

Appeal No. UKEAT/0311/19/BA

**EMPLOYMENT APPEAL TRIBUNAL**  
ROLLS BUILDING, 7 ROLLS BUILDINGS, FETTER LANE, LONDON, EC4A 1NL

At the Tribunal  
On 14 September 2020

**Before**

**HIS HONOUR JUDGE JAMES TAYLER**

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**MARKAZI JAMIAT AHLE-HADITH**

**APPELLANT**

**MR MUHAMMAD ASIF EHSAN**

**RESPONDENT**

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Transcript of Proceedings

**JUDGMENT**

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## **APPEARANCES**

For the Appellant

PAUL SMITH  
(Of Counsel)

Instructed by  
Stachiw Bashir Green  
656 Greal Horton  
Road  
Bradford  
West Yorkshire  
BD7 4AA

For the Respondent

IN PERSON

## **SUMMARY**

### **UNLAWFUL DEDUCTION FROM WAGES**

The Appellant is a mosque and a Registered Charity (“the Respondent”). The Claimant was employed by the Respondent as a Minister of Religion. The Claimant alleged that he was paid £1,407.16 by bank transfer from the Respondent each month, but then required to repay part of each payment to the Respondent. He claimed these sums as unauthorised deductions from wages. The Tribunal found in his favour. The Tribunal erred in law in failing to determine the specific occasions on which, and precise circumstances in which, payments and repayments had been made. As a result, the Tribunal had failed to determine whether there was an “occasion”, or occasions, on which the sums paid to the Claimant by the Respondent was less than that “properly payable”. The matter was remitted for rehearing.

Before the rehearing, case management will be required to consider any application by the Claimant to contend that any payments he made to the Respondent were rendered unlawful by section 15 ERA (rather than being unlawful deductions contrary to section 13 ERA) and/or by the Respondent to claim that recovery of the sums is precluded by the doctrine of illegality because there was an arrangement to make it appear that the Claimant’s salary was greater than it was to support his application for a visa.

**A** **HIS HONOUR JUDGE JAMES TAYLER**

**B** 1. This is an appeal against the Judgment of Employment Judge Jennifer Wade sitting in Leeds on 9 and 10 January 2019. The written reasons for the Judgment were sent to the parties on 2 April 2019.

**C** 2. The parties are referred to as the Claimant and Respondent as they were before the Employment Tribunal. The Respondent is a mosque and a Registered Charity. The Claimant was employed by the Respondent as a Minister of Religion from 4 September 2017. The Claimant was summarily dismissed by the Respondent on 9 July 2018.

**D** 3. The Claimant submitted a claim form that was received by the Employment Tribunal on 25 July 2018. The Claimant alleged that his dismissal was unfair because it was for the reason, or principal reason, that he had made protected disclosures. The Claimant also ticked the box at **E** section 8 of the claim form contending that he was owed “other payments”.

**F** 4. The Claimant provided additional information in which he claimed that his annual salary had been agreed at £20,000; and that monthly payments of £1,407.16 were transferred into his bank account; but that he had been required to make repayments; initially of £720 and later £520 per month. This was treated as a claim for unlawful deduction from wages.

**G** 5. The matter was heard on 9 and 10 January 2019. The Claimant represented himself. The Respondent was represented by Mr Green, a solicitor. The claim of unfair dismissal failed. The Tribunal held that unlawful deductions had been made from the Claimant's wages and the **H** Respondent was ordered to pay him £5,800.

**A** 6. The Respondent appealed by a notice of appeal received by the Employment Appeal Tribunal on 9 May 2019. The matter was considered by the President of the Employment Appeal Tribunal, Choudhury J, who permitted the matter to proceed to a full hearing on the following grounds:

**B** **Ground 1 - It is arguable that a repayment of part of salary does not fall within the meaning of a "deduction" in s.13 of the Employment Rights Act 1996.**

**Ground 2 - It is also arguable that the full salary was not "properly payable" having regard to the Tribunal's findings about the factual matrix giving rise to the contract between the parties.**

**C** **Ground 3 - It is not clear whether the illegality point was taken below. However, even if it was not, it does seem to me to be at least arguable that if a contract is entered into for an ostensibly illegal purpose, that raises a question as to whether the "properly payable" test under s.13 of the 1996 Act is satisfied.**

**D** 7. The Tribunal made the following factual findings:

**13. The documentary evidence in relation to this matter included the bank account statements of the claimant and of the respondent charity, and also a large number of receipts from the cash receipt books of Mr Rehman, recording cash donations to the mosque. Mr Rehman was subject to cross examination by the claimant on these matters and the claimant was subject to cross examination on the matters in his bank statement by Mr Green.**

**E** **14. I accept that the claimant asked to be paid electronically to his bank account at the outset of his employment. There was no doubt that his contract of employment provided for him to be paid a gross annual salary of £20,000. I will come on to the way in which other members of the mosque's support team or staff were remunerated. From the documents, many of which are not in dispute, I can conclude that from the commencement of his employment, once his net monthly salary of £1407.16 was paid into his account, the claimant regularly withdrew large sums in cash, soon after each occasion on which he was paid.**

**F** **15. The exception in this monthly pattern was one occasion where he evidenced a bank transfer of £700 to his wife's account, and in that respect his oral evidence was that he made a bank transfer to his wife, and then his wife gave the £700 or so to him in cash, to give back to the mosque. I accept his evidence and explanation. Mr Green made much of the transfer to wife (the claimant having asserted he drew out cash each month), but it was one departure from 8 or 9 episodes of the claimant drawing cash out himself personally.**

**G** 8. The Tribunal set out its analysis and conclusion:

**H** **21. In all the circumstances I have to decide whether the sums paid to the claimant on any occasion were less than the sums properly payable to him (the question posed by Section 13(3) of the Employment Rights Act 1996). I have to decide whether the respondent has made a deduction Section 13(1). There was nothing in a written contract of employment which identified that the claimant would give back a proportion of his wages in cash to the mosque; nor did he sign any separate agreement to that effect. Clearly, the respondent mosque paid the**

**A** claimant's contracted wages every month electronically and appeared to process PAYE tax and national insurance in respect of those sums. The respondent's case was not that the claimant made private and voluntary donations to the mosque of his own accord and free will. It was that he had not made such donations. In view of the mosque's inability to establish its factual case, and my finding to the contrary, I am also clear that the claimant's paying back was not the exercise of his free, and charitable, will. It was an arrangement imposed on him, in my judgment, as a condition of his employment, and as a quid pro quo for the higher salary, necessary to support his visa, which in turn was necessary to secure his son's position, as he saw it. In these circumstances I consider such an arrangement is properly to be identified as a deduction, akin to where some employers issue payslips to identify sums having been paid, but in fact make payments of lesser amounts in cash. For these reasons this complaint succeeds. The respondent must repay the claimant the sum of £5800.

**B**

**C** 9. Various protections concerning the wages of workers are provided by Part II of the Employment Rights Act 1996 ("ERA 1996"). The protections have their origin in the Truck Acts.

**D** 10. Section 27 ERA 1996 defines "wages" to include "any sums payable to the worker in connection with his employment". Section 13(1) ERA 1996 provides:

**E** **(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**

**F** **(b) the worker has previously signified in writing his agreement or consent to the making of the deduction.**

11. Section 13(3) ERA 1996 sets out the circumstances in which a deduction occurs:

**G** **(3) Where the total amount of wages paid on any occasion by an employer to a worker employed by him is less than the total amount of the wages properly payable by him to the worker on that occasion (after de-ductions), the amount of the deficiency shall be treated for the purposes of this Part as a deduction made by the employer from the worker's wages on that occasion. [emphasis added]**

**H**

A 12. The provision requires consideration of three principle questions:

12.1. what wages were properly payable;

12.2. on what occasion (or occasions) was payment to be made;

B 12.3. was there an occasion (or occasions) on which a sum less than that properly payable was paid to the worker.

C 13. The approach the Respondent adopted in its skeleton argument was rather different in emphasis to that in the Notice of Appeal. The Respondent's primary contention on the first question is that the Tribunal correctly identified the sum that was properly payable to the Claimant as being his annual salary, paid in monthly instalments of £1,407.16.

D 14. The Respondent contends that to establish a breach of section 13 ERA 1996 the Tribunal was required to identify the occasions on which a sum less than that properly payable was paid to the Claimant.

E 15. In Murray v Strathclyde Regional Council [ 1992] IRLR 396 Lord Coulsfield held at para. 8:

F **Section 8(3) provides that where the amount of wages paid on any occasion is less than the amount properly payable on that occasion, the deficiency is to be treated as a deduction. That wording implies, in our opinion, that, in a case like this where a salary is payable by regular monthly instalments, each occasion on which wages are due to be paid in terms of the contract has to be considered separately and the amount properly due on that occasion has to be ascertained and compared with the amount actually paid on that occasion. If that comparison produces a shortfall, the shortfall is to be treated as a deduction**

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**A** 16. Accordingly, it is necessary in any claim of unlawful deduction from wages to determine the occasion on which there was a sum of wages that was properly payable and then to determine if on that occasion there was a shortfall.

**B** 17. Part II ERA 1996 does not only provide protection against unlawful deduction from wages; but also protects workers from being forced to make payments to their employers. The protection is provided by section 15 ERA 1996 (in very similar terms to section 13):

**C**

**(1) An employer shall not receive a payment from a worker employed by him unless—**

**D**

**(a) the payment 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 payment.**

**E** 18. Section 15 ERA 1996 was not relied upon by the Claimant before the Employment Tribunal. The Claimant was acting in person. The possibility of him relying on section 15 was not raised by the Respondent or the Tribunal. Section 15 ERA 1996 is something of a Cinderella provision; it is rarely considered. It is an important part of the protection provided to workers, and probably should get out more often.

**F**

**G** 19. I accept the Respondent's primary contention that the sums "properly payable" were the monthly payments of £1,407.16. These sums were paid into the Claimant's bank account. There might be circumstances in which money is passed from employer to worker and immediately taken back, so that the whole sum is not in reality paid to the worker. This would require careful consideration of the "occasion" on which this occurred and the precise nature of the transaction.

**H** If one takes a somewhat contrived example, in which an employer passes a cash payment to a



**A** worker across a table, but before the worker takes the money, the employer grabs back a portion,  
that could be analysed as a deduction. However, it is hard to see how a deduction can be  
established if a payment is made to the worker, but on a different occasion the worker makes a  
**B** payment to the employer. In such a situation, the repayment might well be caught by section 15,  
rather than section 13, ERA 1996.

**C** 20. In this case the Tribunal did not identify the “occasions” on which less was paid than that  
properly payable. That was a necessary stage in determining whether unlawful deductions had  
been made from the Claimant's wages. The Employment Judge stated in respect of the alleged  
arrangement for repayments that “I consider such an arrangement is properly to be identified as  
**D** a deduction, akin to where some employers issue payslips to identify sums having been paid, but  
in fact make payments of lesser amounts in cash”. I do not accept that analysis was correct. In  
the example the Employment Judge gave part of the payment is not made at all. In this case it  
was contended that a payment was made, but there was an immediate repayment of a portion that  
**E** resulted in a deduction. As there was no analysis of when such deductions occurred there was an  
error of law in the determination of the Tribunal. That error requires that the matter be remitted.

**F** 21. There are likely to be strong arguments that this is a claim that should have been  
considered under section 15 ERA 1996.

**G** 22. I was provided with bank statements, that were before the Employment Tribunal, that  
showed payments of £1,407.16 made into the Claimant’s account, approximately monthly. The  
bank statements show occasions on which the Claimant withdrew sums from his account. The  
**H** Claimant contended that the money he withdrew (or some of it) was paid to the Treasurer of the  
Respondent. The documentation does not appear to show an exact correlation between the dates

**A** of the payments from the Respondent to the Claimant with the dates, and amounts, he withdrew, and the sums that he claims he paid to the Respondent. It is not appropriate on appeal to consider the documentation in detail and make findings of fact. That will be a matter for the remission. It is clear that the matter requires proper investigation and determination to decide whether sums were repaid to the Respondent, and, if so, the occasions of the repayments and precise circumstances.

**C** 23. I do not consider that there was an error of law in the Tribunal not considering the issue of illegality, as it had not been pleaded or alleged by the Respondent. The precise nature of any agreement reached with the Respondent will have to be considered afresh on remission.

**D** 24. The claim will be remitted to be determined by a differently constituted employment tribunal because, having regard to the principles in Sinclair Roche & Temperley v Heard [2004] IRLR 763:

- E**
- 24.1. This is a relatively straightforward claim and it is not proportionate to await the availability of the same Tribunal for the matter to be determined;
- F** 24.2. The Employment Judge set out her views about the actions of the Respondent in fairly strong terms, so the Respondent could be concerned about the risk that the Tribunal would unconsciously take a second bite of the cherry

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**H**

**A** 25. Prior to the determination of the claim on remission, I consider it is likely that case management will be required to consider;

**B** 25.1. Whether the Claimant should be permitted to amend the claim to allege that the payments to the Respondent were unlawful under section 15 ERA 1996;

**C** 25.2. Whether the Respondent should be permitted to amend the response to contend that recoupment of any sums repaid is precluded by the doctrine of illegality because there was an arrangement to make it appear that the Claimant's salary was greater than it was, to support his application for a visa.

**D** 26. I apologise for the substantial delay in these reasons being sent out. The recording of my oral reasons failed. Repeated attempts were made to recover the recording but they proved unsuccessful. I have reconstructed these reasons from my notes. They represent my reasoning at the time, even if it may have been expressed slightly differently when I gave my reasons orally.  
**E** In some sections I have clarified my reasoning.

**F**

**G**

**H**