she found the claimant so intimidating, she left the meeting. The claimant disputed this account, in effect saying that Ms White had failed to follow health and safety procedures when trying to use the washing machine.

21. According to Ms Choudhary, other members of staff continued to raise issues about the claimant's conduct.

22. There were also persistent issues with the claimants' timekeeping. The tribunal accepted the respondents' case as to this because of an email from the nursery manager dated 10.9.19 (described as a statement) and timesheets which corroborated the respondent's account.

Events leading to the dismissal

23. One of the claimant's responsibilities was to arrange the Tesco's internet shopping delivery for Mondays.

24. On 15.3.19 (a Friday) the claimant made a grocery order from Tesco for food for the nursery meals. The delivery was due on Monday 18.3.18 at 8 to 9am. The tribunal had sight of the computer receipt which did not include chicken or parmesan cheese, which the claimant thought she had ordered and which she needed to prepare the week's meals.

25. On 19.3.19 the claimant approached Ms Choudhary in the open plan nursery and said that that Ms Choudhary had deleted the chicken and parmesan from the Tesco food order. The tribunal accepted that this occurred in front of parents, children and other staff as it was credible that all these would be present during the nursery opening hours in an open plan space.

26. Ms Choudhary stated that she had not deleted anything. However, the claimant did not accept this and stated that Ms Choudhary had deleted the order. The claimant's case was that Ms Choudhary sometimes deleted items from the food order without telling anyone. The claimant relied on her handwritten checklist to show that the two items had been ordered, and, therefore, must have been removed from the order.

27. According to Ms Choudhary, the claimant went on to say that Ms Choudhary was lying about deleting the food items from the order and Ms Choudhary should therefore go out to buy replacement items. The

claimant said that she tried to arrange for someone to buy the missing items at Sainsburys but was told there was no petty cash by the nursery manager.

28. Ms Choudhary suggested to the claimant that she might have been responsible for the error, or that the store had failed to include the items in the grocery delivery. The claimant continued to state that Ms Choudhary had cancelled the items.

29. Ms Choudhary asked the claimant to discuss the matter in her office away from children, parents and staff. However, the claimant continued to state that Ms Choudhary was at fault and should put matters right. In effect, she said that Ms Choudhary was not telling the truth about cancelling the food items.

30. After this, Ms Choudhary called Mr Choudhary on the phone to inform him of events. Mr Choudhary came to the nursery and spoke to the nursery manager who had witnessed the confrontation between Ms Choudhary and the claimant. Mr Choudhary's evidence was that the director told him that the claimant had accused Ms Choudhary in front of staff, children and parents of being a liar and deleting the Tesco items. The director went on to tell him that the claimant expected Ms Choudhary to obtain these items and was not willing to listen. Finally, the director told him that the claimant had not spoken to her about the items, although the delivery was received first thing on the previous day.

31. Mr Choudhary then sought to discuss the matter with the claimant as she was due to leave. The claimant said she did not have time and that Ms Choudhary should be spoken to. The claimant made a number of criticisms of the management of the nursery and stated that Mr and Ms Choudhary lacked integrity. If the management could not see that the Claimant and colleagues were making all the efforts, then, "just fire me." She left and slammed the door. The claimant agreed that she did not want to attend the meeting, because she was already late in leaving. She said that Mr Choudhary was aggressive and intimidating and shouted at her that she was insubordinate, and he would sack her.

32. Mr Choudhary asked other staff for their views on the claimant's conduct and work. According to Mr Choudhary the majority of colleagues said that they found the claimant intimidating, aggressive and bullying and disruptive. They said that they had not wanted to raise a formal grievance in a small workplace, and they feared the claimant's reaction. The tribunal accepted Mr Choudhary's evidence because it was corroborated by staff statements. The manager's email of 10.9.19 stated that "many times" staff were intimidated by the claimant if they went into the kitchen, for instance to get water or snacks. The claimant snapped at staff without reason. The manager stated that she had told the claimant to communicate more respectfully but the claimant's behaviour worsened.

33. In addition, according to the email of 23.5.19 from Ms White, the claimant was intimidating. She objected to or refused to allow staff to get water from the kitchen. She was rude to staff. Ms White tried to avoid going into the kitchen in order to avoid the claimant; she would go all day without drinking in order to avoid the claimant and she "dreaded" going into the kitchen and coming to work. The claimant was described as "a very confrontational person" who said "many horrible things" about colleagues and the directors. A third member of staff stated in an email of 13.9.19 that the claimant came across as very rude and shouted at her.

34. The claimant's evidence was that these emails from members of staff were obtained by the respondent offering money to all staff to make statements against the claimant and that this was, "bribery, corruption and blackmail". The Tribunal did not accept this allegation for the following reasons. It was vague, generalised and unsubstantiated. The tribunal had sight of an email from Ms White expressly denying any improper pressure and in particular any financial incentive.

35. The claimant's witnesses on the other hand stated that the claimant was not to blame and was not an intimidating person.

Dismissal and aftermath

36. After taking sounds from the staff, Mr and Ms Choudhary decided to dismiss the claimant for gross insubordination and gross misconduct, being bullying. The respondent sent an email that day to the claimant terminating her summarily on the grounds of gross misconduct and serious insubordination. The claimant would be paid one week's notice.

37. The parties exchanged emails about the claimants' final salary and termination. The respondent emailed the claimant on 25.3.19 stating that she owed it £1584.00 under clause 24 in respect of 50% of the agency fee and £35 for the uniform.

38. On 27.3.19 the claimant said that she had sent the uniform – an apron – back to the respondent. However, in her statement she said that this was a mistake, and no apron was in fact sent.

39. The respondent on 27.3.19 again stated that it had paid the claimant one week's notice and had not yet received her uniform.

40. The claimant's final pay slip dated 31.3.19 recorded a deduction of £1171.32 as "agency fee recovery" and £35 "lost property". Accordingly, on the respondent's case, this resulted in a shortfall of £412.68.

Applicable Law

41. The applicable law is found at Section 13 of the Employment Rights Act as follows:-

> 13 Right not to suffer unauthorised deductions.
>
> (1)An employer shall not make a deduction from wages of a worker employed by him unless—
>
> (a)the deduction is required or authorised to be made by virtue of a statutory provision or a relevant provision of the worker's contract, or
>
> (b)the worker has previously signified in writing his agreement or consent to the making of the deduction.
>
> (2)In this section "relevant provision", in relation to a worker's contract, means a provision of the contract comprised—
>
> (a)in one or more written terms of the contract of which the employer has given the worker a copy on an occasion prior to the employer making the deduction in question, or
>
> (b)in one or more terms of the contract (whether express or implied and, if express, whether oral or in writing) the existence and effect, or combined effect, of which in relation to the worker the employer has notified to the worker in writing on such an occasion.
>
> (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.

42. The applicable law in a breach of contract claim is that the burden of proof – on the balance of probabilities - is upon the party which asserts that there has been a breach. The tribunal has, under the Extension of Jurisdiction Order, the same jurisdiction as a county court, with some exceptions which are not relevant to these facts. A tribunal must determine the terms of the contract, establish if either party is in breach and consider if there is anything which, including a penalty clause, prevents the injured party from enforcing the contract.

Submissions

43. Both parties provided written submissions following the case going part heard.

Applying the Law to the Facts

44. The first issue was to determine whether the claimant had committed gross misconduct or other fundamental breach of contract permitting the respondent to dismiss her summarily.

45. The burden of proof was upon the respondent which alleged that the claimant had breached her contract. The standard of proof was on the balance of probabilities.

46. The difficulty for the tribunal was that the witnesses before the tribunal gave different accounts of what had occurred on 19.3.19. The tribunal heard no oral evidence from any other witness. Unlike in an unfair dismissal case where a tribunal must determine if the respondent followed a fair procedure and came to a decision which was within a reasonable range, in a breach of contract case a tribunal must make a finding as to what actually occurred, on the balance of probabilities.

47. The tribunal had sight of what were in effect, character references for the claimant from parents and former colleagues. One parent explained that, after meeting at the nursery, they became friends. They paid tribute to the claimant's positivity and integrity. Another parent alleged that the respondent misled parents about its high staff turnover and mistreated its staff.

48. The claimant also relied on a statement from her former manager and colleague. This colleague was dismissed by the respondent around the same time at the claimant. The statement said that the claimant was a good team player who had good working relationships with her colleagues.

49. The tribunal considered what corroborating evidence existed for the differing accounts of the events of 19.3.19 and the claimant's behaviour towards her colleagues. The tribunal took into account the fact that all the other statements and emails were of witnesses not before the tribunal, not giving oral evidence, not on oath and not subject to questioning. It was not clear that all the persons writing the emails understood that the emails would be placed before the tribunal. Most of the statements were dated some months after the events material to the claim. Nevertheless, they were the only other accounts of the claimant's conduct at work.

50. There was little other evidence about the events of 19.3.19 in the written statements. The statements dealt with the claimant's conduct at work in general. The respondents' relied on the account of the manager and Ms White as to the claimant's alleged bullying.

51. The tribunal attached little if any weight to the statements of the parents. They were not best placed to know about the claimant' relationship with colleagues or management.

52. The tribunal took into account the possible influences on the witnesses who were the claimant's ex-colleagues. One of the claimant's witnesses had been dismissed by the respondent at around the same time which indicated that there could be animosity (whether reasonable or not) towards the respondent. In contrast Ms White did not appear to have any reason to be anything other than a neutral witness. The tribunal did not accept the claimant's submission that Ms White was in effect bribed. Ms White expressly rejected this in a second email and stated that she moved abroad. In such circumstances, it was difficult to see why she might have been influenced to give a misleading or biased statement in favour of the respondents. Ms White's account of the "washing machine incident" was detailed. She also gave detailed accounts of how she felt bullied by the claimant for instance that she did not feel able to go into the kitchen to get water. In the view of the tribunal her account was likely to be reasonably accurate.

53. If Ms White's account was accepted as likely to be accurate, this would be consistent with the respondent's account of the claimant's conduct on 19 March and that Mr and Ms Choudhary were told of the claimant's intimidating behaviour by other staff.

54. The tribunal also noted that the respondent had raised the claimant's performance or conduct with her in her appraisals. In addition, she was given an informal warning due to her behaviour to other staff. This was not a situation where a tribunal was asked to believe that an employee, with an excellent record, had committed a fundamental breach by way of her behaviour. Whilst the difficulties with the claimants' timekeeping were not directly related to her behaviour to other staff, it did indicate that the claimant was less than willing to take direction and comply with management instructions.

55. The tribunal also considered the inherent plausibility of the different accounts. The difficulty for the claimant was that it was harder to understand why the respondent might want to dismiss her if she had not acted as they alleged. All the respondent's evidence pointed to her being an excellent cook; the respondent had paid a significant finder's fee to an agency in respect of her employment. In contrast, if she had acted as alleged by the respondent, the decision to dismiss was more credible. Whilst the tribunal bore in mind that implausible things do sometimes occur, the respondent's account was in general more plausible than the claimant's.

56. Taking all the evidence into account and for the reasons set out above, the tribunal determined that on the balance of probabilities that the

respondent had discharged the burden upon it of showing that the claimant had fundamentally breached her contract by her confrontation with the director on 19.3.19 and her behaviour towards her colleagues. This behaviour was expressly listed as gross misconduct in the contract of employment.

57. According, the claimant was lawfully summarily dismissed and the claim for notice pay must fail.

58. The tribunal went on to consider the deduction from wages claim and the counterclaim. These claims, in effect, primarily turned on the same issues. Did the respondent have the right to clawback the finder's fee and the uniform from the claimant?

59. The tribunal considered the drafting of the contract. The contract stated in terms that the respondent might recover the finder's fee from the employee even in circumstances where the employee was dismissed; the respondent had a discretion to recover this fee in cases of dismissal.

60. There is extensive caselaw in which courts and tribunals have considered the extent to which an employer is fettered in the exercise of its discretion in an employment contract. As noted by the Supreme Court in *Braganza v BP Shipping Ltd and anor 2015 ICR 449, SC*, 'Any decision-making function entrusted to the employer has to be exercised in accordance with the implied obligation of trust and confidence."

61. The EAT considered an employer's discretion over pay rises in *FC Gardner Ltd v Beresford 1978 IRLR 63, EAT*, and identified an implied term not to treat the employees 'arbitrarily, capriciously or inequitably'.

62. In *Clark v Nomura International plc 2000 IRLR 766, QBD*, the High Court proposed a test of *irrationality or perversity* to one of 'capriciousness' or 'without reasonable or sufficient grounds' for determining whether the exercise by the employer of a contractual discretion breached the trust and confidence term; it expressly stated that the test is not one of reasonableness permitting the tribunal to substitute its view for that of the employer.

63. In *Horkulak v Cantor Fitzgerald International 2005 ICR 402, CA* the Court of Appeal determined that an employer must not exercise its discretion in a way which was irrational or arbitrary or come to a decision which no reasonable employer would make; discretion must be exercised in a bona fide and rational manner.

64. The respondent in this case gave a reasoned explanation for its exercise of discretion – it needed to claim back from employees the costs it could not recover from the agency. It was a small employer and could not afford

to lose considerable sums in what were, in effect, failed recruitments which would result in unavoidable further recruitment time and costs.

65. The tribunal could not find that this decision was a capricious or irrational exercise of discretion. The example given in the contract of when the discretion might be exercised was in cases of dismissal on conduct grounds. The respondent gave evidence that it had clawed back money from other employees in these circumstances. Whilst the tribunal was of the view that this was to some extent a harsh decision by the employer, there were reasonable and sufficient grounds for it. For the tribunal to interfere, would mean it was impermissibly substituting its view for that of the employer.

66. Accordingly, the respondent's exercise of its discretion to claw back the agency fee was permitted under the contract. Therefore, the deduction was authorised by a provision of the written contract for the purposes of section 13.

67. The next issue was whether the clawback was an unenforceable penalty clause, see *Dunlop Pneumatic Tyre Co Ltd v New Garage and Motor Co Ltd 1915 AC 79, HL*. A penalty clause is a clause which imposes a penalty on a party which is not a genuine pre-estimate of the losses suffered by the other party. A penalty clause is void and unenforceable at common law.

68. The Employment Appeal Tribunal in *Cleeve Link Ltd v Bryla* UKEAT/0440/12/BA confirmed that an employment tribunal should consider the question of whether a deduction might amount to a penalty clause in determining the lawfulness of a deduction under s13 Employment Rights Act.

69. The Tribunal did not apply the decision of the Supreme Court in *Cavendish Square Holding BV v Makdessi and another case (Consumers' Association intervening) 2016 AC 1172, SC* because the Supreme Court expressly referred to contracting parties' equal bargaining power. The tribunal accepted the claimant's evidence that she was presented with the contract at the start of her employment and had little real chance to object. Accordingly, the tribunal did not find *Cavendish* relevant to the facts of this case. The tribunal instead concentrated on cases involving employment contracts.

70. The Tribunal sought to apply the judgement of Hands J in *Cleeve Link Ltd v Bryla* UKEAT/0440/12/BA which was expressly stated to be intended to of assistance to tribunals in determining penalty clause cases. Hands J quoted from *Lordsvale Finance PLC v Bank of Zambia [*1996] QB 752 as follows:-

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

71. In summing up the approach for tribunals Hands J stated

> …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."

72. This shows that in considering what is a genuine pre-estimate of loss a tribunal should give the employer a fairly wide latitude, the sum needs to be *unconscionably* or *extravagantly* beyond the amount which it would have reasonably been able to recover in a claim for damages, for it to be a penalty clause.

73. Another division of the Employment Appeal Tribunal in *Giraud UK Ltd v Smith 2000 IRLR 763, EAT*, found that a clause permitting an employer to clawback sums from final payment in the event that they failed to give notice and work out their notice period was 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.

74. The tribunal considered the employer's state of mind at the time the contract was entered into. The tribunal had accepted that the employer's motivation in inserting this clause was its previous experience of losing

agency fees on failed recruitments which were a burden on the business's profitability. There was no suggestion that the clause was intended to deter. In fact, the employee was not given enough time to read the contract before it was signed and there was no evidence that the clause was brought to her attention of anything done consistent with using the clause as a deterrent. The evidence was consistent with the employee being surprised by the clawback and it was not something she took into account. This was consistent with the employer not intending the clause to be a deterrent.

75. The deduction from the employee's wages did relate to the employer's losses, albeit not precisely. The employer had paid out a finder's fee to an agency which it could not wholly recover. There was some relation between the proportion of the deduction and the proportion of the finder's fee which the employer could not contractually recover from the agency. The difference between the employer's loss and the deduction was not extravagant or unconscionable. It was possible to explain the relation between the deduction and the loss other than by seeing the deduction as a deterrent.

76. In such circumstances the agency fee clause was not an unlawful penalty clause. The deduction was permitted as a relevant provision of the claimant's contract and therefore fell within permitted deductions in s.13(1)(a) of the Employment Rights Act 1996.

77. These findings apply to the counterclaim. The clawback was not a penalty clause and accordingly, the claimant was contractually liable to pay the clawback to the respondent.

78. The tribunal went onto consider the uniform. There was a dispute between the parties as to whether the uniform was returned. However, in evidence the claimant accepted that she had not returned the uniform. As the respondent's evidence was consistent – the uniform was not returned – and the claimant's evidence was inconsistent, the tribunal preferred the respondent's version of events. The contract expressly permitted the respondent to deduct the cost of a lost uniform from the employee. The tribunal did not find the uniform clause to be a penalty clause. It was causally related to the cost of the uniform (evidenced by a printout of the uniform cost). Accordingly, the deduction in respect of the uniform was lawful under section 13

79. The tribunal went on to consider the counterclaim for the balance of the clawback for the finder's fee and uniform. The contract expressly stated that the employee was liable to reimburse the employer. The tribunal's applied its findings as to the lawfulness of the deduction clauses. Because the tribunal had found that this was not a penalty clause and that it could not interfere with the respondent's exercise of its contractual discretion, the tribunal therefore found for the respondent in its counterclaim.

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Employment Judge Nash
Date: 28 March 2021