Legal Implications of Employees Not Working the Notice Period

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Your employment contracts may contain a 'failure to work notice' clause which allows you to make deductions from an employee's pay if they do not work their contractual notice period.

Challenges in Enforcing Notice Clauses

Many employers do not seek to enforce this clause because of the difficulties surrounding the law relating to penalties, as well as the costs associated with enforcement, which can be disproportionate to the issue in question.

Legal Framework for Notice Period Deductions

A clause is likely to be unenforceable for being a penalty where it is intended to punish the employee, rather than compensate the employer for reasonable costs, anticipated at the time the contract was signed. If the clause provides for a pre-determined sum to be payable upon breach, and the sum reflects a genuine pre-estimate of the employer's losses, it is more likely to be enforceable against the employee.

Case Study: Enforceability of Notice Deduction

Employers will be pleased to note the Employment Appeal Tribunal (EAT) decision in Yizhen Li v First Marine

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Solutions and another where the employer's deduction of one month's salary for failure to work the notice period was found to be a valid and enforceable clause.

Case Details

Miss Li resigned and refused to work her notice period because she believed she had accrued but untaken holiday. The employer disputed she had outstanding holiday entitlement, and told Miss Li she was required to work her notice as per the wording of her contract.

Outcome and Implications

As Miss Li did not work the required notice, the employer deducted one month's notice pay to cover her notice period pursuant to the following clause:

"... If an Employee leaves, without working the appropriate [one month] notice, the company will deduct a sum equal in value to the salary payable for the shortfall in the period of notice".

Reassessment of Employee's Decision

Following notification of the deduction, Miss Li confirmed she was prepared to work the balance of her notice period. However, the employer had by this time engaged a consultant to replace Miss Li and so it confirmed to Miss Li that she could no longer work her notice.

The EAT accepted that the amount of deduction would have reduced, and the costs of replacing her could diminish, the longer Miss Li worked into her notice period. As such, the clause reflected a genuine pre-estimate of the employer's loss. This pre-estimate of loss had to be assessed as at the time the parties entered into the contract and so the focus was not on the actual losses suffered. The deduction was limited to a month's salary

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and this was not considered to be excessive.

It is important to note that this decision was limited to arguments put forward about whether the clause was an unenforceable penalty or a genuine pre-estimate of loss. The following (non-binding) recommendations were made for dealing with similar cases in the future:

One should consider the circumstances intended by the parties – in particular:

- Whether they actually intended that the employee should pay the employer for the unworked period, or rather that the employee would simply not be paid for services not performed.
- Whether they actually intended the clause to operate as a genuine pre-estimate of loss, a penalty or provision entitling the employer to withhold pay for the unworked period. In this case, the Judge noted the wording in the clause did not indicate the employer had in mind the additional recruitment costs.

There must be an express clause which permits the deduction, but the employer will want to draft this to enable it to recover the payment by means other than a deduction from salary.

Strategic Advice for Employers

You will no doubt be aware that an employee's failure to work their notice period can cause severe disruption to your business as well as additional costs. In this particular case, it was noted that the employee was a senior professional project engineer, engaged at a high salary, and a replacement at short notice would likely cause particular difficulty, and potentially significant expense.

You should give careful consideration to the likely losses you will incur from a 'failure to work notice' situation and include a well-drafted clause to offer you the best protection. This should assist to ensure the employee fulfils their contractual obligations, but otherwise provide opportunities to recover your losses in appropriate

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situations.

Final Thoughts and Contact Information

In line with another decision, Cleeve Link Ltd v Bryla, consideration should also be given to other costs associated with employing staff so these are properly captured. In this case, the employer was permitted to deduct recruitment and training costs pursuant to a repayment agreement following the employee's dismissal for gross misconduct. The clause properly reflected a genuine pre-estimate of loss as at the date the contract was entered into, and it included a sliding scale reduction to reflect the benefit received by the employer the longer the employment relationship lasted.

Please contact our employment and HR solicitors on 01202 786135 or email online.enquiries@LA-law.com for assistance with drafting and enforcing repayment clauses.

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