Appeal No. UKEAT/0383/14/DA

EMPLOYMENT APPEAL TRIBUNAL

FLEETBANK HOUSE, 2-6 SALISBURY SQUARE, LONDON EC4Y 8AE

At the Tribunal
On 27 February 2015

Before

HER HONOUR JUDGE EADY QC

(SITTING ALONE)

EASTERN EYE (PLYMOUTH) LTD — APPELLANT

(1) MISS J HASSAN
(2) MR S SINGH — RESPONDENTS

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellant	MR RICHARD REES (Representative)
For the First Respondent	MISS JAVERIA HASSAN (The First Respondent in Person)
For the Second Respondent	No appearance or representation by or on behalf of the Second Respondent

SUMMARY

UNLAWFUL DEDUCTION FROM WAGES

NATIONAL MINIMUM WAGE

UNFAIR DISMISSAL - Compensation

Appeal against the Employment Tribunal's refusal of reconsideration application. Two points arose: (1) whether the ET had adopted the correct approach to the claims of unlawful deductions from wages, given statutory provision permitting such a deduction for living accommodation (**National Minimum Wage Regulations 1999**); and (2) whether, in making no deduction for tax and National Insurance liability, the ET had erred in its approach to calculating the compensatory award in respect of Mr Singh's unfair dismissal claim.

The ET had refused the application for reconsideration on either ground. It had reasoned: (1) the issue of a deduction pursuant to a statutory provision had not been taken at the original hearing, and (2) Mr Singh's pay had not been subject to deductions for tax and National Insurance during his employment so his compensatory award should be gross rather than net.

Held: Allowing the appeal. The ET had erred in not allowing the reconsideration application. The points arose from the Reserved Judgment and identified errors of law in the ET's approach in calculating the awards made on the basis of its findings of fact (as set out in that Judgment):

> (1) The ET having accepted the Claimants' evidence that deductions of £30 per week were made from their wages for their living accommodation (provided by the Respondent), the Respondent was entitled to rely on the benefit of the living accommodation as meeting part of its liability for National Minimum Wage purposes and, accordingly, had been entitled to make the deduction of £30 per week (see Regulations 30(d) and 36(1) **National Minimum Wage Regulations 1999**): a

deduction authorised by statute (section 13(1)(a) **Employment Rights Act 1996**); it had been in the interests of justice to permit the Respondent's application for a reconsideration of the ET's Reserved Judgment, which failed to comprehend this provision.

(2) The ET further erred in refusing to reconsider its Judgment in respect of the compensatory award in Mr Singh's case, which it had made on a gross - rather than net - basis. Referring back to the Respondent's treatment of Mr Singh's pay during his employment was not a relevant factor, given that Mr Singh had been paid at a level such that tax and National Insurance liabilities did not arise. The ET having calculated the monies due to Mr Singh correctly at National Minimum Wage rates, those liabilities would arise and the ET was bound to take this into account to avoid Mr Singh being placed in a better position than he would have been but for the dismissal. Again, the interests of justice dictated that the reconsideration application should have been permitted in this respect.

Given the nature of the points raised, the Respondent's submissions identified revisions to the ET's calculations required as a result of the application of the correct legal principles. It was appropriate for the EAT to carry out the necessary corrections without remission.

On the Respondent's application for costs against Mr Singh, under Regulation 34A(2A) of the **EAT Rules 1993** (as amended), that application was refused. The EAT had a broad discretion in this regard and it was noted that the Respondent had only written to Mr Singh warning him of the possibility of the application late in the day and after the fees concerned had already been incurred. Moreover, on the particular facts of this case, the interests of justice dictated against making any such award in the Respondent's favour. The claims in issue had originally been brought because of the Respondent's apparently wilful disregard of its legal obligations towards

the Claimants. It had then failed to properly put its case in the alternative at the original hearing, which might have assisted the ET in its calculations. In the circumstances, it would not be just to make a costs award against Mr Singh.

HER HONOUR JUDGE EADY QC

Introduction

1. I refer to the parties as the Claimants and the Respondent as below, save where it is necessary to distinguish between the Claimants, in which case I do so by name. The appeal is that of the Respondent against a Judgment of the Bristol Employment Tribunal (Employment Judge Griffiths, sitting with members on 15 May 2014 - "the ET"), sent to the parties on 23 May 2014. Both Claimants appeared before the ET in person. Miss Hassan has appeared before me today, again acting for herself. Mr Singh has sent his apologies to the Court as he is unable to attend, but he has responded to the appeal in writing and I have taken his written representations into account. The Respondent appeared before the ET by its consultant, Mr Reynolds. It is represented before me by Mr Rees, consultant from Peninsula.

2. The Judgment with which I am concerned was a Judgment on a reconsideration application. The underlying Judgment of the ET had been reserved, and related to a hearing on 30 and 31 January 2014; the Judgment being sent to the parties on 20 February 2014. By that substantive Judgment the ET made the following awards:

> **"1. That the respondent pay to Miss J Hassan the sum of £6,539.57 being unpaid wages, compensation under s38 Employment Act 2002 and damages for injury to feelings following sexual harassment by the respondent; and**
>
> **2. That the respondent pay to Mr S Singh the sum of £10,192.90 being unpaid wages compensation under s38 Employment Act 2002 and compensation for unfair dismissal."**

3. By application of 3 March 2014, the Respondent sought reconsideration of particular aspects of the Judgment; relevantly, as to the conclusion on unlawful deductions and the compensatory award in Mr Singh's case. The ET rejected that application and the Respondent now appeals on the two points I have identified.

The Background Facts and the ET's Findings at the Substantive Hearing

4. The Respondent is a long established Indian restaurant in Plymouth. The ET found, however, that its owner, a Mr Kalam - had at least so far as his staff were concerned - "a wholesale disregard for basic legal requirements and for any sort of record keeping". Other than the restaurant chefs, "his staff were young vulnerable people who he referred to as his "girls and boys"". The ET further found Mr Kalam's principal aim was to ensure that no employee was paid sufficient to require him to pay tax or National Insurance.

5. The Claimants were typical of others of the Respondent's staff. They were a couple, both aged 18 at the effective date of termination, who were in a disadvantaged and vulnerable position. From 28 April 2012, they worked in the Respondent's restaurant and lived in accommodation provided for them on site. Miss Hassan was 17 when she first started working for the Respondent as a waitress and cleaner at a weekly wage of £130, generally working around 38 hours per week. From 25 November 2012, her pay was increased to £150 a week. Mr Singh was 18 when he also started working for the Respondent. He worked the same basic hours as Miss Hassan, with an additional two hours preparing popadams. He was paid £120 a week until 25 November 2012 and then £140. Although the Respondent asserted that the accommodation had been provided free of charge, the ET found as a fact that the £30 a week was deducted from each Claimant's wages for this purpose.

6. During her employment with the Respondent the ET found Miss Hassan had been subjected to various acts of sexual harassment; the final incident being when Mr Kalam was aggressive and shouted at her, leading to her dismissal on 17 January 2013. On leaving the premises, Miss Hassan went to the Jobcentre, which directed her to ACAS where she received some basic advice enabling her to write to the Respondent setting out various claims, including

of breaches of the **National Minimum Wage Act**. Mr Singh then also claimed that he should be paid in accordance with the **National Minimum Wage Act**, but was dismissed in response. Meanwhile, Miss Hassan was only able to retrieve her personal belongings after intervention from her social worker. Even then, she was required to sign a receipt for £270, as satisfying her outstanding claims (which it did not). Both Claimants then found it impossible to find new jobs in the local restaurant sector, because Mr Kalam had been telling others not to employ them.

7. On the facts found, the ET found held the Claimants' claims were made out and made the awards I have already set out above.

Appeal and Submissions

8. By its first ground of appeal the Respondent contends that the ET erred in its original finding that the provisions of section 13 of the **Employment Rights Act 1996** had not been satisfied in respect of the weekly deduction from the Claimant's wages of £30 and then erred in refusing the application for a reconsideration in this respect.

9. This refers to the ET's finding that there had been no written consent to the deductions of £30 per week from the Claimants' wages. The ET considered this fatal to the Respondent's case that it had been entitled to make the deductions. On the reconsideration application, the Respondent made the point that section 13 **ERA** was not limited to deductions authorised by written consent; section 13(1)(a) also allows a "deduction authorised to be made by virtue of a statutory provision". The statutory provision relied on by the Respondent was that provided by Regulations 30(d) and 30(6) of the **National Minimum Wage Regulations 1999**, which - read together - permit a deduction in respect of accommodation of up to (relevantly) £4.73 per day (that is, up to £33.11 per week). In refusing the application, the ET rejected that argument on

the basis that the issue of there being a statutory entitlement had "never been an issue nor was it material to our finding". This is a reference to the fact that the point had not been expressly taken by the Respondent at the substantive hearing before the ET. The Respondent submits, however, that this does not mean that the point should have been rejected out of hand: the substantive Judgment had been reserved and the Respondent had not been in a position to present argument on the factual basis found to exist by the ET. It was this that brought into play the relevant statutory provision.

10. In its second ground of appeal the Respondent argues that the ET erred in its original award in Mr Singh's case in assessing his loss of earnings on a gross, rather than net, basis. The Respondent also applied for this part of the Judgment to be the subject of a Reconsideration Hearing, submitting that (following **Norton Tool Co Ltd v NJ Tewson** [1972] IRLR 86 at paragraph 12):

> **"… The relevant figure is the 'take-home' pay since this and not the gross pay is what he should have received from his employer. …"**

The ET rejected this argument on the basis that the Respondent had paid Mr Singh gross, not net.

11. The Respondent contends this amounts to an error of law. Mr Singh had been paid during his employment at the lower rate of £130 per week and not the £201.20 the ET had found he should properly have been paid. At the correct level (as found by the ET) his pay was taxable, and the award should have reflected that fact and assessed his loss on a net rather than a gross basis. Although accepting that it had not made this submission clear at the original hearing, Mr Rees again observed that, as the Judgment had been reserved, the Respondent had not been able to make a submission as to the correct calculation of the award on the factual

basis found by the ET. The ET had thus erred in law in failing to grant the reconsideration application on this point.

12. For her part, Miss Hassan took no particular issue with the appeal so far as it related to her case (this being limited to the rent deduction point). Mr Singh has, however, sought to defend the awards as made by the ET. He observes that the Respondent's reliance on the **National Minimum Wage Regulations** at this stage was misplaced given that it had never applied the National Minimum Wage during his employment. Similarly, when asserting the right to make any compensatory award only on the basis of net pay, he asks rhetorically what sum should that refer to given that the pay slips produced by the Respondent at the ET differed from those given to Mr Singh at the time? More generally, Mr Singh observes that the Respondent had shown complete disregard for the law at every stage.

Discussion and Conclusions

13. On the facts found by the ET in this case, it is hard not to have sympathy for Mr Singh's position. It might be said that the Respondent displays a certain degree of chutzpah in now seeking to place reliance on the provisions of the **National Minimum Wage Regulations** or the obligation to pay wages subject to tax when it showed such a disregard for such matters when employing the Claimants. That said, the ET was only entitled to award the Claimants compensation for losses suffered on a proper assessment, applying the correct legal principles.

14. The right not to suffer unlawful deductions from wages is provided by section 13 of the **Employment Rights Act 1996** as follows:

> **"13(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."

15. At the original hearing before the ET the Respondent had denied making any deductions from the Claimants' wages. By its reserved Judgment, however, the ET found that what the Claimants had said was true; deductions of £30 per week were made for accommodation. That was notwithstanding the Respondent having informed the Claimants that their accommodation would be free of charge. Given its position at the merits Hearing, it is right to say - and Mr Rees does not shy away from this - that no point had been raised as to the possibility of such deductions being authorised by virtue of a statutory provision.

16. The provision now relied on arises from the **National Minimum Wage Regulations 1999**, relevantly Regulation 30, which provides as follows:

"The total of remuneration in a pay reference period shall be calculated by adding together -

…

(d) where the employer has provided the worker with living accommodation during the pay reference period, but in respect of that provision is neither entitled to make any deduction from the wages of the worker nor to receive any payment from him, the amount determined in accordance with regulation 36."

17. Regulation 36 provides (paragraph (1)):

"The amount referred to in [Regulation] 30(d) … is …

(b) the amount resulting from multiplying the number of days in the pay reference period for which accommodation was provided by … "

And then it refers to the relevant sum allowed at the relevant time.

18. So, the statutory provision in question is engaged when assessing what sums should be taken to count towards the National Minimum Wage. Regulation 30(1)(d) allows that some sum is to be allowed for the provision of living accommodation - the one exception against the

general rule that benefits in kind are not to be taken into account for National Minimum Wage purposes - even if there is no other entitlement for the employer to make a deduction from the worker's wages for this. Regulation 30(6) then specifies the amount that it is permitted to take into account in this regard.

19. Accepting the Respondent's calculation, to the extent that it provided living accommodation, the Respondent was thus entitled to count £30 per week towards meeting its obligation to pay the Claimant's National Minimum Wage. The fact that it had no contractual right to make the deduction is allowed for by Regulation 30(1)(d).

20. The question that arises on this appeal is whether the ET was wrong to refuse to consider this submission on the reconsideration application given that the point had not been raised at the original hearing.

21. In general it will not be open to an ET to reopen a point on reconsideration when a party has failed to raise it at the original hearing. In **Lindsay v Ironsides Ray & Vials** [1994] ICR 384 EAT, for example, it was held that an ET was wrong to grant a review on the ground that the Claimant's representative had not addressed the ET on its discretion to extend time in a race discrimination case. Mummery J (as he then was) stated:

> **"… Failings of a party's representatives, professional or otherwise, will not generally constitute a ground for review. That is a dangerous path to follow. It involves the risk of encouraging a disappointed applicant to seek to reargue his case by blaming his representative for the failure of his claim. That may involve the tribunal in inappropriate investigations into the competence of the representative who is not present at or represented at the review. …" (page 394)**

22. The difficulty that arises in this case is that once the ET was engaged in having to recreate the wage history for the Claimants - as it had to do, to calculate the level of National Minimum Wage to which they are entitled - it was then operating under the statutory regime of

the **National Minimum Wage Act** and the **Regulations** made thereunder. Given the ET's finding of fact that £30 per week had been deducted for living accommodation, albeit there was no contractual right to do so, Regulation 30(6) meant that such a deduction was permitted because that sum could count towards the National Minimum Wage. The ET's findings of fact in this regard were, however, made in a reserved Judgment. The question of how the calculation should be carried out on the basis of those specific findings had not been addressed.

23. Given the ET's findings - which created a specific and new factual foundation that had implications for the calculation of National Minimum Wage - the Respondent was entitled to seek to take into account the benefit in kind of living accommodation. Moreover, in my judgment, given the way in which the point arose, it was in the interests of justice for the ET to allow this to be done on the reconsideration application. I agree with the Respondent: to refuse to consider the application in these circumstances constituted an error of law.

24. That is an error that can be corrected at this stage. Doing so, it is clear that there is only one possible result: the Respondent was entitled to make a deduction of £30 per week for living accommodation because this was allowed by statutory provision. It is thus a sum that should be permitted to count towards the Minimum Wage and not characterised as an unlawful deduction.

25. In terms of the awards made, the effect of that in Miss Hassan's case will be to substitute a total of £5,459 (allowing deductions totalling £1,080) for that awarded by the ET, of £6,539.57. In Mr Singh's case the total award of £10,192.90 will, on this basis, now be subject to a reduction of £1,170 giving a substituted total, at this stage, of £9,022.90.

26. I turn, then, to the second ground of appeal, which relates to the Respondent's contention that Mr Singh's compensatory award should have been calculated on net rather than gross pay. The Respondent relies on the well-known principle that it is not the purpose of the compensatory award in an unfair dismissal case to place a Claimant in a better position than s/he would have been in but for the dismissal. There can be no argument with that principle but the question for me is whether the ET erred in law in refusing to entertain the reconsideration application because the Respondent had not expressly made this point at the merits hearing.

27. It is not entirely clear how the Respondent's case was put on this point below. The Respondent had not itself made deductions for tax and National Insurance from Mr Singh's pay during his employment but that was because it had (wrongly) paid him at such a low level as to avoid such liabilities arising. Having reserved its Judgment, the ET had taken upon itself the calculation of Mr Singh's unfair dismissal award, based on what it had found to be the correct level of pay. Only upon receiving the reserved Judgment and by its reconsideration application was the Respondent able to point out the error in the ET's calculations.

28. The ET refused the application on the basis that it was entitled to calculate the award on a gross basis because that is how the Respondent had paid Mr Singh during his employment. That response, however, fails to engage with the fact that different circumstances applied when the ET was calculating its award. Given the ET's calculation of the level of wages to which Mr Singh was properly entitled (applying National Minimum Wage), his pay would have been subject to tax and National Insurance and thus any compensatory award would need to be made net of those sums. Failing to do so, the ET was awarding Mr Singh more than the sum that would compensate him for losses he would actually have suffered. It was an error of approach that the Respondent could not have predicted. It was thus in the interests of justice to permit it

to take the point by way of its application for reconsideration. Failing to do so was, in my judgment, an error of law on the ET's part.

29. Adopting the correct approach must require Mr Singh's award to be further reduced to take into account tax and National Insurance liabilities. Again it is appropriate for this exercise to be carried out at this stage and for the revised sum to be substituted for that awarded by the ET. Mr Rees has taken the trouble to demonstrate how that calculation should be made. Accepting his figures, which I am prepared to do, the further reduction is in the sum of £529.62, which leads to a final total of £8,493.28 and that is the sum I substitute for the award made by the ET. I therefore allow the appeal and quash the original Judgment to the extent of those final totals and substitute my own awards in the sums that I have indicated.

30. Having given my Judgment in this matter, allowing the Respondent's appeal, Mr Rees has made an application on behalf of his client for costs to the extent that those relate to the fees that the Respondent has had to pay in order to pursue this appeal. That application is made under Rule 34A(2A) of the **EAT Rules 1993** as amended, which provides:

> **"If the Appeal Tribunal allows an appeal, in full or in part, it may make a costs order against the respondent specifying the respondent pay to the appellant an amount no greater than any fee paid by the appellant under a notice issued by the Lord Chancellor."**

The fees in question are the £400 lodgement fee and the fee of £1,200 for the hearing.

31. Mr Rees makes clear that his application is made only in Mr Singh's case, not in that of Miss Hassan, who has not sought to resist the appeal. Anticipating a potential concern of this Court as to Mr Singh's means, Mr Rees observes that the question does not arise because the sum can simply be deducted from the award still outstanding to Mr Singh. He further draws my

attention to his e-mail to Mr Singh of 19 February 2015, putting him on notice of the risk of this application, telling me there has been no response to that e-mail.

32. Rule 34A of the **1993 Rules** gives the EAT a very broad discretion in terms of costs. Rule 2A, which relates to fees, does not lay down any particular requirements save that the fees will have had to be paid by the Appellant and an application might be made where the Appellant has been successful, in whole or in part. Otherwise such an award is simply left to the discretion of the Court.

33. Recognising the new world which dawned with the introduction of fees, different divisions of the EAT have been minded to consider applications for the recovery of fees under Rule 34A in cases where appeals have been successful, subject to the expression of various caveats. One such caveat would (relevantly) be the means of the paying party. In this case, Mr Rees observes that there is an award outstanding to Mr Singh which should give him sufficient means to be able to meet any such award of costs. I have to take that at face value. I have no further detail of Mr Singh's means; I do not know, for example, whether he has any debts (perhaps incurred whilst awaiting resolution of this case) which might be relevant in this regard.

34. In other instances the EAT has considered it relevant to consider what steps an Appellant has taken to seek to avoid the incurring of fees by, for example, seeking the other party's consent to the points taken on appeal. In this respect, Mr Rees relies on the e-mail sent to Mr Singh, albeit that was sent fairly late in the day, certainly after the fees were incurred.

35. I then look at the particular facts of this case. This is a case where, on the ET's findings, the Respondent acted in a way to positively avoid its legal obligations to the Claimants. It was,

to put it neutrally, an unfortunate experience for both Claimants in terms of their first employment. Moreover, the points on which the Respondent has been successful are points which its representative failed to take before the ET below. Whilst I have allowed the appeal on the basis of Mr Rees's submission that the reserved nature of the original Judgment mitigates that fact, it had still been open to the Respondent to put its case in the alternative so these matters could have been taken into account by the ET in its original decision. The Respondent might not have been obliged to adopt that course; indeed, my judgment allows that it was entitled to make further submissions after seeing the way in which the ET had determined the case in its reserved Judgment. On the other hand, it was a course that had been open to the Respondent (even if limited to simply flagging up that it might want to make further submissions as to any calculation of awards) and neither Claimant could be held responsible for the choice the Respondent made in this respect. Indeed, if it was not for the Claimants' evidence as to the deductions of £30 a week being in respect of accommodation, the Respondent would have had no point to take in that regard at all.

36. Given the broad discretion I have, and given the particular facts and circumstances of this case, I do not consider this to be an appropriate case for an award under Rule 34A – it would not be just - and I refuse the application.