Neutral Citation Number: [2025] EAT 56

Case No: EA-2023-001451-AS

Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 10 April 2025

Before:

THE HONOURABLE MR JUSTICE CAVANAGH

- -

Between:

Mr J Biddulph

Appellant

- and -

Eastern Counties Leather (In Partnerships)

Respondent

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The Appellant in person
Adam F Griffiths (instructed by **Arag Law**) for the **Respondent**

Hearing date: 10 April 2025

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JUDGMENT

SUMMARY

PRACTICE AND PROCEDURE, UNLAWFUL DEDUCTION FROM WAGES

The Appellant contended before the Employment Tribunal that a payment of £10,000 that had been made to him by his employer whilst he was in employment was a payment of commission and denied that it was a loan. The Employment Tribunal found that the payment had been an interest-free loan, and that the Respondent had been entitled, pursuant to a term in his contract of employment, to recover the loan from his pay, or by way of claim after his employment terminated. Accordingly, the Employment Tribunal dismissed the Appellant's claim for arrears of pay arising from the withholding of his notice pay for his last month of employment, and upheld the Respondent's counterclaim for the remaining balance of the loan.

In his appeal, the Appellant contended that the Employment Judge should have found that the loan was irrecoverable because it had breached the requirements for regulated consumer credit agreements that are set out in the Consumer Credit Act 1974.

The Employment Appeal Tribunal refused to grant permission to the Appellant to rely upon this new point, applying the guidance in **Secretary of State for Health v Rance** [2007] IRLR 665 (EAT). This was not an exceptional case in which a party should be permitted to advance a point on appeal which was not advanced below, even though it would not require any fresh evidence. The new point is predicated on a version of the facts which was accepted by the Employment Tribunal but which was wholly inconsistent with the Appellant's own evidence as placed before the Tribunal, and with his pleaded case in the claim form. Having denied that the payment was a loan, the Appellant should not now be permitted to advance a new ground on appeal on the basis that the payment was, indeed, a loan. In any event, the new ground was weak, if not hopeless.

Appeal dismissed.

MR JUSTICE CAVANAGH:

Introduction

1. This is appeal against the judgment of the Employment Tribunal sitting at Bristol (Employment Judge Hindmarch, sitting alone), which was entered in the Register and sent to the parties on 3 November 2023. The Respondent is a partnership which runs a business that is concerned in the manufacture and supply of leather goods. The Appellant, who was the Claimant below, had been employed by the Respondent as Website Manager from 1 September 2018 until his resignation, which took effect on 25 April 2021. The Appellant claimed that he was owed various sums by way of arrears of wages, and resulting from breaches of contract by the Respondent. The Respondent counterclaimed for a sum which it said was owed to the partnership by the Appellant.

The appeal hearing proceeded in the absence of the Appellant

2. The Appellant acted for himself on appeal, as he did before the Employment Tribunal. This Appeal was listed as a hybrid hearing, on the basis that the Appellant would attend remotely from Canada. In the event, the Appellant did not join the hearing. The hearing was listed for 10.30 am and the invitation to the Appellant told him that he should be online by 10.15. He did not appear. The EAT staff sent an email to the address given by the Appellant, but there was no response. The Appeal Tribunal waited until just before 11.00, but the Appellant did not join the hearing and there was no response to the email. He had not contacted the EAT to say that there was a reason why he would be unable to attend today's hearing.

3. In the circumstances, I decided that it would be in the interests of justice to proceed with the appeal hearing in the absence of the Appellant, and so this is what I did. The reasons for taking this course of action were as follows:

(1) The hearing had been set up as a hybrid hearing at the specific request of the Appellant in an application dated 25 October 2024. The Appellant has moved to live in Canada and it would not be convenient for him to travel to London for the appeal hearing;

(2) Permission was given for the Appellant to appear remotely, notwithstanding the Respondent's objections, by HHJ Auerbach, in an order dated 3 March 2025;

(3) In his order, HHJ Auerbach said:

> "8. As to the Appellant's participation, if a hybrid hearing is directed the Appellant will be responsible for ensuring that he is in a suitable location and using suitable equipment so that he has a stable video link by which he can join the hearing and that he will be uninterrupted and undistracted. He will also need to ensure that he is ready to join the hearing on time, including being available in advance of the start time, so that the administration can ensure that the link is established and stable.
>
> 9. It is not in the interests of either party for the hearing to be postponed, and there is ample time to make the necessary arrangements. If for any reason the Appellant is unable to participate on the day, it should not be assumed that the judge will necessarily grant a postponement. The judge may decide to proceed, taking account of written arguments."

(4) Accordingly, it was made clear to the Appellant, well in advance of the hearing, that it was his responsibility to ensure that he was able to attend the hearing remotely, and he was warned that if he did not, the hearing might continue in his absence;

(5) The Appellant was sent the link details for the appeal hearing by email dated 4 April 2025. He was told that he should join at least 15 minutes before the start of the hearing;

(6) The Appellant did not notify the EAT that he was unwell or that there was some other reason outside his control why he could not attend the hearing remotely;

(7) The Employment Tribunal judgment was handed down nearly a year and a half ago, on 6 November 2023;

(8) The Respondent would be prejudiced by a delay. The Respondent has instructed counsel, who has attended today. Moreover, an award of money was made in the Respondent's favour on its counterclaim by the Employment Tribunal, enforcement of which is currently stayed pending the outcome of this appeal;

(9) It would cause inconvenience and delay for other litigants if this appeal were adjourned and re-listed for another day. A day of EAT sitting time would be wasted and other cases would face the risk of being put back as a result;

(10) The Appellant has set out his case fully in his grounds of appeal and in his written skeleton argument, both of which I have read. I have his arguments well in mind; and

(11) I did not decide simply to strike out the Appellant's appeal because of his non-appearance, but went on to consider the appeal on its merits.

4. The Respondent has been represented by Mr Adam F. Griffiths of counsel, who also represented the Respondent at the Employment Tribunal. Mr Griffiths attended the EAT in person. I am grateful to Mr Griffiths for his very helpful submissions.

5. Though there were a number of issues that the Employment Judge had to resolve, the central issue for the Tribunal was whether a sum of £10,000 that had been paid by the Respondent to the Appellant in or about December 2019 had been paid by way of commission, as the Appellant had contended before the Employment Tribunal, or by way of an interest-free loan, as the Respondent had contended. The Employment Judge heard evidence from the Appellant, and from a number of witnesses on behalf of the Respondent. These were Malcolm Burnett, Sales Manager, the Appellant's line manager, Hugh Byrne, the General Manager, Jacinta Dean, Partner and Finance Manager, and Natalie Frapwell, the E-Commerce Manager. The evidence covered the discussions which had taken place between the parties in relation to the payment of £10,000 and other payments that had been made to the Appellant. The Employment Judge was also provided with a number of contemporaneous emails. The Employment Judge made a number of findings of fact in her judgment, and resolved the key factual issues in favour of the Respondent. She found that the £10,000 had been paid to the Appellant as a loan, not as commission. The Employment Judge further found that, when the Appellant gave a month's notice of his resignation, the Respondent was entitled to require him to repay the £10,000 that had been advanced to him. This meant that the Respondent was entitled to withhold the

last month's pay and reimbursement of expenses that would otherwise have been due to the Appellant, as a contribution to the repayment of the loan. Accordingly, the Employment Judge dismissed the Appellant's claim for unpaid wages in respect of notice pay and expenses. The key finding by the Employment Judge meant, further, that she found in the Respondent's favour on its counterclaim that it was entitled to recover a further sum of £7,766.47. This was the balance of the £10,000 loan sum that was still outstanding at the date of termination of the Appellant's employment, after the deduction was taken into account. The Employment Judge awarded the Appellant the sum of £471.13 in relation to 3 days of accrued holiday pay for which he had not been reimbursed by the Respondent. She dismissed the Respondent's counterclaim for the sum of £1,705 in tax and national insurance contributions which the Respondent sought on the basis that a further payment of £5,000 which had been paid to the Appellant in February 2021 as a bonus payment had been paid without deduction for income tax and National Insurance. She found that the Appellant was entitled to consider that the Respondent would have made the appropriate tax and National Insurance deductions before making the payment of £5,000 to him.

6. The Appellant sought reconsideration of the judgment on the basis that the Employment Judge had miscalculated the amounts of final pay and holiday pay that were set out in her judgment. Specifically, the Appellant contended that the Employment Judge had taken the wrong figure for the Appellant's final month's salary; that she had failed to take account of deductions for tax, National Insurance, pension, and student loan contributions; that the holiday pay claim was wrongly mixed up with the final month's salary calculation; and that these errors meant that the counterclaim sum awarded to the Respondent was nearly £2000 too much. In a reconsideration judgment, dated 15 May 2024, the Employment Judge dismissed the application for reconsideration. For the reasons she gave in the reconsideration judgment, the Employment Judge decided that the relevant figures had not been incorrectly calculated.

7. The Appellant appeals against the findings that were derived from the Employment's Judge's conclusions in relation to the £10,000 payment, leading to the rejection of his claims for arrears of pay and the Judge's finding in favour of the Respondent in respect of the counterclaim for £7,766.47. He submits that she reached a conclusion which was not supported by any evidence, and was one which no reasonable employment judge, properly directing herself in law, could have reached.

8. The Appellant's central submission is that, having found that the payment to him of £10,000 was a loan, the Employment Judge should have gone on to find that the loan was void and invalid, because the loan did not comply with the requirements of the Consumer Credit Act 1974 ("the CCA 1974"). This meant, he submitted, that he could not be required to repay the £10,000 that had been paid to him, and so that there was no valid basis for the failure to pay him his last month's salary, or for the counterclaim for the balance of the £10,000.

9. The Appellant has a second, and separate, argument. He submits that, even if the loan was valid and enforceable, it could only be offset against commission payments, and could not be offset against salary or holiday pay. He also says that the Employment Judge miscalculated the relevant figures.

10. The Respondent submits that this appeal should be dismissed. Mr Griffiths points out that the main ground of appeal is entirely contradictory to the Appellant's case as it was advanced before the Employment Tribunal. In his evidence before the Employment Tribunal, the Appellant contended that the payment of £10,000 was a payment in respect of commission and he denied that it was a loan. Now that the Employment Tribunal has found against him on this pivotal issue of fact, he has changed horses and seeks to run an argument that he did not advance before the Tribunal and which is wholly inconsistent with the evidence that he presented to the Tribunal. Mr Griffiths submits that he should not be allowed to do so. He also points out that the Appellant did not take the point that he now relies upon in his reconsideration application. Furthermore, and in any event, Mr Griffiths submits that the Appellant should not be granted leave to rely upon the new argument about the unenforceability of the

loan because it is hopeless. He submits that it is plain that the requirements of the CCA 1974 did not apply to the loan that was made by the Respondent to the Appellant.

11. Mr Griffiths submits that the Respondent would be prejudiced if the Appellant were to be permitted to advance this new argument at the Employment Appeal Tribunal. Mr Burnett has sadly died and, also very sadly, Mr Byrne now suffers from a form of dementia which gives rise to memory issues, and so would be unable to give evidence about the discussions which resulted in the loan, or the terms of the loan, at a remitted hearing. The Respondent has filed an application with the EAT to rely upon fresh evidence, from a medical specialist, in order to show that Mr Byrne now suffers from a form of dementia. The Appellant submits that this fresh evidence should not be admitted.

12. When granting permission to appeal, on 3 July 2024, John Bowers KC said that the Appellant will need to demonstrate that the point now taken was argued in the Employment Tribunal, or, alternatively, as to why he should now be allowed to take the point on appeal if it was not. It is not in dispute that the point about the enforceability of the loan was not a point that was taken by the Appellant below, as his position before the Employment Tribunal was that the payment of £10,000 was not a loan at all, but a payment in respect of commission.

13. I will deal first with the question as regards whether this fresh evidence should be admitted.

Should the fresh evidence be admitted?

14. As is well known, a party will normally only be permitted to adduce evidence before the Appeal Tribunal which the party did not adduce before the Employment Tribunal if three conditions are satisfied. These are that:

(1) The evidence could not have been obtained with reasonable diligence at the time of the Employment Tribunal hearing;

(2) The evidence is relevant and would probably have had an important influence on the outcome of the Employment Tribunal hearing; and

(3) The evidence is apparently credible.

15. This has been made clear in the EAT Practice Direction 2024, paragraph 8.12.6, and by the EAT in **Korashi v Abertawe Bro Morgannwg University Local Health Board** [2012] IRLR 4 and in the earlier case of **Wileman v Minilec Engineering** [1988] ICR 318. This is, more or less, the same test as is applied for the admission of fresh evidence in the Court of Appeal (**Ladd v Marshall** [1954] 1 WLR 1489). Ordinarily, where fresh evidence comes to light after judgment which might affect the outcome of the Employment Tribunal proceedings, the party concerned should make an application to the Employment Tribunal for reconsideration, rather than appeal to the Employment Appeal Tribunal, and, if an appeal is filed, it may be adjourned pending the outcome of the reconsideration application in the Employment Tribunal (see EAT Practice Direction 2024, paragraph 8.12.2, and **Korashi** at paragraphs 114-122).

16. The Respondent's application to rely upon fresh evidence in the present case is a somewhat unusual one. It is not an application to rely upon fresh evidence which, if it had been led before the Employment Tribunal, might have been relevant to the Employment Judge's conclusions. Rather, it is evidence about something that has happened since the Employment Tribunal judgment which may be of relevance to the appeal itself. It is evidence about the health of Mr Byrne and its impact upon his ability to recall the events that are in issue. The Respondent seeks to rely upon a letter dated 10 December 2024 which was written by a Dementia and Movement Disorders Specialist Nurse to Mr Byrne's GP. The letter states that Mr Byrne has been diagnosed with Posterior Cortical Atrophy, a form of dementia. The letter also relates the impact that this illness has had on Mr Byrne's life, such as an inability to judge distances, and headaches. The letter makes clear that Mr Byrne needs constant care from his wife. It does not state in terms that his memory is adversely affected, but it is obvious that anyone who is unfortunate enough to suffer from this type of dementia is likely to struggle to recall matters, especially matters of detail. The significance of this evidence, therefore, is not that the Respondent has produced some new evidence that is relevant to whether the payment of £10,000 to the Appellant in late 2021 was a commission or a loan or whether, if it was a loan, the requirements of

the CCA 1974 applied to it. Rather, its relevance is that it shows that one of the Respondent's main witnesses would not be able to give evidence on these issues if the matter were reopened and further findings of fact were required.

17. In these circumstances, I have decided that the fresh evidence meets the **Ladd v Marshall** test, in so far as it applies, and so I should admit it. It relates to developments that have taken place since the Tribunal judgment and so it could not have been obtained and deployed with reasonable diligence at the Tribunal hearing. It is, plainly, credible. This evidence is not of a type that would have been capable of having an important influence on the Employment Tribunal decision, since it is not concerned with the subject-matter of the Employment Tribunal claim. It is not the type of evidence that could sensibly have been the subject of a reconsideration application before the Employment Tribunal. However, it is relevant to issues before the Employment Appeal Tribunal, as it goes to the question whether the Appellant should be permitted to rely upon his new argument. Its admission does not cause prejudice to the Appellant, and so I grant leave for it to be relied upon.

18. I should add that Mr Griffiths has pointed out that there is a difference between the rule about admission of fresh evidence that is set out in paragraph 8.12.6 of the EAT Practice Direction and the **Ladd v Marshall** test. Limb (2) of the test set out in the Practice Direction sets out a requirement that the fresh evidence must be such that it would probably have had an important influence on the outcome of the Employment Tribunal hearing. The **Ladd v Marshall** test refers to an important influence on the "case" (see judgment, page 1491). Mr Griffiths points out that there will be cases, of which this is one, where the fresh evidence is relevant to the appeal, and is relevant to the case as a whole, and so should be admitted, but where the evidence is not such as to have a probably important outcome on the outcome of the hearing at the Employment Tribunal (as opposed to the Employment Appeal Tribunal). I agree, but I think in practice the relevant paragraph of the Practice Direction has been interpreted in a purposive manner so at permit fresh evidence which may have an important impact upon the appeal, rather than on the proceedings at the Employment Tribunal.

The basis for the main ground of this appeal

19. In his Appellant's Notice, the Appellant said:

> "This appeal is based on the Employment Tribunal reaching a decision of fact for which there was no evidence to support and also reached this decision which no reasonable Employment Tribunal, directing itself properly on the law, could have reached.
>
> With reference to paragraph 62 of the reserved judgement "I find the £10,000 paid by the Respondent to the Claimant in 2019 was a loan."
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> Under the Consumer Credit Act 1974 employers who provide loans or credit to their employees are subject to certain requirements and regulations. Employers who provide loans or credit to their employees must comply with various disclosure requirements. They must provide the employee with the following key information.
>
> 1. Amount of credit
> 2. Interest rate
> 3. Any fees or charges
> 4. Repayment terms.
>
> This information must be provided in a clear and transparent manner allowing the employee to make an informed decision about the loan. It was not made clear that the £10,000 amount was to be repaid through the claimant's salary stated in various evidence in the witness bundle. It was only stated to be repaid through commission as stated in paragraph 18 of the reserved judgement. Therefore, an informed decision by the claimant could not be made if the employer's intention of the £10,000 amount was to collect repayments via salary. The Consumer Credit Act 1974 also sets out rules where the employer must not engage in any unfair or deceptive practices when providing credit to employees.
>
> As stated in paragraph 18 of the reserved judgement "No repayment terms were agreed, no loan agreement was prepared". In addition to not disclosing repayment terms or a loan agreement, no information on interest, fees or charges were provided to the claimant. The only terms that were stated by the respondent were "any repayments of commission once agreed might have been used as repayments for the loan" paragraph 18 of the reserved judgement. This therefore makes any alleged loan void or decision made by the employment tribunal that the loan was valid to be unlawful based on the consumer credit act 1974."

20. As I have said, in the proceedings before the Employment Tribunal, the Appellant gave evidence to the effect that the payment of £10,000 had been a payment of commission. He denied that it was a loan. The Employment Judge rejected his evidence on this point, and accepted the evidence of the Respondent's witnesses. The Appellant does not now contend that her decision on this point was perverse: indeed, he now relies upon the conclusion that the £10,000 payment was a loan as the basis for his contention that the Employment Judge should have gone on to find that the loan was irrecoverable.

21. It follows that this is not the usual type of perversity challenge in which an appellant contends that the Employment Judge was wrong to decline to accept the appellant's evidence, or in which the appellant contends that, in light of the findings of fact, no reasonable Employment Judge could have done other than to find in the appellant's favour. Rather, the Appellant is contending that, in light of the findings of fact that she made about the loan of £10,000, and its terms and the circumstances in which it was made, the Employment Judge erred in failing to go on to consider and deal with a point that was not raised by either party, namely that if the payment was a loan it was irrecoverable because it was in breach of the requirements that were laid down by the CCA 1974.

22. In my judgment, therefore, properly understood, the Appellant's appeal is not a perversity challenge at all, although that is the way that it has been put in the Appellant's Notice. Rather, it is a challenge that is based on three grounds, namely:

(1) The Employment Judge erred in law in failing to deal with a point that had not been advanced by either party;

(2) If the Employment Judge had done so, she would have been bound, as a matter of law, to find that the loan was unenforceable; and/or

(3) In the alternative to (2), the Employment Judge should have gone on to make further findings of fact that would have enabled her to determine whether the loan was unenforceable, because it breached the requirements of the CCA 1974.

23. As a matter of logic, if the Appellant is right on (1) and (2), then the Appeal Tribunal should substitute a finding that the loan was unenforceable, and should amend the Employment Tribunal's conclusions accordingly, without the need to remit the case to the Employment Tribunal for further findings of fact. If, on the other hand, the Appellant is right on (1) and (3), then the case will have to be remitted for further findings of fact.

24. Even though the Appellant has not characterised his appeal by reference to the three grounds that I have just referred to, in my view it is clear from his Appellant's Notice that this is the true nature of his appeal. In particular as he is a litigant in person, I intend to proceed to consider his appeal on this basis. It reflects the real thrust of his grounds of appeal and therefore I do not consider that the Respondent, which does have the benefit of experienced legal representation, is prejudiced if I proceed in this way.

25. Thus understood, the Appellant is not facing the high hurdle of showing that the Employment Judge's findings of fact and evaluative judgments are perverse. But he faces, instead, the different high hurdle of persuading the Appeal Tribunal to permit him to advance a ground that was not advanced before the Employment Tribunal.

The relevant findings of fact and conclusions of the Employment Judge

26. The Employment Judge found that the Appellant was issued with a contract of employment which he signed on 9 October 2018. This stated that his annual salary was £30,000 and, at paragraph 7.3, that he would be entitled to commission payments, the terms of which were to be agreed between the Appellant and the Respondent following the update of the Respondent's websites. Clause 7.4 stated that the Respondent was entitled to alter the terms of any commission scheme, including any targets, or to withdraw them altogether at any time on reasonable notice to the Appellant. Clause 7.6 stated, "We shall be entitled to deduct from your salary or other payments due to you owing money which you may owe to the Partnership at any time."

27. The Appellant's line manager was Mr Burnett. The Appellant performed well, creating a new website for the Respondent and developing its presence on sites such as Amazon, eBay and Etsy. The Pandemic boosted the Respondent's business, as more people shopped online.

28. The Employment Judge found that in 2018 the Appellant and Mr Burnett discussed the commission that might be paid to him. Mr Burnett's evidence, which the Judge accepted, was that they had a number of discussions about an opening 5% commission, but that Mr Burnett was not the decision-maker, and the final decision would rest with Mr Byrne. Mr Burnett asked the Appellant for sales figures that he could share with Mr Byrne, and the Appellant provided such figures in a spreadsheet. On 8 October 2019, in an email, Mr Burnett replied to the Appellant, saying, "Add new column headed JB [i.e. the Appellant] – this'll be your 5%." Mr Burnett's evidence, however, was that only Mr Byrne could agree the commission terms, and so that this did not indicate that a figure of 5% was agreed.

29. On 5 November 2019, the Claimant emailed Mr Burnett and asked, "Regarding my commission do you need me to email you online sales to date?" On the same day Mr Burnett replied, "Please update me from the very start week with regard to commission – these figures must not include VAT",

30. At the same time as the discussions about commission were taking place, the Appellant was talking to Mr Burnett about the possibility of the Respondent lending him some money for house renovations. In a conversation on 8 November 2019, Mr Byrne agreed to provide a loan to the Appellant. In December 2019, Mr Byrne asked the Appellant when he would need the funds. The Appellant said that he needed them in two weeks and that the figure that he estimated for the works was £10,000. Mr Byrne agreed to provide the money and on 20 December 2019, the Appellant emailed Mr Byrne, saying, "Here are the details for my bank for the £10,000 loan." The payment was made.

31. In his evidence the Appellant said that this payment was in fact commission owed to him. The Employment Judge rejected the Appellant's evidence on this issue. She concluded that the contemporaneous email correspondence established that the payment was made as a loan. She said that

no repayment terms were agreed, no loan agreement was prepared, and the loan was said to be interest free. Mr Byrne said that he anticipated that the loan would be repaid in 3-5 years.

32. The Employment Judge said that it was not in dispute that a commission scheme was envisaged and that any payments of commission once agreed might have been used as repayments for the loan. On 18 December 2019, Mr Burnett had emailed the Appellant to say, "Would you like me to confirm to HB [Mr Byrne] that you would like to proceed with the loan and use the commission in place as an offset."

33. Business was good during the Pandemic, as I have said, but there was no evidence that the commission arrangements were discussed in 2020. The Appellant next raised the issue with Mr Burnett in early 2021. Mr Burnett raised it with Mr Byrne, who asked Ms Dean to look into a potential commission structure. She did so, but decided that it would be too difficult to implement. It would not be practicable to identify which sales were attributable to the Appellant's efforts. She told Mr Byrne of her conclusion and Mr Burnett asked Mr Byrne if the Respondent could pay the Appellant £5,000 for the work he had done in 2020. In January 2021, Mr Burnett emailed the Appellant to say that he expected to hear shortly from Mr Byrne about "your loan", which the Employment Judge held was a mistaken reference to what was intended to be a bonus payment.

34. In February 2021, Mr Burnett sent some sales figures to Mr Byrne and said that "The commission hinted at Joe was 5%". Mr Burnett praised the work done by the Appellant since he joined the business. On 5 February 2021, Mr Burnett reported back to Mr Byrne on a conversation that he had had with the Appellant. He said, "I mentioned the loan and that you were prepared to transfer the sum of £5k – there's no question he was very pleased and said that this would help him massively." A payment of £5,000 was made to the Appellant in February 2021. The Employment Judge rejected the Appellant's evidence that this was a commission payment. She found that it was a bonus payment for the work done by the Appellant in 2020, and that the reference in email correspondence to it being a "loan" was a mistake. The Employment Judge rejected the Respondent's contention that the Appellant

was obliged to pay a sum in respect of tax and National Insurance in relation to the payment of £5,000: this had been a net figure.

35. At about the same time as the bonus payment was made, the Appellant's annual salary was increased from £30,000 to £35,000. The Employment Judge accepted the Respondent's evidence that the Appellant was told by Mr Byrne at a meeting that this pay rise had been implemented because there were insuperable difficulties in calculating commission, and that the Appellant agreed to the pay rise. The Appellant had disputed this account of their meeting. There was contemporaneous evidence of the Respondent's account. In an email to Mr Byrne dated 22 April 2021, Mr Burnett said, "he [the Appellant] is very happy you increased his salary in preference to commission."

36. There was further contemporaneous email evidence that no final decision had been made about commission by the end of 2021. In January 2022, the Appellant was informed that, along with other employees in the business, he would not have a pay rise that year.

37. The Appellant obtained a new job and gave notice on 28 March 2022, stating that his last day of employment would be 25 April 2022. He made no mention of outstanding commission. On 1 April 2022, Mr Burnett emailed the Appellant saying that Mr Byrne was naturally disappointed by his resignation but understood the reason for it. Mr Burnett added, "He has asked that the outstanding loan will need to be repaid prior to …. 25 April 2022". Mr Byrne sought repayment proposals from the Appellant on 8 and 14 April 2022.

38. On 14 April 2022, the Claimant emailed Mr Byrne, saying, "I dispute what you are saying regarding owing £10,000. Further to disputing I believe I am owed 5% commission on all partnership websites sales I have built, and new online sales channels introduced – arriving from our contractual agreement and the 5% commission which was agreed during my employment." On 28 April 2022, Mr Burnett replied to the email that had been sent to Mr Byrne. Mr Burnett said:

> "Could I please ask what contractual agreement you are referring to… A commission arrangement was discussed at length but in the end the decision was to increase your salary by £5k from £30k to £35k which was a 16.65%

> increase… for your information my email to Hugh Byrne dated 22nd April 2021 does include a conversation that I'd had with you where you expressed your preference to the salary increase over commission (see attached)."

39. The Appellant did not reply to this email. The Respondent withheld the Appellant's salary for the last month of his employment as part-repayment of the loan, citing paragraph 7.6 of his contract of employment. On 5 May 2022, Mr Byrne emailed the Appellant asking for proposals for the repayment of the balance of the loan, saying that he would instruct solicitors if no repayment was made.

40. In submissions before the Employment Tribunal, Mr Griffiths, for the Respondent, accepted that the burden of proof in relation to the counterclaim rested with the Respondent. He said that the payment of £10,000 had not been a commission payment because the relevant clause of the contract of employment did not set out a set sum; it provided for a figure to be agreed and no figure was ever reached. The Appellant's case was that a 5% commission had been agreed on all sales channels that he introduced, and that the £10,000 payment that he received in 2019 was to be offset against commission.

41. The Employment Judge set out her conclusions at paragraphs 60-62 of her judgment:

> "60. Turning firstly to be issue of commission, it is clear when the parties entered into the contract there was an intention that the Claimant would receive commission payments and that is reflected at clause 7.3 of the written contract of employment. It is also clear that a figure of 5% was discussed between the Claimant and Mr Burnett. The difficulty is however that nothing was ever in fact agreed and no commission payments were made. There was no agreement reached as to the amount of commission or how it should be calculated or on what basis. I accept the Respondent's evidence that it proved too difficult to set in place a scheme and that instead it agreed to pay a higher salary. I accept this as it is reflected in the contemporaneous email from Mr Burnett to Mr Byrne on 22 April 2021 referencing a £5000 lump sum 'as a substitute to commission' and an increase in salary 'in preference to commission.' It is the case that the Claimant emailed Mr Burnett on 8 December 2021 referencing commission, but it is clear he was using the 5% of sales figure as a yardstick to argue for a pay increase, rather than revisiting the issue of commission which had been overtaken by the increase in basic salary earlier that year. It therefore follows the claim for commission payments as an unlawful deduction from wages must fail. There was no agreement to commission and there was no declared and quantifiable sum from which a deduction could be made.

> 61. The £5000 lump sum that was paid to the Claimant in February 2021 was clearly a bonus but did not have the necessary deductions for tax and national insurance made. This was a mistake on the part of the Respondent who should have made the payment via payroll. Given my finding that this sum was paid to the Claimant as a bonus for his work in 2020, and was received by him from the Respondent's account, I find he was entitled to consider the Respondent to have made the appropriate deductions and the Respondent's intent was that it should be a net sum. The Respondent's counterclaim for tax and national insurance on this sum therefore fails.
>
> 62. I find the £10,000 paid by the Respondent to the Claimant in 2019 was a loan. The Claimant referred to it as such in his email to Mr Byrne of 20 December 2019. I accept it was not subject to any agreed repayment terms and that the parties anticipated that if a commission scheme was agreed it could be offset against the loan, but no such scheme was agreed and, at the time of the Claimant's resignation and termination of employment, no repayments had been made and the total sum of £10,000 was outstanding. The employment contract had the right at clause 7.6 to make deductions from salary. The Respondent deducted the final salary payment in totality from the £10,000 and its counterclaim is for the balance of £7766.47. Ms Deans evidence was that the deductions made were the April salary of £1278.84 and accrued holiday of £942.27 and that expenses owed were also deducted. The Respondent was entitled under the contract to deduct these sums."

42. The Employment Judge's judgment was well-structured, careful, and thorough. In my judgment, the conclusions that she reached, and, in particular, the conclusion that the payment of £10,000 had been made as a loan and not as a payment of commission, were fully in accordance with the facts that she had found. In her judgment, the Employment Judge said that, where there was a dispute in evidence, she was assisted by contemporaneous email exchanges which she found most persuasive in her deliberations. The findings of fact that she made were wholly consistent with the contemporaneous emails. The Employment Judge also had the opportunity to see and assess the Appellant and the Respondent's witnesses when they gave their evidence.

43. If the Appellant had sought to contend that the findings of fact that the Employment Judge made, and, in particular, her finding that the £10,000 payment was a loan, were perverse, such an argument would have been hopeless. But, this is not what the Appellant is doing in this appeal. He accepts and relies upon the finding that the payment was a loan, and uses this as the foundation for a new argument that the loan was irrecoverable.

If the Appellant is to be permitted to advance the argument based on the CCA 1974, will it be necessary for further evidence to be heard?

44. It is convenient to address this as the first issue. In my judgment, the answer is "no". The Employment Judge has already made a number of relevant findings about the circumstances of the making of the loan and its terms. In particular, the Employment Judge found, or it is clear by necessary implication from her judgment, that:

(1) The payment of £10,000 was a loan;

(2) The loan was made by an employer to its employee;

(3) It was very informal;

(4) Its terms were not set out in writing:

(5) The loan was interest-free;

(6) There were no fees or charges;

(7) The lender was not acting in the course of a lending business;

(8) The date by which repayment had to be made of the full amount or of any instalments was not specified. The effect of clause 7.6 of the contract of employment was that repayment could be sought at any time. It was anticipated when the loan was made that, in due course, repayment would be taken from commission payments but, in the event, no commission scheme was ever agreed and so no agreement was reached that repayment could be made (or could only be made) from commission payments; and

(9) The Respondent was entitled to seek repayment of the loan, or any outstanding balance, upon the termination of the Appellant's employment with the Respondent, pursuant to paragraph 7.6 of the contract of employment.

45. It is difficult to see what further evidence would be required at a remitted hearing either to support the Appellant's contention that the loan was in breach of the requirements of the CCA 1974, or to support the Respondent's contention that the loan was exempt from those requirements. In both

cases, the argument would consist of legal submissions against a factual background that has already been established by the findings of fact that were made by the Employment Judge.

46. It follows, in my judgment, that, if the Appellant is permitted to advance this new argument at the appeal stage, it would not be necessary to remit the case for further findings of fact. The EAT could decide the issue on the basis of the findings of fact which were made by the Employment Judge and which are not themselves open to challenge on appeal on any arguable basis. This means that the Respondent is not disadvantaged by the fact that Mr Byrne's illness means that he is no longer able to give evidence about the loan and its terms. It also means that the Respondent is not disadvantaged by the fact that Mr Burnett has died. This does not necessarily mean that the appeal should be allowed to proceed, but it means that one of the objections to it, namely that the Respondent would be disadvantaged if the appeal were successful because it can no longer provide fresh evidence from the key witnesses, falls away.

47. It also follows that the criticism made of the Appellant in the Respondent's skeleton argument that he has not filed an application to rely upon fresh evidence in support of his appeal, in accordance with paragraph 8.12 of the EAT Practice Direction 2024, is not well-founded. He is not seeking to rely upon any additional evidence, but to rely upon a new argument of law that he did not advance below.

The test to be applied when an Appellant seeks to rely upon a new point that was not relied upon below

48. The relevant principles were helpfully summarised by HHJ McMullen QC in **Secretary of State for Health v Rance** [2007] IRLR 665 (EAT), at paragraph 50 of his judgment.

> "50. I regard those two passages as key statements of the law, together with the interpretation by Brooke LJ of previous judgments of the EAT dealing with concessions. From the authorities reviewed in those cases, I draw the following principles of law:
>
> > (1) There is a discretion to allow a new point of law to be argued in the EAT. It is tightly regulated by authorities; Jones paragraph 20.

(2) The discretion covers new points and the reopening of conceded points; ibid.

(3) The discretion is exercised only in exceptional circumstances; ibid.

(4) It would be even more exceptional to exercise the discretion where fresh issues of fact would have to be investigated; ibid.

(5) Where the new point relates to jurisdiction, this is not a trump card requiring the point to be taken; **Barber v Thames Television plc** [1991] IRLR 236 EAT Knox J and members at paragraph 38; approved in **Jones**. It remains discretionary.

(6) The discretion may be exercised in any of the following circumstances which are given as examples:

> (a) It would be unjust to allow the other party to get away with some deception or unfair conduct which meant that the point was not taken below: **Kumchyk v Derby City Council** [1978] ICR 1116, EAT Arnold J and members at 1123.
>
> (b) The point can be taken if the EAT is in possession of all the material necessary to dispose of the matter fairly without recourse to a further hearing. **Wilson v Liverpool Corporation** [1971] 1 WLR 302, 307, per Widgery LJ.
>
> (c) The new point enables the EAT plainly to say from existing material that the employment tribunal judgment was a nullity, for that is a consideration of overwhelming strength; **House v Emerson Electric Industrial Controls** [1980] ICR 795 at 800, EAT Talbot J and members, followed and applied in **Barber** at paragraph 38. In such a case it is the EAT's duty to put right the law on the facts available to the EAT; **Glennie** paragraph 12 citing **House**.
>
> (d) The EAT can see a glaring injustice in refusing to allow an unrepresented party to rely on evidence which could have been adduced at the employment tribunal; **Glennie** paragraph 15.
>
> (e) The EAT can see an obvious knock-out point; **Glennie**, paragraph 16.
>
> (f) The issue is a discrete one of pure law requiring no further factual enquiry; **Glennie** paragraph 17 per Laws LJ.
>
> (g) It is of particular public importance for a legal point to be decided provided no further factual investigation and no further evaluation by the specialist tribunal is required; Laws LJ in **Leicestershire** paragraph 21.

(7) The discretion is not to be exercised where by way of example:

> (a) What is relied upon is a chance of establishing lack of jurisdiction by calling fresh evidence; **Barber** paragraph 20 as interpreted in **Glennie** paragraph 15.
>
> (b) The issue arises as a result of lack of skill by a represented party, for that is not a sufficient reason; **Jones** paragraph 20.
>
> (c) The point was not taken below as a result of a tactical decision by a representative or a party; **Kumchyk** at p.1123, approved in **Glennie** at paragraph 15.
>
> (d) All the material is before the EAT but what is required is an evaluation and an assessment of this material and application of the law to it by the specialist first instance tribunal; **Leicestershire** paragraph 21.
>
> (e) A represented party has fought and lost a jurisdictional issue and now seeks a new hearing; **Glennie** paragraph 15. That applies whether the jurisdictional issue is the same as that originally canvassed (normal retiring age as in **Barber**) or is a different way of establishing jurisdiction from that originally canvassed (associated employers and transfer of undertakings as in **Russell v Elmdon Freight Terminal Ltd** [1989] ICR 629 EAT Knox J and members). See the analysis in **Glennie** at paragraphs 13 and 14 of these two cases.
>
> (f) What is relied upon is the high value of the case; **Leicestershire**, paragraph 21."

Discussion

49. It is clear from **Rance**, and from the authorities cited in that judgment, that the mere fact that a new point will not require any additional evidence does not mean that it should be permitted to be advanced on appeal, though the burden of persuading the Appeal Tribunal that a new point should be permitted is significantly higher where the new point requires new findings of fact. Even where no new evidence will be required, it will only be in an exceptional case that a litigant will be permitted to rely upon a point of law that was not argued below. Paragraph 8.13.1 of the current EAT Practice Direction 2024, and the same paragraph of its predecessor, the EAT Practice Direction 2023, which was in force when the appeal in this case was filed, state that the EAT generally will not consider an argument that was not advanced before an Employment Tribunal. In the case of **Glennie v Independent Magazines (UK) Ltd** [1999] IRLR 719, referred to in **Rance**, Laws LJ said that:

> "It is a general principle of the law that it is a party's duty to bring forward the whole of his case at the proper time."

50. Paragraphs 8.13.2 and 3 of the 2023 and 2024 Practice Direction require an appellant to file an application form if they wish to raise a new argument and to explain why they did not raise the new argument in the Employment Tribunal. The Appellant did not file an application to this effect. I will not rule against him simply because he did not take this procedural step, especially as he is a litigant in person, but it is significant that he did not give a reason for his failure to take the point below.

51. In my judgment, in all of the circumstances of the case, the Appellant should not be permitted to take the new point to the effect that the loan was irrecoverable because it was in breach of the requirements of the CCA 1974. I have come to this conclusion, despite the fact that no new evidence would be required to deal with the point. I also bear in mind that the Appellant is a litigant in person, as he was before the Employment Tribunal.

52. I do not consider that this is one of the exceptional cases in which a completely new point should be permitted to be raised on appeal when it was not raised by the Appellant at the Employment Tribunal for the following cumulative reasons.

53. First, as Mr Griffiths has emphasised, the point about the CCA 1974 is not just a new point, but it is an argument that is wholly inconsistent with the case as advanced by the Appellant below. The new point is predicated upon the assertion that the payment of the £10,000 to the Appellant was a loan. It is true that, as a matter of pleading, it would have been open to the Appellant to say that the payment was a payment of commission but that, if the Tribunal did not accept his evidence about this and found that it was it was a loan, then the loan was rendered irrecoverable by the Respondent's failure to comply with the provisions of the CCA 1974. But he did not do so. In his claim form, he said that:

> "In December 2019 it was agreed between myself, Hugh Byrne…. and Malcolm Burnett… that Eastern Counties Leather would pay me £10,000 which would

> be offset against my 5% commission back dated from 2019 sales and sales onwards."

54. The claim form further alleged that by the end of 2020 the £10,000 which the Appellant had received in 2019 was completely offset by the 5% commission which he had earned from 2019 sales. He said that at a meeting between him and Mr Byrne on 23 February 2021 it was agreed that the £10,000 received in 2019 was covered by his 5% commission on sales already achieved.

55. To put it colloquially, the Appellant put all his eggs in the basket of his contention that it had been agreed that the £10,000 was commission, not a loan. He said so in his claim form, and he said so in his evidence before the Employment Tribunal. The Employment Judge did not believe or accept this evidence. The Employment Judge's conclusion cannot be explained on the basis that she decided that there had been a misunderstanding between the parties, or that she placed a different interpretation on events from the Appellant's interpretation. The only possible explanation for the Employment Judge's conclusion was that she did not accept that the Appellant had been telling the truth in his evidence. This may have been because he was deliberately lying or because, as sometimes happens, he had persuaded himself of the truth of a version of events that suited him. The Employment Judge did not have to decide which it was, because, either way, she could be satisfied that in fact the payment of £10,000 was a loan and not commission.

56. In my judgment, it would not be in the interests of justice, or fair to the Respondent, or consistent with the efficient operation of the Tribunal system, to allow a party to advance an argument on appeal in these circumstances, which is predicated upon the assumption that the party themselves had given untrue evidence to the Employment Tribunal at the original hearing. It would be to give the party a second bite at the cherry in circumstances in which he did not deserve a second chance. If this type of appeal were permitted it would cause delays for other litigants in other cases, because of the risk that Tribunals and the Appeal Tribunal would become clogged up with unsuccessful parties who

have a second try by making a claim that based on facts that are incompatible with the facts that they relied upon first time round. The appeal in this case is, frankly, opportunistic.

57. On behalf of the Respondent, Mr Griffiths submitted that the failure to take the new point at first instance was tactical, in that the Appellant was aware that to do so would undermine his principal argument that the payment was not a loan at all. In the absence of any explanation in the Appellant's Notice for why the point was not taken, I am driven to agree. I do, as I have said, bear in mind that the Appellant is a litigant in person. However, there is nothing to suggest that the Appellant failed to take the point based on the CCA 1974 at the Employment Tribunal because he was unaware of it. He is still unrepresented at the EAT and yet he has taken the point at this stage. There is nothing to dislodge the inference that the Appellant could have advanced the argument based on the CCA 1974 at the Tribunal but, for tactical reasons, chose not to do so.

58. I do not think that either the Respondent or the Employment Judge can be criticised for not mentioning this point at the Tribunal hearing.

59. So far as the Respondent is concerned, there are circumstances in which the representatives of a party who are facing a litigant in person are under an obligation to draw to the Tribunal's attention a point of law, even if it is against the interests of their own client to do so. But this is not such a case. It was legitimate for the Respondent's representatives to consider, if the point had occurred to them at all, that there was no need to mention the point to the Tribunal because it was weak, if not hopeless. That is the position that has been taken by the Respondent on appeal, and it is a reasonable one.

60. In his skeleton argument for the appeal, the Appellant submitted that the failure to address compliance with the CCA 1974 arose due to the Respondent's lack of disclosure regarding loan terms. I do not accept this. The Employment Judge's findings of fact make clear that there were no loan terms: this was an informal agreement that was never reduced to writing. There was nothing for the Respondent to disclose.

61. So far as the Employment Judge is concerned, there can be cases in which the Employment Judge will draw a litigant in person's attention to a point of law that is in the litigant's favour, but which the litigant has overlooked. Whether this should be done in a particular case is a matter for the discretionary judgment of the Employment Judge (see **Drysdale v Department of Transport** [2014] IRLR 892 (CA)). The Judge needs to be aware of the need to avoid descending into the arena and to avoid the appearance of bias. Employment Tribunal proceedings are adversarial, not inquisitorial. There is nothing to suggest in this case that the Employment Judge was alive to the possibility of an argument that the loan was void. There would be no reason to expect her to be: this is a point of consumer credit law, not a point of employment law. Even if the Employment Judge was aware of the argument, however, she could not possibly be criticised for failing to draw it to the parties' attention. The Appellant's pleaded case, and the case that he advanced at the hearing, was entirely based on a denial that the payment of £10,000 had been a loan at all, and upon the assertion that it was not recoverable because it was a payment of commission. In those circumstances, there was no obligation upon the Employment Judge to raise a question with the Appellant as to whether he had a completely different and inconsistent argument to the effect that even if the payment was a loan it was unenforceable. An Employment Tribunal is not obliged to enquire into a case on a basis that is completely different from the claimant's pleaded case: **Chapman v Simon** [1994] IRLR 124.

62. It is also relevant that the point of law that the Appellant now seeks to rely upon is not a point of law of general public importance, and is not a point that is a knock-out point that goes to jurisdiction.

63. The final reason why I am not prepared to allow the Appellant to rely upon an argument which was not advanced below is that the argument is weak, if not hopeless. I make clear that I would have dismissed this appeal even if the new argument relied upon had some apparent merit to it, but my conclusion that the appeal should be refused is reinforced by my view that it does not have any merit.

64. The difficulty with the Appellant's argument is that the type of loan that was made by the Respondent to the Appellant falls within an exempt category, that is, a class of loan that does not have

to comply with the requirements of the CCA 1974. That being so, there can be no successful argument that a failure to comply with the requirements of the CCA 1974 renders the loan irrecoverable.

65. The requirements of the CCA 1974 apply to consumer credit agreements which are regulated credit agreements within the meaning of the Act. The loan made by the Respondent to the Appellant was undoubtedly a credit agreement for the purposes of the CCA 1974. Section 9(1) provides that "credit" includes a cash loan. The important question is whether it was a regulated credit agreement. This depends upon whether the loan agreement was a regulated credit agreement for the purposes of Chapter 14A of Part 2 of the Regulated Activities Order (section 8(3)(a) of the CCA 1974). The Regulated Activities Order is the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001 (SI 2001/544): see CCA 1974, section 189(1). Regulation 60G(3) of the Order provides that, subject to certain exceptions that do not apply, a credit agreement is an exempt agreement (and so is not a regulated credit agreement; regulation 60B) if it is a borrower-lender agreement, it is not of a kind that is offered to the public generally, if there is no charge other than interest, and if the interest rate is no higher than 1% over the bank base rate. In the present case, there was no interest at all, and so this loan agreement was an exempt agreement. It follows that it was enforceable even though the requirements of the CCA 1974 were not complied with. Standing back, this makes sense, because an interest-free loan between parties who knew each other does not give rise to the risk and dangers and possibilities of abuse that arise in relation to loans that are offered at higher rates to the general public.

66. There are other reasons why it is at the least highly likely that the Appellant's argument is misconceived. One is that the Appellant is not a "consumer" for the purposes of the CCA 1974, because he was not acting as a consumer in entering the agreement, but as an employee. Another is that the CCA 1974 applies to a "consumer hire business" and it is clear by necessary implication that the Respondent, a leather tannery, is not such a business.

67. Accordingly, in my judgment, even if I had taken the view that the Appellant should be permitted to proceed with his appeal on the grounds that the loan agreement was unenforceable because it breached the requirements of the CCA 1974, the appeal would have been doomed to failure.

The remaining ground of appeal

68. The other ground of appeal relied upon by the Appellant is that, even if the loan was valid and enforceable, the Employment Judge should have found that it could only be offset against commission payments, and could not be offset against salary or holiday pay.

69. I am unable to accept this submission. Clause 7.6 of the Appellant's contract of employment stated, "We shall be entitled to deduct from your salary or other payments due to you owing money which you may owe to the Partnership at any time." The Employment Judge found that clause 7.6 of the contract of employment permitted the Respondent to recover the outstanding loan amount from the Appellant's last month's salary, and then to reclaim the unpaid amount by way of counterclaim after the Appellant had left. This was plainly the right conclusion in light of the wording of clause 7.6 and the law relating to deductions from pay (which was set out in the Employment Judge's judgment, and which it is unnecessary to set out here). It is not the case, as the Appellant submitted, that paragraph 18 of the Tribunal judgment showed that repayment was to be through commission payments only. Rather, in that paragraph, the Employment Judge said that the parties had intended to put in place a commission scheme for the Appellant, and that any payments of commission once agreed might have been used as repayment of a loan. But the Employment Judge also made clear that no agreement as regards commission was ever concluded and so there was no agreement that the loan would only be repaid by set-off against commission payments.

70. It follows that the Employment Judge's rejection of the Appellant's contention that the loan debt was only required to be repaid by offset against commission due to him was not tainted by an error of law and, if and in so far as it involved findings of fact, it was not perverse.

71. The Appellant's Notice also contends that the figures used by the Employment Judge in her judgment for the last month's salary and for the accrued holiday pay, both of which were deducted from the £10,000, along with outstanding expenses, to reach the figure still owing on the counter-claim, were wrong. It is not clear whether permission was granted on this ground. Even assuming that it was, this ground of appeal repeats the point that was made in the reconsideration application. The Employment Judge dealt with it in her reconsideration judgment, and I am fully satisfied that her conclusions were right, for the reasons given in that judgment and in the Respondent's written submissions for the reconsideration application. She accepted the Respondent's figures, given in evidence by Ms Dean, for the last month's salary and for accrued holiday pay, and it was not perverse for her to do so. These were net figures, because they reflected the sums that were actually owing to the Appellant.

Conclusion

72. For these reasons, the appeal is dismissed. The Respondent has asked me to make any order necessary to lift the stay on the enforcement of the counterclaim judgment debt ordered by the Tribunal below, which was stayed generally by Deputy District Judge Rose in the County Court at Oxford on 24 June 2024. I have no power or jurisdiction over the County Court or its enforcement jurisdiction when I am sitting in the Employment Appeal Tribunal, but, on the footing that the stay was imposed pending the outcome of the appeal to the Appeal Tribunal, I am able to say in this judgment that the appeal is now over, that the Appellant has been unsuccessful, and that the basis for the stay therefore no longer applies.