No, a claim cannot be brought for a quantum meruit under the unlawful deductions from wages jurisdiction, EAT confirms, but an employee may have a good claim in the ordinary courts

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***Abellio East Midlands Ltd v Mr K Thomas* [2022] EAT 20**

1. This appeal considered whether a claim can be brought for a quantum meruit under the unlawful deductions from wages jurisdiction in Part II of the Employment Rights Act 1996 ("ERA"). The Claimant was offered a new Area Manager role by his employer in Nottingham and told he would receive an increased salary to reflect the greater responsibilities in that role. However, there was no agreement about the specific amount of the increased salary when he accepted the new role and began a one-month handover period. It was then agreed that the Claimant's salary should be increased to £52,000 per annum, subject to agreement from HR, but subsequently HR indicated it would only agree to increase his pay to £48,000 per annum. In the event, the Claimant's employment terminated without agreement as to his salary.

2. Before the ET, the Respondent submitted that there never was any concluded agreement to increase the Claimant's wages to any new sum, so the wages properly payable to the Claimant were those under his existing salary of £42,000. However, the Claimant submitted *inter alia* that he had a right to a quantum meruit for the services he provided in the new Area Manager role, which fell within the definition of wages in section 27 of ERA. The EJ upheld that submission, reasoning that both parties realised and accepted that the Area Manager position was an entirely different position carrying a salary with it of £52,000 per annum, evidenced not only by what was paid to the previous incumbent, but also it had been valued at that level under a Hay evaluation survey and the Respondent had advertised the position subsequently at that higher salary. The EJ decided the Claimant was entitled to be paid

£52,000 a year, payable from the time that he took up the position, and the non-payment of the difference in wages amounted to an unlawful deduction of wages.

3. Claims for unlawful deductions from wages are brought under Part II of the ERA. The EAT (Michael Ford QC, Deputy Judge of the High Court) considered that, as a starting point, the provisions of Part II should be given a broad and inclusive interpretation, in light of the statutory purpose of protecting workers against arbitrary deductions which deprive them of the substance of their earning; the wording of section 27 ERA defines wages in broad and inclusive language, as *"any sums payable to the worker in connection with his employment...whether payable under his contract or otherwise".* In *Delaney v Staples* [1992] 1 AC 687, Lord Browne-Wilkinson described the words *"in connection with employment"* as *"very wide":* 694H. Thus, while the individual must be or have been a "worker" within the meaning of section 230 ERA, and so must have a contractual relationship to bring a claim in the first place, the source of the payment itself need not be contractual. An example in this category are the sums due as payments for annual leave under the Working Time Regulations 1998, which were held in *Stringer* to fall within the definition of wages in section 27.

4. The EAT observed that these were considerations which provide some support for an argument that unjust enrichment claims potentially fall within the scope of Part II of ERA and as a matter of policy, there was something to be said for enabling such claims to be brought in the relative informality of the employment tribunal. However, the EAT found, part II is not indefinitely elastic, and the authorities provide some guidance on where the boundary line is to be drawn. In *Delaney v Staples,* the House of Lords held that a payment in lieu of notice did not fall within the meaning of "wages" in the predecessor legislation.

5. As for whether a quantum meruit falls within Part II, the EAT considered that a quantum meruit does not fit readily into the *Delaney v Staples* 'basic concept' of wages: the *"essential characteristic of wages is that they are consideration for work done or to be done under a contract of employment"* (at 692B). On one view, that is not necessarily fatal to the claim - claims for sums due under the Working Time Regulations are, strictly, not due under contract. In *Stringer,* however, Lord Rodger held that such payments were consideration for work done under the contract of employment and so met the essential characteristics of wages identified by Lord Browne-Wilkinson in *Delaney* [24]-[25]. A quantum meruit, on the other hand, falls outside the *Delaney* core conception of wages, does not appear to fall within any of the items listed in section 27(1)(a)-(f) ERA, and appears to be dissimilar to the other types of payments listed in that subsection.

6. The EAT concluded that a quantum meruit does *not* fall within the statutory concept of "wages" in section 27. Other considerations reinforced that view: it will frequently be very difficult to identify the "occasion" on which such sums were "properly payable", it will typically be difficult to identify any quantifiable sum which is "properly payable" prior to its quantification by the court based on *ex post facto* evidence, and to hold that unjust enrichment claims could be brought under Part II would take ETs into, for them, uncharted waters - the doctrine involves much case law, may require expert evidence and has special pleading rules – which, in the absence of any express reference to unjust enrichment claims in section 27 of ERA, the EAT doubted that parliament had intended.

7. The consequence, the EAT observed, is that that any claim for a quantum meruit could be, and should have been, brought in the ordinary courts, but not in the employment tribunal. However, the EAT considered the claimant's claim for a quantum meruit *did* have merit. The EAT found that the principle that a quantum meruit may be payable where work goes beyond the scope of an existing contract, was the basis of the judgment of the Court of Appeal in *Cooke v Hopper*. In the instant case, the ET had found that the work the Claimant did at Nottingham was in an 'entirely different' position which, the EAT held, was a sufficient finding that the work being done in that role was necessarily outside the scope of the original, subsisting contract. The claimant was still working as an Area Manager but, at the respondent's request, in a different position at a different location and with additional responsibilities which entailed changes to his existing terms and conditions.

8. This appeal highlights a problem which may arise if an employee is permitted to start a new role for an employer, carrying greater responsibilities, before the details of the new salary are agreed. Employers should not assume that the employee has no right to any additional payment unless and until the salary details are agreed, since the doctrine of unjust enrichment could apply. However, where an employee seeks to bring a quantum meruit claim in the ordinary courts, neither party will have the benefit of the relative informality of the employment tribunal, the issues are likely to be legally complex as the doctrine of unjust enrichment involves much case law and has special pleading rules, expert evidence may be required, and the costs are likely to be higher and often prohibitive.

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