Case No: 2406107/2022

EMPLOYMENT TRIBUNALS

Claimant: **Miss C L Allen**

Respondent: **Goyt Valley Carers Ltd**

Heard at: **Manchester by CVP** **On:** **7 November 2022**

Before: **Judge Lloyd**

Representation

Claimant: Miss C L Allen in person

Respondent: Ms Joanna Thorpe, employee of the Respondent

RESERVED JUDGMENT

1. The Claimant's claim in respect of the Respondent's failure to pay holiday pay was withdrawn and is dismissed.

2. The Claimant's claim against the Respondent for breach of contract is respect of a failure to pay the correct sum for visit payments was withdrawn and is dismissed.

3. The Claimant's claim against the Respondent for an unlawful deduction from wages for repayment of a bonus payment succeeds. The Respondent is ordered to pay to the Claimant her bonus payment in the sum of £500. This amount was unlawfully deducted from her wages.

REASONS

Issues in the appeal

1. There were three issues in this claim which were agreed by the parties at the start of the hearing. The first was whether the Claimant had taken unaccrued annual leave such that the Respondent was entitled to deduct a sum of £57.75 to reflect this from her final pay slip. The second was whether the Claimant had been paid correctly in respect of her contractual entitlement to visit pay. The final claim was whether the Respondent had made an unlawful deduction from the Claimant's wages in deducting a bonus payment of £500 from her pay.

Procedure, documents and evidence heard

2. The hearing was conducted via video. There were no technical issues during the hearing.

3. The Claimant and Mr Joyce gave evidence in person. Witness statements had not been submitted.

4. At the outset of the hearing, the Tribunal attempted to establish whether there was an agreed bundle of documents. Both parties had sent in documents, but these had not been put into an agreed bundle. The Claimant and the Respondent confirmed that they had seen each other's documents. The parties had not agreed a joint bundle. Ms Joyce had not seen an email from Steve Boswell from Adult Social Care and Health dated 18 February 2022 which he had sent to the Respondent. A copy was emailed to Ms Joyce and she was given time to read it.

Background

5. The Claimant worked as a care support worker and training support office for the Respondent from 4 January 2021 until she left on 1 July 2022.

6. On 21 December 2021, Simon Stevens Director of Adult Social Care at Derbyshire Council wrote to Adult Social Care Domiciliary Care Providers. This said as follows: "*We are heading into a winter that is anticipated to be*

more pressurised than ever before, in part due to the unprecedented demand for NHS and social care services, but also because of the new Omicron coronavirus variant. Derbyshire County Council and local NHS partners are acutely aware of the pressures that domiciliary care providers are under in terms of your workforce. We know that the festive period adds additional strain on your ability to retain staff due to competition from seasonal employers in other sectors, but also as you need to allow staff to take time off with their families. We are clear that all care providers have an invaluable role to play in keeping local people safe, well and cared for at this time, but the specific demand for care at home is likely to increase significantly in the coming weeks and months. Delays to getting people back home from hospital, or delays to accessing a community home care package is already adding pressure onto the NHS in terms of increasing the risk of hospital admissions or calls to primary care services for assistance. The government has recently announced that it is making funding available via the Workforce Recruitment and Retention Fund, which is in addition to the existing Infection, Prevention and Control funding available. I am writing to you today as our local Integrated Care System - Joined Up Care Derbyshire is pleased to be able to take steps to support the domiciliary care sector by making an additional financial contribution to the total funding available to support the workforce. What this means is that we are able to offer a dedicated winter retention payment of ***up to £500, as a one-off payment, for each home care worker*** *in your employment who remains employed and available for work during the rest of December and through the winter months of 2022. This is designed to help you maintain staffing levels so we can, together, cope with the demand for care at home and to help get people back home after a hospital admission".*

7. Steve Boswell from Adult Social Care sent an email to care providers on 18 February 2022. This said "*I am pleased to confirm that the council is now in a position to make the staff retention bonus payments to you as domiciliary care employer. the purpose of this payment is to recognize and reward your dedicated staff who have worked so hard during the pandemic*". The email said that all members of staff who have worked regularly between 13 December 2021 and 18 February 2022 will receive a payment.

8. On 1 March 2022, the Respondent emailed its care staff, including the Claimant, to set out details of the bonus payment. It said that "*The bonus payment is to recognize and reward you for your dedication to the company for working so hard during the pandemic. The bonus payment is also part of staffing retention in the care sector. Should you choose to accept the payment you will be expected to commit to Goyt Valley Carers Ltd for the next 6 months. If you accept the bonus payment and leave the company before the 6 months retention period you will be expected to pay back the retention bonus payment*".

9. The Claimant emailed to confirm she accepted these payment terms on 1 March 2022.

10. Clause 7 of the Claimant's contract of employment allows the Respondent to make deductions from the Claimant's salary. It says: "*If the company makes an overpayment to you to which you are not entitled, is more than that to which you were entitled, you agree to allow the company to recover the overpayment by deductions to your salary or other payments made to you*".

11. The Claimant was paid the £500 bonus in March 2022. As she left the Respondent's employment on 1 July 2022, the Respondent deducted £500 from her final pay slip.

The Law

12. Regulations 14 and 16 (1) and (5) of the Working Time Regulations provides as follows:

14 Compensation related to entitlement to leave (1) This regulation applies where – (a) a worker's employment is terminated during the course of his leave year, and (b) on the date on which the termination takes effect ("the termination date") the proportion he has taken of the leave to which he is entitled in the leave year under regulation 13 and regulation 13A differs from the proportion of the leave year which has expired. (2) Where the proportion of leave taken by the worker is less than the

proportion of the leave year which has expired, his employer shall make him a payment in lieu of leave in accordance with paragraph (3).

16 Payment in respect of periods of leave (1) A worker is entitled to be paid in respect of any period of annual leave to which he is entitled under regulation 13[and regulation 13A]1, at the rate of a week's pay in respect of each week of leave. ….. (5) Any contractual remuneration paid to a worker in respect of a period of leave goes towards discharging any liability of the employer to make payments under this regulation in respect of that period; and, conversely, any payment of remuneration under this regulation in respect of a period goes towards discharging any liability of the employer to pay contractual remuneration in respect of that period.

13. Section 13 of the Employment Rights Act 1996 sets out the right not to suffer unauthorised deductions from wages. It provides 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. (4) Subsection (3) does not apply in so far as the deficiency is attributable to an error of any description on the part of the employer affecting the computation by him of the gross amount of the wages properly payable by him to the worker on that occasion. (5) For the purposes of this section a relevant provision of a worker's contract having effect by virtue of a variation of

the contract does not operate to authorise the making of a deduction on account of any conduct of the worker, or any other event occurring, before the variation took effect. (6) For the purposes of this section an agreement or consent signified by a worker does not operate to authorise the making of a deduction on account of any conduct of the worker, or any other event occurring, before the agreement or consent was signified. (7) This section does not affect any other statutory provision by virtue of which a sum payable to a worker by his employer but not constituting "wages" within the Case No's: 1801759/2022, 1801870/2022, 1802882/2022 and 1803353/2022 10.7 Judgment with reasons – rule 62 March 2017 meaning of this Part is not to be subject to a deduction at the instance of the employer. 36. Overpayment of wages are in Section 14 excepted from Section 13 "where the purpose of the deduction is the reimbursement of the employer in respect of… an overpayment of wages.

14. In determining the claim for unauthorised deduction from wages the Tribunal has considered the following issues:

a. Was the claim presented in time?

b. Was the Claimant and employee and therefore, entitled to bring a claim under this legislation.

c. Is the claim in respect of wages?

d. Has the employer made a deduction?

e. If the wages were deducted, was the deduction authorised or exempt?

f. What payment, if any, is owed?

15. The Tribunal's jurisdiction to hear claims for breach of employment contracts is conferred on it by the Employment Tribunals Extension of Jurisdiction (England & Wales) Order 1994. Article 3 of that Order provides that: "Proceedings may be brought before an employment tribunal in respect of a claim of an employer for the recovery of damages or any other sum…if – …(c) the claim arises or is outstanding on the termination of the employee's employment."

Holiday pay

16. After an explanation from the Respondent at the hearing, the Claimant accepted that she had taken holiday which she had not accrued. The Claimant and Respondent agreed at the hearing how much leave the Claimant had taken and how much she had accrued. The Claimant agreed that she had taken leave that she had not accrued when she left the Respondent. As such the Claimant agreed there had been no unlawful deduction from her wages in respect of holiday pay. This part of the claim is withdrawn and is dismissed.

Visit pay

17. After an explanation from the Respondent at the hearing about visit pay, the Claimant also agreed that she had not been underpaid for visit pay due to her. The Claimant had been of the understanding that she had been entitled to be paid £1.00 per visit. The Respondent explained that the reference to "1" on her pay slip was to one unit and not to £1.00. The Claimant had only ever been entitled to payment of 75 pence per visit. The Claimant accepted that she had been paid correctly for visit pay due to her. This part of her claim was withdrawn and is dismissed.

Deduction of bonus payment.

18. The Claimant says that it was not fair for the Respondent to deduct the bonus sum of £500 when she left within six months of it being paid. The Claimant points out that the amount was paid by the Government who had not put this requirement to the payment. The Respondent says that the Claimant agreed to repay the bonus if she left within six months before she accepted the bonus payment.

19. I have considered whether the deduction of the bonus from the Claimant's final salary payment was authorised, or whether the retention clause amounted to a penalty clause.

20. The Claimant submits that the requirement to repay the bonus if she left within six months amounts to a penalty clause and should therefore be unenforceable.

21. The Supreme Court's decision in Cavendish Square Holding BV v Makdessi; Parking Eye Ltd v Beavis (Consumers' Association intervening) 2016 AC 1172, SC (a non-employment case), examined and restated the law on penalty clauses. This is authority that the penalty clause rule will only apply to clauses which specify a sum to be repaid to the employer in the event of a breach of contract.

22. Kaur v Hatten Wyatt Solicitors ET Case No.2301523/19 (a case which relied on the decision in Cavendish Square) held that a clause in the contract of Case No: 2201185/2022 8 Classification - Internal employment of a solicitor who had been introduced to a firm by an employment agency, under which she agreed to refund the agency's fee (£5,100) if she gave notice to terminate within 12 months of commencing employment, was not a penalty clause. The clause was not penal in nature because there was no breach of contract: K had lawfully given notice, which gave rise to the conditional primary obligation to refund the recruitment agency's fee. The clause was enforceable under general principles of contract law and a deduction made pursuant to it was lawful under S.13(2)(a) of the Employment Rights Act 1996.

23. In Fairfield Ltd v Skinner 1992 ICR 836, EAT, the Employment Appeal Tribunal decided that once it is established that there is a statutory or contractual provision or a written agreement authorising the type of deduction in question — and what the scope of that authorisation is — a tribunal may then go on to consider whether the actual deduction is in fact justified.

24. In MBL UK Ltd v Quigley UKEAT/0061/08, the EAT held that it is possible in principle (although difficult in practice) for an employer to demonstrate the cost (or the value) of training given during the course of a probationary period so as to justify a deduction under a contractual term. However, the right to make a deduction would only arise if training costing at least the amount deducted had in fact been given.

25. In Quigley, the employer relied on a clause in the employee's contract providing for the deduction of "a sum equivalent to but not exceeding £500... [to] cover the training costs provided by the Company during this period" if the employee left or was dismissed during their probationary period. The employer withheld £500 allegedly for the provision of "structured and on the job training" during the probationary period. The tribunal had been entitled to accept the employee's evidence that he had not been given material training of any kind during his probationary period, that what on-the-job training he had received did not justify a charge of £500 and that the "conventional induction" undergone by the employee, lasting 1.5 days, did not amount to training of the type contemplated by the clause.

Conclusions on deduction for the bonus payment

26. Many of the issues were not in dispute and can be dealt with quite briefly.
    a. The Claimant was an employee and had a contract of employment so was entitled to bring these claims. b. The claim was submitted in time. c. It was not in dispute that the Respondent made a deduction of £500 from the Claimant's salary and that this amounted to a deduction from wages.

27. This claim falls to be determined by whether the deduction was authorised by the contract. The Claimant confirmed in writing that she was accepting the bonus payment on the basis that she had to repay it if she left within six months of receiving it. Clause 7 of the Claimant's contract of employment permits the Respondent to recover any overpayment made to the Claimant by deductions from her salary. It was open to the Claimant to refuse the offer of the bonus made by the Respondent.

28. The Tribunal is therefore required to assess whether the terms of the bonus payment were enforceable or whether it was a penalty clause. If it was enforceable, the Tribunal then needs to consider whether the deduction under clause 16.5 was authorised under section 13(1)(a) or 13(1)(b) of the Employment Rights Act 1996. Are the terms of the bonus payment and the requirement to repay it if an employee left within six months an unenforceable penalty clause?

29. As seen in the cases of Cavendish Square and Kaur, 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 terminated the Claimant's contract by giving the required notice period. The bonus repayment clause is therefore not a penalty clause.

30. Having decided that the terms of the bonus repayment were not a penalty clause and are therefore enforceable under general principles of contract law, the Tribunal must turn to the question of whether the Respondent was entitled to deduct the sum of £500 when the Claimant left the Respondent's employment within six months of receiving it.

31. I have considered whether the Respondent has made an unlawful deduction from the Claimant's wages with regard to the bonus. Section 13 of the Employment Rights Act says as follows: (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.

32. Clause 7 in the Claimant's contract allows the Respondent to deduct from the Claimant's salary if there has been an overpayment to her to which she was not entitled or is more than what she was entitled to. The bonus was not an overpayment to the Claimant. As such, I find that the deduction for the bonus was not authorised under Clause 7 of the Claimant's contract. The terms of the bonus say that the sum has to be repaid if an employee leaves the Respondent's employment within six months. There is no agreement or statement that the bonus can be recovered by way of a deduction from the Claimant's salary. I find that there has been an unlawful deduction of the bonus sum of £500 from the Claimant's wages. There is no contractual term which allows the Respondent to deduct the bonus as it was not an overpayment.

33. The Respondent is ordered to pay the Claimant the sum of £500 in respect of the unlawful deduction from wages.

Employment Judge **R. Lloyd**
15 November 2022

RESERVED JUDGMENT & REASONS SENT TO THE PARTIES ON
21 November 2022
FOR EMPLOYMENT TRIBUNALS

NOTICE

THE EMPLOYMENT TRIBUNALS (INTEREST) ORDER 1990 ARTICLE 12

Case number: **2406107/2022**

Name of case: **Miss C L Allen** v **Goyt Valley Carers Ltd**

Interest is payable when an Employment Tribunal makes an award or determination requiring one party to proceedings to pay a sum of money to another party, apart from sums representing costs or expenses.

No interest is payable if the sum is paid in full within 14 days after the date the Tribunal sent the written record of the decision to the parties. The date the Tribunal sent the written record of the decision to the parties is called **the relevant decision day**.

Interest starts to accrue from the day immediately after the relevant decision day. That is called **the calculation day**.

The rate of interest payable is the rate specified in section 17 of the Judgments Act 1838 on the relevant decision day. This is known as **the stipulated rate of interest**.

The Secretary of the Tribunal is required to give you notice of **the relevant decision day**, **the calculation day**, and **the stipulated rate of interest** in your case. They are as follows:

the relevant decision day in this case is: 21 November 2022

the calculation day in this case is: 22 November 2022

the stipulated rate of interest is: **8% per annum**.

Mr S Artingstall
For the Employment Tribunal Office

GUIDANCE NOTE

1. There is more information about Tribunal judgments here, which you should read with this guidance note: www.gov.uk/government/publications/employment-tribunal-hearingsjudgment-guide-t426

   If you do not have access to the internet, you can ask for a paper copy by telephoning the Tribunal office dealing with the claim.

2. The payment of interest on Employment Tribunal awards is governed by The Employment Tribunals (Interest) Order 1990. Interest is payable on Employment Tribunal awards if they remain wholly or partly unpaid more than 14 days after the **relevant decision day**. Sums in the award that represent costs or expenses are excluded. Interest starts to accrue from the day immediately after the **relevant decision day**, which is called **the calculation day**.

3. The date of the **relevant decision day** in your case is set out in the Notice. If the judgment is paid in full by that date, no interest will be payable. If the judgment is not paid in full by that date, interest will start to accrue from the next day.

4. Requesting written reasons after you have received a written judgment does **not** change the date of the **relevant decision day**.

5. Interest will be calculated as simple interest accruing from day to day on any part of the sum of money awarded by the Tribunal that remains unpaid.

6. If the person paying the Tribunal award is required to pay part of it to a public authority by way of tax or National Insurance, no interest is payable on that part.

7. If the Secretary of State has claimed any part of the sum awarded by the Tribunal in a recoupment notice, no interest is payable on that part.

8. If the sum awarded is varied, either because the Tribunal reconsiders its own judgment, or following an appeal to the Employment Appeal Tribunal or a higher court, interest will still be payable from **the calculation day** but it will be payable on the new sum not the sum originally awarded.

9. The online information explains how Employment Tribunal awards are enforced. The interest element of an award is enforced in the same way.