Appeal No. **UKEAT/1006/03/RN**
UKEAT/0005/04/RN
UKEAT/0006/04/RN

EMPLOYMENT APPEAL TRIBUNAL
58 VICTORIA EMBANKMENT, LONDON EC4Y 0DS

At the Tribunal
On 11 June 2004

Judgment delivered on **16 July 2004**

Before
THE HONOURABLE MR JUSTICE BEATSON
MR M CLANCY
MR J C SHRIGLEY

UKEAT/0005/04/RN

MR P S GILL APPELLANT

(1)FORD MOTOR COMPANY LTD
(2) MR S SINGH
(3) MR R KATECHIA
(4) MR S DHILLON
(5) MR J BISSEMBER RESPONDENTS

UKEAT/0006/04/RN
(1) MR S SINGH
(2) MR R KATECHIA
(3) MR S DHILLON
(4) MR J BISSEMBER APPELLANTS

(1)FORD MOTOR COMPANY LTD
(2) MR P S GILL RESPONDENTS

UKEAT/1006/03/RN
MR W G WONG & OTHERS APPELLANTS

BAE SYSTEMS OPERATIONS LIMITED RESPONDENT

Transcript of Proceedings

JUDGMENT
Revised

APPEARANCES

UKEAT/0005/04/RN
UKEAT/0006/04/RN

For the Appellants

MR A ROSS
(of Counsel)
Instructed by:
Messrs Rowley Ashworth
247 The Broadway
Wimbledon
London SW19 1SE

MR M WALSH
(of Counsel)
Instructed by:
Messrs Edward Duthie
Solicitors
292-294 Plashet Grove
East Ham
London E6 1EE

For the Respondent
MR I SCOTT
(of Counsel)
Instructed by:
Messrs Wragg & Co LLP
Solicitors
3 Waterhouse Square
142 Holborn
London EC1N 2SW
UKEAT/1006/03/RN
For the Appellants

MR A ROSS
(of Counsel)
Instructed by:
Messrs Rowley Ashworth
247 The Broadway
Wimbledon
London SW19 1SE

For the Respondent
MISS H BARNEY
(of Counsel)
Instructed by:
EES Yorkshire & Humberside
Fieldhead
Thorner
Leeds LS14 3DN

SUMMARY

Employment Tribunal wrong to conclude that jurisdiction under section 13 of Employment Rights Act 1996 amount ousted by section 14(1)(A) (purpose of deduction reimbursement in respect of overpayment of wages) or 14(5) (deduction made on amount of employee participation in a strike without making findings as to the precedent facts to the exclusion of jurisdiction under section 14(1)(a) and 14(5) Philips Components Ltd v Scott [2003] UKEAT 0609/01 followed.

THE HONOURABLE MR JUSTICE BEATSON

1. 1. These are appeals from the decisions of an Employment Tribunal in Stratford on 14 October 2003 and an Employment Tribunal in Manchester on 13 November 2003 that claims that deductions made from the wages of Mr Gill and 4 other employees of the Ford Motor Company and Mr Wong and 82 other employees of BAE Systems Operations Limited were unauthorised and fell outside the jurisdiction of the Employment Tribunal by virtue of section 14 of the Employment Rights Act 1996. In Mr Gill's case and others there is a cross-appeal by the Ford Motor Company Limited against the decision of the Tribunal that, but for the effect of section 14 of the 1996 Act, it would have had jurisdiction to hear the claims under section 13 of that Act. The company submits that in doing so the Tribunal misconstrued or misapplied the requirements of sections 13(1)(a) and (b) and 13(2) of the Act.

2. 2. The broad issue before us is thus the familiar one of the boundary of the jurisdiction of Employment Tribunals created by section 14 of the 1996 Act (which consolidated provisions previously in section 1(5) of the Wages Act 1986). May employees who claim that deductions from their wages are unauthorised seek relief in an Employment Tribunal or do they have to do so by instituting proceedings in the civil courts for breach of contract? The particular issue concerns what findings, if any, an Employment Tribunal has to make in considering whether it has jurisdiction. The Appellants submitted that, where the jurisdiction of a Tribunal depends on the existence of a particular state of facts, the Tribunal must enquire into the existence of the facts and make findings in order to decide whether it has jurisdiction. They argue that in the present case both Tribunals fell into error in neither so enquiring nor making findings of fact before concluding that they had no jurisdiction. They submitted that an important issue arises because, where the facts are disputed, to decline jurisdiction without making findings of fact would, in effect, allow a respondent to choose whether the Employment Tribunal or the County Court has jurisdiction by the form of its response to a claim. The Respondents argue that the Employment Tribunals were not required to make such findings of fact because this would involve them in determining the lawfulness of the deductions, a matter precluded on the authorities and which would defeat the purpose of section 14 of the Act.

THE FACTS

3. In Mr Gill's and others' case it was common ground before the Tribunal that, during the night shift which commenced at 10.30pm on 23 May 2002, unofficial industrial action took place by bringing the Respondent's assembly line to a halt. The following morning when 74 employees including the 5 Appellants attended work they were issued with letters stating that their behaviour amounted to "unconstitutional action" and that their pay would be stopped from midnight during the shift until they resumed work. They were also told they would lose their attendance supplement for the week. The Appellants deny that they took part in the unofficial industrial action, state they could not continue to work once the assembly line came to a halt, and they did not refuse to work.

4. In Mr Wong's case 83 manual workers employed by the Respondent brought claims in respect of deductions made from wages in April 2003 in connection with what the Respondent considers to be an overpayment of bonus made in the March 2003 wages payment. There had been an agreement in 2001 to make payments under what was known as the Gainshare Bonus Scheme, but the employers stated that the Scheme was not included in the 2002 agreement.

5. In both cases the Employment Tribunals accepted submissions by the employers that they had no jurisdiction. In Mr Gill's and others' case this was because of section 14(5), and, in Mr Wong's case, because of section 14(1)(a) of the 1996 Act.

The Legal Framework

6. The right not to suffer unauthorised deductions is contained in section 13 of the Employment Rights Act 1996. This provides:

> "13. - (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."

7. Section 13(1) thus imposes a general restriction on any deductions from wages by an employer. Section 14 disapplies section13 in a number of situations. Its material parts provide:

> "14. - (1) Section 13 does not apply to a deduction from a worker's wages made by his employer where the purpose of the deduction is the reimbursement of the employer in respect of-
> (a) an overpayment of wages, or
> (b) an overpayment in respect of expenses incurred by the worker in carrying out his employment,
> made (for any reason) by the employer to the worker.
> ... ...
> (5) Section 13 does not apply to a deduction from a worker's wages made by his employer where the worker has taken part in a strike or other industrial action and the deduction is made by the employer on account of the worker's having taken part in that strike or other action."

8. By section 23(1)(a) of the 1996 Act a worker may present a complaint to an Employment Tribunal that his employer has made a deduction from his wages in contravention of section 13.

The Decisions of the Tribunals

9. In Mr Gill's case and others' the Tribunal stated (paragraph 13) that it did not see how, as the Respondent had submitted, it would be possible to deal with a case on the basis of the jurisdictional submission merely because there is a provision in the contract entitling the employer to make deductions if the employee does not work. It stated:

> "If the employees raise a dispute as to whether or not they were available for work that factual issue requires resolution before it is possible to identify whether the deduction was lawful. Accordingly, on that issue the appropriate course of action for the tribunal would be to proceed to hear the merits of the claim."

This conclusion is the subject of the cross-appeal. The Tribunal, however, accepted the Respondent's submission that the application of Mr Gill and the others fell outside its jurisdiction by virtue of the provisions of section 14(5). It declined to hear evidence as to whether Mr Gill and the others took part in the "unconstitutional" action. It considered that it was not possible to conduct an investigation into whether a worker took part in a strike or other industrial action and stated (paragraph 14):

> "Once an employer makes a deduction on account of a worker having taken part in a strike or other industrial action, we found it impossible to see how the exception can be of any effect unless it covers at a basic level whether the employee took part in the action in question."

It also stated (paragraph 15) that:

> "it would not be possible to embark on an investigation into those facts without trespassing into exactly the area where Parliament has decided the Employment Tribunal should not be

involved. The lawfulness of a deduction made as a result of industrial action is clearly to be resolved in the County Court."

10. Earlier in its decision (paragraphs 6 and 11) the Tribunal had considered the decision in Sunderland Polytechnic v Evans [1993] IRLR 196 and in particular the extract from Hansard of what Mr Trippier, the Under Secretary of State for Employment, had said in Committee. Mr Tripper said:

> "If the worker believes that a deduction is not contractually authorised, his means of redress is the civil court for breach of contract, rather than an industrial tribunal. Such contentious and difficult problems where, as the Committee knows, emotions occasionally run high are best dealt with by the courts not industrial tribunals. Therefore deductions made as a result of industrial action should be separated from those deductions about which a complaint may be made to an industrial tribunal."

This Tribunal considered this to be the key portion of his statement. It also considered SIP (Industrial Products) v Swinn [1994] ICR 474 and in particular Mummery J's statement (at page 477) that the Tribunal has no jurisdiction to enquire into or determine the lawfulness of the deductions.

11. In Mr Wong's case the Employment Tribunal stated that it had no jurisdiction because of section 14(1)(a). It had before it (see paragraph 4 of its decision) the Originating Applications, the Notice of Appearance, and two bundles of documents. The documents included a letter from the Respondent to the Appellant dated 13 March 2003 stating that an overpayment had been made, sample letters to employees recording an agreement made in relation to the inconvenience caused by the deduction in wages and compensation to be paid, a 2001 agreement stating that the entitlement to Gainshare bonus payments lasts during its lifetime, a 2002 agreement which does not mention a continuation of the Gainshare bonus scheme, and documents indicating that no agreement had been reached to extend the terms of the 2001 Gainshare scheme. The Tribunal stated in paragraph 4 that it:

> "heard no evidence and made no findings of fact."

12. After considering the submissions (paragraphs 5-8) the Tribunal in Manchester concluded that, in the light of the decisions in Sunderland Polytechnic v Evans [1993] IRLR 196 and SIP (Industrial Products) Limited v Swinn [1994] ICR 473, section 14 is concerned with the cause of the deduction not its validity, and the Tribunal is not concerned with whether the deductions in question were lawful deductions (see paragraphs 10 and 12). It considered that the deductions in question fell within section 14(1)(a) of the 1996 Act because it was clear from the claim that the lead Appellant had received correspondence from the company stating he had been overpaid on the Gainshare bonus, that following negotiations an agreement had been reached that the employees in question would receive compensation of between £150 and £300, and that it was clear from this that the recoupment in April related to an overpayment of wages. Accordingly, it concluded that the application should be struck out as misconceived, that is the Applicants had no reasonable prospect of success.

GROUNDS OF APPEAL

13. In Mr Gill's case the grounds of appeal are:

i.The Tribunal misapplied and misconstrued section 14(5) of the 1996 Act. On a correct interpretation of section 14(5), a Tribunal is required to decide, as a question of fact, whether the appellant had taken part in any industrial action. The Tribunal should not have declined jurisdiction by refusing to decide this issue purely because, as in this case, the Respondent alleges that the Appellant did take part in industrial action. To decline jurisdiction for this reason amounts to allowing the Respondent, in effect, to decide that the Employment Tribunal has no jurisdiction. Such a decision is for the Employment Tribunal to take having examined the evidence and found the facts in the case before it.

ii.The Tribunal misdirected itself as to the meaning of section 14(1) of the 1996 Act by failing to distinguish the facts in Sunderland Polytechnic v Evans and SIP (Industrial Products) Limited v Swinn. In the Sunderland Polytechnic case it was common ground that the Applicant had taken part in industrial action. In the SIP case, which concerned section 14(1)(b), there was a finding of fact that there had been an overpayment because the Applicant had pleaded guilty to a charge of obtaining money from his employers by fraudulently altering his expense vouchers and receipts so as to engage section 14(1)(b).

iii.The Tribunal erred in law by making a finding for which there was no evidence before them since, while it was common ground that there had been industrial action within the factory, there was no admission and no evidence heard as to whether the Appellant had been part of the industrial action.

iv.In a separate notice of appeal by Messrs S Singh, R Katechia, S Dhillon, and J Bissember substantially the same grounds of appeal are advanced.

14. In Mr Wong's case the grounds of appeal are:

i. The Tribunal misapplied and misconstrued section 14(1) of the Employment Rights Act 1996 in deciding it had no jurisdiction to hear and decide whether there was an overpayment of wages in each case. On a correct interpretation of section 14(1)(a) the Tribunal is required to decide, as a question of fact, whether there was an overpayment of wages to each of the Appellants. The Tribunal should not decline jurisdiction by refusing to decide this issue purely because, as in this case the Respondent alleges the Appellants were overpaid wages. To decline jurisdiction for this reason amounts to allowing the Respondent, in effect, to choose which Court has jurisdiction. Such a decision is for the Employment Tribunal to take having examined the evidence and found the facts in the case.

ii. The Tribunal misdirected itself as to the meaning of section 14(1) by applying the wrong test in reliance on Sunderland Polytechnic v Evans and SIP (Industrial Products) Limited v Swinn by considering only the Respondent's allegation as to the cause of the admitted deduction or treating the allegation as determinative rather than considering whether there was, in fact, any overpayment.

iii. The Tribunal's decision was perverse in that, having directed themselves to consider the cause of the deduction, they failed to make any findings or hear any evidence as to the cause of the deduction and declined jurisdiction.

iv. The Tribunal misdirected itself as to the meaning of section 14(1) by failing to distinguish the facts in Sunderland Polytechnic v Evans and SIP (Industrial Products) Limited v Swinn because in Evans, where the relevant exception was section 14(5), it was common ground that the Applicant had taken part in industrial action and in Swinn, the Tribunal made a finding of fact that the Applicant had pleaded guilty to a charge of obtaining property by deception from his employers in respect of his expenses so as to engage section 14(1)(b).

v. There was no evidence that the Appellants had been overpaid by the Respondent. The Tribunal expressly made no findings of fact and heard no evidence from the parties.

THE APPELLANTS' SUBMISSIONS

15. Mr Ross appeared on behalf of the Appellants in Mr Wong's case and on behalf of Mr Gill. Mr Walsh appeared on behalf of the other Appellants in the appeal from the decision of the Employment Tribunal in Stratford.

16. They submitted that the issues raised by the Respondents in these two cases are ones of jurisdiction in the sense the term is used in Post Office Counters Limited v Malek [1991] ICR 355, 358; (see Sunderland Polytechnic v Evans at paragraph 19) and must be dealt with by the Employment Tribunal, normally at a preliminary hearing. There is, Mr Ross submitted, a public interest, beyond the interests of individual parties, that statutory Tribunals exercise the whole of but exceed none of the jurisdiction which Parliament has given them upon such facts as are approved or admitted before them; Glennie v Independent Magazines (UK Limited) [1999] IRLR 719 at paragraph 18, per Laws LJ. Where the jurisdiction of a Tribunal depends on the existence of a particular state of facts, the Tribunal must enquire into the existence of the facts in order to decide whether it has jurisdiction: Halsbury's Laws of England, volume 10, paragraph 314. It would be wrong for a tribunal to be able to state that it has no jurisdiction to hear a claim under section 13 of the Employment Rights Act 1996 without hearing evidence and investigating the circumstances: New Centurion Trust v Welch [1990] IRLR 123 at paragraph 15; Delaney v Staples [1991] IRLR 112, 114 (per Nicholls LJ).

17. Turning to the application of these principles, the Appellants submitted that the structure of each of the subsections of section 14 consists of three basic parts:

i. a reference that section 13 does not apply to "any deduction from a worker's wages";

ii. some connecting words, in the case of section 14(1), "where the purpose of", and in the case of section 14(5), "on account of";

iii. the operative words or "trigger event". In the case of section 14(1)(a) it is "an overpayment of wages", and in the case of section 14(5) it is that "the worker has taken part in a strike or other industrial action".

The Tribunal must decide whether this "trigger event", or, more conventionally "jurisdictional fact" has, in fact occurred in order to decide whether or not it has jurisdiction.

18. As well as the approach in New Centurion Trust v Welch and Delaney v Staples (see paragraph 16 of this judgment) the Appellants rely on Phillips Components Limited v Scott [2003] UKEAT/0609/01. That case concerned deductions made by employers claiming they were entitled to do so under an arrangement whereby employees who had previously been laid off but paid for the laid off shifts were to work additional hours after they returned to work (the "recovered shifts"). After the end of the financial year the employers made deductions from the wages those workers who had failed to work all the recovered shifts in lieu. They stated this was a reimbursement of an overpayment of wages. The employees brought claims under section 13. Two issues arose. The first was whether a collective agreement authorised a deduction from earnings for general overtime hours not worked. The second was whether the Employment Tribunal had jurisdiction. Before this Tribunal the employers argued that the deductions were in effect the recovery of overpayments of wages "excepted deductions" under section 14(1)(a) of the 1996 Act because employees who failed to work the additional hours (the "recovered shifts") had been overpaid by the amount paid for the laid off shifts for which they had failed to work recovered shifts in lieu. They, however, also argued that even if this was not so, it was sufficient if the purpose of the deduction was to recoup a sum which Phillips regarded as being overpaid. This Tribunal held that:

> "section 14(1), properly construed, requires there to have been an overpayment. The words "the purpose of the deduction was the reimbursement of the employer in respect of (a) an overpayment of wages" cannot properly be read as the purpose of the deduction was the reimbursement of the employer in respect of (a) a payment which the employer regarded as an overpayment of wages. There is no justification for such a reading and it is to be noted that in the cases of SIP and Sunderland upon which the appellant relies there had clearly been an overpayment. That is not so in this case on the findings we have made. Section14(1) does not therefore apply."

(paragraph 73)

19. The Appellants in Mr Wong's case submitted that this case is on all fours with Phillips Components Limited v Scott. The Appellants in Mr Gill's case submitted that its principle applies by analogy to the requirement that the worker has taken part in a strike or other

industrial action, a jurisdictional fact or trigger event under section 14(5).

20. In Mr Gill's case and others' the Appellants submitted that whether a particular employee was taking part in a strike or other industrial action is an objective question of fact for the Tribunal: see the statutory provisions now contained in section 238 of the Trade Union and Labour Relations Act 1992; Coates v Modern Methods and Materials Limited [1982] IRLR 318; Hindle Gears v McGinty [1984] IRLR 477. The Appellants in Mr Wong's case submitted that similarly the Tribunal was required to investigate what bonus was payable to the Appellants and that investigation is separate from the question of (a) whether the purpose of the deduction was the reimbursement of the employer because of that overpayment, and (b) whether the employer may contractually (i.e. lawfully) deduct wages as a result of that overpayment.

21. The Appellants in both cases submitted that the Tribunals misdirected themselves in relying on Sunderland Polytechnic v Evans and SIP (Industrial Products) Limited v Swinn because in both cases it was not in dispute that the "trigger event" precluding jurisdiction had in fact occurred. In Sunderland Polytechnic v Evans it was common ground that the applicant had taken part in industrial action. The dispute was whether the employer was contractually entitled to deduct a full day's pay when the applicant had taken part in only half a day of industrial action. In the SIP case it was accepted that the applicant had dishonestly claimed and received money from the employer by altering fuel receipts and the Tribunal had found this as a fact (see [1994] ICR 473-475 C-D]). The dispute in that case was as to whether notwithstanding his dishonest claim of expenses the wages retained were contractually due to him (see page 478C).

22. The Appellants submitted that if Parliament had intended that the Tribunal's jurisdiction should be ousted in circumstances in which an employer merely alleged the employee's involvement in industrial action, and that the deduction was made on account of such involvement, or that the employer merely alleged that there had been an overpayment of wages and that the purpose of the deduction was the reimbursement of the employer, it would have said so clearly. They submitted that any provision ousting jurisdiction of the Tribunal should be reinterpreted restrictively.

THE RESPONDENT'S SUBMISSIONS

23. In Mr Gill's case and others', Mr Scott on behalf of the Respondent Company submitted that the Tribunal made no error of law in finding that the application fell outside its jurisdiction by virtue of the provisions of section 14(5). The Tribunal had before it documents setting out the Respondent's position. It was not in issue that unconstitutional action had taken place on the night shift on 23 May 2002 and that the company made the deductions as a result of that action. Mr Scott submitted that for the Tribunal to investigate whether the Appellants were involved in that industrial action necessarily means investigating whether the money was payable. This involves consideration of the issue under section 13(3) of the 1996 Act, i.e. whether the total amount of the wages paid to the workers was less than the total amount of the wages properly payable to them on

that occasion after deductions. In turn this requires consideration of the lawfulness of the deductions. On the authorities, in particular Sunderland Polytechnic v Evans [1993] IRLR 196 and SIP (Industrial Products) Limited v Swinn [1994] ICR 474, the lawfulness of the deduction plays no part in the determination of whether section 14 applies so as to remove the Tribunal's jurisdiction in a particular case. In SIP (Industrial Products) Limited v Swinn this Tribunal stated, in relation to the provisions in section 1 of the Wages Act 1986, that:

> "Section 1(5) [now section 14 of the 1996 Act] disapplies the provisions of section 1(1) [now section 13 of the 1996 Act] in cases where there is 'any deduction' lawful or unlawful, falling within the specified categories. In those cases the Industrial Tribunal have no jurisdiction to enquire into or determine the issue of lawfulness or unlawfulness of the deduction..."

Mr Scott also relies on the Hansard extracts set out in the Sunderland Polytechnic case in particular that set out in paragraph 10 of this judgment. He submitted that the policy of what are now sections 13 and 14 of the Employment Rights Act was that deductions made as a result of industrial action should not be the subject of complaint to an Industrial Tribunal but should be brought before the County Court.

24. Mr Scott also submitted that, in SIP (Industrial Products) Limited v Swinn, the Employment Tribunal did not make a finding of fact that there had been an overpayment in respect of expenses. Accordingly, he argued that Mr Gill's case and others is on all fours with it and the Stratford Employment Tribunal was not required to make a finding of fact that the Appellants had taken part in the industrial action. Reliance was also placed on the recent decision of this Tribunal in Scott v Strathclyde Fire Board EATS/0050/03 given in Edinburgh on 26 April 2004. The deduction was plainly made on account of the Applicants' participation in industrial action. Burton P, delivering the judgment, stated:

> "If the section, section 14 is an exemptive section, it must be an exemption from something that otherwise falls within the generality of the provision within which it is an exception"

(paragraph 22).

He considered it was wholly unnecessary and contrary to the clear intention of the statute to read the word "lawful" into section 14(5). Citing Browne-Wilkinson P in Courtaulds Northern Spinning Limited v Moosa [1984] ICR 218, 224/5, Burton P stated that Parliament intended "to prevent [Employment] Tribunals from going into the merits or demerits of collective industrial action" (paragraph 23). He rejected the argument that the employer could have enquired into the deduction in that case without going into the merits or demerits or the nature or extent or indeed the duration of the industrial action in question. The Appeal Tribunal was not persuaded of this without knowing the full facts. The decision before it was (paragraph 25):

> "... not a decision which depends on the particular facts of a given case, but upon a construction of the statute; and what section 14(5) does is to remove this question from the ambit of

> the Employment Tribunal. One can entirely see, that, in the ordinary case, or the majority of cases, in order to resolve the issue whether there was an appropriate deduction - if appropriate is the right word - made by an employer in respect of an employee who had taken part in industrial action, questions will inevitably arise as to the extent of the action its nature and its duration, how far the particular employee was involved in it, whether he or she was only involved for 2 or 3 hours and not the whole day, or whether some part of what he or she was doing may not be described as strike but could be described as something short of a strike. The whole of that area, is, as we see it, plainly ruled out by section 14(5) once the employer shows, as is common ground in this case, that the deduction was made on account of the participation of the employee."

25. Mr Scott submitted that the Appellants' case invited this Tribunal to contemplate and indeed require the factual enquiry ruled out by the decision in Scott v Strathclyde Fire Board. He submitted that before the Employment Tribunal and in their grounds of appeal the Appellants were and are seeking to test the lawfulness of the deductions which were made pursuant to section 13 and to circumvent the purpose and effect of section 14 of the 1996 Act.

26. On behalf of BAE, Miss Barney submitted that there was no need for the Employment Tribunal to determine whether an overpayment was made. The Tribunal adopted the right approach since Sunderland Polytechnic v Evans, at paragraph 19, established that what had to be considered under section 14(1) was the purpose or cause of the deduction not its lawfulness or its amount. She submitted that a consideration of whether an overpayment has in fact been made intrinsically requires a determination of the lawfulness of the deduction. The Tribunal would have to determine as question of fact whether there was a contractual entitlement to the payment and, if so, whether the Respondent was permitted to make deduction. To enter into such an enquiry would, she argued, defeat the purpose of section 14(1) of the Act and the intention of Parliament.

27. Miss Barney also submitted that the Tribunal had properly determined whether the deduction fell within section 14(1) of the 1996 Act by taking into account not only the submissions of both the parties but the bundles of documents before it and in particular the documents referred to in paragraph 11 of this judgment. She submitted that those documents constituted a perfectly adequate basis for its decision and that this Tribunal should not interfere with it. No objection had been raised to the Tribunal's indication that it would consider the application to strike out the claim on jurisdictional grounds by oral submissions and reference to the documents before the Tribunal only. The Tribunal was entitled to regulate its own procedure, had acted in accordance with rules 7.1 and 15.1 of schedule 1 to the Employment Tribunal's (Constitution and Rules of Procedure) Regulations 2001 SI 2001/1171, and the decision not to hear witness evidence or to make findings as to the cause of the deduction was neither "certainly wrong", "not a permissible option", or "outrageous" so as to entitle this Tribunal to overturn the decision: see Stuart v Cleveland Guest (Engineering) Limited [1994] IRLR 440.

28. As to the authorities, Miss Barney submitted that the distinctions the appellants sought to draw between Mr Wong's case and those decisions are superficial. In Sunderland Polytechnic v Evans the Tribunal accepted the Applicant's contention that the Respondent was not entitled to deduct a full day's wages since she had in fact only been involved in half a day's strike. The Employment Appeal Tribunal overturned this on the ground that the Tribunal did not have the jurisdiction to determine the lawfulness of the deduction. In so doing, it rejected the Respondent's submission that an Employment Tribunal must satisfy itself that the deduction was "linked" to the trigger: (see paragraph 17 for the submission that was rejected). As for SIP (Industrial Products) Limited v Swinn, that case shows ([1994] ICR 473, 477) that the purpose of section 14 is to exclude jurisdiction. She argued that was no finding of fact by the Tribunal that there had been an overpayment in respect of expenses. She also relied on Scott v Strathclyde Fire Board (see above paragraphs 24 and 25).

CONCLUSIONS

29. The proposition that a Tribunal is not entitled to refuse to make findings to determine whether it has jurisdiction is well established. As well as the passage from Halsbury's Laws referred to in paragraph 16 of this judgment, see Wade and Forsyth, Administrative Law, 8th ed., (2000), page 284 discussing R v Marsham [1892] 1 QB 371. In R v Marsham it was held the refusal by a magistrate to receive evidence to show that the amount alleged to have been expended by a district board of works in paving a new street had not actually been expended or included items other than paving expenses, amounted to a refusal by the magistrate to exercise jurisdiction. The magistrate was held to have improperly refused to allow jurisdictional facts to be disputed.

30. It is common ground that the question whether section 14 is engaged goes to the jurisdiction of an Employment Tribunal: Sunderland Polytechnic v Evans. It remains to consider which the jurisdictional facts or, in the Appellants' terms, "trigger events" are in sections 14(1)(a) and 14(5). We consider that in section 14(1)(a) the jurisdictional fact is that there has been "an overpayment of wages", and in section 14(5) it is that "the worker has taken part in a strike or other industrial action". Only when these facts are established can a Tribunal look at the employer's motivation for the deduction, under section 14(1)(a) "the purpose of the deduction" as reimbursement of an overpayment of wages, and under section 14(5) that the deduction is made "on account of the worker's having taken part in that strike or other action". In the case of section 14(5) it does not suffice that a strike or other industrial action has taken place or that the employer considers that the worker who has suffered a deduction from his or her wages has taken part in the strike or other industrial action. What is crucial to the determination that the tribunal has no jurisdiction is whether the worker who has suffered a deduction has taken part in the strike or other industrial action.

31. In reaching this conclusion we take into account the fact that the statutory purpose behind the provisions now consolidated in the Employment Rights Act was to see that workers receive their wages in full at the time they are due and that employers may not make deductions save in specified circumstances: SIP (Industrial Products) Limited v Swinn [1994] ICR 473, 476C; Delaney v Staples [1991] IRLR 112

at paragraph 5. The carefully circumscribed limits to the jurisdiction of the Tribunal in section 14 would be avoided if a Tribunal was entitled to determine that it had no jurisdiction without making findings as to the existence of the jurisdictional questions. We accept the Appellants' submission that, where the facts are disputed, to decline jurisdiction without making findings of fact would, in effect, allow a respondent to choose whether the Employment Tribunal or the County Court has jurisdiction by the form of its response to a claim. Where the jurisdictional question is a pure question of law, the Tribunal will almost invariably be able to reach a decision on the basis of submissions. Where, however, the jurisdictional question at issue is factual and is contested, the Tribunal will generally have to have evidence before it upon which it can make the necessary finding of fact, and to make that finding of fact.

32. We do not consider that investigating the jurisdictional facts under section 14(1)(a) and 14(5) necessarily involves investigating the lawfulness of a deduction i.e. whether it is contractually authorised. This is clear in relation to section 14(5) where the jurisdictional fact is whether the particular workers claiming under section 13 have in fact taken part in a strike or other industrial action. Determining whether they have done so need not involve any consideration of the lawfulness of the deduction. Although the distinction is less bright in the case of section 14(1)(a), we consider that the question whether an employee in fact received an overpayment can be considered separately from the question whether the employer may contractually, i.e. lawfully, deduct wages as a result of that overpayment.

33. We do not consider that the decisions in Sunderland Polytechnic v Evans; SIP (Industrial Products) Limited v Swinn and Scott v Strathclyde Fire Board assist the Respondents in the present cases. In the Sunderland Polytechnic case it was not disputed that Mrs Evans had taken part in the strike. In the SIP case there was a finding by the Tribunal that after the employee was dismissed he was prosecuted and pleaded guilty to a charge of dishonestly obtaining money from his employers by deception: see [1994] ICR 473, 475C. The employees' unsuccessful argument that expenses dishonestly obtained which were the subject of criminal proceedings fell outside what is now section 14(1)(b) was rejected by the Tribunal because the overpayment was in respect of expenses incurred by the employee in carrying out his employment: see [1994] ICR 473, 477H-478A. The Appeal Tribunal accepted the employer's submission that the fact that the overpayment to the employee was secured by fraud or theft does not alter its character as an overpayment in respect of expenses incurred: see [1994] ICR 473, 476H. In Scott v Strathclyde Fire Board the deduction was plainly made on account of the applicants' participation in industrial action, and the statements in the decision of this tribunal referred to earlier in this judgment are made on the basis that the appellants in that case had participated in the industrial action. Accordingly, those cases were concerned with the question whether, as well as the jurisdictional facts expressly specified in the statutory provisions a further jurisdictional matter, i.e. whether the payment was unlawful in the sense of not being contractually authorised, should be implied. Those decisions held that no such implication should be made.

34. With regard to the Respondents' reliance on the extracts from Hansard, we note that Burton P in Scott v Strathclyde Fire Board

considered that section 14(5) was not ambiguous so as to justify the reliance on what was said in Parliament: see paragraph 21. He stated that "the reference to Hansard [in Sunderland Polytechnic v Evans] was in order to comfort Wood P in departing from his own earlier conclusion about what the purpose of Parliament had been...". We respectfully agree. In any event the passages in Hansard are not, in our view, of assistance to the respondents in the cases before us. First, the Ministers, Mr David Trippier and Lord Trefgarne, were concerned with situations in which a worker was in fact engaged in industrial action. Both Ministers start their statements with the words "If a worker is involved" in industrial action. It is clear that it is in such cases that the Ministers considered that the issues are best dealt with by the Courts and not Employment Tribunals. They did not consider the position where the involvement is disputed.

35. Moreover, the Respondents' submissions are inconsistent with the decision of this Tribunal in Phillips Components Limited v Scott [2003] EAT/0609/01 in which it was stated:

> "Section 14(1) properly construed, requires there to have been an overpayment. The words 'the purpose of the deduction was the reimbursement of the employer in respect of (a) an overpayment of wages' cannot properly be read as 'the purpose of the deduction was the reimbursement of the employer in respect of (a) a payment which the employer regarded as an overpayment of wages'."

(paragraph 73)

That is directly applicable in Mr Wong's case, which is concerned with the same provision. We accept that the principle is also applicable in Mr Gill's and others' case in relation to section 14(5). Section 14(5) cannot properly be read as stating that section 13 does not apply "... where an employer states that the worker has taken part in a strike or other industrial action...".

36. For these reasons we consider that the Tribunals fell into error in considering that the determination of the facts which by virtue of sections 14(1)(a) and 14(5) removed the jurisdiction of the Employment Tribunals would involve them having to consider whether the deductions were lawful in the sense of authorised by the employees' contracts. It follows that they should have found the facts before concluding that they had no jurisdiction: New Centurion Trust v Welch [1990] IRLR 123 at paragraph 15. It is clear that in Mr Gill's and others' case the Tribunal did not find any facts. Accordingly these cases must be remitted to another tribunal for this to be done.

37. In Mr Wong's case the position differs. Miss Barney submitted that the Tribunal did make findings on the basis of the documentary evidence before it. We agree that it is for a Tribunal to regulate its procedure and that, for the purposes of a preliminary hearing on jurisdiction, it might decide that in the circumstances before it, the matter could adequately be determined on the basis of documents. Had the Tribunal made a finding on the material before it as to the fact going to its jurisdiction, i.e. as to whether in this case there was an overpayment of wages, it is probable that, as Miss Barney submitted (see paragraph 6.2 of her skeleton argument), the Appellants would have been unable to demonstrate that the Tribunal had no evidence upon which

to base its decision. The evidence before it would in all probability have entitled the Tribunal to conclude that there was an overpayment. Our qualification arises because, in relation to a disputed jurisdictional fact, it may be that the Tribunal's discretion is narrower since a refusal to receive relevant evidence that a party wishes to adduce may amount to a refusal of jurisdiction: see the discussion in Wade and Forsyth's, Administrative Law, 8th ed., (2000), pages 266-267, 284 and 612. We need not explore this as, in Mr Wong's case, the Tribunal expressly stated that it made no findings of fact. It does not, moreover, appear that it refused to receive evidence the employees wished to adduce.

38. In the result the Tribunal made no finding of fact upon the question upon which its non-jurisdiction depended. This may have been because the Respondent's submissions (see paragraphs 5-6 of the Tribunal's decision) focussed on the purpose of the deduction and on the employees' entitlement to the bonus payments. Moreover, although the Applicants' representative submitted there had been no overpayment, it does not appear it was argued that in order to decline jurisdiction the Tribunal was required to make a finding that there was an overpayment of wages. For whatever reason, the Tribunal's conclusion in paragraph 12 that the deductions in question fall within section 14(1)(a) was made without the necessary finding of fact as to whether there had been an overpayment and thus a necessary finding for its conclusion that it did not have jurisdiction. We have stated that we consider that there may well have been sufficient material in the documents before the Tribunal to provide an evidential basis for a finding that there was an overpayment of wages. Nevertheless, the answer to the question whether there was an overpayment is not one upon which it is for us to usurp the function of the tribunal: O'Kelly v Trusthouse Forte [1984] 1 QB 90. Accordingly since the Tribunal has categorically not made a finding on the matter, the case must be remitted to another tribunal for this to be done.

THE CROSS-APPEAL

39. In Mr Gill's case and others', the Respondent cross-appeals against the Tribunal finding that it would have had jurisdiction to hear the Appellants' claims under section 13 but for the effect of section 14 of the 1996 Act. The Respondent submitted that the Tribunal misconstrued the requirements of sections 13(1)(a) and 13(2) of the Act. Mr Scott submitted that the right set out in section 13(1) is limited in respect of authorised deductions which fulfil the requirements of section 13(1)(a) or (b) read together with section 13(2). He submitted that, if a deduction is authorised pursuant to sections 13(1)(a) or (b) and 13(2), it does not fall to be considered under section 13(3). By section 13(1)(a) an employer is empowered to make a deduction from wages where the deduction is authorised by a relevant provision of the worker's contract. Mr Scott submitted that there were terms in the Appellants' contracts which provided that they would be paid only for time when they were available for work. This submission in effect seeks to erect the requirements of section13(1)(a) and (b) as additional matters going to the jurisdiction of an Employment Tribunal.

40. We consider this to be wholly misconceived. Jurisdiction is specifically conferred on Employment Tribunals where a worker complains

that his employer has made a deduction from his wages in contravention of section 13 by section 23(1)(a) of the 1996 Act: see also SIP (Industrial Products) Limited v Swinn [1994] ICR 473-477. While section 13(1)(a) and (b) provide defences to a claim that an unauthorised deduction has been made, they do not go to the jurisdiction of the Employment Tribunal. The argument that they do is inconsistent with the statutory structure by which the jurisdictional limits to the Employment Tribunal in respect of deductions of wages are set out in section 14 under the heading "excepted deductions". We do not consider that the Tribunal fell into error in concluding that no jurisdictional issue arises merely because there is a provision in the workers' contract entitling an employer to make a deduction if the employee does not work and that the issue is a factual one which requires resolution by the Tribunal. Mr Scott valiantly sought to distinguish the case of Fairfield v Skinner [1993] IRLR 4 but we consider it to be authority against the proposition upon which the cross-appeal is based.

CONCLUSIONS

For the reasons given above we allow the appeals in both the cases and remit them to differently constituted Tribunals for a hearing of the questions going to their jurisdiction. That is, in the case of Mr Gill and the others, whether the Appellants had taken part in the industrial action on the night of 23 May 2002, and in the case of Mr Wong, whether the payment made in March 2003 was an overpayment of wages. In Mr Gill's case we dismiss the cross-appeal.