

Appeal No. UKEAT/0053/16/BA

**EMPLOYMENT APPEAL TRIBUNAL**  
FLEETBANK HOUSE, 2-6 SALISBURY SQUARE, LONDON EC4Y 8AE

At the Tribunal  
On 13 February 2017

**Before**

**HIS HONOUR JUDGE SHANKS**

**(SITTING ALONE)**

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MR W WALTERS T/A ROSEWOOD

APPELLANT

MISS S BARIK

RESPONDENT

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Transcript of Proceedings

JUDGMENT

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## **APPEARANCES**

For the Appellant

MR BENJAMIN UDUJE  
(of Counsel)  
Instructed by:  
Defank Solicitors  
Queens Court  
9-17 Eastern Road  
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For the Respondent

MR JOHN CAVANAGH  
(One of Her Majesty's Counsel)  
Instructed by:  
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## **SUMMARY**

### **UNLAWFUL DEDUCTION FROM WAGES**

The Claimant was employed by the Respondent for seven years and was paid nothing. She brought a claim for unlawful deduction from wages and succeeded. The Employment Tribunal awarded her a sum of £182,000 which was recorded as being the gross amount of wages she should have been paid over the seven year period and it was recorded in the Reasons that she was entitled to receive this sum after deduction of income tax and National Insurance. The Respondent appealed on the basis that the amount awarded should have been the net sum that would have been paid after tax and National Insurance. He did not in the meantime pay anything to the Claimant.

The income tax position in respect of seven years' arrears of wages paid after the termination of employment was complex and not one that the Employment Tribunal could be expected to work out. The Employment Tribunal had been fully entitled to make an award of the gross sum and to leave it to the Respondent to work out exactly how much of the gross sum should be paid to the Claimant and how much to HMRC.

The Respondent ought to have taken the step of contacting HMRC immediately, finding out the appropriate figures, paying the Claimant and HMRC and giving an appropriate account to the Claimant. Instead he had brought and persisted in an appeal which the EAT found to be a means of further delaying payment of whatever was due to the Claimant and which led the EAT to make a Costs Order in her favour.

**A** HIS HONOUR JUDGE SHANKS

**B** 1. This is an appeal by Mr Walters, the Respondent below, against an Order of the Employment Tribunal made in Watford by Employment Judge Southam sitting with Mr Kaltz and Ms Telfer, which was sent out on 27 May 2015. The Employment Tribunal found that the Claimant, Miss Barik, had worked for the Respondent as an employee for a period from 2007 to 2014 and was entitled to be paid a salary in respect of that work but that she had never been paid anything.

**C** 2. At paragraph 30 of their Reasons the Tribunal said this:

**D** “30. Leaving remedy to one side for the moment, we turn to the issues at paragraphs 7.9 to 7.14. The responses we give to these issues become slightly repetitive. It is clear that the claimant worked for the respondent during the relevant period [the seven years to which I have referred] and her employment terminated when she resigned. She was not paid any remuneration. The respondent therefore made unlawful deductions. Subject to the time question discussed below, the claimant is entitled to payment of £182,000 less tax and national insurance but she must give credit for the sum of £1,800 given to her originally as a loan but not repaid.”

**E** In the Judgment itself, coming before the Reasons, at paragraph 9.1 the Tribunal said this:

“9. The respondent is ordered to pay to the claimant the following sums:

**F** 9.1. In respect of unlawful deductions from pay, the gross sum of: £180,200.00;

...”

**G** As it happens, since that Order was sent out on 27 May 2015 Mr Walters has paid absolutely nothing pursuant to that Judgment, which, incidentally, includes other sums in respect of unfair dismissal and discrimination.

**H** 3. There was an appeal, which I have not looked at, which was rejected on the sift by HHJ Eady QC. There was then a Rule 3(10) Hearing, which came before Langstaff J on 12 February 2016. It appears that Langstaff J himself raised in the absence of any representation for the

A Claimant the question of the deductions that would have to be made in respect of tax and  
National Insurance and whether they had to be specified in some way, and he therefore  
B adjourned for two months to give the parties an opportunity to sort things out. Unfortunately,  
that was not successful. In due course an amended Notice of Appeal was lodged to reflect this  
point. In that Notice of Appeal there is a calculation as to what the Claimant's net income after  
tax and National Insurance would have been over the various years, and a total sum is reached  
C of £137,828 as being the correct sum to be put in the Tribunal's Judgment. As I understand it,  
there is no particular dispute about the sum shown in the calculation but there is a matter of  
principle. Mr Cavanagh, who has appeared pro bono for the Claimant, for which I am grateful,  
said that the Employment Tribunal was right to leave the matter in the way that it did.

D  
4. I have been referred to the provisions of the **Employment Rights Act 1996** in relation  
to deductions and to the familiar rules about the need for Tribunals to give reasons and to set  
E out calculations where a Judgment includes a financial award. I have also been shown the  
**Income Tax (Pay As You Earn) Regulations 2003** ("the PAYE Regulations") - which I am  
pretty sure will have been superseded, since they date back to 2003. There is a particular  
F provision, which is Regulation 37, which deals with PAYE income paid after the cessation of  
employment. We then had a little debate about the meaning of Regulation 37(2) and its precise  
effect on the facts that we are presented with. I have also been shown a case called McCarthy  
v McCarthy & Stone plc [2007] EWCA Civ 664 about the operation of the **PAYE**  
G **Regulations** and system as a whole, and I think it is fair to say that all of the lawyers in the  
room - all three of us - have given somewhat anecdotal evidence about our understanding of  
how the **PAYE Regulations** work.

H

**A** 5. I have not been able in this hearing, and I do not suppose the Tribunal would have been  
very interested in attempting at the earlier hearing, to resolve all of these issues. They are tax  
**B** matters. They are undoubtedly complicated. The facts of this case in relation to tax are very  
unusual. For somebody to be paid seven years' salary in arrears after they have ceased to be an  
employee no doubt raises unusual circumstances so far as HM Revenue & Customs are  
concerned. I am not proposing to even attempt to resolve how this gross amount should be  
**C** accounted for so far as tax is concerned. What I do know and am quite clear about is that if tax  
is not accounted for by an employer it is open to the Revenue to pursue the employee.

**D** 6. It seems to me, taking all of that into account, it was eminently sensible for the Tribunal  
to leave the matter in the way that it did, indicating that the sum of £180,200 was by way of a  
gross sum and that there may be tax and National Insurance deducted before payment to the  
Claimant. The sensible, obvious thing was for the Respondent to make contact with the  
**E** Revenue and to find out how much he had to pay direct to the Claimant, how much he had to  
pay to the Revenue to pay those amounts, make sure they were properly accounted for so that  
everybody knew what the position was, and if he had done that, none of this would have arisen.  
It seems to me it remains for him to sort this matter out by, as I say, liaising with the Revenue  
**F** and paying what is due. He could have done that long ago, but he has not.

**G** 7. Although there was a further clarification that I suggested that could have been added,  
namely that he was to pay a sum net of tax and National Insurance and to account for the  
Revenue for any balance, such sum to amount to a gross sum of £180,200, and that was  
something that Mr Uduje would have considered acceptable, I do not think that it was  
**H** necessary. I think it was quite clear from paragraph 9.1 of the Judgment and paragraph 30 of

**A** the Reasons that the Tribunal was ordering a gross sum, part of which may have to be paid direct to the Revenue.

**B** 8. There were questions raised about interest. It seems to me that interest, on any judgment, is a separate issue. It may need sorting out separately. I am not clear in my mind how interest will be dealt with. However, that does not seem to me to undermine the basic point.

**C** 9. I also raised the question of compensation and the fact that there is often a grossing-up exercise done to take account of the £30,000 tax free element. It seems to me that compensation is a different category. We are dealing here with non-payment of salary, which is taxable, perhaps, in different ways at different times, and the right Order is indeed a gross sum with a continuing obligation to deduct tax and account for it in accordance with whatever **PAYE Regulations** applied to the payment in question.

**D** 10. For those reasons, I dismiss the appeal. It seems to me that the Order made by the Tribunal was perfectly acceptable.

**E** 11. A costs application is brought on the basis that this appeal was unnecessary, misconceived and/or unreasonable. The point is rightly made that the mere fact it got through a sift does not mean it is not misconceived or unreasonable, although in this case I cannot help noting that the point was more or less taken by Langstaff J of his own motion, which perhaps puts a slightly different spin on matters. There is nothing said about the figure that is claimed, which is a modest figure of £1,562.28, and nothing has been said about the Respondent's [ie Mr Walters'] means. The question is whether this was an unnecessary appeal, it seems to me, and

**A** if so whether I should order costs against the Respondent in the exercise of my discretion. On  
the basis of my decision, it seems to me that this was an entirely unnecessary appeal. The  
**B** proper way to proceed was for the Respondent very promptly to have contacted the Revenue,  
got an indication of how much he needed to deduct from the gross payment ordered by the  
Tribunal and to proceed to make the net payment to the Claimant and the balance to the  
Revenue. He did not do that, I can only assume, because he does not want to pay the money,  
and that is rather reflected in the fact that he did not pay the Claimant for seven years' work and  
**C** frequently changes his business names, as pointed out to me at paragraph 18 of the Reasons.

**D** 12. So, I am convinced that this was an unnecessary appeal, and I am convinced in all the  
circumstances that it is simply another way of delaying matters. Taking that all into account, I  
am persuaded it is right to make a Costs Order against the Respondent, which is what I now do,  
in the sum that was asked for, £1,562.28. I suggest he now gets on and pays the debt that has  
**E** been long ago adjudicated on, and that way he will also probably get the charging order  
released that the Claimant has at least been able to obtain, which may or may not get her the  
whole of what she is due but certainly, I assume, get a proportion of it whatever happens.

**F**

**G**

**H**