Appeal No. UKEATS/0043/13/JW

EMPLOYMENT APPEAL TRIBUNAL

52 MELVILLE STREET, EDINBURGH, EH3 7HF

At the Tribunal
On 22 January 2014

Before

THE HONOURABLE LADY STACEY

(SITTING ALONE)

MR GRAHAM WILLIAM WILSON — APPELLANT

ENERGY SUPPORT MANAGEMENT PTE LTD — RESPONDENT

JUDGMENT

APPEARANCES

For the Appellant	MR K McGUIRE (Advocate) Instructed by: Allan McDougall & Co Solicitors 3 Coates Crescent Edinburgh EH3 7AL
For the Respondent	MS F McBEATH (Solicitor) Law at Work Limited Kintyre House 205 West George Street Glasgow G2 2LW

SUMMARY

CONTRACT OF EMPLOYMENT – Implied term/variation/construction of term

UNLAWFUL DEDUCTION FROM WAGES

Contract of employment. Deduction from salary under **ERA 1996**. The Claimant argued that in terms of his contract which had incorporated a collective agreement, he was entitled to payment when on sickness absence under two clauses of the agreement, numbers 3 and 28. The Respondent argued that he was entitled only to sick pay in terms of clause 28. **Held**: the Employment Tribunal dismissed the case but made an inconsistent finding on a vital matter within the reasons which resulted in a judgment which was not clear and unequivocal. That must amount to an error of law. It would be necessary to have all of the evidence before the EAT before enabling it to decide the case. Case remitted to a freshly constituted Tribunal.

THE HONOURABLE LADY STACEY

Background

1. This was an appeal by the Claimant against a decision of the Employment Tribunal, Employment Judge Hosie sitting alone in Aberdeen, in which the decision was copied to parties on 22 May 2013. The claim related to unlawful deduction from wages. The claim was dismissed. I will refer to the parties as the Claimant and Respondent as they were in the Employment Tribunal. Mr McGuire, counsel, appeared for the Claimant and Ms McBeath, solicitor appeared for the Respondent. Neither of them had appeared in the ET.

2. At the beginning of his address to me Mr McGuire stated that this case was about an offshore worker, and he intended to argue that the ET had failed to construe provisions of the contract of employment, particularly in relation to salary, holiday pay and sick pay in the context of offshore work. He asserted that the contract was different from the standard contract of employment for those who did not work offshore. He also stated that while the contract provided for 'rolled up holiday pay' the case was not about that provision. The last sentence of the ET1 is in the following terms:-

> **"Esto the Respondent has not breached the contract and the collective agreement, given that the Claimant's remuneration includes payment towards his entitlement to annual leave, the Respondents are in breach of their obligations under the Working Time Regulations to pay the Claimant in respect of his annual leave entitlement."**

3. According to the judgment of the EJ, at paragraph 24, there was reference by the Claimant's solicitor to argument on the subject. The EJ has set out in his reasons the argument that was put as follows: –

> **"On the Claimant's interpretation of the collective agreement, if an employee who is scheduled to work offshore 161 days per year is absent for the whole of a leave year, he will receive a payment of 28/189 of his salary. On the Respondent's interpretation, he will receive no payment at all in respect of annual leave entitlement. Leaving aside the evidence before the Tribunal, against the background of the *Russell -v- Transocean International Resources Ltd***

> **litigation, it is inconceivable that the negotiating parties would not be alive to the question of paid annual leave."**

The EJ dealt with this argument in his paragraph 24. That is in the following terms: –

> **"Finally, I was not persuaded that the submission by the Claimant's solicitor with reference to *Transocean,* which is to be found in the paragraph immediately before his "Summary" in his written submission (Page 11 of these Reasons) was well-founded. The reason why an employee in these particular circumstances would: "receive no payment at all in respect of annual leave entitlement" would be because he had not taken any leave in the first place as he had been absent from work all year due to ill-health (it is important to bear in mind that the basic entitlement is to *leave*). If an employee is off work for a whole year he has not taken any leave and would not be entitled to holiday pay. However, his entitlement is not lost. It remains to be taken later and Regulation 13 (9) of the Working Time Regulations 1998 falls to be read as subject to that proviso (*HMRC -v- Stringer and others* [2009] UK HL 31). In the circumstances as set out by the Claimant's solicitor the employee concerned would be seeking holiday pay without having taken any holidays. His contention relates to holidays which have not actually been taken. Holiday pay is a legal entitlement but only in respect of holidays actually taken. In normal circumstances under this contract such holidays are accommodated within the onshore field breaks within the normal work cycle, which is presumably why it is convenient to have the holiday pay "rolled up" into the salary."**

4. In the course of his argument Mr McGuire did refer to the case of **Stringer and others v HMRC** [2009] IRLR214, which was not in the agreed list of authorities. He produced a copy of the case. He did not develop argument about it, beyond stating that the case was authority for the proposition that an employee who is on sick leave cannot be forced to take holidays during that period but may do so. In any event he had no ground of appeal relating to the concept of 'rolled up holiday pay'.

5. As noted by the Employment Tribunal, the essence of this dispute is an issue between the parties on the interpretation of the Claimant's contract of employment and in particular of a Collective Agreement incorporated into his contract. The facts were not in dispute. Parties helpfully entered into an "Agreed Statement of Facts" before the ET and it is set out in full in the reasons. Given the view that I have taken of the case, it is necessary for me to repeat the agreement in full. It is as follows: –

> **"1. The Claimant is employed by the Respondent as a chef working offshore. He works a pattern of 2 weeks offshore followed by 3 weeks onshore. His employment commenced on 24 May 1996.**

2. The contract of employment governing the relationship between the Claimant and the Respondent is dated 4 February 2011 and is lodged as production number (4) ("the contract of employment").

3. In terms of the contract of employment, the Claimant is paid monthly in arrears. The month's payment run covers the period from 21st of one month to 20th of the following month.

4. The Claimant's remuneration is identified in the contract of employment as being that of a chef on "COTA Grade D". The contract of employment states, "Annual Salary is as per the current collective agreement inclusive of statutory vacation entitlement". Sick pay is described in the contract of employment as being "as per collective agreement". The relevant collective agreement is the Joint Memorandum of Agreement between the individual members of COTA and both Unite the Union and the RMT dated July 2012 which is lodged as production number 5 ("the collective agreement").

5. The Claimant is a "Salaried Employee" for the purposes of the collective agreement.

6. Appendix 1 of the collective agreement identifies the annual salary of a Grade D Employee, such as the Claimant, as being £37,624.62. It identifies the sick pay daily rate for such employees as being £77.55.

7. The collective agreement is predicated on employees working 161 days offshore per year. However, the collective agreement applies to employees, including the Claimant, who work a greater number of days or a lower number of days offshore per year dependent on their particular rota.

8. The Claimant submitted a grievance asserting that he had been subject to a deduction from wages. His grievance was refused by Trinity International Services Limited who dealt with the matter on behalf of the Respondent. The Claimant appealed the decision in accordance with the Respondent's grievance appeal process but the appeal was refused.

9. The Claimant was certified as being unfit to work between 16 November 2011 and 10 May 2012. Had the Claimant not been absent due to ill-health, he would have been due to work 5 periods of 14 days offshore (i.e. 18 November 2011 to 2 December 2011, 23 December 2011 to 6 January 2012, 27 January 2012 to 10 February 2012, 2 March 2012 to 16 March 2012 and 6 April 2012 to 20 April 2012) amounting to 70 days. The Claimant returned to work off-shore on his normal crew-change on 11 May 2012.

10. If the correct interpretation of the collective agreement is as asserted by the Claimant, the Claimant was entitled by virtue of clause 3 to the following payment during his period of absence between 16 November 2011 and 10 May 2012: £21,947.70 (being pay for 7 months that he would have received had he not been unfit to work) minus £13,935.04 (being the deduction of 1/189 for the 70 days he would otherwise have been offshore) = £8,012.66.

11. In terms of clause 28 of the collective agreement, the Claimant was entitled to receive £1085.70 by way of sick pay in respect of the first 2 weeks of absence, £542.85 by way of sick pay in respect of the following 2 weeks of absence and £1734.85 being statutory sick pay for the remaining period (at a rate of £81.60 for 16 weeks and £85.85 for 5 weeks).

12. The Claimant received total pay of £6779.16 from the Respondent in respect of the period from 21 October 2011 to 20 May 2012.

13. If the correct interpretation of the collective agreement is as asserted by the Claimant, he has sustained an unlawful deduction of wages of [£4596.90] gross (i.e. 21,947.70-13,935.04 +1085.70+542.85+1734.85-£11, 376.06 [£6779.16])."

6. The background to the case is that the Claimant is a chef, working offshore. His employment with the Respondent commenced on 24 May 1996. His work is in a pattern of 2 weeks offshore followed by 3 weeks onshore. The Claimant is paid monthly in arrears, the payment period running from the 21st of one month to the 20th of the following month. He is a

salaried employee, grade D. A collective agreement between the Caterers Offshore Trade Association (COTA) and 2 unions, Unite, and the Rail Maritime & Transport Workers Union (RMT) was incorporated into the contract of employment. The dispute between the parties relates to the terms of the collective agreement.

7. The collective agreement comprises 40 sections and 2 appendices. Clauses 1 and 2 contain introductory material and applicability and definitions clauses. Section A (Clauses 3 to 9) applies to salaried employees only. Section B (clauses 10 to 13) applies to ad hoc employees only. Section C comprises terms which are common to salaried and ad hoc employees. The dispute in this case relates to the interplay between clause 3 and clause 28.

8. Clause 3 is in the following terms: –

> **"3. SALARIES**
>
> **The annual salaries for Salaried Employees are set out in the table at Appendix 1 below. Salaries will be paid on the basis that the employee is engaged to work on a rota which requires the employee to work for an average of up to 161 offshore days per year (excluding annual leave).**
>
> **Salaries also include:**
>
> **(i) payment to reflect the fact that the employee may be requested to carry out work offshore at any point all year round, except when on agreed periods of annual leave or during any periods of compensatory rest under the Regulations; and**
>
> **(ii) all periods of annual leave to which the employee is entitled under the Regulations, under this agreement or otherwise.**
>
> **All scheduled offshore days within the employee's rota count towards the contracted 161 working offshore days. In the event that the employee does not carry out the contracted work offshore salary is not payable. In that event, on a day when the employee would otherwise be offshore on a scheduled offshore day the amount not paid shall be calculated on the basis of 1/189 of salary per day (that being calculated on the basis of 161 offshore days and 28 days of annual leave). Payments otherwise are due set out below."**

9. Clause 28 is in the following terms: –

> **"28. SICK PAY**
>
> **Where an employee is absent from scheduled work offshore by reason of ill health, the intention of the employer is to ensure that the employee continues to receive sick pay for a**

period as provided below during the period of certified absence from work. Employees require to comply with the employer's sick pay requirements.

The following minimum sick pay entitlements will apply in any 12 month period (inclusive of Statutory Sick Pay ("SSP") entitlement at both levels):

- **Less than one year's service –SSP**
- **More than one year's service**

  (i) For Salaried Employees up to 14 days at the sick pay rate as set out in Appendix 1, then up to a further 14 days at half the sick pay rate, followed by SSP.

  (ii) For Ad-Hoc Employees up to 14 days at the sick pay rate as set out in Appendix II, then up to a further 14 days at half the sick pay rate, followed by SSP.

These provisions commence on the first day of scheduled work (taking into account the normal flight schedule for that employee's normal place of work if a Salaried Employee, or when the ad hoc employee would reasonably be expected to have gone offshore) and continue until sick pay is exhausted or the employee is signed fit to return to work whichever comes first.

If the employee has been absent from a continuous period of 12 months or more, no further sick pay is payable until he/she has returned to work."

10. In his form ET1, the Claimant made a claim in respect of arrears of pay. He claimed that he had been subjected to an unlawful deduction of wages contrary to the **Employment Rights Act 1996** (ERA) between November 2011 and May 2012 when he had been unfit for work. In the form ET3 the Respondent stated that the Claimant was entitled in terms of his contract to sick pay from the first day of absence (due to sickness) which was a scheduled off shore day. His normal salary would resume on the day of the first scheduled flight to take him off shore after he was certified as fit.

11. The dispute between the parties was whether the Claimant was entitled, when unfit for work, to be paid his normal salary under deduction of 1/189 for each day when he was not offshore, but would have been scheduled to be offshore had he been fit, together with sick pay as set out in clause 28, or entitled only to payment of sick pay under clause 28. The parties were agreed as to the figures. The parties accepted in the course of the hearing before the ET that an error had been made in paying the Claimant and that the Respondent was due to pay him £433.92.

12. Mr McGuire took a point which though it was not presented as a preliminary matter, it is convenient, in my opinion, for it to be considered as such. There was no notice of this argument in the grounds of appeal. No objection was taken by the Respondent. Ms McBeath made submissions relating to it orally but only when asked to address me on it. I had the impression it had not been drawn to her attention in advance. It concerns paragraph 15 of the reasons. That paragraph appears under a section headed "**Conclusion**" and it follows the agreed statement of facts and sections of the judgment in which the submissions of the Claimant, the submissions of the Respondent, and the response by the Claimant are set out. On the face of it then paragraph 15 would appear to be a conclusion reached by the Employment Judge. The paragraph is in the following terms: –

> **"15. Clause 3 relates to "Salaries" which are paid on the premise of employees working an average of up to 161 days offshore per annum. If they do not work offshore on any days when they were scheduled to do so there is a deduction of 1/189 of salary per day (calculated on the basis of 161 offshore days and 28 days of annual leave). An employee's holiday pay entitlement is "rolled up" into the salary.** ***That is why the salary of an employee who was signed off work due to ill-health is reduced by only 1/189 for each day missed and not 1/161 as this ensures that they may still receive their holiday pay entitlement."*** **(Emphasis added)**

13. Mr McGuire argued that the EJ had accepted that an employee who was signed off work due to ill-health would have his pay reduced by 1/189, and by so accepting had accepted the essential argument put before him on behalf of the Claimant. He argued that the rest of the reasoning was incomprehensible in light of that paragraph.

14. Paragraphs 16 to 27, which follow under the heading 'conclusion', on any reading of them indicate that the Employment Judge decided that a person who was off sick did not get paid under clause 3 of the contract but rather got paid sick pay under clause 28. This can be seen most clearly in paragraph 18 which is in the following terms: –

> **"18. The Claimant's solicitor maintained that Clause 3 and Clause 28 *both* operate in the event of ill-health, whereas the Respondent's solicitor maintained that only clause 28 operates. In other words, the Claimant's solicitor maintained that you apply Clause 28 in the event of ill-health but you do not disapply Clause 3, a day of absence due to ill-health being still a day**

> **when the employee *"does not carry out the contracted work offshore"*, and thus remains liable to a deduction of only 1/189. That is not my interpretation. The Claimant's solicitor appeared to be interpreting "otherwise" as meaning "additionally" (a word not used in Clause 3), whereas I consider its meaning ("in an other way" or "under other conditions") is almost the opposite, with the effect actually excluding Clause 3 when the circumstances apply. It seems to me that absence due to ill-health is a circumstance different from the one in question and indeed is expressly covered elsewhere, i.e. in Clause 28."**

15. It is clear from paragraphs 19 and 20 that the EJ decided that sick pay was to be dealt with in terms of clause 28, without reference to any other clause. In paragraph 22, the EJ made reference to evidence which had been led relating to the Claimant's payslip with a view to arguing that the Respondent had operated the contract in the way contended for by the Claimant. The EJ stated that he accepted contrary evidence from the Respondent. Thus the EJ was being asked to decide was whether there was evidence to show that the contract had been operated by the Respondent in such a way as to enable the Claimant to receive pay under clause 3 as well as pay under clause 28. He came to the view that there was not. It is plain that the EJ understood the question that was before him. In paragraph 24, the EJ turned his mind to the interconnection between sick pay and holiday pay stating:-

> **"…If an employee is off work for a whole year he has not taken any leave and would not be entitled to holiday pay. However, his entitlement is not lost. It remains to be taken later and Regulation 13 (9) of the Working Time Regulations 1998 falls to be read as subject to that proviso (*HMRC -v- Stringer and others* [2009] UKHL 31."**

16. In paragraphs 25 and 26 the EJ stated that he found in favour of the submissions by the Respondent's solicitor and found that there had been no unlawful deduction from wages and accordingly the claim was dismissed by him.

17. Mr McGuire argued that the terms of paragraph 15 did not make sense in light of the rest of the judgment, or perhaps more accurately, that the rest of the judgment did not make sense in light of the terms of paragraph 15. His position was that EJ had decided the matter before him in favour of the Claimant, as he had found that '**the salary of an employee who was signed off work due to ill-health is reduced by only 1/189 for each day missed and not 1/161 as this ensures that they may**

still receive their holiday pay.' He argued that the Employment Judge must have erred in law because he decided as he did in paragraph 15 but then dismissed the claim

18. On being asked to address me on this, Ms McBeath submitted that the EJ was, in paragraph 15, narrating a submission made to him. She accepted that he had narrated submissions elsewhere and that paragraph 15 fell under the heading "conclusion" as stated above. Nevertheless, she argued that he had not decided that a person who was off due to ill-health would be paid his salary under a 1/189 deduction under clause 3. She argued that the Employment Judge was, throughout the judgment, setting out firstly the submissions put before him, then stating his own conclusions in working up to the decision which was given at paragraphs 25 and 26. She reminded me that the claim had been dismissed by the Employment Tribunal.

19. I agree with Mr McGuire that the terms of paragraph 15 do not make sense in light of the rest of the judgment. In my opinion the Employment Judge did err in law, in that paragraph 15 appears to contain a decision on the matter in dispute which is contrary to the rest of the judgment. I am not persuaded by Ms McBeath's argument that the EJ was narrating a submission put to him as that does not fit with the layout of the judgment. Nor am I persuaded by Mr McGuire's assertion that the EJ intended to give a decision in favour of the Claimant in that paragraph, because that does not fit with the sense of the rest of the judgment. As no application was made by either party for a review of the judgment I have no way of knowing if the error was a slip of the pen. As it is on a vital matter, I have come to the view that I must regard it as an error of law which leaves the question open for me to consider.

20. As stated above all of the judgment apart from paragraph 15 indicates that the Employment Judge did not accept the submissions put before him on behalf of the Claimant

and did accept the submissions on behalf of the Respondent. That being so, I intend to proceed on the basis that there is no finding of fact before me that the contract was operated in the way set out in paragraph 15, that is that 1/189 was deducted from persons who were off work sick.

21. Mr McGuire addressed me on the Claimant's position in four chapters, being firstly the factual background, then the case law regarding interpretation of contracts, then the errors of law said by him to have been made by the EJ and finally disposal.

22. The contract of employment states in article 9 the following: –

> **"Leave is consolidated within your remuneration. The employee will be eligible for an appropriate number of days leave to days worked during each tour of duty. If the employee fails to complete their tour of duty under any circumstances save for the termination of this contract initiated by them or arising out of their default, their entitlement to leave shall be computed using the number of days' completed of the tour of duty on a pro-rata basis."**

23. Article 11 is headed "remuneration" and is in the following terms: –

> **"Remuneration is as per the wage scale stated in appendix 10. Payments will be made monthly in arrears and are inclusive of all vacation entitlement."**

24. The collective agreement provides in its first paragraph that

> **"…The purpose of this Agreement is to set out the minimum level of terms and conditions of employment which apply to those employees referred to below who are employed by COTA member companies in catering, accommodation and ancillary services on recognised types of offshore installation. The standard terms of such contracts will be for each COTA member company to determine, but shall be no less than the minimum terms provided for in this agreement….."**

The terms of clauses 3 and 28 of the collective agreement are as noted above.

25. The argument on behalf of the Claimant was that he had in terms of his contract of employment into which the collective agreement had been incorporated entitlement to receive his salary in accordance with clause 3 of the collective agreement when he was off sick.

Mr McGuire argued that the principles applicable to the construction of collective agreements are the same as those which apply to the construction of other contracts. He cited as authority for that proposition the case of **Adams v British Airways plc** [1996] IRLR 574. He argued that the principles of construction set out in the case of **Investors' Compensation Scheme Limited v West Bromwich Building Society** [1998] 1 WLR 896 apply to the construction of the provisions of employment contracts. He argued that even where there was no ambiguity in the terms of a contract, it should be construed so as to provide a result which was that which the parties intended. From the case of **Anderson and others v London Fire & Emergency Planning Authority** [2013] IRLR 459, he argued that there is a requirement for "industrial sense" to be applied to the exercise of construction of such a contract. He argued further that if the contract was ambiguous then a court or tribunal could have regard to a clearly established practice which continued before and after the agreement was made, as evidence of what the parties meant by the contract, for which proposition he relied on the case of **Dunlop Tyres Ltd v Blows** [2001] IRLR 629.

26. Counsel argued that the ET had failed to consider what the clauses in the employment contract and collective agreement would convey to a reasonable person having the background knowledge which would have been available to the parties as described by Lord Hoffman in the **Investors' Compensation Scheme** case. He argued that the Employment Tribunal had erred in law by concentrating on the final words of clause 3, "payments otherwise due are set out below" and thereby coming to the view that those words meant that payments when a worker was sick were governed by clause 28 and not clause 3. He argued that the evidence given by the trade union representative, Mr Fraser, was that the aim of clause 3 was to ensure that employees who were absent from work due to ill-health would receive a payment in respect of their annual leave entitlement. He argued that the Tribunal had failed to consider this evidence

in reaching its decision on the meaning of clause 3. He criticised the literal approach to the construction of the agreement that he said had been taken by the Employment Judge.

27. Counsel argued that the written agreement between the parties was ambiguous and that in those circumstances the aims of the parties were an important element in ascertaining the meaning of the agreement. He relied on the case of **Carmichael and another v National Power plc** [2000] IRLR 43. Under reference to the case of **Anderson v London Fire & Emergency Planning Authority**, he submitted that the construction of the agreement had to be in context. He argued that just as the trade union representatives in that case would not have agreed to a contract whereby the employer had a choice of what percentage to award as a pay increase, the trade union in the current case would not have agreed that workers would be paid sick pay only under clause 28 and not under clause 3 in addition. He argued that there was evidence about the way in which the contract had been applied by other parties to the collective agreement and he relied on the authority of the **Dunlop** case to argue that the Employment Tribunal had erred in law by ignoring that evidence.

28. Anticipating the argument against him, counsel argued that it was necessary to remember always the context of any contract. This is an agreement reached after negotiation by unions and employers. Thus if it were argued that business sense would be offended by a provision which involved paying twice, under both clause 3 and clause 28, the counter argument is that in the context of a contract of employment there is business sense in such a construction. The protection of the workers by receiving such payments was the purpose of the clauses. That had been accepted by the employers.

29. Ms McBeath for the Respondent argued that the general principles of interpretation of contracts are set out in the **Investors Compensation Scheme** case. She referred to paragraph

22 of the **Adams** case from which she noted that while an agreement reached in the context of collective bargaining has special characteristics, as it follows negotiation between unions and employers, it is still to be construed like any other contract, fair meaning being given to words used in the factual context known to parties. She argued that the reasonable person who had all the background knowledge which was necessary would in this case decide that clause 28 operated only when a person was sick and that its function was to deal with sick pay. The construction sought by the counsel for the Claimant would entail clause 28 having no purpose. She argued that clause 3 is a general provision which deals with circumstances where an employee does not go offshore on a scheduled offshore day and is therefore not paid for that day. She argued that there could be a number of reasons why an offshore worker might not be able to work on a particular day; they would be known to the parties negotiating the agreement and would include for example missing a connecting flight. According to her argument, the way in which the collective agreement was drafted was clear; clause 28 specifically referred to sick pay whereas clause 3 covered the many and varied other reasons why a worker might not be offshore when he had been scheduled to be so. She argued that her interpretation of the agreement was bolstered by clause 30 which provided that on return to work, salary would resume on the day of the first scheduled flight. She argued that the pay receivable under clause 3 was paid when a person was not offshore for reasons other than sickness. In contrast, clause 30 provided that when a person had been off sick, had recovered his fitness and resumed his duties by getting a flight to take him off shore, his salary would then resume.

30. Ms McBeath argued that if there was any ambiguity in the contract of employment and collective agreement then the construction to which the Tribunal should come was one which made business sense. She referred to the case of **Rainy Sky S.A. &c v Kookmin Bank [**2011] UK SC 50. She argued that it was not in accordance with business sense that the Respondent

would pay sick pay to employees plus an additional sum under clause 3 while they were off sick. She argued that such an arrangement could encourage employees to stay off work.

31. It was accepted on behalf of the Respondent that the Tribunal Judge was entitled to take into account evidence about what the parties understood they had agreed. Ms McBeath argued that the EJ had done so and had dealt with this part of the case before him from paragraph 21 onwards. He had found that there was no ambiguity but had dealt with the evidence. He accepted that the payslip dated 30:11:11 appeared on the face of it to deal with a period of sickness as the Claimant contended it should be dealt with. He said however that he accepted oral evidence from a witness led for the Respondent that the reason for that was that no evidence of ill health had been produced for that period, and so the Respondent erroneously paid under clause 3. Thus the EJ found that payment had been made in error, and he was entitled to make that finding of fact.

32. Further, the EJ explained that while there was evidence from Mr Fraser that other signatories to the COTA agreement paid in the way contended for by the Claimant, there was no evidence that the Respondent did so. Thus there was a distinction to be drawn between the circumstances of the current case and the **Dunlop** case.

33. Counsel argued that there was agreement on the facts of the case and on quantum, it would be appropriate to allow the appeal and rather than remit the case, to decide it myself. If I was not with him on that disposal then he submitted that the case should be remitted to a differently constituted employment Tribunal. He argued that there should be a complete rehearing with evidence.

34. The solicitor for the Respondent argued that the appeal should be refused. If however I was not with her on that I should remit to the same Tribunal in order that new findings in law might be made. While acknowledging that the Employment Judge had given a view, Ms McBeath argued that the overriding objective would be best served by it going back to the same Employment Judge, who could of course be trusted to put his previous judgment aside and consider matters afresh.

35. As stated above, I have decided that paragraph 15 does show that an error of law has been made by the Employment Judge. It appears to me that the judgment is otherwise clear that he has found against the Claimant, for the reasons which he has given, but I do accept that paragraph 15 exists and that as printed it does not make sense when read along with the rest of the judgment. That must be construed as being an error of law. In deciding what should follow from that, I have considered whether or not I can simply decide the case on the basis of the facts found by the Employment Judge, reading his judgment as not including a finding in fact that 1/189 of salary is deducted in respect of ill health absence. I had at one stage been of the preliminary view that I could proceed to decide the case but I have come to the view that I cannot so proceed. It seems to me that in light of the cases to which I was referred on the question of contractual construction, it is necessary to have before me all of the evidence given by the witnesses including Mr Fraser and Mr Adam for the Claimant and Mr MacBride, for the Respondent. I am very conscious that I do not have the advantage that the Employment Judge did of hearing the evidence. I appreciate that the Employment Judge has stated what he made of that evidence but he has not set out what the evidence was in such a way as to allow me to make any findings in fact about it.

36. I am also conscious that while the matter of "rolled up holiday pay" was raised, I was not favoured with argument on the subject. It will be a matter for parties to decide whether or not they should argue that question in front of the Employment Tribunal.

37. I have considered whether or not this should be remitted to a new Tribunal. I have every confidence that the Employment Judge would consider matters afresh and that he would do so in a professional manner. I have however decided that it should be remitted to a freshly constituted Tribunal as it may be difficult in a case such as this for any judge to take a completely fresh view of the facts.

38. I allow the appeal and remit to a new Tribunal.