EMPLOYMENT TRIBUNALS

Claimant: Mr K Kakara

Respondent: CrossFlow Payment Trading Solutions Limited

Heard at: London Central (via CVP) **On:** 22 July 2022

Before: Employment Judge S Connolly

Representation
Claimant: In Person
Respondent: Ms M Rozczka, chief operating officer

JUDGMENT

The judgment of the Employment Tribunal is as follows:

The Respondent has made an unauthorised deduction from the Claimant's wages in and is ordered to pay the sum of £1,770.02 in respect of the amount unlawfully deducted. This is a net figure so should not be subject to deductions for income tax or national insurance.

REASONS

Claims and Issues

1. The Claimant was employed by the Respondent from 8 November 2021 until 26 January 2022 as a junior DevOps Engineer. He was dismissed by the Respondent on 19 January 2022 and given one week's notice during which he was not required to attend for work. Following his dismissal, the Respondent failed to pay any wages for January (amounting to £1,770.02) and has demanded repayment of a further £4,229.98.

2. It is the Respondent's case that they are entitled to deduct money from the Claimant's wages as these are authorised to be deducted in accordance with his employment contract as costs of training. They claim that the Claimant is liable to pay them a further £4,229.98. It is their case that, by virtue of clause 16.5 of his contract, the company had reserved *"the right to repayment of training costs by the employee of £6,000 should this employment be terminated within the first 12 months from the start date, for whatever reason, and that such payment will be made on termination."*

3. It is the Claimant's case that he did not receive such training and that, if he did, it did not cost the Respondent £6,000. The Claimant also submitted that clause 16.5 amounts to a penalty clause incurred for something outside his control.

4. The Respondent deducted £1,770.02 from the Claimant's wages for January and sent an invoice for £4,229.98 to the Claimant on 25th January 2022, followed by a default notice on 11 February 2022. On 17 February 2022 the Respondent issued proceedings in the County Court against the Claimant. The Claimant counterclaimed in the county court for the amounts already deducted.

5. A Preliminary Hearing took place on 13 May 2022 at which EJ Spencer issued Case Management Orders. EJ Spencer also considered whether the tribunal claim should be stayed pending the outcome of the County Court proceedings and acknowledged that there is considerable overlap between the two sets of proceedings, and it is not appropriate to run tribunal and civil court proceedings over similar issues concurrently. EJ Spencer did not consider that that it was appropriate to stay the tribunal proceedings, as a deduction of wages claim was likely to be determined more quickly in the Employment Tribunal.

6. 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?

Procedure, documents and evidence heard

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

8. The Claimant and Ms Rozczka gave evidence in person. A witness statement was submitted on behalf of a Senior DevOps Engineer - a contractor engaged by the Respondent called Mr John Shortland, but he did not attend the hearing.

9. At the outset of the hearing the Tribunal attempted to establish whether there was an agreed bundle of documents. The Case management order dated 14 May 2022 required the parties to submit the documents they wished to include in the bundle by 27 May 2022 and it provided that the Respondent would produce a single bundle of relevant documents by 7 June 2022. However, the Claimant submitted an additional bundle of documents on 14 July 2022 and sought to rely on this at the hearing. This included additional documents somewhere not in the bundle of 7 June 2022. The Claimant explained that the reason for this late

bundle was that he was only recently able to obtain advice from the Citizens Advice Bureau and that his adviser only worked Monday to Wednesday. It was the Respondent's position that the Claimant should have had enough time to meet the deadline and that it was unfair to the Respondent for the Claimant to be able to submit additional documents over a month after the deadline and just in advance of the hearing.

10. The Tribunal explained the need to balance fairness to both parties and that part of the purpose of the timelines is to allow the Claimant to put his case but also for the Respondent to have the chance to defend it. It was the view of the Tribunal that the Case Management Order was clear and that if the Claimant felt he needed more time, he could have raised this at that time. The Tribunal decided that it would not be fair to the Respondent to allow documents that were produced just over a week in advance of the hearing after the Claimant had seen the Respondent's documents and witness statements.

11. The Tribunal decided that the Claimant's additional bundle dated 14 July 2022 should not be allowed and that the bundle of 7 June 2022 would be the bundle to be used in the hearing.

Fact Findings

Contract of Employment

12. The Claimant was employed by the Respondent from 8 November 2021 until 26 January 2022 as a junior DevOps Engineer. He was dismissed by the Respondent on 19 January 2022 and given one week's notice during which he was not required to attend work.

13. The Respondent deducted £1,770.02 from the Claimant's wages for January and sent an invoice for £4,229.98 to the Claimant on 25 January 2022, followed by a default notice on 11 February 2022. The Claimant contacted ACAS on 9 March 2022 and an early conciliation certificate was issued the same day. His claim was presented on 10 March 2022.

14. The Claimant had a contract of employment with the Respondent. The Claimant signed and returned a copy of the contract by e-mail dated 29 October 2021. He was not provided with a Job Description setting out the duties of a junior DevOps Engineer.

15. The relevant clauses from the contract are highlighted below :

a. Clause 6.4 of the contract of employment states that: *"The Company shall be entitled at any time during your employment, or in any event on termination, howsoever arising, to deduct from your remuneration hereunder, any monies due from you to the Company including but not limited to any outstanding loans, advances, overpayment of salary or other remuneration, the amount of expenses claimed by you and paid but subsequently disallowed by the Company, the cost of repairing any damages or loss to the Company's property caused by you (and of recovering the same), or excess annual leave."*

b. Clause 16.5 of the contract states "*The Company reserves the right to the repayment of training costs by the employee, of £6,000 should this employment be terminated within first 12 months from the start date, for whatever reason, and that such payment be made on termination.*."

c. The signature page of the contract included the following wording in bold type and in capital letters: *"Please obtain independent legal advice if you are unsure about any element of this agreement."*

16. The Respondent has approximately 10 employees and the contract for each one of them includes provisions similar to the above. The Respondent's intention is to protect its business and to avoid a situation where the employees learn from the Respondent and then leave its employment.

17. The Claimant accepted that he signed the contract and that clause 16.5 was included. He said he signed the contract as he needed the job. It was the Claimant's position that no training was provided to him and this was supported by the lack of evidence provided by the Respondent. The Claimant stated that his work was overseen by Mr Shortland as his line manager and that Mr Shortland would assist him with difficulties but that this was the usual role of a senior for a new starter. The Claimant was shocked when he received the letter of 25 January 2022 request which stated that the £6,000 was owed for training as he was never instructed to go on any training. His position was that the tasks undertaken by him were mandatory for his role.

Discussion about training needs

18. It was the Respondent's evidence that three people (Ms Rozczka - COO, Mr Shortland – Senior DevOps Engineer, and Mr Keating – IT Director) dedicated special time beyond their regular duties to training the Claimant. Ms Rozczka gave evidence in person. A witness statement was submitted by Mr John Shortland, but he did not attend the hearing. No witness evidence was submitted on behalf of Mr Keating.

19. Ms Rozczka's evidence was that the Respondent internally discussed the training needs and the time commitment around the time of the commencement of the Claimant's employment with a view to having him ready to undertake substantially unsupervised activities within 3 months of commencement of employment on 8 November 2021.

20. There was limited evidence in relation to any discussions or agreement on training needs for the Claimant around this time. There were some "training kkakara" entries in Mr Shortland's timesheets dated for example, 5 November 2021 and 8 November 2021. Page 52 and 53 of the Bundle also included a table headed "IT Director Training Schedule for K Kakara". This was undated but signed by Mr Keating. It included entries on 8-9 November for "Skills gap analysis" and "Plan training activities along with objectives and outcomes". There was no evidence provided regarding when this document was created and whether it was contemporaneous. As Mr Keating was not present in the hearing to answer these questions, this document is of limited evidential value.

21. It was the evidence of Ms Rozczka and Mr Shortland that the Claimant's training was iterative based on the Claimant's needs and therefore that it was not syllabus based and therefore there was limited training documentation.

Amount of training provided

22. Ms Rozczka gave evidence that over the 53 days of the Claimant's employment he spent 2-3 hours of training daily with Mr Shortland and that from day 3 of his employment, the Claimant spent at least 1 hour per day to learn from Mr Keating. Ms Rozczka also said that she gave 2 hours of training to the Claimant on financial services and the Respondent's client offering.

23. Mr Shortland's evidence was that he was briefed by the Respondent to provide training to the Claimant to enable him to carry out the duties of a Junior DevOps Engineer independently. He said that the purpose of the training was to share all his experience, knowledge and skills for the Claimant to perform his duties as per the Respondent's system and infrastructure. The Respondent submitted three invoices and associated timesheets submitted by Mr Shortland. Each monthly invoice amounted to €5,833.00 and the timesheets including entries such as "kkakara training". Mr Shortland said he charged the Respondent for 64 hours of training but also provided 1-2 hours of further support on a daily basis on ad hoc support outside of dedicated training time.

24. It was the Respondent's position that the cost of the training provided to the Claimant should be based on the hourly salary of Ms Rozczka and Mr Keating and the hourly fee of Mr Shortland. This amounted to a cost of £10,080. Mr Shortland and Mr Keating received the same amount of pay in each month and no additional sums were paid to them by the Respondent in relation to these tasks. If these tasks had not been undertaken, they would have been doing other work for the same payments.

25. In her evidence Ms Rozczka accepted that payment for supervision time should not be deducted from the Claimant and was asked about the difference between training and supervision. She stated that supervision would relate to things that the Claimant knows or should know. She added that any questions raised during the time of the training would be deducted but that anything else asked outside of this time and not related to the training would be supervision.

26. The Respondent submitted a one page summary of what it says was the training provided to the Claimant (page 25 of the bundle). This document was undated. This was a table listing 9 tasks beside various dates from 12 November 2021 to 5 January 2022. This document also included links to websites hosted by Terraform (a software provider used by the Respondent). Mr Rozczka accepted that this summary of tasks was prepared after the Claimant's employment had ended, not at the time of each task. She stated that the information used to complete this was in the Respondent's internal resources. No evidence of these internal resources was put before the Tribunal. The Claimant stated that the Terraform links are free sources of third party information and not unique to the Respondent. The Tribunal accepts this explanation. There were no training materials provided to the Tribunal, nor were there any emails, notes or calendar entries about the training.

Tribunal conclusions on facts

27. It was notable to the Tribunal that neither Mr Shortland nor Mr Keating attended the hearing to be cross-examined and that no witness evidence was submitted on behalf of Mr Keating given that it was the Respondent's position that Mr Shortland and Mr Keating provided at least 150 hours of training to the Claimant during his 53 days of employment (based on an estimate of 3 hours per day).

28. Despite the significance of this time period (approximately half of the Claimant's entire working time with the Respondent), there was no contemporaneous evidence to document the training that took place. There were no materials , no presentations and no notes. There were no emails, invitations or calendar entries referencing such training taking place. For the reasons set out above, the Tribunal has given limited weight to timesheets submitted on behalf of Mr Shortland and to the undated statement provided on behalf of Mr Keating. The Tribunal notes the Respondent's position that the training was iterative and not syllabus based but given its position that such a significant number of hours of training were provided, this lack of evidence suggests that no such training took place.

29. The Tribunal has reviewed the summary of the training provided by the Respondent (page 25). However, given that this is a one page document produced several weeks after the Claimant's departure, it is of limited evidential value. The Tribunal accepts the Claimant's position that the much of the training alleged to have been provided by the Respondent amounted to on the job supervision which would be normal for a new starter in their probation period.

30. Ms Rozczka for the Respondent accepted in her evidence that there was a blur between training and supervision. There is further evidence of this blurring by the Respondent including in the calculation of training hours of 2 hours of Ms Rozczka's time on the topic of financial services and the Respondent's client offering. It is the view of the Tribunal that this topic would form part of an induction or introduction to the Respondent's business – rather than training envisaged by clause 16.5. This blurring, alongside the Respondent's position that approximately half of the Claimant's working time was part of training, also indicates that it is more likely that not that the training hours claimed by the Respondent included time spent on elements of supervision and induction, rather than training.

31. The Tribunal therefore finds that the time spent with the Claimant during his probation period was on the job supervision and induction provided to him as a new starter. It did not amount to training as contemplated by clause 16.5.

The Law

Unauthorised Deduction from Wages

32. Section 13(1) provides the right for a worker not to suffer an unauthorised deduction from wages:

13Right 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.

33. Section 23 of the Employment Rights Act 1996 provides a worker with the right to bring a complaint to the Employment Tribunal:

23Complaints to employment tribunal.
(1)A worker may present a complaint to an employment tribunal—

(a)that his employer has made a deduction from his wages in contravention of section 13 (including a deduction made in contravention of that section as it applies by virtue of section 18(2)),

(b)that his employer has received from him a payment in contravention of section 15 (including a payment received in contravention of that section as it applies by virtue of section 20(1)),

(c)that his employer has recovered from his wages by means of one or more deductions falling within section 18(1) an amount or aggregate amount exceeding the limit applying to the deduction or deductions under that provision, or

(d)that his employer has received from him in pursuance of one or more demands for payment made (in accordance with section 20) on a particular pay day, a payment or payments of an amount or aggregate amount exceeding the limit applying to the demand or demands under section 21(1).

34. Section 27 of the Employment Rights Act 1996 includes a definition of wages for the purposes of the act.

Is the deduction authorised? - Penalty Clauses

35. The Claimant submits that clause 16.5 amounts to a penalty clause and should therefore be unenforceable.

36. The Supreme Court's decision in *Cavendish Square Holding BV v Makdessi; ParkingEye 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*.

37. *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

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.

38. 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.

39. 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.

40. 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

41. 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 £1,770.02 from the Claimant's salary and that this amounted to a deduction from wages.

42. This claim falls to be determined by whether the deduction was authorised by the contract. Clause 16.5 permits the Respondent to charge the sum of £6,000 to the Claimant in the event that he leaves employment within 12 months. The Claimant accepted that he had signed the contract. Whilst he stated that he needed the job, it was open to him to refuse the offer of employment made by the Respondent.

43. The Tribunal is therefore required to assess whether clause 16.5 was

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.

Is clause 16.5 an unenforceable penalty clause?

44. The initial question to be considered is whether clause 16.5 is a penalty clause. However, 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 Respondent terminated the Claimant's contract by giving the required 1 week of notice. This was not an obligation in the contract for the Claimant to perform an act in default of which he would have to pay a sum of money. Clause 16.5 is therefore not a penalty clause.

Is the deduction authorised by the contract?

45. Having decided that Clause 16.5 is not a penalty clause and is 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 £1,770.02 in respect of part payment of the training fee.

46. As in *MBL UK Ltd v Quigley UKEAT/0061/08*, 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. This is a factual issue for the Tribunal to assess based on the evidence presented.

47. As set out above, based on the lack of contemporaneous documentary evidence and in person witness evidence provided on behalf of the Respondent, the Tribunal finds that no material training was provided by the Respondent to the Claimant which would permit the deduction under clause 16.5. Therefore, the Respondent has unlawfully deducted the sum of £1770.02 from the Claimant.

Application for a Preparation Time Order

48. The Respondent made an application for its costs in defending the claim. Ms Rozczka submitted in her witness statement a claim for 63 hours spent by her, the CEO and the IT Director. Using a rate of £19 per hour, this amounted to £1,197.00. As the Respondent was not legally represented, the Tribunal treats this as an application for a preparation time order under Rule 75 of the Employment Tribunals Rules of Procedure (2013) ("the Rules").

49. In response, the Claimant set out that he wasn't negligent in how he dealt with the claim. He explained that he was a student and didn't know all of the rules in relation to conducting the hearing. He said that he engaged with the Respondent and that he did seek advice to get help with the claim but that his adviser only worked Monday – Wednesday, which was the reason for the additional bundle.

50. Rule 76 of the rules sets out when a costs order or a preparation time order may be made.

a. *76 (1) "A Tribunal may make a costs order or a preparation time order, and shall consider whether to do so, where it considers that—*
    (a) a party (or that party's representative) has acted vexatiously, abusively, disruptively or otherwise unreasonably in either the bringing of the proceedings (or part) or the way that the proceedings (or part) have been conducted; or
    (b) any claim or response had no reasonable prospect of success; or
    (c) a hearing has been postponed or adjourned on the application of a party made less than 7 days before the date on which the relevant hearing begins.
b. *76 (2) A Tribunal may also make such an order where a party has been in breach of any order or practice direction or where a hearing has been postponed or adjourned on the application of a party"*

51. It is clear from the case law in this area that the award of costs should be the exception not the rule and limited to the specific circumstances as set out in Rule 76. Whilst the Claimant did attempt to submit documents later than the deadline set out in the Case Management Order, this does not amount to the kind of behaviour described in Rule 76(1)(a) which would warrant a preparation time order. Further, I do not consider that the Claimant making a counterclaim in the County Court proceedings gives rise any further issues under this rule. The Respondent's application is therefore rejected.

Employment Judge S Connolly

26 September 2022

JUDGMENT & REASONS SENT TO THE PARTIES ON

27/09/2022

FOR THE TRIBUNAL OFFICE