EMPLOYMENT TRIBUNALS

SITTING AT: **LONDON CENTRAL**

BEFORE: **EMPLOYMENT JUDGE F SPENCER**

CLAIMANT **Mr K Onurcan**

RESPONDENT **Malaysia**

ON: **4 April 2025**

Appearances:

For the Claimant: **In person**
For the Respondent: **Mr O Jackson, counsel**

RESERVED JUDGMENT

The Tribunal finds that the Respondent made unlawful deductions from the Claimant's wages. However, for reasons set out below (at paragraphs 25-27) there may be a jurisdictional issue under section 23(2) of the Employment Rights Act 1996. No order is made for the payment of any sum until the parties have had an opportunity to address the jurisdictional point.

REASONS

1. This is a claim for our unlawful deduction of wages contrary to section 13 of the Employment Rights Act 1996. The issues were set down by Employment Judge Brown at a preliminary hearing on 6 January 2025 as follows:

    a. what sums were properly payable under the Claimant's contract, including any variations which may have been agreed from time to time, for the periods (i) prior to 1 July 2020, (ii) between 1

July 2020 and 31 October 2020 and (iii) after 1 November 2020?

b. Was the Claimant paid less in wages that he was entitled to receive under his contract, including as varied from time to time?

c. What remedy, if any, is the Claimant entitled to?

2. I heard evidence from the Claimant. Mr Ahamad had provided a witness statement on behalf of the Respondent but did not attend the hearing. The Claimant did not seek to dispute any part of his statement. I had a bundle of documents, a bundle of authorities and a written skeleton from Mr Jackson. The facts were not materially in dispute.

3. There has been some delay in hearing this claim due to issues as to sovereign immunity which have now been resolved.

4. The case was set down for a three-hour hearing so there was insufficient time to provide an oral Judgment.

Relevant facts

5. The Claimant was and remains a Driver working for the Malaysian High Commission in London. He began working for the Respondent on 6 June 2001 on a salary of £270 per week plus London weighting and a lunch allowance (£308 per week in total). His offer letter stated that he was on the salary scale of £270 x £2 - £298 per week. In Mr Ahamad's witness statement he explained that this meant that his initial salary was £270 per week and that he would receive a £2 increment added to his salary every week for each completed year of employment, with a ceiling of £298 per week which would be reached after 14 years of employment.

6. His terms and conditions of appointment provided (somewhat incomprehensibly) that "*the salary to be drawn by an employee on 1st appointment shall be the initial point within the salary scale of the appointment. Nevertheless, emplacement on a higher point up to a maximum of 3 increments may be given and it should be based on one increment for every one completed year of service experience."* The Claimant referred to the T scale which was referable to the number of years service starting from T1 and finishing at T21 and these were linked to the yearly increments.

7. By 2020 the Claimant was on a salary scale of T18 as he had been employed for 18 years. His salary had increased (beyond £298) to £389 per week. Each time the Claimant received a salary increment he was required to sign a letter indicating consent to the change.

8. On 1st July 2020 Claimant was sent an offer letter to vary his contract to increase his salary (from £389) to £468 per week with effect from 1 January 2019. This meant that the Claimant was to receive £6,213.90 in back pay for the period from 1 January 2019 to 30 June 2020. The Claimant signed

that offer letter and accepts that he had agreed to vary his contract by the increase in salary.

9. On 1 November 2020 the Respondent wrote to the Claimant (and all other locally recruited staff). In that letter the Claimant was told that the Ministry had decided to review all salaries of locally recruited staff and the salary he had received from 1st January 2019 to 31st October 2020 "*is void and no longer applicable*". (131)

10. Instead, his new salary scale would be £400 x 4-480. From 1 January 2019 his new salary scale of T14 would be £452 per week, compared to the previous salary at T18 of £389 per week. The Claimant was told that from 1 August 2020 to 30 September 2020 the Respondent had overpaid the Claimant salary by £208.02. This would be deducted from the back pay which remained due to the Claimant- though the amount of the backpay was to be reduced to reflect the proposed new terms. (I am not clear at what stage the deductions to his previously agreed pay and/or back pay were made.)

11. The Claimant objected. In a letter dated 10 November 2020. He said he did not understand and asked for an explanation and a justification of all the sudden changes. However, the Claimant was told by the chief clerk at the High Commission that if he did not sign the letter of 1st November he would be paid in accordance with the old (pre-3 July 2020) salary scale of £398 until his service terminated. He was also told that he would not get a long service gratuity. On 12 November 2020 the Claimant signed the 1st November letter. Although it is in a box which says "kindly acknowledge receipt" the Claimant accepted that he had agreed to the new salary. He said though that he had agreed only because he was told that if he did not sign it, he would revert to his old salary and lose his gratuity. He told the Tribunal. "I did say that I accepted it. I accepted it because of the gratuity. That's why I carried on, but I was not happy.".

12. The Claimant's letter of 10 November was taken as an appeal. On 2 December 2020 the Respondent wrote to him to say his appeal had not been "approved" and that "should you refuse to accept the new salary scale, the High Commission will continue paying you in accordance with the old salary scale which is £338 x 3 -398 until your service ends. In addition, any appeal made by you in the future to apply for a new salary scale will not be considered any further by the Ministry." The Claimant responded saying that he found the letter threatening, intimidating and blackmailing and he would seek legal advice.

13. The Claimant contacted ACAS on 15 April 2021, received a certificate on 27th May 2021 and presented his claim on 2 July 2021.

14. In November 2021 the Claimant met with inspectors from the Malaysian Foreign Ministry who tole the Claimant that his July increase had been an "honest mistake" and pressurized the Claimant to drop his employment

case. He was told that if he continued the Respondent might terminate his contract and he might lose his retirement gratuity money.

15. The Claimant remains employed by the Respondent. He has been paid in accordance with the terms of the 1 November letter.

The Law

16. Section 13 of the Employment Rights Act 1996 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 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.
>
> (5) For the purposes of this section, a relevant provision of a worker's contract having effect by virtue of variation of the contract does not operate to authorise the making of a deduction on account of any conduct of the worker, or any other event occurring, before the variation took effect.
>
> (6) For the purposes of this section an agreement or consent signified by a worker does not operate to authorise the making of a deduction

on account of any conduct of the worker or any other event occurring before the agreement or consent was signified

Submissions

17. For the Respondent Mr Jackson submitted first that the Claimant expressly agreed in writing to a contractual variation to the new salary arrangements. These were the wages "properly payable" to the Claimant and that as such there had been no deductions. Secondly, he submitted that, even if there was no written contractual variation, the requirements of section 13 were satisfied. The letter of 1st November amounted to "one or more written terms of the contract of which the employer has given the worker a copy on occasion prior to the employer making the deduction" (section 13(2) (a)). Alternatively the giving of the written new wages arrangements amounted to "one more terms of the contract (whether express or implied and if express, whether oral or in writing) the existence in effect or combined effect of which in relation to the work of the employer has notified to the worker in writing on such an occasion" and so satisfied the provisions of section 13 (2) (b)).

18. The Claimant submitted that he had been forced to accept the new salary arrangement in November 2020, but this had been a breach of his original Terms and Conditions which provided for yearly increments in the T scale". The Claimant should not have been moved down to T14 and if he hadn't been moved to T14 his salary would have been unaffected. His agreement to the new arrangements had only been obtained because of the threats made by the Respondent. He should be entitled to be paid at the July 2020 rate until today's date.

Conclusions

19. I am satisfied that as of 12 November 2020 the Claimant had agreed to the new salary. I considered carefully that the agreement was obtained by duress – and that the Claimant was forced to agree because the Respondent had threatened to further reduce his salary if he did not agree.

20. Duress is a difficult concept in employment cases. Mr Jackson took me to Laird v AK Stoddart 2001 IRLR 591 where the EAT indicated that the tribunal should be slow to conclude that the worker's apparent consent is ineffective '*If an employee agrees to a contractual variation even under protest, he can be said to affirm it if he continues in the workplace. What is required to avoid such a conclusion in that situation is a lack of consent which may be evidenced either by a refusal to accept the position or by succumbing to some form of duress or pressure. Merely to sign under protest is not enough . . . If the appellant signed the contract and was thus consenting, albeit under protest, then he has agreed to the variation. He will have to establish that his signature was appended under such duress as amounts to vitiation of consent.*'

21. The Claimant said that he signed the contract as he did not want a further reduction in salary and did not want to lose his long service gratuity. He has remained employed by the Respondent – although the presentation of this claim and his continuation of the litigation indicates that he is working under protest even if he has not used the specific words.

22. I am unable to find that there was sufficient duress to vitiate his consent. He has remained working at the Respondent for another 4 ½ years since the change was imposed, and has taken a rational decision to stay at this employer. The Claimant has not suggested that he sought other work, saying that to do so would mean losing his annuity. (In any event duress makes a contract voidable rather than void and by continuing to work under it there must be said to be affirmation.)

23. On the other hand, the Respondent was not entitled to impose a change to the Claimant's rate of pay retrospectively. Since July 2020 he had given his time and efforts on the basis of the July contractual variation. Sub section (5) and (6) of section 13 (not quoted in the Respondent skeleton) make it plain that:

    a. A variation of contract does not operate to authorise the making of a deduction on account of any conduct of the worker occurring before the variation took effect. The Respondent is therefore not entitled to rely on section 13(1)(a).
    b. an agreement or consent signified by a worker does not operate to authorise the making of a deduction on account of any conduct of the worker before the agreement or consent signified. The Respondent is therefore not able to rely on section 13(1)(b).

24. Mr Jackson seeks to argue that if there is a contractual variation the parties can agree what they like, and this will be the wages "properly payable". However, given subsections (5) and (6), that is plainly not correct. Such a construction would render those subsections meaningless. See also *Discount Tobacco and Confectionery Ltd v Williamson* 1993IRLR 327.

25. Unfortunately, this finding may present another difficulty. I was not clear from the evidence what was paid and when or when the last deduction occurred; but if the last unauthorised deduction was made in November 2020, then the Claimant's claim is outside the primary time limit for the presentation of claims.

26. Section 23(2) of the Employment Rights Act 1996 provides that an employment tribunal shall not consider a complaint [of unlawful deduction of wages] unless it is presented before the end of the period of 3 months beginning with the date of payment of the wages from which the deduction was made or, where a claim is in respect of the series of deductions, the last deduction in the series. However section 23 (4) provides that "where the employment tribunal is satisfied that it was not reasonably practicable for a complaint under the section to be presented before the end of the

relevant period of 3 months, the tribunal may consider the complaint if it is presented within such further period as the tribunal considers reasonable." The time limit is also extended to allow for early conciliation. (Section 207B of the ERA). When determining whether a time limit has been complied with the clock will stop when ACAS receives the early conciliation request and restart the day after the early conciliation certificate is given.

27. As the Claimant's case was that there was a series of deductions continuing to the present day, and the Respondent's case was that there was no unlawful deduction, neither side has made submissions on the jurisdictional issue which arises because of my finding that the Claimant must be taken to have agreed to the new salary from 12 November 2020.

28. Absent the jurisdictional point the Claimant would be entitled to the difference between the wages that were agreed in July 2020 (including any backpay from January 2019) until he agreed to a variation going forward from 12 November 2020. This is a relatively small amount, and I would urge the parties to settle this dispute. However, if they are unable to do so the matter will need to be listed for a further short hearing to determine the jurisdictional issue and, if the Claimant overcomes that hurdle, to make an award.

29. The parties are therefore directed to write to the Tribunal no later than 4 weeks from the date that this judgement is sent to them indicating whether they have been able to reach agreement and if not giving dates to avoid for a further 3-hour hearing before me in June or July 2025.

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Employment Judge Spencer
29th April 2025

JUDGMENT SENT TO THE PARTIES ON

2 May 2025
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FOR THE TRIBUNAL OFFICE