EMPLOYMENT TRIBUNALS

Claimant: **Miss L Kilpatrick**

Respondent: **Patterson Law Ltd**

Heard at: **Bristol** (by Video Hearing Service)

On: **23 May 2023**

Before: **Employment Judge Hastie**

Representation

Claimant: In person
Respondent: Ms Hornblower, counsel.

JUDGMENT having been sent to the parties on **26 June 2023** and written reasons having been requested in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided.

REASONS

1. In this case the claimant, Miss Kilpatrick brings a claim for unlawful deduction from wages against her ex employer, Patterson Law. The respondent denies the claim.

2. The hearing took place by remote platform which was consented to by the parties. The form of remote hearing was by video hearing service (VHS). A face to face hearing was not held because no one requested the same and all issues could be determined in a remote hearing. The claimant was present via video link. The hearing was put back briefly so that the video hearings officer could assist the claimant with her sound. The issue was quickly resolved, and no further technical issues arose. The respondent was represented by counsel, Ms Hornblower. Ms Hornblower's instructing solicitor, Mr Davies, and witnesses Mr Moore, Ms Hudson and Mr Smith joined the hearing albeit the witnesses remained off camera. Ms Payne was unable to attend, it seems due to having attended hospital the evening before the hearing. Both parties were content to proceed.

Facts

3. I was referred to a bundle of 70 pages that was provided to the tribunal on 19 May and received by me on the morning of the 23 May. The claimant had

provided witness statements of B Payne and S Moore. The respondent prepared witness statements of C Hudson, and D Smith. A skeleton argument and authorities had been provided by counsel, Ms Hornblower. I read all of the papers that were provided. I heard from the claimant.

4. There was no real conflict of events on the evidence. I found the following facts proven on the balance of probabilities after considering the whole of the evidence, both oral and written, and after listening to factual and legal submissions made by and on behalf of the parties.

5. The respondent is a regulated law firm specialising in motoring offences. The claimant was employed by the respondent as a case progression officer from 1 April 2019. She gave notice to terminate her contract of employment on 19 July 2022 and worked an extended period of notice until 2 November 2022.

6. In August 2021, the respondent agreed to assist the claimant with the payment of CILEX fees. On 13 August 2021, the claimant signed a repayment agreement that she would repay any fees incurred during the three years preceding her leaving date. The agreement recorded that any fees to be recouped in accordance with its terms could be deducted from the claimant's salary. The agreement also states, *'Patterson Law will recoup any fees and any associated costs that have been incurred during the three years immediately preceding the date you cease to continue with the course, or you leave the employment of the firm'.*

7. During the claimant's notice period, the parties exchanged messages regarding the repayment of the fees. The claimant agreed to repay, subject to an affordable repayment plan.

8. On 25 October 2022, the respondent's office manager, Ms Wilkinson, messaged the claimant to say, 'I can confirm that we won't take anything direct from your pay, any amount paid will come directly from you.'

9. On 27 October 2022,the claimant signed a letter confirming her agreement to repay the outstanding fees by 12 monthly instalments of £277.25 commencing on 31 October 2022 and ending on 29 September 2023.

10. The claimant was owed holiday pay of £306.25. The claimant requested that this money be offset against the first instalment. The claimant emailed Ms Wilkinson on 27 October 2022 stating, '*Are you happy to take this all back before I am paid and take this as the first payment?*' A further email on 27 October from the claimant stated, '*My first instalment of £306.25 will be taken from my unused holiday hours as agreed.*'

11. The respondent withheld the £306.25 and used it to offset the debt. One further payment of £138.62 was made by the claimant. The balance of the unpaid fees is put by the respondent as £2882.13. This figure was not disputed by the claimant.

12. The claimant submitted her ET1 on 9 January 2023. In the ET3 submitted on 8 March 2023, the respondent denies the claim in respect of unlawful deductions from wages.

Preliminary issues – application for reconsideration

13. By notice dated 13 February 2023, the parties were notified of a 2 hour hearing on 23 May 2023.

14. The ET3, submitted on 8 March 2023, included an employer's contract claim. The employers contract claim asserts that the respondent was entitled to repayment of £3327.00 in respect of the costs paid to the claimant in connection with her CILEX training, the balance of which is put at £2882.13.

15. On 20 April 2023, the parties were informed that Employment Judge Roper had determined that the claimant had not issued a claim for breach of contract, and in those circumstances the tribunal had no jurisdiction to hear an employer's contract claim by the respondent.

16. On 21 April 2023 the respondent's solicitors, TJD Law, emailed the tribunal requesting a reconsideration of the rejection of the counterclaim. The email asserts that the claimant had brought a claim for breach of contract in relation to an alleged disclosure of confidential information as the claimant refers to a breach of implied terms of employment in her ET1.

17. In the ET1 the claimant states *"'In addition to the above, it has been bought to my attention that Patterson Law approached an employee of a firm I was interviewing at and provided my confidential personal data, without being asked for a reference. This information included confidential information from my employee file and untrue claims. Therefore, it is a breach of the implied terms of employment.'*

18. On 9 May 2023, the respondent's solicitors again emailed the tribunal asking for confirmation that the respondent's contract claim had been accepted.

19. Rule 70 of the Employment Tribunals Rules of Procedure 2013 provides that a tribunal may reconsider any judgment where it is necessary in the interests of justice to do so. On reconsideration, the decision (the original decision) may be confirmed, varied or revoked.

20. Rule 71 provides that, except where made during a hearing, an application for reconsideration shall be made in writing within 14 days of the date on which the written record or other written communication, of the original decision was sent to the parties and shall set out why reconsideration of the original decision is necessary.

21. Rule 72(1) provides that an Employment Judge shall consider any application made under rule 71. If the Judge considers that there is no reasonable prospect of the original decision being varied or revoked, the application shall be refused, and the Tribunal shall inform the parties of the refusal. Alternatively, rule 72 sets out the process that is to be followed for further consideration of the application.

22. Rule 72(3) provides that, where practicable, the consideration under rule 72(1) shall be the Employment Judge who made the original decision. Where that is not practicable, the Regional Employment Judge shall appoint another Employment Judge to deal with the application.

23. As it is not practicable for Employment Judge Roper to consider the reconsideration application, the REJ has appointed me to consider the application today.

24. I was invited by counsel to consider the skeleton argument and the authorities, Cavendish Square Holding BV v El Makdessi, Parking Eye Ltd v Beavis [2015] UKSC 67, Dunlop Pneumatic Tyre Co Ltd v New Garage & Motor Co Ltd [1915] AC 79, and the first instance decision in Kaur v Hatten Wyatt Solicitors (Case No. 2301523/2019) in relation to penalty clauses. Also, Patel v RCMS Ltd [1999] IRLR 161 and Simpson v Merrick (Formerly t/a W A Merrick & Co Solicitors) UKEAT/0490/09 in relation to the reconsideration application.

25. The respondent accepts that it can only bring an employer's contract claim if the claimant has brought a claim for breach of contract. The respondent submits that the decision in relation to the employer's contract claim made by Employment Judge Roper should be reconsidered as the claimant has brought a breach of contract claim thereby allowing the respondent to bring an employer's contract claim and this is regardless of whether the claimant's claim fails or is dismissed.

26. The respondent submits that a breach of contract claim has been brought by the claimant and it is implied that this claim has been dismissed (Skeleton para 18). The respondent submits that if an employment tribunal does not have jurisdiction to hear an employee's contractual claim, an employer's contract claim will not be automatically dismissed. It is primarily on this basis that the respondent asserts that the decision not to allow the respondents contract claim to proceed, should be reconsidered.

27. I have concluded that the claimant does not bring a claim for breach of contract in relation to notice. The claimant is precluded from bringing a breach of contract claim for restraint of trade or breach of confidence (Employment Tribunals Extension of Jurisdiction (England and Wales) Order 1994). There is, therefore, no breach of contract claim brought by the claimant, and the tribunal has no jurisdiction to hear an employer's contract claim. There was no dismissal of any breach of contract claim brought by the claimant as no such claim has been brought.

28. The application for reconsideration is refused as there is no reasonable prospect of the original decision being varied or revoked.

Issues and Law

29. The issues to be determined on 23 May 2023 were therefore in relation to the claimant's claim for unlawful deductions from wages. The respondent indicated that the witnesses they had at the hearing would not be called as their evidence primarily concerned the employer's contract claim and there was little, if any factual dispute between the parties in relation to the unlawful deductions claim.

Unlawful deductions from wages

30. 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.

31. 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".

32. S. 24 ERA 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

33. 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

34. The Claimant asserts that the repayment agreement was a restraint of trade or a penalty clause, mainly because she says the repayment terms did not reduce over time to give value for her training. The claimant asserts that the agreements should be declared void and monies she has already paid to the respondent in part settlement of the debt should be returned to her.

35. Restraint of trade refers to the principle that an individual should be free to follow his or her trade and use his skills without undue interference. The principle renders a contractual term purporting to restrict an individual's freedom to work for others or carry out his trade or business void unless it is designed to protect legitimate business interests and no wider than reasonably necessary.

36. A penalty clause must be '*out of all proportion'* to the respondent's legitimate interests or amount to an '*extravagant and unconscionable'* recovery in comparison to the loss to the respondent (Dunlop Pneumatic Tyre Co Ltd v New Garage & Motor Co Ltd [1915] AC 79). The respondent in these proceedings was seeking to recover no more than the exact amount loaned and was willing to negotiate with the claimant as to payment terms.

37. In any event, a penalty clause can only arise where there has first been a breach of contract. The claimant's resignation on notice involved no breach by the claimant and therefore no penalty clause arose.

38. I do not accept that the terms of the agreement were a restraint of trade as the claimant did leave her employment with the respondent in full knowledge that the debt would become due. The agreement did not seek to restrict her freedom to work for others or restrict her in any way from her work. The claimant resigned and obtained alternate work within a short period of concluding her employment with the respondent. The claimant resigned from her employment with the respondent knowing that the repayment of the fees would be due. The claimant and the respondent exchanged messages during the claimant's notice period in relation to the monthly instalments that the claimant would make to settle the outstanding balance. During her period of notice, the claimant signed an agreement to pay the balance due over 12 monthly instalments, October 2022 – September 2023.

39. The repayment agreement signed by the claimant incorporated a tapering effect as it was expressed to cover fees incurred in the three years immediately preceding the termination date, and thereby reduced with time. The claimant's case was that she would be required to remain in the employment of the respondent for three years beyond the completion of the course to avoid having to repay all of the fees. This is not the case and the tapering effect specified in

the agreement is not unreasonable.

40. Even if a penalty clause might be said to arise in the circumstances of this case, which I do not accept, the terms of the repayment agreement are not out of all proportion to the respondent's legitimate interests, which were to recoup the fees paid to support the claimant's CILEX studies once she had left her employment with the respondent. The financial support from the respondent was made at the claimant's request in August 2021 and was to enable the claimant to undertake further study and thereby develop her career. The respondent sought to do no more than recoup what it had paid in accordance with an agreement with the claimant that such fees would be recouped, subject to a tapering effect, if the claimant left the employ of the respondent, as she did in November 2022. The value of the outstanding balance is relatively modest when set against the claimant's income as a CILEX trainee and consequently a qualified CILEX lawyer.

41. I find that there was no restraint of trade or penalty clause in the agreements made between the parties in relation to the outstanding debt, nor in any other of their communications referred to in this case.

42. I find that the claimant signified in writing her agreement to the making of the deduction from her wages by the respondent in the sum of £306.25. The respondent did not make an unlawful deduction from the claimant's wages as the claimant had consented in writing to the deduction being made as part payment of the debt in relation to the CILEX fees. The claim for unlawful deductions from wages therefore fails and is dismissed.

Evidence from abroad

43. At the end of evidence and submissions on 23 May 2023, the claimant stated that she was currently in Australia on a working holiday. The tribunal and the respondent were, until that point, unaware that the claimant was abroad. The hearing was adjourned briefly in order that guidance including the Presidential Guidance – 'Taking oral evidence by video or telephone from persons located abroad' issued on 27 April 2022, could be considered.

44. On resumption of the hearing, the claimant indicated that she had not appreciated that there was any significance to her being abroad and giving evidence at the hearing.

45. I indicated to the parties that, having checked the guidance on taking evidence from abroad, Australia has indicated that it would not object to evidence being given from their jurisdiction.

46. Ms Hornblower helpfully detailed that, where a witness is outside England or Wales, then the taking of evidence abroad unit within HMCTS should have been approached prior to the hearing in order that they could liaise as necessary with the other jurisdiction. Ms Hornblower suggested that as Australia is a Commonwealth country, one might assume there would be no issue in permission being obtained from the Australian authorities for the evidence to be given.

47. Ms Hornblower submitted that the tribunal might either be content to proceed or reserve its decision on liability whilst making enquiries of the taking evidence from abroad unit of HMCTS, or alternatively, list a further case management hearing to determine the position.

48. I determined, in accordance with the overriding objective of dealing with cases fairly and justly, which includes dealing with cases in ways which are proportionate to the complexity and importance of the issues, avoiding delay so far as compatible with proper consideration of the issues, and saving expense, that it would be appropriate to continue with the case and reach a final decision. This determination was made after a careful consideration of the importance to be given of consulting foreign authorities, as well as the Presidential Guidance of April 2022.

49. The application by the respondent for reconsideration is refused.

50. The claimants claim for unlawful deductions from wages fails and is dismissed.

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Employment Judge Hastie
Date 06 August 2023

Reasons sent to the Parties on 24 August 2023

For the Tribunal Office

Notes
Reasons for the judgment having been given orally at the hearing, written reasons will not be provided unless a request was made by either party at the hearing or a written request is presented by either party within 14 days of the sending of this written record of the decision.

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