EMPLOYMENT TRIBUNALS

Claimant: Ms Belinda Belli

Respondent: Lake District Hotels Limited

HELD AT: Manchester (by CVP) **ON:** 1 December 2022, 4 January, 26 April 2023 (in chambers)

BEFORE: Employment Judge Ficklin

REPRESENTATION:

Claimant: in person

Respondent: Mr Tom Scaife, Baines Wilson LLP

The JUDGMENT of the Tribunal is:

1. The claimant's claim that there was an unauthorised deduction from her wages contrary to section 13 of the Employment Rights Act 1996 is not well-founded and is dismissed.

2. The claimant's claim for unpaid holiday pay is not well-founded and is dismissed.

REASONS

PREAMBLE

1. In a claim form received on 17 March 2022 following ACAS Early Conciliation on 8 March 2022, the claimant has brought complaints of unpaid wages (unauthorised deduction) and unpaid holiday pay.

EVIDENCE

2. I heard evidence from the claimant on her own behalf. I also heard from Mr Anthony Belli, the claimant's husband who had also been employed with the respondent.

3. For the respondent I heard from Ms Daniella Hope, Company Director, and Mr Gwyn Jones, Group Operations Manager.

4. There is an agreed bundle of 235 pages and further witness statements from witnesses that did not attend.

AGREED ISSUES

5. The issues were agreed between the parties, as set out in the agreed bundle:

Unauthorised deductions/Unpaid wages

5.1 Did the respondent make unauthorised deductions from the claimant's wages and if so how much was deducted?

5.2 Were the wages paid to the claimant in her last wages less than the wages she should have been paid?

5.3 Was any deduction required or authorised by a written term of the contract?

5.4 Did the claimant have a copy of the contract or written notice of the contract term before the deduction was made, or did the claimant validly agree in writing to the deduction before it was made?

5.5 How much is the claimant owed? The claimant claims a shortfall of approximately £3245.97, which includes £292.32 holiday pay.

5.6 The claimant also alleges that she was owed gratuities in relation to work carried out in January and February, which she is yet to quantify. The tribunal will determine whether these amount to wages, and if so what were the facts in relation to the alleged non-payment of those sums.

Holiday pay

5.7 Did the respondent fail to pay the claimant for annual leave the claimant had accrued but not taken when their employment ended?

5.8 What was the claimant's leave year?

5.9 How much of the leave year had passed when the claimant's employment ended?

5.10 How much leave had accrued for the year by that date?

5.11 How much paid leave had the claimant taken in the year?

5.12 Were any days carried over from previous holiday years?

5.13 How many days remain unpaid?

5.14 What is the relevant daily rate of pay?

FACTS

6. The respondent company runs hotels, and employs some 320 people in total, including about 117 on the same site as the claimant, the Ladore Falls Hotel and Spa. The claimant started at the company as a Spa Manager on 7 December 2021. She signed her contract on 31 December 2021.

7. The claimant's recruitment was arranged through OX Seven Ltd, a recruitment company in the hospitality sector. The respondent company paid OX Seven £4740 for her recruitment. OX Seven's contract with the respondent states that if the worker accepted by the respondent leaves the job or is dismissed within three months of commencing work, then OX Seven will continue to try to fill the position under the same payment. The respondent has discretion whether to accept any replacement candidates.

8. The claimant's employment ended on 19 February 2022 when she resigned. The claimant's unpaid gross wages as of that date were £3245.97, consisting of her salary of £2168.04, overtime pay of £785.61, and unpaid holiday pay of £292.32.

9. The claimant received nil pay for her final pay period. The respondent withheld her pay and holiday pay on the basis that she was liable for the recruitment fees paid to OX Seven under clauses in her contract.

10. Relevant clauses in the claimant's employment contract state:

"4. HOURS OF WORK

...

4.7 You agree that the 48 hour limit on average weekly working time as specified in the Working Time Regulations 1998 shall not apply to you in this employment ...

8. TRIAL PERIOD

8.1 The first 3 months of your employment will be a trial period during and at the end of which your suitability for the position to which you have been appointed will be assessed. ...

8.2 During or shortly after the expiry of your trial period, your employment may be terminated by the giving of one week's notice or the staturoty minimum notice whichever is longer by the Employer. ...

...

16. DEDUCTIONS

You agree that the Employer may require you to pay or repay any monies due from you to the Employer including, without limitation, any of the following either by deduction form wages or any other monies payable...

...

Any outstanding monies due to the Employer in respect of Recruitment or Accommodation costs as per clause 26 and clause 27 of this contract of employment;

...

27. RECRUITMENT COSTS

...

27.2 In circumstances where the Employer has incurred costs during your recruitment, including without limitation and of the following, you will reimburse to the Employer within 2 months of the termination of your employment;

27.2.1 any recruitment agency fees;

...

In accordance with the following scale:

Period in which the employment ends	Proportion of fees and expenses
If you leave within 6 months of the start of your employment	100%

...

27.3 You agree that any monies due under clause 27.2 above may be deducted from your pay or any other money payable by the Employer to you, including the final payment of your pay and acknowledge that this authorisation entitles such deduction to be made as provided by the Employment Rights Act 1996 and constitutes particular authorisation for the amounts in question."

EVIDENCE AND FINDINGS

11. Having considered the oral and written evidence and submissions presented by the parties (the Tribunal does not intend to repeat all of the oral submissions, but has attempted to incorporate the points made by the parties within the body of this judgment with reasons), I have made the following findings of the relevant facts having resolved conflicts in the evidence on the balance of probabilities.

12. The claimant argues that her wages were unlawfully withheld when she left the business. The respondent argues that the claimant was bound by clauses 16 and 27 in her contract (the recoupment clauses) that authorise the deductions for the purposes of the Employment Rights Act section 13. These clauses purport to allow wage deduction to recoup recruitment fees paid to an external agency in the hiring process within certain time limits and other conditions.

13. The claimant was recruited through the OX Seven recruitment company for a fee of £3950 + VAT (ie £4740). The claimant says that OX Seven told her that the recoupment clauses were unusual. The claimant says that she had raised misgivings about the clauses with Mr Gwen Jones, and that her understanding from what he told her was that the clauses would not be enforced. In evidence the claimant said that Mr Jones had said that they would have a "grown-up conversation" about the clauses and this led her to the understanding that they would be waived.

14. She said that she signed the contract under duress because she felt that she would not have been employed otherwise. She said that she was concerned about the tone of the contract and found it threatening. She signed the contract on 31 December 2021.

15. The claimant said in evidence that she believed that she had been duped by the respondent because she had understood that the recoupment clauses would not apply until after probation, and because had agreed to the position on the basis of a higher salary, which she learnt was only payable after the probation period.

16. The claimant also believed that the respondent could have filled the vacancy and so not invoked the recoupment clauses but declined to do so. There is written evidence from the OX Seven recruitment company expressing surprise that the fees have been recouped from her and describing it as unfair. There is no dispute that OX Seven offered several candidates to the respondent to fill the position. If the respondent had accepted one of OX Seven's candidates, the recoupment clauses could not have been invoked. Instead the respondent promoted an internal candidate who the claimant thought was unsuitable.

17. I take these matters into account but the respondent is entitled to decide who to hire to fill the vacancy, as the claimant acknowledged in evidence. OX Seven is not a party to the contract between the claimant and respondent. There is no suggestion that the contract between the respondent and OX Seven was breached or was even in issue.

18. There was dispute between the claimant and Mr Jones about what was said about the recoupment clauses. Mr Jones said that he gave no assurances about the application of the recoupment clauses. I accept that Mr Jones did not mislead the claimant about the potential for the recoupment clauses to be applied.

19. The claimant says in her witness statement that it was “absolutely clear” that the recoupment clauses would not be applied. I acknowledge the strength of the claimant’s feeling about this issue, but there is no clear reason why this would be the case. While I accept that Mr Jones and Ms Hope may have made equivocal statements about the clauses at times, the evidence does not show that they made any assurances that the clauses would not be applied.

20. There is no basis for the claimant’s belief that the recoupment clauses would not be applied until after the three-month probation period. The claimant relies on the wording of the contract under clause 8. Trial Period, but there is nothing in this section that indicates that.

21. The claimant also claimed that she was required to work more than 48 hours in a week and was not able to take breaks. While she accepted that part of her responsibility was to organise the staff rotation for the spa, she said that due to staff leaving or being off sick, there was a shortage. Combined with the requirement to cover other areas such as reception, she was not able to take proper breaks or leave work on time.

22. The claimant said that she had not agreed to work more than 48 hours in a week, but clause 4.7 of her contract includes this agreement.

23. The claimant raised several instances of poor behaviour by staff at the respondent company, including the owner Ms Kit Graves. She said that these instances of bullying and insulting behaviour, along with the untenable working hours, were the reason why she felt she had to leave the employment when she did. There was no real challenge to this evidence, other than that the respondent’s witnesses said that they were not aware of the claimant’s complaints about it during her employment. The incidents the claimant describes are unpleasant, but there is no claim before me that requires findings on these claims.

LAW

24. Section 13 of the Employment Rights Act 1996 (ERA 1996) provides that a worker has the right not to suffer unauthorised deductions from her wages. A deduction from wages cannot be made without the worker’s written consent unless the employer is authorised by a statutory provision or by a relevant provision in the worker’s contract. Paying a worker for fewer hours than she worked at her contractual rate is an unauthorised deduction.

25. Section 27 of the ERA 1996 provides that wages includes “any sums payable to the worker in connection with his employment”. Holiday pay counts as wages.

26. The case of *Cleeve Link Lts v Mrs E Bryla* [2013] UKEAT/0440/12 is concerned with whether a particular clause in a contract is a penalty, which is unenforceable, or whether it is validly enforceable. It was found in that case that whether the clause is enforceable depends on whether the main purpose of the clause is to deter a breach or to compensate for it. If the purpose is to deter a breach, then it is a penalty clause and is unenforceable. If the clause is intended to compensate a party for losses, then it is enforceable. There are three parts to the test:

(a) The contract falls to be construed at the time it was entered into.
(b) It falls to be construed on an objective basis, so that the issues of genuineness and honesty of the parties are not a relevant consideration.
(c) A clause amounts to a penalty where the difference between the amount that could be recovered for damages for breach of contract and the amount stipulated in the contract as a fixed sum is so extravagantly wide of the mark that it cannot be explained on any other basis than that it is a penalty to deter breach.

27. *Cleve Link v Bryla* must be considered in light of the Supreme Court cases *Cavendish Square Holding BV v Makdessi; Parking Eye Ltd v Beavis (Consumers' Association intervening)* [2015] UKSC 67. In that case it was re-iterated that,

> "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."

28. The case goes on to say that a clause may be a deterrent to breaching or ending the contract, but that does not in itself make the contract unlawful.

CONCLUSION

29. The claimant's evidence regarding the recoupment clauses is in my view based on two main points. The first is that she had understood from conversations with the respondent's staff that the recoupment clauses would not be applied. I have found that there was no basis for her to believe this. She duly signed the contract and worked under its terms, including for lower pay during the probationary period, despite claiming that she had been misled about this. I do not accept that any of the respondent's employees, eg Mr Jones or Ms Hope, said anything upon which the claimant could rely to argue that the contract she signed was not binding.

30. The second point she made is that the recoupment clauses are unfair. I find that the claimant was able to refuse to take the employment and was not misled. She was not at any kind of unfair disadvantage, having been a senior employee in the industry for some time. The respondent did not exert any kind of undue influence, what the claimant refers to as duress, in order to influence her to agree to the contract. The claimant at all times had the option not to take the employment. Her argument that she had to accept the contract or not take the job is not undue influence.

31. I have applied the caselaw in *Cleeve Link Ltd v Bryla*. The contract was entered into in December 2021, and it says on its face that the recoupment clauses apply. But what is particularly relevant to my decision is that the amount recouped is linked to the amount that the respondent paid to OX Seven for recruiting the claimant. The amount diminishes over time, reducing from 100% of the recruitment fee after six months down to 75%, etc. But the amount is based on the amount that the respondent paid to OX Seven for the claimant's recruitment.

32. I find that the recoupment clauses in the claimant's contract, whatever else may be said about them, are not penalty clauses. Because the claimant was free to agree to the contract or not, the claimant is bound by them.

33. I accept that the unpaid holiday pay amounts to wages for these purposes, and so the recoupment clauses can be applied to them. The amount of the authorised deduction under the contract (£4740) is more than the claimant's final gross wages and unpaid holiday pay (£3245.97).

34. The claimant's claims are not well-founded and are dismissed.

Employment Judge Ficklin
5 May 2023

JUDGEMENT & REASONS SENT TO THE PARTIES ON
12 May 2023

FOR THE SECRETARY OF THE TRIBUNALS

(1) This judgment follows a "CVP" hearing that took place on a remote video platform. Neither party objected to the format of the hearing.