

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

At the Tribunal
On 24 August 2012
Judgment handed down on 2 November 2012

Before

HIS HONOUR JUDGE McMULLEN QC

MR D EVANS CBE

MR J R RIVERS CBE

QANTAS CABIN CREW (UK) LTD

APPELLANT

(1) MR A LOPEZ
(2) MISS A HOOPER

RESPONDENTS

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellant

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SUMMARY

UNLAWFUL DEDUCTION FROM WAGES

On the true construction of the Claimants' contracts of employment on their secondment from Qantas in Australia to its subsidiary, the Respondent, in London, payment of allowances for food and accommodation were not made on top of the normal wages but were included within the package, for reasons of tax efficiency. The Employment Tribunal's judgment was reversed. Since the payment was in respect of expenses, a claim under Part II of the **Employment Rights Act 1996** was not available to them. Their claim for location payments was not a payment related to expenses but was properly open to the Claimants under the Act. The claim at the higher level they had sought failed as a matter of construction. The Employment Tribunal's judgment on this point was upheld. Further, Ms Hooper's claim was out of time. She complained of only one deduction which could not be part of a series so as to extend time.

HIS HONOUR JUDGE McMULLEN QC

1. This is a wages claim – formally a claim under Part II of the **Employment Rights Act 1996** that unauthorised deductions were made from the pay of two employees.

2. It is the judgment of the court to which all members appointed by statute for their diverse specialist experience have contributed. By the **Employment Tribunals Act 1996** a wages claim is heard by a judge alone unless it is considered that there should be lay members. In this case it was considered that a three person tribunal would best be able properly to consider the issues because of their experience. Thus, an appeal is heard by a three person bench at the EAT.

3. We will refer to Qantas Cabin Crew (UK) Ltd as the Respondent. Mr Andrew Lopez's and Ms Alexandra Hooper's circumstances are similar but not identical. Ms Hooper signed the first and second contracts of employment to which we will refer, whereas Mr Lopez was found to have agreed the first and signed the second. Part of Ms Hooper's claim was out of time, but was rescued by the Tribunal's finding. Mr Lopez's claim was in time. Save for the above, we will refer to them as the Claimants.

Introduction

4. It is an appeal by the Respondent and a cross appeal by the Claimants, conditional on the appeal succeeding, against the judgment of an Employment Tribunal sitting at London South under the chairmanship of Employment Judge Stacey over two days with a written judgment given on 3 October 2011 and reasons sent to the parties on 28 October 2011. The Claimants are represented by Mr Deshpal Panesar and the Respondent by Mr Marcus Pilgerstorfer. The Claimants make claims for wages due. The Tribunal upheld part of their claims but dismissed UKEAT/0106/12/SM

the second part as to which they cross appeal. The Respondent appeals against the primary finding and takes a jurisdictional point that the claims were not properly made under the Act: they were not for wages but for expenses. During the course of the hearing, Mr Pilgerstorfer sought to amend his Notice of Appeal in respect of Mr Lopez, and Mr Panesar sought to raise new points in respect of the appeal and the cross appeal by way of a written submission after the end of our hearing. We gave him permission if so advised to develop a point he made for the first time at the hearing and so our judgment has been delayed in order to allow the exchange of these two further submissions.

5. The appeal was sent for a full hearing by His Honour Judge Peter Clark and the cross appeal by His Honour Jeffrey Burke QC (albeit the EAT orders confused the two).

The issues

6. The substantive issue is the construction of a written contract of employment entered into in the absence of undue influence and duress.

- a. Does the judgment of the Supreme Court in **Autoclenz v Belcher** [2011] ICR 1157 require a departure for employment contracts from settled principles of construction in **L'Estrange v Graucob** [1934] 2 KB 394 CA and of interpretation in **Investors Compensation Scheme Ltd v West Bromwich Building Society** [1998] 1 WLR 896 HL?
- b. If the Claimants' construction of the relevant contract is correct, and they have been underpaid, does the payment consist of wages or of expenses?
- c. The Respondent contends that the judgment of the Tribunal is perverse.
- d. The approach of the EAT to applications to amend arises directly in relation to the Respondent's midway application, and what we hold to be a post-hearing

application by the Claimants. Generally, such amendments are refused by the EAT where not raised below, and requiring further evidence and findings.

The legislation

7. Part II of the **Employment Rights Act 1996** is headed “Protection of Wages”. Section 13 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 statutory provision or a relevant provision of the worker’s contract, or

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

27 Meaning of "wages" etc

(1) In this Part "wages", in relation to a worker, means any sums payable to the worker in connection with his employment , including–

(a) any fee, bonus, commission, holiday pay or other emolument referable to his employment , whether payable under his contract or otherwise...”

There are exceptions for deductions for overpayments of wages and expenses, and for other purposes not relevant to the present case (section 14). Expressly excluded from the above by s27(2)(b) is:

“Any payment in respect of expenses incurred by the worker in carrying out his employment.”

8. The procedure for making a complaint is set out in s23 and it imposes a 3-month time limit with the following exception:

“23(3) Where a complaint is brought under this section in respect of–

(a) a series of deductions or payments

...

the references in subsection (2) to the deduction or payment are to the last deduction or payment in the series or to the last of the payments so received.”

9. In both cases an issue arises as to whether the claims relate to wages or expenses, and in Ms Hooper’s case whether time for making the claim was extended by reason of the Tribunal’s finding that she suffered a series of deductions.

The facts

10. Qantas Airways Ltd is the national airline of Australia. Cabin crew are supplied to it by Qantas Cabin Crew Australia Pty Ltd (“QCCA”). These crew are based in Australia. The Respondent is an English company which also provides crew to Qantas. They are based at London Heathrow and serve on routes from Heathrow to the Far East but not to Australia. Both the Respondent and QCCA are wholly owned subsidiaries of Qantas. The Respondent recruits cabin crew locally, and from Qantas subsidiaries. For these subsidiaries including QCCA there is an expatriation programme under which Qantas and QCCA staff may be given time out to work for the Respondent in the UK; it lasts about two years.

11. Both the Claimants came from a base in Australia to a base in London. The practical effect of the Respondent’s approach to their wages is summarised by the Tribunal as follows:

“71. Both Ms Hooper and Mr Lopez find they are struggling to live in London and that they are approximately one third worse off than they were in Australia. Mr Lopez is eating into

savings and is borrowing money off friends and family to pay his mortgage at home. Ms Hooper has had to move from Chiswick to Croydon in an attempt to make ends meet.”

12. Mr Lopez on 19 January 1998 and Ms Hooper on 9 March 2008 started working for QCCA in Australia. They read the Q&A document (below) about work in London. In February 2010 they completed application forms to work for the Respondent. On 13 August 2010 they were informed that they had been “successful” and written terms would be sent. On 27 August 2010 they were notified of a meeting to discuss tax briefing and advised “I still would strongly suggest you seek your own financial advice as well”. They both prepared to travel to London. Shortly after 6 October 2010 Ms Hooper signed and returned an offer letter made by the Respondent. The Tribunal found that Mr Lopez did not sign the offer letter but agreed its terms (“the October contract”).

13. The tax briefing took place on 3 November 2010. It included a PowerPoint presentation conducted by an officer of the accountants Ernst & Young. The November contracts were then offered to the Claimants for signature. They did not have to sign that day and could take them away. They did so sign. There were changes between the October and November contracts. The Claimants were told the only change was to the length of the assignment (from a maximum of 26 months to two years). They noticed the change to the length of the assignment but that is of no consequence here. The Claimants were not told of the two changes which were the subject of the current dispute. They each noticed the change to the second set of payments known as the relocation benefits. They considered this to be a mistake but nevertheless were not prepared to raise any argument about it. The change was clearly in their favour on their interpretation. This is the subject of their cross appeal.

14. The other payments are Living Away From Home Allowance, referred to as LAFHA. This consists of a food allowance and a housing allowance. There were changes to the wording relating to these allowances which the Respondent contended made no difference.

15. Payments were made in accordance with the agreement to the Claimants of their first incentive payment, the relocation benefit, in November 2010. Grievances were lodged by the Claimants in February and March 2011, followed shortly by Mr Lopez's claim, but not until 28 June 2011 by Ms Hooper. The claims in this case are based on a contention that the Respondent failed to pay LAFHA and relocation benefits in accordance with the terms of the relevant contract, and an issue arises as to which contract that is.

The documents

16. There are four documents relevant to this case, which we set out in turn.

(1) The Q&A

17. The Q&A was on the website and preceded the Claimants' applications for the job; they read them. Relevant to the wages issue in this case are the following:

"Will there be a rent/utility subsidy?

No. A competitive salary package is available to pay for your cost of living.

Will the crew in London be taxed under the British or Australian tax law?

Crew will be taxed under British tax law and may be subject to Australian tax laws. LWOP crew will be provided with a tax briefing prior to departure from Australia, however we strongly advise that you seek individual advice on your own taxation circumstances.

Will there be any assistance given with accommodation in LHR?

Your remuneration package is weighted to allow you assistance at the time of relocation to London. Crew can access a special rate of £60 (single) including continental breakfast per night (rates valid until end of 2010) at Jury's Inn, Hatton Cross until such time you obtain your own accommodation.

...

How much is the incentive payment?

For those employed by Qantas Cabin Crew Australia [the Claimants' employer], an incentive payment to encourage people to relocate and take up the opportunity in the UK is offered:

Qantas Cabin Crew Australia employee £4,000 on arrival into UK

£1,000 at the end of year 2.

...

Is the incentive payment taxable?

It is part of your remuneration so will attract taxation."

(2) *The October contract*

18. The October contract, signed by Ms Hooper and agreed by Mr Lopez, includes a number of conditions none of which is relevant since the Claimants satisfied them and then the following:

"2 Term of Employment

2.1 Subject to paragraph 21.2, your employment will be for approximately two years (the Term), commencing in November 2010 with a range of 22 to 26 months, concluding between October and November 2012. The Company will consult with you about your precise Termination Date, to facilitate your return to Australia in order to recommence your employment with Qantas.

...

6. Living Away From Home Allowance (LAFHA)

6.1 In recognition of you being required to live temporarily in the UK in order to perform your employment duties, your total salary package will include a Living Away From Home Allowance ('LAFHA'). The purpose of the LAFHA is to compensate you for additional expenses incurred as a result of you being required to live away from your usual place of residence whilst working in the UK.

6.2 Specifically, the LAFHA (accommodation) component is an agreed amount which is reasonable to cover your accommodation costs whilst on assignment in the UK. The LAFHA (exempt food) component is based on your family size (see below).

6.3 The length of your assignment is pursuant to Clause 2.1. The terms and agreement of any extension will be mutually agreed at that time and will be confirmed in writing.

6.4 Your entitlement to the LAFHA is conditional upon you completing, on an annual basis, the Living Away From Home Declaration. The signed declaration must be returned to Qantas by 31 March each year.

...

6.7 The Living Away From Home - Housing Allowance amount is based on the actual cost of your accommodation in the UK being GBP900 per month.

6.8 The Living Away From Home - Food Allowance amount is an allowance designed to cover the additional costs of food associated with you being required to live away from your usual place of residence in order to perform your work duties. The amount will be fixed as GBP5,044 per annum.

7. Remuneration

7.1 The Company has established a simple remuneration system. Your total gross remuneration package will consist of:

Base Salary (p.a.)	£13,820	
Fixed Allowance (p.a.)	£655.97	
Sector Pay (per sector)	1-8 hrs	£28.68
	8.01-16 hrs	£57.37
	16.01 hrs+	£91.79
Two lump Sum Payments payable in accordance with paragraph 8 below	Year 1 Lump Sum Payment	£4000
	Year 2 Lump Sum Payment	£1000

Separate additional pay, allowances and benefits will not be paid, except as otherwise provided in this Letter of Offer, the Company's Work Rules or the Collective Agreement. The Fixed Allowance will be paid in consideration of the expenses associated with uniform maintenance and communications costs associated with flying duties.

7.2 Your Base Salary, Fixed Allowance and Sector Pay will be paid monthly, in arrears, into an account with a financial institution in the UK, nominated by you and acceptable to the Company.

7.3 In accordance with Clause 6 of this contract, the total gross remuneration package will be delivered in a manner which includes the LAFHA. This recognises the additional costs incurred as a result of you residing in the UK to perform your work duties.

7.4 Allowances for meal reimbursement will be paid to you in the local currency of the slip port and the current rates are set out by the Company, as varied from time to time.

...

9. Relocation and Repatriation Benefits

9.1 In consideration of your relocation from Australia to the UK to perform your duties under this Letter of Offer:

(a) within 2 weeks of the Commencement Date, you will be paid the Year 1 Lump Sum Payment of £4000 (gross);

...

(c) subject to paragraph 9.2:

...

(ii) the Year 2 Lump Sum Payment of £1000 (gross) will be paid in your final instalment of salary following the Termination Date.

...

31 Completeness

31.1 This agreement replaces all previous written or oral agreements and understandings."

19. The agreement also incorporates by reference various documents including the company's works rules and the collective agreement between the Claimants' union Unite and the Respondent.

(3) *The tax briefing*

20. On 3 November 2010, the officer from Ernst & Young put up a number of slides which the Tribunal and the Claimants found confusing and which they could not take away and copy. We will reproduce the findings of the Employment Tribunal citing these documents as follows:

"29. The box in the left headed "Employee contract" provides as follows:

'Base salary (p.a.)	£13,820
Fixed allowance (p.a.)	£656
Sector pay(est)	£4,590
Meals in slip port(est)	£8,080
Transfer year incentive payment	£4,000
Total £31,146'	

30. The box on the right with the heading "Tax Structuring for LAFHA under Australian Tax" provides as follows:

'Salary and allowances	£10,102
LAFH food	£5,044
LAFH accommodation	£12,000
Transfer incentive payment	£4,000
Total	£31, 146'

...

32. Considerable time in tribunal was spent understanding the reference to "meals in slip port(s)" on p61 of the Ernst and Young tax presentation. It apparently amounts to some £8,080 per annum and no mention is made of it in the letter of offer. The Tribunal was concerned about this and wondered if the offer letter complied with s1 ERA 1996.

33. On closer analysis it turned out that the collective agreement of March 2009 provides that: "Allowances that provide for reimbursement of meal expenses in slip port will be paid at the rates determined by the company for each port from time to time. These rates will be published in the cabin crew administration manual." (Clause 4.4 page 6). We accepted Mr Pilgerstorfer's explanation that these payments do not fall within the definition of wages in s1(4)(a) ERA 1996 and are properly expenses and s1 ERA 1996 has therefore not been breached of in this regard. We learnt that HMRC accept the meals in slip port (other than in relation to Hong Kong) allowance is assessed as tax exempt as being "incurred wholly, exclusively and necessarily in the performance of the duties of the employment" (s336(1) (b)). If it amounts to a genuine out of pocket expense one questions why it is described in the Ernst and Young presentation on p61 as part of the remuneration package.

34. At page 30 the power point slide states:

- ‘You will be provided a Living Away From Home Allowance (LAFHA) within your compensation package.
- LAFHA is made up of a food component and an accommodation component
- LAFHA is delivered tax free in Australia
- For the LAFHA to be paid in a tax effective manner, it should be clearly stated in the assignment letter or elsewhere that it is for additional costs incurred as a result of your assignment to the UK.’

35. A sample calculation is provided which provides salary and allowances of £27,146 under both UK tax and Australian tax regimes which, for the purposes of Australian tax has LAFHA for both food and accommodation deducted to make the calculation more tax efficient.

36.They understood from the presentation that they would receive LAFHA payments in addition to basic salary, but did not work out precise calculations or do the maths of adding the LAFHA figures of £12,000 and £5,044 per annum to their base salary. They trusted their employer was not misleading them when they were told that their pay would be comparable and that allowance had been made for higher costs in the UK than Australia.

37. At the meeting they were given new contracts and told they needed to be signed before they could leave for the United Kingdom. They were told that the only change to the contract was to increase the length of the assignment to two years from its previous wording of being up to two years with a possible extension to 26 months (see slide at page 59). They were not told of any other changes and were told the amendment had been made for tax purposes only. Both Claimants felt pressurised to sign on the spot and they were committed to travel and had made all the arrangements.”

21. The Employment Tribunal did not cite all of the slides but in particular the slide cited included a clear reference to the reason for the change from the original contract being to “eliminate the consequences of LAFHA being taxable to employee”. It is striking from the written evidence of the manager Mr Rogers, that the reference to structuring the salary and benefits is to the tax treatment of LAFHA by the Australian authorities, which would in effect allow such figure to escape tax. He said there were notional LAFHA figures for that purpose.

(4) The November contract

22. The Tribunal found that the offer had been changed from October to November in relation to LAFHA. It noted the change in one place to location payments but held that did not reflect the correct agreement. It found that changes had been made to clauses 6.1, 7.1, 7.3 and 9. The substance of clause 7.1 was unchanged. The figures in clause 9 were £10000 and £4500 in place of £4000 and £1000 respectively. For the appeal, therefore, the focus is on clauses 6.1

and 7.3, and for the cross appeal on clause 9. Actually, there had been a change in Mr Lopez's contract for he was now offered a position of a first and business class attendant whereas previously he had been simply a flight attendant, but nothing seems to turn on this.

23. The relevant clauses are now as follow:

"6. Living Away From Home Allowance (LAFHA)

6.1 In recognition of you being required to live temporarily in the UK in order to perform your employment duties, your base salary as detailed at paragraph 7.1 includes a Living Away From Home Allowance ("LAFHA") component. For the avoidance of doubt, LAFHA is not paid in addition to the base salary. The purpose of the LAFHA is to compensate you for expenses incurred as a result of you being required to live away from your usual place of residence whilst working in the UK.

6.2 Specifically, the LAFHA (accommodation) component is an agreed amount which is reasonable to cover your accommodation costs whilst on assignment in the UK. The LAFHA (exempt food) component is based on your family size (see below).

6.3 The length of your assignment is pursuant to Clause 2.1. The terms and agreement of any extension will be mutually agreed at that time and will be confirmed in writing.

6.4 Your entitlement to the LAFHA component is conditional upon you completing, on an annual basis, the Living Away From Home Declaration. The signed declaration must be returned to Qantas by 31 March each year.

...

6.7 The Living Away From Home - Housing Allowance component is based on the actual cost of your accommodation in the UK being GBP900 per month.

6.8 The Living Away from Home - Food Allowance amount is an allowance designed to cover the additional costs of food associated with you being required to live away from your usual place of residence in order to perform your work duties. The amount will be fixed as GBP5,044 per annum.

7. Remuneration

7.1 The Company has established a simple remuneration system. Your total gross remuneration package will consist of:

Base Salary (p.a.)	£13,820	
Fixed Allowance (p.a.)	£655.97	
Sector Pay (per sector)	1-8 hrs	£28.68
	8.01-16 hrs	£57.37
	16.01 hrs+	£91.79
Two lump Sum Payments payable in accordance with paragraph 9 below	Year 1 Lump Sum Payment	£4000
	Year 2 Lump Sum Payment	£1000

Separate additional pay, allowances and benefits will not be paid, except as otherwise provided in this Letter of Offer, the Company's Work Rules or the Collective Agreement. The Fixed Allowance will be paid in consideration of the expenses associated with uniform maintenance and communications costs associated with flying duties.

7.2 Your Base Salary, Fixed Allowance and Sector Pay will be paid monthly, in arrears, into an account with a financial institution in the UK, nominated by you and acceptable to the Company.

7.3 In accordance with Clause 6.1 of this contract, the total gross remuneration package includes the LAFHA component. This recognises the additional costs incurred as a result of you residing in the UK to perform your work duties.

7.4 Allowances for meal reimbursement will be paid to you in the local currency of the slip port and the current rates are set out by the Company, as varied from time to time.

7.5 You should refer to the Administration manual in relation to the process for claiming reimbursement in relation to any other expenses incurred by you in performing your duties.

...

9. Relocation and Repatriation Benefits

9.1 In consideration of your relocation from Australia to the UK to perform your duties under this Letter of Offer:

(a) within 2 weeks of the Commencement Date, you will be paid the Year 1 Lump Sum Payment of £10,000 (gross);

...

(c) subject to paragraph 9.2:

...

(ii) the Year 2 Lump Sum Payment of £4,500 (gross) will be paid in your final instalment of salary following the Termination Date.

...

31 Completeness

31.1 This agreement replaces all previous written or oral agreements and understandings."

Which contract?

24. The Tribunal found that the agreement reached by the Claimants was the October agreement. By para. 100 of its reasons the explanation the Tribunal gave in its preceding paragraphs 21 and 23 represented "the terms agreed". Paragraphs 21 and 23 follow an examination of the October contract. Throughout, the language used is of the old contract and the new contract. Neither is described as a draft, each therefore is a contract in its proper legal sense. Clause 31 of the new contract shows in our judgment what the parties intended to do about the old contract which was that it should be superseded. It also shows that no other

terms, for example, from the Q&A and the Ernst & Young presentations, formed part of the contract.

25. The Tribunal's finding that the old contract applied is the sole ground on which the finding in favour of the Claimants on LAFHA, and against them on relocation benefits, was made. This is because the Tribunal found that the references to the higher relocation payment in year 1 was a mistake caused by cutting and pasting part of another contract and this was known to the Claimants. The same goes for the higher payment in year 2.

26. We pause here to note the way in which the claims were framed. Mr Lopez says:

"My contract specifies that I receive a relocation payment of £10,000 in the first year. On 25 November 2010 I received £4,000 gross therefore I am owed £6,000 gross."

27. He goes on to describe his entitlement under LAFHA by reference to the same monetary amounts as appear in the new and the old contracts. He repeats this claim in his witness statement and says:

"I entered into this contract on the basis that this is what I would receive."

His reference to "this contract" and the express citation from clause 6.1 are references to the November contract.

28. Ms Hooper in her claim asserts the following:

"I have a written Contract of Employment. In this contract it states that I should receive a relocation payment of £10,000 in the first year. I have not been paid this £10,000 and believe it is due to me.

My contract also states that I should receive a living away from home allowance. This includes £5,044 for food allowance, £900 per month for rent.

I also wish to clarify part of my contract."

29. In her witness statement she says that the first contract which she signed was ambiguous as to LAFHA. She acknowledges that it “should be paid for additional expenses and because I have to live away from home”. She then refers to the payment of £10,000 which is clearly an error by her for this did not appear in the October contract which she signed. She goes on to say:

“When we attended there were rumours that we would have to sign a new contract which would make our old contract void. Our fears were confirmed at the beginning of the presentation. They informed us that the contract we had was incorrect and that they would be offering a new one.”

30. She knew that the new contract was different. She looked through it and signed it. In doing so she found “it was ambiguous as to whether we would receive the LAFHA on top of our wage”. She acknowledged that the £10,000 relocation figure was a big incentive “in signing the new contract”. There is no finding on this, but it may well be an explanation as to Ms Hooper’s action; for since she is wrong in thinking that the old contract referred to £10,000 (it is £4000) the offer of it in the new contract would be an incentive to sign. Indeed, this is the thrust of Mr Panesar’s argument on the cross appeal where he contends that the terms in relation to relocation were clear, no mistake was apparent to the Claimants and this clause was relied upon by them both when signing their contracts.

31. The dispute between the parties is as to which contract applies. Mr Panesar in his written argument contends that:

“The November terms do not in respect of LAFHA constitute a valid agreement or variation.”

He submits that the November contract is different and contains revised terms as to LAFHA but that these terms were never agreed by the Claimants and therefore are not binding. He makes

no separate argument as to the true construction of the November contract itself, but only by reference to the circumstances in which it came to be signed.

32. In the context of this discussion about the relevant contract, it is necessary for us to determine an application made by the Respondent to amend the Notice of Appeal. There is no need to do this for Ms Hooper in respect of whom the legal position is clear. Having signed the October contract, she was an employee of the Respondent as both counsel accept following **Sarkar v South Tees Acute Hospitals NHS Trust** [1997] IRLR 328 EAT and s230(1) of the **Employment Rights Act 1996**. However, in respect of Mr Lopez, what is asserted is that he never did agree the terms in the October contract and was not an employee until November. This would open the door to the submission that he did not need to be shown amendments to an existing contract, for he was entering into the contract for the first time in November.

33. This is to challenge a finding of fact by the Employment Tribunal. For it to be raised for the first time on appeal would require remission to the Tribunal for it to make findings as to the primary facts behind its conclusion that Mr Lopez did agree the terms, or to use Mr Pilgerstorfer's language, how he "externalised any subjective acceptance there may have been to the terms" of the offer. It would require an adjournment of today's proceedings for that to be done and for Mr Panesar to make representations to the Tribunal.

34. As we indicated above, this will generally not be allowed by the EAT for the reasons which I gave in **Secretary of State v Rance** [2007] IRLR 665 and in the similar formulation in **Leicestershire County Council v Unison** [2005] IRLR 920 EAT, itself approved by the House of Lords in **Celtec Ltd v Astley** [2006] IRLR 635 HL. No good reason has been put to us why this point could not have been made earlier in the Employment Tribunal or in the Notice of Appeal. We would not allow it to be raised now.

35. Lest we are wrong in the exercise of our discretion and case management, we would hold that it has no merit in substance. This is essentially a perversity point for which the threshold before a successful appellant is high: **Yeboah v Crofton** [2002] IRLR 634 CA. Mr Lopez attended the tax briefing because he had agreed the terms of the October offer and had taken steps to pack up his belongings. The absence of his signature was not material and he was in the same position as Ms Hooper by 3 November 2010 when he came to sign the new contract.

36. We consider Mr Panesar is correct on both the procedure and the substance of the amendment application. It follows that both Claimants were employees of the Respondent under the October contract. Having seen the Q&A on the website, agreed the October contract, heard the presentation and seen the slides at the tax briefing they entered into the November contract. Since Mr Panesar relies on the matters taking place in the tax briefing, it must follow that it is the November contract which is to be construed. Yet he argues that because of what was said in the Q&A, the October contract and the tax briefing, the terms on LAFHA in the November contract do not apply but the terms on relocation do. In short, his case is that LAFHA is added to base salary; and the relocation figures are £10,000 and £4500, not £4,000 and £1000.

37. From the citations from the claim and the evidence of the Claimants above, it is clear that they were relying upon the November contracts. Even in his further submissions, Mr Panesar leaves unchallenged the basis of the Claimants' claims founded upon the November contract for he simply submits that the November contract could not be enforced as respects LAFHA absent an agreement to the variation from the October LAFHA terms. The conditional cross appeal which he mounts is of course based upon the figures produced by the November contract only. It is implicit in Mr Panesar's submission that the language of the October contract serves to

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provide LAFHA payments on top of basic salary and this right is taken away by the November contract. Mr Pilgerstorfer maintained throughout that there was no difference in the LAFHA clauses in the October and November contracts. The intention of the parties was to include a notional LAFHA payment within the overall money going to the Claimants. The surrounding circumstances, the context, the factual matrix however it is put, for this stratagem was to present a tax efficient formula to the Australian authorities. That was what Ernst & Young had advised and that was what the tax briefing was all about. Of course there would be many things on the minds of the Claimants when considering work on the other side of the world, but the overwhelming weight of evidence about the explanation of the benefits to them focuses on an efficient payment system for the purposes of the tax authorities in Australia should they be liable for that, and in the UK where they would be liable to be taxed.

38. The premise of Mr Panesar's submission therefore is that there was unagreed variation of the contract of employment which took the form of the November contract. On the findings as we have held them of the Employment Tribunal, both Claimants had entered into contracts of employment by the October contracts. What they were being offered were revised contracts in November. The Tribunal found that they did not expect their employer to mislead them. Taking this baton and running with it, Mr Panesar contends that the LAFHA terms in the November contract should have no effect. In his supplementary submissions he contends that the doctrine in **L'Estrange v Graucob Ltd** [1934] 2 KB 394 does not apply to these signed contracts since the Respondent made "untrue statements". He contends that there was misrepresentation by the Respondent, and further that the doctrine on *non est factum* applies here. In other words, the signature on the foot of each of the contracts was not the act of the signatory because neither of them knew the material terms.

39. As to this, Mr Pilgerstorfer contends that new points have been raised by Mr Panesar and for the same reasons as we have found above that the Notice of Appeal may not be amended, we should not allow a back door amendment by way of the further post-hearing submissions. In succinct submissions Mr Pilgerstorfer contends that even if the Claimants can establish a misrepresentation of fact, the remedy is rescission. Misrepresentation was not pleaded and it was not relied upon. There has never been any contention that the contract should be rescinded. The plea of *non est factum* is bound to fail since the Claimants understood the legal character of the documents and the changes as to LAFHA were not so fundamental as to allow the doctrine to take effect.

40. In our judgment it is Mr Pilgerstorfer who now is correct on both the procedure and the substance. Again, the matter would require remission to the Tribunal if misrepresentation were to be pleaded and relied upon. It would in effect mean starting the case again. The correct legal approach seems to us to be as follows:

- (1) A party is bound by the written terms of a contract they have signed whether or not they have read them: see **L'Estrange**.
- (2) A party induced to enter a contract by misrepresentation is bound by it unless it is rescinded.
- (3) The right to rescission is qualified by section 2(2) of the **Misrepresentation Act**. It is by no means certain that had the Claimants pleaded this matter the remedy of rescission would have been awarded. Since **Autoclenz** it is the less likely to be awarded in an employment contract.
- (4) Rescission here is simply not possible since the parties cannot be put back by the court into their original positions. There are, as Mr Pilgerstorfer argues correctly, very substantial bars to rescission as a matter of fact in this case based on affirmation by the Claimants in that they have worked under the contracts and have performed all of the

terms binding upon them. The Respondents have received value for the money they have paid to the Claimants and there is a very substantial lapse of time.

41. It follows that since the route to rescission is not open to the Claimants for any of the above reasons the terms remain binding upon them.

42. As for the application of the doctrine of *non est factum*, the material authority is **Saunders v Anglia Building Society** [1971] AC 1004 HL. As Lord Reid (page 1015G-1017D) held, the plea when it is raised must be kept within narrow limits so as not to shake the confidence of those who rely on signatures. There is a heavy burden on the person seeking to invoke the remedy which is only available in very exceptional circumstances to a person of full capacity. The essence of the doctrine is that the person signed the document believing it had one character or effect completely different from what he or she signed. The plea is not available where the mistake was really a mistake as to the legal effect of the document.

43. The short answer to Mr Panesar's extra-time submission is that it involves effectively an amendment to the Notice of Appeal to raise points which were not the subject of adjudication or plea below. For the reasons we gave above we will not allow this. However, again lest we be wrong, the arguments against it would appear as a matter of substance to be insuperable.

Application of Autoclenz

44. We then turn to the principal finding of the Employment Tribunal as to the applicability of the law on the interpretation of contracts. A good deal was made of the judgment in **Autoclenz**. The Tribunal was correct to look for the reality of the agreement between the parties, and to search for that in the context and circumstances of the case starting with the written material. The major point of departure from **Autoclenz** occurs in our case because there

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was no allegation that the agreement was a sham. Indeed, neither the October nor the November agreement is asserted by the Claimants as an unenforceable agreement on the particular terms which favour them. Once the context in which the LAFHA terms were agreed is recognised – tax efficiency – the terms of the October and November contracts make complete sense. The Respondent did not force the Claimants to enter into the agreements and indeed it was said to them in writing that once they had fully understood the position at the 3 November meeting, they could withdraw if they wished. The Tribunal may have been distracted by its constant reference to the subjective views of the Claimants but in our judgment the Claimants had in mind the tax consequences of the arrangements they were making.

45. In his judgment in Autoclenz, with which all members of the Supreme Court agreed, Lord Clarke developed a more generous approach to the treatment of employment contracts from those of commercial contracts. He did this by reference to earlier judgments of different divisions of the Court of Appeal. He referred to “a valuable article by Alan Bogg” (see paragraph 28) on the requirements for a finding of sham in contracts of employment. In his turn, Mr Bogg himself analyses the judgment in Autoclenz in “*Sham self-employment in the Supreme Court*” 41 ILJ 328, an authoritative article extending to rather more words than the judgment itself. We agree with his analysis which was this:

“...Lord Clarke is keen to emphasise the normative differences between personal employment contracts as compared with ordinary or commercial contracts. This is reflected in the loosening of the signature rule and the parole evidence rule, the potential liberalisation of restrictions on the use of extrinsic evidence to interpret personal employment contracts, and the deployment of a purposive approach to construction and characterisation. This high judicial recognition of the need for contractual protection of vulnerable parties in the employment sphere means that the common law of personal employment contract is now something other than ‘commercialist or mercantilist, essentially committed to the values and techniques of private law in a narrow sense’.”

46. In our judgment, whilst seeking to apply Autoclenz the Employment Tribunal came to the wrong conclusion. It was not suggested that the document was a sham. Given our findings as to misrepresentation and *non est factum* those arguments would not lie either.

47. A simpler route to the solution of this case lies in the construction of the October contract. If the Respondent is correct in its submission that there is no difference between October and November, there is no basis for not applying it. While the wording may not be as clear as the Respondent may have wished it, it is clear enough to the Claimants for them to have relied upon the October agreement. Construing it on its own, and in the context of the tax efficiency it sought to promote, it cannot be said as the Claimants assert that the agreement was to make payments of LAFHA on top of salary. What the clauses mean, taken as a whole, is that for the purposes of tax structuring, the whole of the payment forthcoming to the Claimants will be presented and a notional figure within it will be earmarked to LAFHA in its two forms, food and accommodation, and those figures will not attract tax. That is the meaning of the index clauses in this appeal, since the Claimants complain that the November contract contains an express formulation in favour of the Respondent that they would not get LAFHA on top of basic pay, the two versions mean the same thing.

48. The dispute in the present case concerns a contract of 32 clauses. Whether in the October or the November version, only two provisions are in dispute: LAFHA and relocation. There is no systemic attack on the nature of the relationship. The Claimants were employed by QCCA and could take or leave the offer of secondment to the Respondent for two years as they expressly agreed in each of the contracts. They could take independent advice and were free to choose whether to take the offer of work in London. LAFHA and relocation terms were no doubt important but they are only a part of the contractual arrangements. The Claimants were provided with independent advice in the tax briefing and their trade union had negotiated terms and conditions relating to their employment at QCCA and the Respondent. The new contracts embodied those collective agreements. While not expert in employment law, or in tax, they

were uniformed members of the Respondent's air crew with very substantial responsibilities for passenger safety. They had their eyes open when they signed these agreements.

49. Let us compare them with the Autoclenz workers. Both counsel accept that Autoclenz provides important authority for the determination of the status of workers. That is not the issue here. The Respondent contends that it has only limited reach where there is not an allegation that the workers were subject to a sham contract. Throughout the judgments at all levels in Autoclenz there is reference to the status of "sub-contractors" suffusing the whole of the written materials. This was held to be unreal in that it did not embody the true agreement between the parties. In our judgment there is a significant difference as the Respondent submits between individuals terms which on the Claimants' case, and the Tribunal's findings, were not made known to them, and the contractual nature of the whole relationship between the parties.

50. Lord Clarke's judgment in Autoclenz accepts the correctness of the orthodox position relating to the applicability of a signed contract since he adopted in full the judgment of Aikens LJ in the Court of Appeal below (see para. 20 of Autoclenz). What he did was to adopt "a different approach" to employment contracts by reference to the judgment in the Court of Appeal below, Consistent Group Ltd v Kalwak [2007] IRLR 360 and Firthglow Ltd t/a Protectacoat v Szilagyi [2009] ICR 835. His conclusion was as follows:

"32. Aikens LJ stressed at paras 90-92 the importance of identifying what were the actual legal obligations of the parties. He expressly agreed with Smith LJ's analysis of the legal position in the *Szilagyi* case and in paras 47-53 in this case. In addition, he correctly warned against focusing on the "true intentions" or "true expectations" of the parties because of the risk of concentrating too much on what were the private intentions of the parties. He added:

'What the parties privately intended or expected (either before or after the contract was agreed) *may* be evidence of what, objectively discerned, was actually agreed between the parties: see Lord Hoffmann's speech in the *Chartbrook* case [2009] AC 1101, paras 64-65. But ultimately what matters is only what was agreed, either as set out in the written terms or, if it is alleged those terms are not accurate, what is proved to be their actual agreement at the time the contract was concluded. I accept, of course, that the agreement may not be express; it may be implied. But the court or tribunal's task is still to ascertain what was agreed.'

I agree.

33. At para 103 Sedley LJ said that he was entirely content to adopt the reasoning of Aikens LJ:

‘recognising as it does that while employment is a matter of contract, the factual matrix in which the contract is cast is not ordinarily the same as that of an arm’s length commercial contract.’

I agree.

34. The critical difference between this type of case and the ordinary commercial dispute is identified by Aikens LJ in para 92 as follows:

‘I respectfully agree with the view, emphasised by both Smith and Sedley LJJ, that the circumstances in which contracts relating to work or services are concluded are often very different from those in which commercial contracts between parties of equal bargaining power are agreed. I accept that, frequently, organisations which are offering work or requiring services to be provided by individuals are in a position to dictate the written terms which the other party has to accept. In practice, in this area of the law, it may be more common for a court or tribunal to have to investigate allegations that the written contract does not represent the actual terms agreed and the court or tribunal must be realistic and worldly wise when it does so.’

35. So the relative bargaining power of the parties must be taken into account in deciding whether the terms of any written agreement in truth represent what was agreed and the true agreement will often have to be gleaned from all the circumstances of the case, of which the written agreement is only a part. This may be described as a purposive approach to the problem. If so, I am content with that description.”

51. He went on to uphold the finding that the wording of the contract was simply window-dressing and “there was ample evidence on which the judge could find as he did that this was in truth an employment relationship”.

52. The true terms of the contract cannot depend on the subjective interpretation of the Claimants, - not only the Claimants’ impression but that of the group - yet the Employment Tribunal was much engaged with this argument. In essence the Claimants’ case is that they trusted their employer not to mislead them. It is implicit in their case that the October contract was neither misleading nor incorrect and delivered to them payments of LAFHA in addition to their salary. By parity of reasoning, the November contract denied them the add-on of the LAFHA payments. All other terms were properly agreed. The difference in clause 2 as to the length of the term was between 22-26 months (the October contract) and two years with a possible extension by mutual agreement (November). Otherwise it is to be assumed that the November terms reproduced the October terms.

53. Since we have found that the contention of the Claimants that they did not expect their employer to mislead them did not inure to a full-scale allegation of misrepresentation pleaded and tried, and since the circumstances set out in Autoclenz could not realistically be applied to this sophisticated group of air crew, there is no reason why their signature on the November contracts should not bind them. We appreciate that since Autoclenz, the suggestion of rectification will be less likely in an employment context but in our judgment it is not applicable anyway in this case given the absence of a finding that there was a common or unilateral mistake.

54. As a matter of construction we respectfully disagree with the Employment Tribunal's approach to the October contract. Clause 6.1 asserts that the total salary package includes LAFHA and clause 6.2 treats LAFHA as a component of the pay. Clause 7.1 asserts that no separate additional allowances will be paid and clause 7.3 asserts that the total gross remuneration package "includes the LAFHA". Those words when placed in the context of the recruitment exercise are not stultified. The Claimants are to receive their salary, part of which is earmarked as LAFHA which will provide a tax efficient benefit to them. Tax efficiency is achieved because it is presented as a payment for the additional costs of accommodation and food while working in London. It follows logically from the Claimants' case that the November contract does make that position clear. As a matter of construction we agree for there, again, there is express reference to the salary as including LAFHA: clause 6.1 and 7.3; and no separate allowances are payable: clause 7.1.

55. In our judgment the November contract represents the true agreement between the parties. If we are wrong and the Employment Tribunal was correct in upholding the October contract, the terms themselves, and the context in which they were agreed, do not as Ms Hooper

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asserts in her witness statement say “we would receive the LAFHA on top of our wage”. The word “includes” makes that untenable. We accept Mr Pilgerstorfer’s submission and this ground of appeal must be allowed.

Jurisdiction

56. The conclusion that there is no unlawful deduction makes the second ground unnecessary but we will deal with it as we have heard full argument. It follows from our finding that this term was about tax efficiency and the treatment of expenses for living away from home that Part II of the **Employment Rights Act 1996** does not apply. This is exempted by section 27. The salary includes an element of payment for the cost of living in London for a period of time. It follows from the fact that it is tax efficient and tax would not be levied upon it in Australia that this is in respect of expenses and not wages. We accept in full the submissions of Mr Pilgerstorfer to this effect. The Employment Tribunal in our judgment wrongly distinguished **Southwark London Borough v O’Brien** [1996] IRLR 420. It is important to apply the guidance of Mummery P in that case who emphasised that the payment was to be “in respect of” expenses and said the following:

“22. ...We would agree with Miss Moor to this extent; that if a payment, which is clearly not in the nature of expenses, is labelled ‘expenses’, it is open to the tribunal to conclude that ‘expenses’ is a misdescription of the payment made. But when asking, ‘Is the payment in respect of expenses incurred by the employee?’, it is not necessary for the payer to show that what he has paid is precisely a reimbursement of the sum expended by the worker. ‘In respect of’ means ‘referring to’ or ‘relating to’ or concerning in a general way, whereas the expression used by the chairman in his decision, ‘payment of expenses’, would appear (wrongly, in our view) to equate the statutory provision with reimbursement of a precise amount.

27. Our conclusion in this case is that a payment of a mileage allowance does not cease to be ‘in respect of’ expenses because it is found to be generous. The errors of law by the chairman are to equate payments ‘in respect of’ expenses with ‘payments of expenses’ and to treat generous expenses wholly as remuneration. Both conclusions are, in our view, wrong as a matter of law.”

57. In this case, the payments were properly to be regarded as payments in respect of expenses since it was a requirement that the Claimants relocate, there were higher costs of

living in London than in Australia, there is a direct link between those costs and the carrying out of their duties from the London base and the notional figures produced by the Respondent are based upon those additional costs.

58. On this ground too the Employment Tribunal erred for it did not have jurisdiction under Part II to make the award

Perversity

59. No additional grounds were advanced by Mr Pilgerstorfer in support of his perversity ground. In our judgment this matter can be dealt with as one of construction of the documents in the appropriate factual circumstances. Nothing is added by the conventional ground of perversity. This fails to reach the high hurdle imposed by **Yeboah v Crofton**: see above.

The cross appeal: relocation payments

60. Given our finding in support of the Appellant, it is now necessary for us to deal with the cross appeal. We can do so quite quickly. The Tribunal found that the entry of the higher figures for relocation in the November contract was a mistake which the Claimants knew about. The figures appear once correctly and once incorrectly in the November contract. In the light of the Q&A, the October contract, the tax briefing and the circumstances known to the Claimants that there was a mistake, as a matter of construction the higher figures are incorrect.

61. Since the Tribunal held that the correct document was the October contract, the Claimants cannot possibly mount an argument based upon the higher figures which occurred only in the November contract. Nor does the context assist them: they were never told anything other than that they would receive relocation payments of £4,000 and £1,000. It was only when

they saw the November contract that a different figure appeared, once. This mix and match approach of the Claimants is misconceived.

62. As to the November contract, there plainly was a mistake, as the Claimants knew. As a matter of construction, primary importance is to be given to the first place where the figures occur. Since the Claimants rely on the context of the Q&A, the October contract and the November tax briefing, the figures which they assert of £10,000 and £4,500 were not the agreed terms. It follows that the payment to both Claimants of the initial tranche for year 1 was correct and there has been no under payment. The claim under Part II of the Employment Rights Act in respect of this payment was correctly dismissed by the Employment Tribunal.

63. Separately, the Respondent contends that such payments were not “wages” for the purposes of Part II. We disagree. The tax treatment of LAFHA is at the forefront of all of the representations made to and by the Claimants. We have disagreed with the Employment Tribunal and held that those payments were in respect of expenses. The relocation payments are treated quite differently and from the outset it is acknowledged that they are taxable in full. They undoubtedly form part of the wages. It might have been possible to structure the package to make this aspect tax efficient but that was never done. These payments are, as they were accurately initially described in the Q&A, incentive payments to induce the Claimants to come to London. They are not payments of or in respect of expenses but of wages, a modest form of golden hello.

64. The Respondent also argues in respect of Ms Hooper that her claim for this was out of time. It is accepted that Ms Hooper received her payment on 25 November 2010 and so should have presented her claim by 24 February 2011. She did so on 28 June 2011. She complained of only one deduction. No claim was made in respect a failure by the Respondent to make the UKEAT/0106/12/SM

second payment which is not due until November 2012. The 2011 complaint therefore cannot have been in relation to a series of deductions but of only one. One might assume what the Respondent's approach would be to the second payment – in line with the construction we have given of both the October and November contracts – but as a matter of fact there has been no deduction from what was properly due on the expiry of year 2. As a matter of language this cannot constitute a series of deductions for there was only one. The Claimant was out of time. She did not assert that it was not reasonably practicable to make the claim within three months and so on this ground too the claim would fail, the Tribunal having no jurisdiction to deal with it.

Disposal

65. The Respondent's appeal on LAFHA is allowed. Since this is a matter of construction there is no need to refer the matter to the Employment Tribunal and we will dismiss the Claimants' claims. As to the cross-appeal on relocation payments, this became live in the light of the foregoing, and is dismissed. The Employment Tribunal's decision on this ground is upheld.