Neutral Citation Number: [2024] EAT 101

Case Nos: EA-2023-000032-BA
EA-2023-000973-BA

EMPLOYMENT APPEAL TRIBUNAL

Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 25 June 2024

Before :

CASPAR GLYN KC, DEPUTY JUDGE OF THE HIGH COURT

- -

Between :

BUILDMASTER CONSTRUCTION SERVICES LTD **Appellant**

- and -

MRS GHADA AL-NAIMI **Respondent**

- -
- -

Mr R Kohanzad (instructed by **Croner's**) for the **Appellant**
Mr M Jackson (instructed by the **Free Representation Unit**) for the **Respondent**

Hearing date: 13 June 2024

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JUDGMENT

SUMMARY

UNLAWFUL DEDUCTION FROM WAGES

The Respondent appealed on the following Grounds

1. That the Judge erred when he elided the question
    a. of what was 'properly payable' under section 13(3) Employment Rights Act 1996 with
    b. the separate question as to whether the formalities necessary to render any deductions lawful from that which was properly payable under s.13(1) and (2) Employment Rights Act 1996.
2. That judge failed to give any or any adequate reasons for the decision that there was no variation of contract.

Held

1. The Judge made no error and did not elide the tests. The Judge correctly directed himself as to the separate questions.
2. Adequate reasons were given, and the Respondent could understand why it lost.

CASPAR GLYN KC, DEPUTY JUDGE OF THE HIGH COURT:

Introduction

1. I refer to the parties as they were before the Tribunal.

2. Buildmaster Construction Services Ltd appealed from two decisions of the London South Employment Tribunal.

3. By its Second Notice of Appeal dated 19 October 2023 the Respondent appealed from the Judgment of EJ Rice-Birchall sent to the parties on 20 July 2023 which, following a CVP hearing, awarded £12,000 to the Claimant in respect of unlawful deductions. Mr Kohanzad withdrew that appeal, consequent on the Judge's reconsideration, which corrected any defect in the original judgment. I dismiss that appeal.

4. The extant appeal was started by a Notice of Appeal dated 12 January 2023. It is an appeal from the judgment of EJ Tsamados sent to the parties 1 December 2022. That judgment followed a 2-hour CVP hearing. An award of £9,750 for unlawful deduction of wages was made in the Claimant's favour. The Claimant appeared in person and the Respondent was represented by a consultant.

The Tribunal Decision

5. The Respondent's case advanced in its Grounds of Resistance, drafted by Croner, provided as follows at §8 (my emphasis)

> 'It was agreed with the Claimant that her monthly salary would be subject to work-load and the profit made by the Company. Unfortunately, as a result of the COVID-19 pandemic the Respondent's business suffered a significant reduction in revenue. As a result, the Claimant's pay rate was reduced in accordance with the original agreement. The Respondent has also had to dismiss all of its employees due to no work and reduced revenue.'

6. Further, Mr Al-Naimi, the witness for the Respondent, in his written statement told the Tribunal that

> '…it was agreed that her monthly payment depend on the company income so it could rise as well as fall subject to workload and profit making'

7. First the Judge directed himself to the law

> '11. ….. More formally: what was properly payable to the Claimant, what was she paid, was there any shortfall between the two and did that amount to an unauthorised deduction from wages?'

8. Having directed himself to the law the Judge set out under 'My findings' from §18 to §28 his findings of fact. These included summarising some parts of the cases advanced by the parties, mixed in with his findings of fact that the Judge made on the balance of probabilities (§18). The judge set out at §19 that he only made findings in respect of the facts necessary to determine the issues and noted that most of the evidence presented to him was irrelevant.

9. The Tribunal found that the Claimant was paid monthly in arrears and that there were relevant payslips. The Tribunal considered the Claimant's case at §22. It then made the following factual findings

> '23. The total amount she should have received as salary during the period in question is £2,400 multiplied by 8 months = £19,200.
>
> 24. The salary she received during the period in question is as follows:
> 2021
> October £1050
> November £1050
> December Not provided but the Claimant's received payment of £1050
>
> 2022
> January £1050
> February £1050
> March £1400
> April £1400
> May £1400
> Total £9,450
>
> 25. The most the short fall in the Claimant's wages can be for the relevant period is therefore £19,200 minus £9,450 = £9,750.
>
> 26. The Respondent's position is that the Claimant's wages varied according to the hours that she worked. However, the pay slips reveal that apart from a short period of time between October 2020 and March 2021 and in September 2021, her salary remained static……. The Claimant asserted that her basic salary at the material time was £2,400 and the Respondent did not dispute this. Its position, through Mr Al-Naimi is that the Claimant verbally agreed to the reduction in her salary as a result of the reduction in work during the height of the Covid-19 pandemic.

> …..
>
> 28. I was not provided with any documents indicating that the Claimant had, prior to the reduction in her salary, signified in writing her agreement or consent to the reductions or any written documents indicating that her entitlement to salary had been varied. Indeed, both parties agreed that there was nothing in writing as to the variation of salary.

10. The Judge went on further to direct himself in the following terms

> '29. Unauthorised deductions from wages are governed by Part II of the Employment Rights Act 1996 ("ERA"). Section 13 ERA prevents an employer from making any deduction from the wages of workers unless it is:
> a) authorised by statute. This enables the employer to deduct from wages the PAYE tax and National Insurance payments as required by law or payments following a court order;
> b) authorised by a "relevant provision in the contract". There is no requirement that the term of the contract should be in writing, and the term in question can be an implied rather than express term. However, it is necessary for the employer to have notified the worker in writing of the existence of the term before making the deduction; or
> c) previously agreed in writing by the worker that the deduction may be made.
>
> 30. Where the total amount of any wages that are paid by an employer to a worker is less than the total amount of the wages that are properly payable to the worker on that occasion, the amount of the deficiency will be treated as a deduction made by the employer from the worker's wages.
>
> 31. ……To decide whether there has been an unauthorised deduction, the Tribunal will have to consider the facts and, if necessary, decide what the contract meant.'

The Judge then expressed his conclusions at §35

> '35. Turning to the matter before me and considering my above findings of fact. What was properly payable to the Claimant was £2,400 per month gross. During October 2021 to May 2022 she received less than was properly payable and the reason for those deductions does not fall within section 13 of the Employment Rights Act 1996 as set out above.'

The Grounds of Appeal

11. There is a single Ground of appeal that

> 'The ET erred in concluding that there needed to be an agreement in writing for the parties to vary the Claimant's pay or for the Claimant to be paid less than £2,400 per month.'

12. Mr Kohanzad submitted that paragraph 5 of his Grounds of Appeal set out the primary error that the Tribunal made, namely that

> ‘(i) to make a deduction to the Claimant’s pay, there needs to be an agreement in writing between the parties [§29];
> (ii) there was no agreement in writing between the parties to reduce the Claimant’s pay [28]; and
> (iii) therefore, the Respondent unlawfully deducted the Claimant’s pay [§35 -36].’

13. Mr Jackson, for the Claimant, accepts, that if the Tribunal made this error, then it would amount to an error of law for it to have done so.

14. The second error is said to be that the Tribunal erred in law by failing to explain why the Respondent lost and the Claimant won.

The Law

15. Section 13 of Employment Rights Act 1996 (The Act) sets out the conditions for bringing a complaint to the Tribunal under s.23(1)(a) of the Act. Section 13 of the Act relevantly provides as follows:

> ‘13.— Right not to suffer unauthorised deductions.
> (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 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.
> (2) In this section “relevant provision” in relation to a worker's contract, means a provision of the contract comprised—
> (a) in one or more written terms of the contract of which the employer has given the worker a copy on an occasion prior to the employer making the deduction in question, or
> (b) in one or more terms of the contract (whether express or implied and, if express, whether oral or in writing) the existence and effect, or combined effect, of which in relation to the worker the employer has notified to the worker in writing on such an occasion.
> (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 deductions), 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.’

Analysis of the Correct Approach to the Law

16. There is no disagreement as to the correct approach to the law. It can be seen that there are broadly two stages to an unlawful deduction case, namely:

> Stage 1: Consider whether there has been a deduction as defined by s.13(3) of the

> Act by analysing whether 'the total amount of wages…is less than the total amount of the wages properly payable'.
>
> Stage 2: Where a deduction is made, consider whether the formalities set out under section 13(1) and 13(2) of the Act are met.

17. Mr Kohanzad submits that it is clear that the Tribunal elided the test at stage 1 with stage 2. He says that the Tribunal effectively held that the amount 'properly payable' could only be varied under contract at stage 1 by complying with the formalities at Stage 2. That would be an error.

Reasons for Decisions

18. I referred Counsel to the **Practice Direction for First Tier Tribunals, Reasons for decisions**, of the Senior President of Tribunals issued on 4 June 2024. Whilst this only applies directly to First Tier Tribunals, it does, helpfully, counsel agreed, distil the principles from the well-known authorities such as **Meek v City of Birmingham District Council** [1987] IRLR 250 and DPP Law v Greenberg [2021] EWCA Civ 672 57-8. I have removed the footnotes to the Practice Direction. The following principles apply to the approach which this Tribunal takes to decisions of the Employment Tribunals §§5-8

> 5. *'Where reasons are given, they must always be adequate, clear, appropriately concise, and focused upon the principal controversial issues on which the outcome of the case has turned. To be adequate, the reasons for a judicial decision must explain to the parties why they have won and lost. The reasons must enable the reader to understand why the matter was decided as it was and what conclusions were reached on the main issues in dispute. They must always enable an appellate body to understand why the decision was reached, so that it is able to assess whether the decision involved the making of an error on a point of law. These fundamental principles apply to the tribunals as well as to the courts.*
> 6. *Providing adequate reasons does not usually require the First-tier Tribunal to identify all of the evidence relied upon in reaching its findings of fact, to elaborate at length its conclusions on any issue of law, or to express every step of its reasoning. The reasons provided for any decision should be proportionate, not only to the resources of the Tribunal, but to the significance and complexity of the issues that have to be decided. Reasons need refer only to the main issues and evidence in dispute, and explain how those issues essential to the Tribunal's conclusion have been resolved.*
> 7. *Stating reasons at any greater length than is necessary in the particular case is not in the interests of justice. To do so is an inefficient use of judicial time, does not assist either the parties or an appellate court or tribunal, and is therefore inconsistent with the overriding objective. Providing concise reasons is to be encouraged. Adequate reasons for a substantive decision may often be short. In some cases a few succinct paragraphs will suffice. For a procedural decision the reasons required will usually be shorter.*

> *8. Judges and members in the First-tier Tribunal should expect that the Upper Tribunal will approach its own decisions on appeal in accordance with the well settled principle that appellate tribunals exercise appropriate restraint when considering a challenge to a decision based on the adequacy of reasons. As the Court of Appeal has emphasised, a realistic and reasonably benevolent approach will be taken such that decisions under appeal will be read fairly and not hypercritically.'*

Submissions

The Respondent

19. Mr Kohanzad submitted that it was obvious that the Judge had fallen into error on a textual analysis of his judgment. Both parties accept that an oral variation of a contract, as was alleged by the Respondent to be the case here, can change that which is 'properly payable' under section 13(3) of the Act. Therefore, no formalities such as those set out in s.13(1) and (2) are required for such a variation. The oral variation is a matter to be determined at stage 1 where the Tribunal is assessing what is properly payable and whether there were any deductions.

20. Mr Kohanzad submitted that one can conclude that the Tribunal went wrong, because at §28 it set out the fact that there were no written documents. It is submitted that it can, therefore, be inferred that the Tribunal only set this consideration out because it thought wrongly that it needed to analyse whether the formalities required by s.13(1) and (2) were complied with. However, on a proper analysis of the law those formalities were irrelevant. On the facts, he submitted, that the Tribunal only needed to determine the issue as to what was properly payable, not whether there was a deduction from what was properly payable. The Respondent's case was simply that there had been an oral variation. Mr Kohanzad submits that it is significant that §28 follows immediately on from §27 where the Tribunal set out the Respondent's case as to the oral variation.

21. Second, it is submitted that one can infer that the Tribunal was continuing down the wrong path when it directed itself to s. 13(1) and (2) of the Act in §29. It was unnecessary. It was not an issue in the case. Third, he argued that §35 did not show, and there was no or no adequate reasoning in the Judgment, that the judge rejected the case on oral variation. It was clear, he submitted, by the summary of evidence only relevant to s. 13(1) and (2) of the Act at §28 and then the direction at §29, that the Tribunal was considering that any oral variation could only lawfully reduced a salary by

complying with those formalities. Further Mr Kohanzad argued that §35 could give the Appellate Tribunal no confidence that any proper assessment of the oral variation was made and there was no or no adequate reasoning for the Tribunal's conclusion.

22. Mr Kohanzad referred me to the Judgment of EJ Rice-Birchall. He submits that Paragraph 5 of his Grounds of Appeal sets out the correct way to read the judgment of EJ Tsamados and one can be sure that he is correct in saying that the error was made by EJ Tsamados because when EJ Rice-Birchall made the same directions in her judgment she expressly made the error that he contends that EJ Tsamados did. The Rice-Birchall judgment replicates §11 of the Tsamados judgment, §18 is an effective analogue to Tsamados §28, and §19 & §21 are the same as §§29-30 of Tsamados. Mr Kohanzad then relied upon the following paragraphs of the judgment of Rice-Birchall which read as follows before the learned Judge amended them after reconsideration:

> '28. The Tribunal is satisfied that nothing about any alleged variation, or dismissal, or redundancy, was confirmed in writing. Therefore, the deduction was not authorised in terms of section 13 and the amount of the deduction is recoverable by the claimant.
>
> 29. Whether or not the claimant agreed to vary her contract, which she in any event denies, a verbal agreement would mean that the statutory conditions laid out in section 13 ERA would not be met and she would still be entitled to recover the difference in pay.
>
> 30. What was properly payable to the Claimant was £2,400 per month gross. During June 2022 to May 2023 she received less than was properly payable, as she received £1400 only. The reason for those deductions does not fall within section 13 ERA as set out above.'

23. Before reconsidering her judgment and correcting it, EJ Rice-Birchall had expressly fallen into the trap of approaching stage 1 through the lens of stage 2, requiring the s.13(1) and (2) formalities to be present for an oral variation of the contract. Mr Kohanzad submits that this is not just a coincidence because he set out that that was how the Tsamados judgment was to be read in his Notice of Appeal and that is precisely how Rice-Birchall approached the case applying, he submitted, precisely the same directions as EJ Tsamados. It is submitted that the Appeal Tribunal can't simply read the Tsamados judgment with a degree of latitude and give the reasoning the benefit of the doubt

when it can be seen that another Judge read the Tsamados directions as wrongly eliding the stage 1 and stage 2 considerations. I should be clear, as Mr Kohanzad accepts, EJ Rice-Birchall corrected these matters fully in her reconsideration.

The Claimant

24. Mr Jackson submitted that §11 was a model direction where Stage 1 and Stage 2 were properly separated. It was his submission that this was 'no flash in the pan' as the same two stage approach was set out at §29-30. Further he noted that the findings of fact set out in terms that the amount that the Claimant should have been paid at §23. The fact that the Respondent's case on variation is set out after that conclusion is not material.

25. Mr Jackson submitted that the finding at §28, the absence of written documents, is relevant to the question of variation and would be a matter that the judge would need to deal with in any event. The absence of any documents is an evidential point that the Tribunal was entitled to note, not least because it went to deduction and helping to decide whether there was a variation of the contract. Further, §28 suggests that the Judge considered distinctly the issue as to whether there was anything in writing as to the variation of the salary as, of course, any judge would be more likely to prefer a case where it was supported by contemporaneous documents.

26. Finally, Mr Jackson set out that not only did the judge make the finding at §23 but he made the additional and or further finding at §35 as to what was properly payable to the Claimant and that the Respondent paid her less. Following the directions that the judge gave himself at §§11, 29 and 30 it was impossible properly to criticise the decision.

27. The Respondent knew, Mr Jackson said, why it had lost and that was because its evidence on variation had not been accepted and that therefore, the sum of £2,400 was properly payable each month. The judge did not need to set out more.

Analysis

28. I take into account that this judgment emerged from a two-hour CVP hearing where the sum at stake was £9,750. The judgment runs to a little over 6 pages. One side was unrepresented and the

other was represented by a consultant. The Respondent's case had changed from its pleading and its witness statement. Its case had been that there was an original agreement by which the salary varied according to workload and profit and that was supported by the Respondent's witness statement. At Tribunal, the Respondent asserted that an oral variation of the contract was struck as a result of Covid.

29. Against the context of those matters the Judge directed himself correctly as to the law at §§11, 29 and 30. He has shown to me expressly by his directions that he understood the law of unlawful deductions and that it was necessary to approach it in two stages - twice. He then made findings of fact that showed his conclusion that the Claimant 'should have been paid' £2,400 per month and followed that up with his final conclusion that the sum of £2,400 was properly payable.

30. There is nothing in the criticism of §28 because any experienced judge might wish to note the absence of written documents. That would help understand his conclusion as to why he rejected the Respondent's new case on variation. Further, the direction at §29 might, as a counsel of perfection, have been unnecessary but it was a correct direction and showed no sign that the judge had allowed his express direction at §11 and §30 that the properly payable issue was separate from the deductions issue, to be infected by an error of law.

31. I reject the submission that one can see that if one applied the Tsamados directions to another factual situation involving the same parties, as EJ Rice-Birchall did, that it would end up in the same error of eliding stages 1 and 2 of the approach. EJ Rice-Birchall made an error in her direction before reconsideration at §20 of her Judgment that

> '20. It is important to note that a), b) and c) set out above are the only methods by which a deduction from wages may be authorised. Specifically relevant to this case, this may be by agreement in writing or by variation of contract. Where the deduction is said to be authorised by an agreed variation of the contract, although that agreement does not need to be in writing, it must be communicated in writing to the employee.'

32. This was not an error that EJ Tsamados made and the use of the Rice-Birchall judgment is accordingly, of no assistance to the Respondent.

33. Finally, the Tribunal found that the sum of £2,400 per month was properly payable and there was nothing in writing to allow those deductions. Accordingly, the Tribunal rejected the Respondent's

new case as to variation. The Respondent can understand why it lost. Given that this judgment arose from a short hearing, with unrepresented parties, concerning a small (relative to many sums that the Employment Tribunal deals with), on a narrow issue it seems to me that whilst the judgment may have been economical, it set out its reasons adequately.

34. I am grateful to counsel for their assistance and wish to record my appreciation for the high quality of their arguments before me. I wish particularly to thank Mr Jackson who appeared before the Appeal Tribunal pro bono.

35. Accordingly, I dismiss this appeal.