EMPLOYMENT TRIBUNALS

Claimant: **MISS K KAUR**

Respondent: **HATTEN WYATT SOLICITORS**

Before: **Employment Judge L Burge**

Representation
Claimant: In person
Respondent: Ms L Calder, Counsel

CORRECTED JUDGMENT

Employment Tribunals Rules of Procedure 2013

Under the provisions of Rule 69, the Reserved Judgment sent to the parties on 8 January 2021 is corrected in bold as set out in paragraph 1.

The judgment of the Tribunal is that:

1. the Respondent's counterclaim under the Employment Tribunals Extension of Jurisdiction (England and Wales) Order 1994, SI 1994/1623 is dismissed upon withdrawal. The Tribunal did not have jurisdiction to hear the counterclaim in any event as the Claimant had not brought a claim "by virtue" of the Order and therefore no adjudication has been made in relation to the counterclaim;

2. the Claimant's application to amend her claim to include a claim for unfair dismissal is refused as she does not have the requisite two years' service in accordance with s.108(1) of the Employment Rights Act 1996;

3. under Part II of the Employment Rights Act 1996:

    a. the Respondent made an unlawful deduction from wages and is ordered to pay the Claimant the sum of £214.67; and

    b. the Claimant's claim for unlawful deduction from wages in respect of the deduction of £1,578.69 (pertaining to a recruitment fee) is unsuccessful and is dismissed.

CORRECTED REASONS

Introduction

1. The Claimant worked as a Solicitor for the Respondent from **16** May 2018, she gave notice to terminate her contract of employment on 6 February 2019 and her employment ended on 29 March 2019.

2. The Respondent deducted the whole amount of her final salary payment of £1,793.36 on 28 March 2019. The Respondent said that it made a deduction of £214.67 for reimbursement of a fee it had paid in respect of the Claimant's practicing certificate and £1,578.69 in respect of part payment of a recruitment agency fee that it had paid when recruiting the Claimant and in respect of which the Claimant had agreed to reimburse if she left within a year.

The hearing and determination of preliminary issues

3. The Claimant gave evidence on her own behalf and the Respondent gave evidence through Mr Yousif, Partner.

4. I was provided with an electronic bundle of 141 pages.

5. The Claimant provided a skeleton argument and the authority of *Cavendish Square Holding BV v El Makdessi; ParkingEye Ltd v Beavis* [2016] 2 All ER 519. Ms Calder also provided a skeleton argument and a bundle of authorities comprising *Neil v Strathclyde RC*, 1983 S.L.T. (Sh. Ct.) 89 (1982), *Nosworthy v Instinctif Partners Ltd* [2019] 2 WLUK 469 UKEAT/0100/18/RN, *Cavendish Square Holdings BV v Talal El Makdessi; ParkingEye Ltd v Beavis* [2016] A.C. 1172; [2015] UKSC 67 and *Clevve Link Ltd v Bryla* [2014] I.C.R. 264 UKEAT/440/12.

6. At the start of the hearing the Respondent explained that it had withdrawn its counterclaim because the Claimant's claim was clearly an unlawful deductions from wages claim, not a breach of contract claim, and therefore the Tribunal could not consider the counterclaim under the provisions of the Employment Tribunals Extension of Jurisdiction (England and Wales) Order 1994. The Tribunal agrees.

7. The Claimant applied to amend her claim to include an unfair dismissal claim. The parties agreed on the dates of employment and those dates meant that the Claimant had significantly under the two years' service she needed under s.108(1) of the Employment Rights Act 1996 in order to bring a claim for unfair dismissal. Accordingly the application was refused.

8. The issues remaining for the Tribunal to determine were:

    a. Was Clause 9.6 in the contract of employment that recouped the recruitment fee a penalty clause and/or (although not agreed by Ms Calder as an issue) did it operate in restraint of trade? And, if not

    b. Were the deductions to the Claimant's wages unlawful under the Employment Rights Act 1996?

9. At the hearing the Claimant said that on reflection she agreed that the Respondent was entitled to withhold the money for repayment of the practicing certificate but she did not agree on the amount. The issue remained unresolved at the hearing and so I asked for written submissions within 7 days of the hearing which were subsequently provided by both parties.

Facts

10. The Claimant was introduced to the Respondent by Paul Hunter, of Hunter's Legal (a recruitment agency) and attended an interview for a job as a Solicitor in the Respondent's Family Law department. On 5 May 2018 the Claimant received the contract of employment that stated that her job title was Solicitor and that her normal place of work was the respondent's offices in Gravesend but that the Respondent could require her to work at one its other offices in Kent. The other clauses of relevance to this claim were as follows:

    Clause 6.1 - the Claimant's "basic salary is £30,000.00 per annum at the date of the signing of this Contract payable on the last day of each month in arrears by Bank Giro Credit in equal instalments."

    Clause 6.2 allowed the Respondent to make deductions from pay because of various factors including:

        Clause 6.2.3 "repayment of any loan or advance or other payment due from you to the firm"

        Clause 6.2.6 "any arrangement requested by you (if agreed by the Firm) for payment to a third party"

        Clause 6.2.8 "reimbursement to the Firm in respect of goods materials and /or services misused or misapplied by you. Any monies owed to the Firm on termination of your employment (including any outstanding loan or advance) must be settled before you leave either by deduction from your final wages (or if there are insufficient to cover the amount you owe) by payment by you."

        Clause 6.3 "For the purposes of these provisions, "deduction" includes amounts withheld from your pay, and non-payments of it, and "pay" covers any sum whatsoever payable to you by the Firm. Should you, for whatever reason be underpaid, then the difference will be made up in the next available salary payment after discovery. You agree to repay any overpayment on your next salary payment day."

    Clause 9.6:

    "9.6 Where you were introduced to the Firm through a recruitment agency and the Firm paid the agency a fee for the introduction then the Firm and you expressly agree that in the event that you give notice to terminate your employment within twelve months from the commencement of your employment then you will refund to the Firm the fee paid in respect of your introduction.

9.6.1 The fee paid by the Firm to the recruitment agency is £5,100.00 exclusive of VAT.

9.6.2 In the event the fee is not refunded by you at the same time as giving your notice, the Firm is entitled to make deductions from your salary to ensure that the Fee is refunded in full by your final salary payment."

11. It is worth noting at this point that the parties originally disagreed about the interpretation of Clause 9.6. The Claimant interpreted Clause 9.6 as meaning that in the event she gave notice and her employment terminated within 12 months then she would be liable to pay the fee. The Respondent interpreted it as meaning that if the Claimant gave notice within 12 months then she would be liable to pay the fee. The latter interpretation would lead to a longer period of potential liability as the employee could give notice at the end of the 12 month period and employment would not terminate for a further three months. At the hearing the Claimant agreed with the Respondent's interpretation so it transpired that there was not dispute between the parties. In any event it did not make a difference on the facts as the Claimant's period of employment including the 3 month notice period was under 12 months.

12. The signature section of the contract stated "it is hereby agreed that the terms set out above comprises your Contract of Employment….".

13. The Claimant did not want to be bound by Clause 9.6 and raised her concerns with Paul Hunter who arranged a telephone call with Carla Hirst from the Respondent. At the hearing there was an issue about whether Ms Hirst worked as a human resources professional for the Respondent, the Respondent saying that she was actually responsible for marketing and that she helped out with recruitment at times. I find as a fact that Ms Hirst was speaking on behalf of the Respondent and that the Claimant was entitled to rely on what she said. In her witness statement the Claimant says that Ms Hirst assured her that Clause 9.6 is hardly ever enforced, that if it is then it is only applied to those who leave within a few months of joining but that time would pass fast and the Claimant would enjoy working there. Under cross-examination the Claimant said that in the telephone conversation with Ms Hirst the impression she was given was that the Respondent had discretion and that on occasions they would waive it. Ms Hirst no longer works for the Respondent and was not a witness before me.

14. An email sent from the Claimant to Mr Hunter on 9 May 2018 said that she had sent an email to Mr Gill of the Respondent accepting the offer and had signed the contract. She asked him to send her the letters regarding the Clause 9.6 and the £300 bonus for accepting the offer. She said that she would be handing in her notice in her current employment shortly. The "letters" regarding Clause 9.6 was a separate agreement with Paul Hunter entitled "Hunter's Legal Financial Agreement" dated 9 May 2018. That agreement promised to protect the Claimant "from any financial clawback from Hatton Wyatt in the event of contract termination". The final paragraph of the agreement stated that the agreement was to be reviewed at the end of probation with the Claimant and carried on for a further period thereafter. The Claimant says that in fact the agreement was not honoured and also that Hunters Legal failed to pay her a

£300 bonus that they had promised. That agreement, between the Claimant and a recruitment agency, is not something that the Employment Tribunal can adjudicate on. Mr Hunter was not a witness in this claim. Mr Yousif, witness for the Respondent, gave evidence that Hunter's Legal is one of the recruitment firms that the Respondent uses.

15. Both parties signed the contract of employment, with the Clause 9.6 in it, and the Claimant commenced work on 16 May 2018. Hunters Legal invoiced the Respondent £5100 plus VAT and the Respondent's witness Mr Yousif confirmed that the Respondent paid that invoice. At the hearing the Claimant said that she now accepted that the fee had been invoiced and paid.

16. There was also an agreement between the Respondent and Hunter's Legal which set out (at clause 6.2) what rebate of the £5100 fee would be repayable by Hunters in the event of the Claimant's termination of employment. The clause detailed a sliding scale starting with termination during the first/second week which would result in a 100% rebate of the fee and ended with a termination during the eighth week resulting in a 0% rebate of the fee. Mr Yousif witness for the Respondent, was asked why there was a difference of an 8 week sliding scale for reimbursement of the fee between the Respondent and Hunters, and a 12 month period within which the Claimant had to reimburse the Respondent. Mr Yousif, in cross-examination, gave evidence that the Respondent was working to the Hunters Legal's terms for the recruitment agreement but that the figure of £5100 in the employment contract to be repayable if the employee left within the year was arrived at "not on a mathematical equation" but based on the actual cost of the recruitment fee. He also said that Clause 9.6 was inserted to ensure that the prospective employees were committed.

17. Unfortunately the Claimant was not happy working for the Respondent. The Claimant is a lone parent and found the journey time, problems with childcare and working hours difficult to juggle. She asked to be transferred to the Maidstone office but the Respondent was unable to accommodate her request. While the Claimant did not raise a grievance about the situation she clearly felt she had little choice but to hand in her resignation. I have every sympathy for her. I found the Claimant to be an honest witness and I believed her account.

18. The Claimant tendered her resignation by letter dated 6 February and gave 3 months' notice with her last working day to be 6 May 2019. The Respondent accepted her resignation by letter dated 11 February 2019 and agreed that the Claimant's last working day would be 6 May 2019. On 22 February 2019 the Claimant emailed Jasvinder Gill, senior partner at the Respondent, requesting to be released earlier from her contract of employment and to reduce her notice period to end on 29 March 2019. This earlier leaving date was agreed at a meeting on 8 March and the Respondent subsequently began the process of redistributing the Claimant's work.

19. On 25 March the Claimant and Ann Chapman from the Respondent's accounts department exchanged emails. The Claimant wanted to ensure that her last day would be included in March's pay. Ms Chapman responded confirming that the Claimant had taken 1.5 days' too much holiday which would be deducted. The Claimant agreed to the deduction. Ms Chapman confirmed: "Yes you will

be paid up to and including your last day less holiday due to the firm".

20. However, on 27 March 2019 (two days before her last day and a day before pay day) the Claimant was hand delivered a letter, saying that the Agency fee was £5,100 and as she had resigned within 12 months of her employment she was liable to pay it. The Respondent said that they would be deducting pro rata her practicing certificate of £214.67. The letter continued:

> *so far as practicable we shall deduct these amounts from your next salary and await your proposals as to how you will pay the balance to us. Once payroll has calculated the outstanding balance due we shall advise you of the same*.

21. Once the Claimant realised the Respondent would be making the deductions, she attempted to rectify this by stating she would retract her request to leave earlier on the 29 March and offered to stay on longer with the Respondent until she completed her full notice period. It is worth pointing out that neither date would have made a difference to whether or not Clause 9.6 would apply in respect of whether or not the period was 12 months or 12 months plus the remainder of the notice period – the Claimant would have only have reached 12 months' service on 15 May 2019.

22. The Respondent did not agree to reinstating the original termination date. In evidence Mr Yousif said, and I find as a fact, that by this point the Respondent was far down a process of moving the Claimant's work. Indeed in an email from the Claimant on 22 February 2019 asking to be released earlier than the 3 months' notice the Claimant says she was still without a childminder for the next half term and that "once [she] began archiving and closing matters, [she wouldn't] be left with many active files and therefore would not be generating fees at all".

23. The letter of 27 March 2019 clearly came as a shock to the Claimant – she was being informed that she would receive nil pay the day before pay day. When cross-examined and asked why she was surprised to learn on 27 March that the Respondent would be deducting money the Claimant said "You sign [your contract] and then you don't really look at again until you leave" and "it was at the front of my mind when I took the job, not so much afterwards". The Claimant had clearly forgotten about the potential recoupment or at the least had hoped that the Respondent would choose not to enforce it.

24. On 28 March 2019 the Claimant received no pay and on 29 March 2019 her employment terminated.

THE LAW AND RELEVANT LEGAL PRINCIPLES

25. The terms in a contract of employment are binding on the employee and employer, although common law may intervene in circumstances such as where the contract has been concluded on the basis of misrepresentation or deceit, or where a clause amounts to a penalty clause or is in restraint of trade. A contractual term must be enforceable at common law if it is to authorise a deduction under the Employment Rights Act 1996.

(i) Penalty clauses

26. Prior to the *Cavendish* case (see below), the common law rule was that any fine or deduction should be a genuine pre-estimate of the loss suffered by the employer as a result of the employee's breach and that anything in excess of this was void as a penalty (*Dunlop Pneumatic Tyre Co Ltd v New Garage and Motor Co Ltd* 1915 AC 79, HL).

27. In *Yorkshire Maintenance Company Ltd v Farr* EAT 0084/09 His Honour Judge Pugsley cautioned employers against acting as 'judge and jury' when requiring an employee to repay certain costs and expenses and considered that such terms should be 'subject to a considerable degree of scrutiny' because of the vast disparity in economic power between employer and employee.

28. In *Cleeve Link Ltd v Bryla* UKEAT/0440/12 a summarily dismissed employee challenged her employer's contractual right to recoup the costs of her recruitment (mainly her flight) for a period after the commencement of her employment. The Employment Appeal Tribunal held that the tribunal had erred in finding that the costs clause was a penalty. At para 31 His Honour Judge Hand concluded that:

> *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.*

29. The test was thus to consider the matter at the time the contract was entered into, and to consider whether there was "an extravagant or unconscionable gulf that existed between the maximum amount that could be recovered in a common-law action for damages for breach of contract as opposed to the sum stipulated in the agreement" (para 32).

30. *Cleeve Link* needs to be considered in the light of the Supreme Court decision of *Cavendish Square Holding BV v Makdessi; Parking Eye Ltd v Beavis (Consumers' Association intervening)* [2016] AC 1172. The President of the Supreme Court, Lord Neuberger, said at paragraph 12:

> *In England, it has always been considered that a provision could not be a penalty unless it provided an exorbitant alternative to common law damages.* ***This meant it had to be a provision operating on a breach of contract.*** ***[my emphasis]***

at paragraph 13:

> *This principle is worth restating at the outset of any analysis of the penalty rule, because it explains much about the way in which it has developed. There is a fundamental difference between a jurisdiction to review the fairness of a contractual obligation and a jurisdiction to regulate the remedy for its breach. Leaving aside challenges going to the reality of consent, such as those based on fraud, duress or undue influence, the courts do not review the fairness of men's bargains either at law or in equity. The penalty rule regulates only the remedies available for breach of a party's primary obligations, not the primary obligations themselves.*

and at paragraph 14:

> *This means that in some cases the application of the penalty rule may depend on how the relevant obligation is framed in the instrument, ie whether as a conditional primary obligation or a secondary obligation providing a contractual alternative to damages at law. Thus, where a contract contains an obligation on one party to perform an act, and also provides that, if he does not perform it, he will pay the other party a specified sum of money, the obligation to pay the specified sum is a secondary obligation which is capable of being a penalty;* ***but if the contract does not impose (expressly or impliedly) an obligation to perform the act, but simply provides that, if one party does not perform, he will pay the other party a specified sum, the obligation to pay the specified sum is a conditional primary obligation and cannot be a penalty*****.** **[my emphasis]**

31. The Supreme Court went on to reformulate the law on penalty clauses. The President said at paragraph 31:

> *The real question when a contractual provision is challenged as a penalty is whether it is penal, not whether it is a preestimate of loss. These are not natural opposites or mutually exclusive categories. A damages clause may be neither or both. The fact that the clause is not a preestimate of loss does not therefore, at any rate without more, mean that it is penal. To describe it as a deterrent (or, to use the Latin equivalent, in terrorem) does not add anything. A deterrent provision in a contract is simply one species of provision designed to influence the conduct of the party potentially affected. It is no different in this respect from a contractual inducement. Neither is it inherently penal or contrary to the policy of the law. The question whether it is enforceable should depend on whether the means by which the contracting party's conduct is to be influenced are "unconscionable" or (which will usually amount to the same thing) "extravagant" by reference to some norm.*

32. In *Nosworthy v Instinctif Partners Ltd* [2019] 2 WLUK 469; UKEAT/0100/18/RN the Claimant had voluntarily resigned and was therefore treated as a "Bad Leaver" in accordance with the relevant documentation. The EAT held that the Employment Tribunal did not err in holding that the Bad Leaver provisions were not a penalty as they were not imposed on breach of contract by the Claimant. *Cavendish* was considered.

(ii) <u>Restraint of trade</u>

33. Any term in a contract that purports to restrict an individual's freedom to work for others or to follow their trade or business will be void and unenforceable by the courts unless it is reasonable by reference to the interests of the parties concerned and to the public interest.

(iii) <u>Unlawful Deductions from Wages</u>

34. Section 13(1)(a) and (b) of the Employment Rights Act 1996 (ERA) provide that an employer shall not make a deduction from the wages of a worker employed by him unless the deduction is required or authorised to be made by virtue of a statutory provision or the relevant provision of the worker's contract or the worker has previously signified in writing his agreement or consent to the making of the deduction.

35. A relevant provision in the worker's contract is defined by section 13(2) as:

"(a) One or more written contractual terms of which the employer has given the worker a copy of 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 the worker in writing on such an occasion."

36. By section 13(3) of the ERA 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 as a deduction made by the employer from the worker's wages on that occasion.

37. S.23 ERA provides that a worker can present a complaint to an Employment Tribunal if the employer has made a deduction from his wages in contravention of section 13, but such a complaint will not be considered by an Employment Tribunal unless "it is presented before the end of the period of three months beginning with (a) in the case of a complaint relating to a deduction by the employer, the date of payment of the wages from which the deduction was made".

38. S. 24 provides that "where any complaint under section 23 is well-founded the Tribunal can make an order that the employer pay to the worker the amount of any deduction in contravention of section 13."

39. S.27 ERA defines wages, which includes "any fee, bonus, commission, holiday pay or other emolument referable to his employment, whether payable under his contract or otherwise."

CONCLUSIONS

40. I must address the claim in two stages. Firstly, is the agreement one which is lawful under general principles of contract law? If it is, I then need to consider whether the deduction is permitted under Part II of the ERA.

41. I must start by considering the contract at the time it was entered into and by considering the written terms, as agreed by the parties.

(i) Deduction for repayment of the practicing certificate

42. In the submissions provided after the hearing, the Claimant's primary position was that the Respondent was not entitled to make the deduction for her practicing certificate under the terms of the contract. The Respondent's position was that it was entitled under clause 6.2.3 of the contract in that the payment of the practicing certificate was an "advance", or if not that it was a payment to a third party (6.2.6) or a service misused or misapplied by the Claimant and so repayable (6.2.8). Neither party provided any evidence that the issue of the practicing certificate payment had been discussed at any point prior to the letter on 27 March 2019 stating that the Respondent would deduct the Claimant's pay in respect of it. There was no evidence of a policy on repayment in the

event of an employee leaving the firm part way through the year.

43. It is my conclusion that the terms of the contract did not allow for deductions to be made for recouping the cost of the practicing certificate. It was paid by the firm without condition and can not properly be described as an "advance" or a payment to a third party or a service misused/misapplied. Therefore there was no "relevant provision of the worker's contract" which would have allowed the deduction under s.13(1)(a) of the Employment Rights Act 1996.

(ii) Deduction for repayment of the recruitment fee

44. Clause 9.6 permits the Respondent to charge £5100 to the Claimant if she hands in her notice within 12 months.

45. The problem the Claimant faces is that she knew about Clause 9.6, indeed she raised her concerns about it with the Respondent and also with Mr Hunter. The Claimant also knew that when she signed the contract she was signing underneath the signature section which states "it is hereby agreed that the terms set out above comprises your Contract of Employment….". While she may have hoped that the Respondent would not enforce Clause 9.6 based on her conversations with Mr Hunter and Ms Hirst, she had signed a contract agreeing that the Respondent was entitled to. Mr Yousif gave evidence that the Respondent has had some potential employees who have pulled out of the process when they would not remove clause 9.6. It was open to the Claimant to do also.

46. It was unfortunate that the Respondent failed to make the Claimant aware that it would be enforcing Clause 9.6 and deducting an amount for payment of her practicing certificate during her notice period. Even three days before the Claimant's final salary payment she was told by Ms Chapman that she would be receiving her pay less deduction for 1 ½ days leave. The letter informing her of the deductions came a day before her entire final payment was withheld. While Clause 9.6 specified that the Respondent was allowed to deduct the money, they did not enquire as to whether the Claimant would be able to manage with the imminent deductions. The Respondent did not agree to an extension of her employment, although that is understandable given that by this time the Claimant's work had been redistributed.

47. While it was not addressed in the claim form or listed as an issue, the Claimant sought to argue that she had entered the contract on the basis of a misrepresentation by Mr Hunter of Hunters Legal and Ms Hirst of the Respondent. There is no doubt she felt the pressure from Mr Hunter, a recruitment consultant who stood to gain a large fee if he placed her. But she also should have been aware that he could not speak for the Respondent. That was the reason why he arranged a telephone call from Ms Hirst of the Respondent and also why Hunters Legal entered into an agreement with the Claimant to reimburse her in the event that the Respondent decided to enforce the agreement. In the Claimant's cross-examination she said she was given the impression by Ms Hirst that the Respondent had discretion and that on occasions they would waive it. That is not the same as Ms Hirst saying that the Respondent *would not* enforce Clause 9.6. The Claimant thus knew that the Respondent had discretion as to whether or not they would enforce the Clause

and so Ms Hirst's representation was not incorrect. The Respondent provided no evidence that it had considered exercising its discretion in not enforcing the Clause 9.6 despite having done so for other employees with "exceptional" circumstances.

48. The Claimant said at the final hearing that Clause 9.6 was in restraint of trade and wanted it to be considered as an issue, although she did not develop this further. I do not think that Clause 9.6 could be considered to be a clause restraining her from trading. It does not seek to restrict her freedom to work for others or restrict her from practising as a solicitor.

49. The question remains whether Clause 9.6 is a penalty clause. The Claimant says that it is because it deters an employee from leaving. However, as seen in the case of *Cavendish Square* and most recently *Nosworthy v Instinctif Partners Ltd*, penalty clauses are concerned with payment to be made to one party *in the event of a breach* by the other. There was no breach of a contract in this case because the Claimant lawfully terminated her contract by giving three months' notice. This was not an obligation in the contract for the Claimant to perform an act in default of which she would have to pay a sum of money. The contract expressly permits her not to perform the act of remaining in work, by providing for its termination by the giving of notice. The requirement to pay the recruitment fee falls into the second category described in paragraph 14 of the judgment in *Cavendish*; that is that if the Claimant does not perform, by terminating the contract herself and giving notice within a year, she shall pay to the Respondent the sum defined in clause 9.6. Clause 9.6 is therefore not a penalty clause.

50. Equity allows me to scrutinise this provision and construe it differently if it was not the true nature of the obligation. It does not allow me to rewrite the contract because I consider it a bad bargain. I remind myself of the words of Lord Neuberger "the courts do not review the fairness of men's bargains either at law or in equity". Just as Hunters Legal/the Respondent determine the terms of the agreement between them, so too can the Claimant/Respondent. The Claimant did not want to accept clause 9.6, but did so in the hope (not the representation) that they would choose not to enforce it.

51. If I am wrong that Clause 9.6 is not a penalty clause, in accordance with *Cavendish* I then need to consider what the commercial justification was (here the fee incurred from a recruitment agent) and whether the clause was in all the circumstances extravagant, exorbitant or unconscionable ie was it out of all proportion to the legitimate interest concerned? The Respondent's evidence was that there was no mathematical equation and that the amount was the recruitment agency's fee but Mr Yousif also stated that the Clause 9.6 made sure that people were "committed". In my view this shows that in addition to recouping the fee, it also puts pressure on employees not to leave within the year. Ms Calder submitted that £5100 was the tip of the iceberg in relation to the costs of recruiting, training, client care and similar issues. I would find it surprising if the Claimant, working as a solicitor in a busy family law department, had not generated fees substantially above £5100 during the 11 months she worked there.

52. The Claimant's gross pay was £30,000 which would equate to approximately

£24,000 net. The £5100 would be deducted from net pay which equates to 21% of her annual salary. The Respondent had not considered the fact that the Claimant had nearly completed a year's service and had not done any calculation as to whether or not she had earned the Respondent the £5100 in that year. Case law on penalty clauses tends to focus on situations where the employee is in default of a provision or where the employee gains some ongoing benefit such as training. Payment of a recruitment fee does not benefit an employee in the same way. Companies who have in-house recruitment personnel such as a human resources professional to my knowledge do not charge the employee the cost of recruiting them.

53. It is my view that the effect of Clause 9.6 is extravagant, exorbitant or unconscionable – it is an attempt to pass on normal recruitment costs to employees, it substantially restricts an employee's ability to leave their employment within the first year and the fee itself is out of all proportion when compared to the net annual salary/income generated for the firm. If the Claimant had left after 8 weeks (when the Respondent's repayment to the recruitment agency would have been nil), the Respondent would have been entitled to pursue the Claimant for £5100 which would have effectively brought her to nil pay for the previous 2 months. My views, however, will be of little comfort to the Claimant, given my primary finding that Clause 9.6 cannot be a penalty Clause because there has been no breach of contract.

54. Having decided that Clause 9.6 is enforceable under general principles of contract law, I must turn to the question of whether the Respondent was entitled to deduct the sum of £1,578.69 in respect of part payment of a recruitment agency fee. In the circumstances I find that the deduction was permitted as "a relevant provision of the worker's contract" and therefore fell within the permitted deductions in s.13(1)(a) of the Employment Rights Act 1996.

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Employment Judge **L Burge**

Date: 23 November 2020

Corrected: 7 February 2021