



Can I Claw Back Training Costs from a Departing Employee?

A Guide to Recovering Training Costs



Hello & Welcome from Glen



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In this guide, **Glen London**, one of THSP's HR & Employment Law Consultants, gives his expert advice on Training Agreements and all the issues concerning recovering training costs.

Recovering Training Costs: Can I claw back training costs from a departing employee?

As the law stands, it is lawful for an employer to recover training fees from an employee who leaves employment within a certain time after they have attended a training session, provided that:

1. There is a contractual clause in the employment contract stating that the employer has the right to do so.
2. There is a specific written Training Agreement that sets out the terms of the training including:
 - costs of the training.
 - the repayment is on a sliding scale period where it is enforceable.
 - signed by the employee before starting the training.
3. It is not Health and Safety Training.



Is the Repayment of Training a “Penalty Clause” in the eyes of the court?

Sometimes an employee will argue that the training costs repayment clause is a penalty clause and therefore unenforceable. A penalty clause is a clause in a contract which imposes a detriment on an employee which is out of all proportion to the actual loss that may be suffered by the employer.

There have been a few tribunal cases that have considered whether a clause in an employment contract requiring an employee to refund training costs is a penalty clause. As confirmed in case law, this will often involve consideration of whether the sum recoverable is “extravagant and unconscionable” in comparison with the greatest loss that could have been suffered by the employer because of the employee leaving employment following a training course.

Although each case will depend on its facts and the circumstances in which the employment ended, if the repayment clause provides for recoupment of costs on a sliding scale, as mentioned above, then it is unlikely that the clause will be considered a penalty.

Do I need both a clause in the Contract and a Training Agreement as well?

The employment contract should have a general clause about the repayment of training. This is to ensure that there is a contractual element to your claim against the employee if there is a dispute over repayment. But some courts have stated that this alone is not good enough on the basis that at the point of time that the contract was signed by the employee, he would not be fully aware of what training costs he may be liable for in the future. Therefore a court may reject the employers claim over the repayment on that the employee was not fully informed of what the implications of the contract were.

Therefore a specific training agreement for the training should be agreed in writing before the training commences to demonstrate that the employee was fully cognisant of the potential repayments. The training agreement should set out the details of the course, the date the course ends, the total cost of the course (not including vat), and a sliding Scale of Repayment.





What is an appropriate Sliding Scale of Repayment?

A typical clause in relation to the recovery of training fees may include provisions that:

- 100% of the training costs shall be repaid if an employee leaves within 12 months of completing the training course.
- 50% recovery of training fees if an employee leaves between 12 – 18 months of completing the course.
- 25% of training costs if the employee leaves between 18 – 24 months after completion of the course.

This may vary depending on the cost of the course and the impact of the loss of that trained employee.



Can training costs be recovered if the employer terminates the employment contract?

Normally the training costs clause/agreement will provide that the employee will not have to repay the costs if their employment is terminated by their employer for any reason, unless the reason for termination is one for which the employer was entitled to dismiss summarily e.g. for gross misconduct.

Therefore, if an employee's employment is terminated on the grounds of redundancy, ill health, or poor performance (for example) they would not be obliged to make any repayment.

What if the employee claims they have been constructively dismissed?

If an employee resigns in response to an employer's fundamental breach of contract – known as "constructive dismissal" – the employer will not usually be able to rely on a repayment clause in the employee's contract of employment. This is because when an employer fundamentally breaches the employment contract, the employee is freed from any terms of the contract that are intended to survive termination.

It may be possible to draft the repayment clause so that the employee is required to repay the training costs regardless of the reasons for dismissal (which would include constructive dismissal), however there is no case law on whether this would be effective or whether it could potentially render the clause unenforceable.



Can we recoup the training costs from an employee's wages?

You can only do this if the employee's contract or training agreement authorises you to make deductions from their pay for the training costs. If there is such a clause in the contract, then you are permitted to deduct the training costs, or a proportion thereof, from the employee's salary or any other payments owing to them on termination.

Occasionally, an employee may argue that such a deduction constitutes an unlawful deduction of wages. However, under section 13 (1) of the Employment Rights Act 1996, an employer is permitted to make a deduction from an employee's wages if the employee has previously consented in writing to the deduction, providing that written consent has been obtained before the event giving rise to the deduction and not just before you make the deduction itself.

Can I recover money for 'Statutory' Training?

Statutory training is where a statutory body has dictated that an organisation must provide training based on legislation. Key pieces of legislation here are the **Health and Safety at Work Act 1974** and the Management of **Health and Safety at Work Regulations 1999**. The aim of such legislation is to ensure that statutory training helps employees maintain a safe and healthy working environment.

If the training has been provided in order to comply with health and safety legislation; then section 9 of the Health and Safety at Work etc. Act 1974 states: "No employer shall levy or permit to be levied on any employee of his any charge in respect of anything done or provided in pursuance of any specific requirement of the relevant statutory provisions." Therefore the employer would not be able to recover the costs, of this type of training.





Do we need to worry about the National Minimum Wage?

Another argument that is sometimes made is that an employer should not deduct training costs from an employee's wages if the result is to reduce the employee's wages below the National Minimum Wage ('NMW'). It is important, however, to make a distinction here between, mandatory training and voluntary training as the rules are different depending on what type of training it is.

Voluntary Training and the National Minimum Wage

Voluntary Training is typically offered by employers to help improve the skills or advance the careers of employees. The rule under the National Minimum Wage Regulations is that a deduction from wages that is made for the employer's own use and benefit will reduce pay that counts towards NMW (Regulation 12 of the National Minimum Wage Regulations 2015). However, there are certain exceptions to this rule where the deductions do not reduce the amount of an employee's total pay for the purpose of calculating whether they are receiving the National Minimum Wage ('NMW').

These include where the deduction falls within the "conduct exception" which is defined as "any deduction in respect of conduct of the worker, or any other event, in respect of which [the worker] is contractually liable" (Regulation 33 (a) of the Regulations).

What this means is that if the employment is terminated by the employee in circumstances where you have the contractual right to recover training costs from them (e.g. because they leave their employment voluntarily without or within 6 months of completing a course), any deduction made from an employee's final wages in respect of the repayment of training costs can be ignored for NMW purposes.

Mandatory training and the National Minimum Wage

If the training is mandatory – that is if it is training that the employer requires the employee to undertake – the rules appear to be different. According to HMRC, mandatory training costs constitute an "expense incurred in carrying out employment" under regulation 12 of the NMW Regulations and any deduction made for the repayment of such costs will reduce pay that counts towards the NMW.

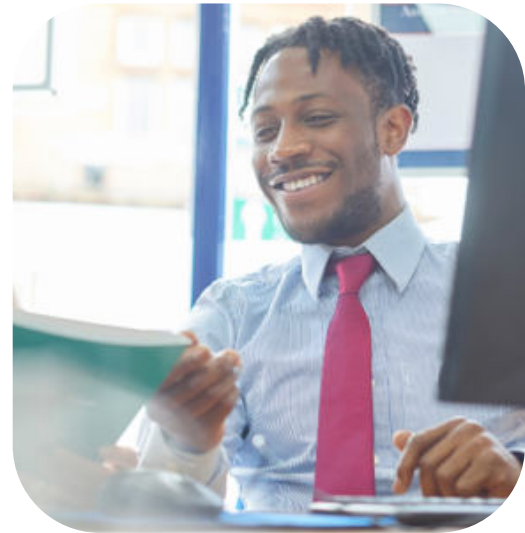
Therefore, if the training you have paid for is training that the employee is obliged to do under their contract, you will need to ensure that any deduction made for the repayment of training costs does not bring the employee's final salary payment below the NMW rate.



Training Costs for Apprentices

It is important to note that the underlying agreement between the employer and the apprenticeship is one of a training contract, and that it is recognised that apprentices work for reduced wages in return for the training they receive.

Subsequently employers are not entitled to reclaim any Apprenticeship Costs from the apprentice themselves, even if they leave the apprenticeship early. Any agreement with the apprentice that they will repay Apprenticeship Costs is unlawful and cannot be relied on.



Summary

- ✔ Check your employment contracts to ensure that they contain a repayment of training costs clause. If you wish you can ask THSP to check your contracts for you.
- ✔ Make sure you have an appropriate Training Agreement signed by the employee before committing to any paid training. This will help not to fall foul of unlawful deduction of wages legislation. [Download your Training Costs Agreement template from THSP.](#)
- ✔ Check that the clause/agreement provides for a sliding scale of repayment whereby the employee's liability is reduced in line with the length of time they remain in your employment.
- ✔ Ensure that you only claim back money that you are entitled to claim back, and that the deductions do not retrospectively put you in breach of the National Minimum Wage calculations.

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Average Customer Rating: ★★★★★ 4.9/5

