EMPLOYMENT TRIBUNALS

Claimant: **Mr Gurdial Singh**

Respondent: **Singh Sabha London East**

Heard at: **East London Hearing Centre**

On: **9-10 and 28-30 March 2023; and**
In chambers on 31 March 2023

Before: **Employment Judge Massarella**

Representation
Claimant: Mr S. Singh (lay representative)
Respondent: Ms Calder (counsel) on days 1 and 2; Mr Bansal (solicitor) on days 3-5
Punjabi interpreter: Mr Saleem on days 1 and 2; Ms Deusi on days 3-5

RESERVED JUDGMENT

The judgment of the Tribunal is that: -

1. **the Claimant was an employee of the Respondent within the meaning of section 230(1) of the Employment Rights Act 1996 throughout the period of his work for the Respondent, from 2 July 2018 to 4 July 2022;**

2. **the contract of employment was illegally performed;**

3. **for this reason, the Claimant's claims are dismissed in their entirety.**

REASONS

Procedural history

1. The claim form was presented on 29 September 2021, after an ACAS early conciliation period between 19 August 2021 and 3 September 2021.

2. The final hearing was due to begin on 23 February 2022. It was postponed at the hearing by EJ Allen, owing to the Claimant's ill-health. She relisted it for 30 June and 1 July 2022 and gave orders for disclosure and preparation of bundles.

3. On 30 June 2022, the case came before EJ Feeny for final hearing. The Respondent applied to strike out the Claimant's case on the ground that the Claimant, through his daughter who had represented him at the hearing before EJ Allen, had misled the Judge when she stated that the Claimant was self-isolating owing to a positive Covid test. EJ Feeny found that she had done so, and that it was unreasonable conduct of the proceedings, but he did not strike the claim out because he concluded it was not material to EJ Allen's decision, which was taken by reference to the Claimant's mental health. On his part, the Claimant raised disclosure failures by the Respondent. EJ Feeny gave a strike-out warning against the Respondent and relisted the final hearing for 3 and 4 November 2022.

4. On 3 November 2022, the case came before EJ Hallen. The Respondent did not attend. Mr Bansal, the Respondent's solicitor, attended by phone and said that he had noted the wrong dates of the hearing. He could not attend as he was out of the country. He applied for the hearing to be postponed. He was ordered to attend by CVP. He explained that Counsel who had been booked for the hearing was not available that day and the Respondent's main witness, Mr Bassi, was also unavailable as he had booked a pilgrimage to Pakistan; he would not be returning until 10 November 2022. The bundle of documents was still not complete. EJ Hallen reluctantly granted the postponement application, recording that the postponement was entirely Mr Bansal's fault. He relisted the case for 9 and 10 March 2023 and gave further orders for preparation for that hearing.

5. EJ Hallen also clarified the Claimant's case at paragraph 8 of his summary:

> 'In relation to the issues to be determined by the Tribunal hearing the matter, the Claimant confirmed that he was claiming that as a worker or an employee as defined by section 230 of the Employment Rights Act 1996 ('ERA'), he was entitled to receive the national minimum wage and holiday pay for the entirety of his employment from 1 July 2018 to 4 July 2021. He asserted that he was either a worker or an employee as defined and that he worked 15 hours per day seven days a week for the entire duration of his employment and was entitled to receive holiday pay as well as national minimum wages for the hours that he worked during the course of his employment. The Tribunal at the substantive hearing would have to determine whether the Claimant was either a worker or employee and if so whether he was entitled to these payments. In addition, the Claimant asserted that he had been dismissed in the absence of statutory notice or a payment in lieu of statutory notice. He claimed that he was entitled to 3 weeks' pay in lieu of statutory notice as he was dismissed without reason by the Respondent. The Tribunal will have to determine the reason for dismissal and whether the Claimant was entitled to 3 weeks' statutory notice. Furthermore, the Claimant asserted that he was an employee and that he was unfairly dismissed without reason or just cause. The Tribunal will have to ascertain the reason for dismissal and whether the Claimant was dismissed for a legitimate reason under section 98 of the ERA and

whether a fair procedure was followed in terminating the Claimant's employment. The Respondent asserted that the Claimant was not dismissed but verbally resigned from his service with the Respondent. If the Tribunal did not find that there was a verbal resignation, the Respondent submitted that the reason for dismissal was misconduct and that it followed a fair procedure. The Tribunal will have to determine whether the Claimant was dismissed or whether he resigned voluntarily and if he did not resign voluntarily whether he was dismissed and the reason for such dismissal. Furthermore, the Tribunal will have to ascertain whether a fair procedure was followed in terminating the Claimant by reason of misconduct. The hearing on 9 and 10 March 2023 will consider liability only.'

The final hearing

6. The first day of the final hearing was spent making further case management arrangements. The Respondent's solicitor had only provided the Tribunal with one copy of the bundle (which was more than 1,700 pages long and mostly unpaginated). Counsel informed me that she had received the bundle late in the day and was concerned that she had not had a proper opportunity to consider it and take instructions from her clients. Mr Bansal was travelling that day to Barcelona and was unavailable to assist. She was considering withdrawing. She made an application to postpone the hearing in its entirety. I was reluctant to grant the application, given the procedural history.

7. After some discussion, I adjourned for the day to allow the Respondent to sort out the bundles, provide a proper copy to the Claimant's representative and bring copies for the Tribunal at 9 a.m. on the second day. Counsel would have the rest of the afternoon to take instructions from her clients. I would hear evidence from the Respondent's main witness, Mr Bassi (meaning that Counsel would not have to cross-examine). I also listed three further days on the first available dates at the end of the month (28-30 March 2023). Counsel said that she was not available for those dates but was confident that Mr Bansal would be able to find alternative representation. I emphasised the importance of her taking a good note of the first day of evidence, which she could pass on to her successor. No objection was raised by or on behalf of the Respondent to proceeding in this way. Counsel did not withdraw.

8. At the beginning of the second day, I spent some time with Counsel clarifying the Respondent's position in relation to the core issues. I gave her a further opportunity to take instructions on matters where there appeared to be some uncertainty. The outcome of that discussion was as follows. The Respondent's case was:

    8.1. that the Claimant was neither an employee nor a worker, but an independent contractor;

    8.2. he was not dismissed, but resigned;

    8.3. if the Tribunal finds that he was dismissed, the Respondent will argue in the alternative that the dismissal was for a fair reason, namely his conduct on 2, 3 and 5 July, which it regarded as gross misconduct; and that the dismissal was fair in all the circumstances; the dismissal was

by way of a letter (undated, but included in the bundle) sent by the Respondent's solicitor to the Claimant on the instructions of Mr Bassi;

8.4. if the Tribunal finds that he was unfairly dismissed, the Respondent will argue that there was a chance that he would have been fairly dismissed in any event (*Polkey*); and that he contributed to his dismissal by the conduct set out above;

8.5. the Respondent accepts that it did not pay notice pay; it contends that it was entitled to dismiss without notice because of the Claimant's gross misconduct (see above);

8.6. as for annual leave, the respondent accepts that it did not allow the Claimant to take paid holiday; if he is found to be a worker or an employee, it accepts that it has not paid him in respect of accrued but untaken holiday;

8.7. if he is found to be a worker or an employee, the Respondent maintains that he was paid the national minimum wage.

9. I stated that I would determine liability in relation to all these matters and would hear evidence on *Polkey* and contribution. I then began to hear evidence from Mr Bassi. I allowed Counsel to ask supplementary questions on employment status, which was scarcely touched on in the witness statement.

10. Shortly before we broke for lunch, the Tribunal clerk came to the hearing room and handed me an email, which the Claimant's lay representative, Mr S. Singh, had sent to the Tribunal at 02:17 that day, saying that when he returned home the previous day, he discovered that his wife had tested positive for Covid. He asked in the email: 'should I come to the court as there is Covid at home?'

11. The email was not passed to me at the beginning of the day and Mr Singh did not mention it when he arrived. Counsel, who has vulnerable individuals at home, was concerned that she had been sharing a room with him all morning, including looking at CCTV evidence over the same laptop screen. The Tribunal proposed that Mr Singh be moved to a separate room, attending remotely, but Counsel was not prepared to return to the hearing room, in which the observers who had been accompanying Mr Singh would be present.

12. There was an additional problem, which was that Mr Bassi was leaving the country for several weeks the following Monday and would not be able to attend the days I had listed at the end of March to complete his evidence.

13. I considered I had no alternative but to adjourn the hearing. I listed a telephone preliminary hearing later the same day, at which I confirmed that I would hear from the other Respondent witness and from the Claimant and his witnesses on 28-30 March 2023. I listed a further two days (4 and 5 May 2023) to conclude Mr Bassi's evidence, hear submissions, deliberate and give judgment.

14. At the resumed hearing on 28 March 2023, the Respondent was represented by Mr Bansal. There was no application to postpone the hearing. Earlier the same morning, Mr Bansal had written to the Tribunal, attaching a short letter from Mr Bassi's GP, which said that he was 'known to have cognitive impairment, which had been gradually getting worse' and that 'his short-term memory is now very poor'. The letter concluded: 'in my opinion he will not be a

suitable witness in court due to his condition and should be exempt to participate in the court hearing in future.'[1]

15. Mr Singh queried whether this was a tactic on the Respondent's part (Mr Bassi's evidence had been unhelpful to the Respondent's case in certain respects). I explained that Mr Bassi had given the evidence he had given; there was no application that I should disregard it entirely; it would be open to both parties to make submissions as to the weight I should give to it in view of the medical evidence and/or what interpretation I should put on the fact that this issue was not raised before Mr Bassi began to give evidence.

16. In the event, neither party made any submissions. I took into account Mr Bassi's written statement (about which no concerns had been raised) and treated his oral evidence with a degree of caution. In the event, Mr Narwal covered much of the same ground.

17. At the end of the third day, after hearing from Mr Narwal, who confirmed that the Respondent paid no tax and National Insurance on the Claimants income from the temple, I asked the Claimant's representative whether the Claimant had submitted a tax return and paid tax on any of his income from the temple. They confirmed that he had not. I mentioned the doctrine of illegality and suggested that the parties might wish to do some legal research overnight.

18. At the beginning of the fourth day, I gave the parties an extract from Tolley's Employment Law Handbook, summarising the relevant principles of illegality. I explained that, although I had not made up my mind about the case one way or the other, I was obliged to give a clear warning about the possible consequences of the fact that neither party had paid tax or national insurance on the Claimant's income from the temple. If I found that the Claimant worked under an employment or worker contract which was illegally performed, it was possible that I may dismiss all the claims for that reason. The reasons would be contained in a public judgment. My understanding was that HMRC sometimes takes an interest in Tribunal cases, especially where they concern disputes about employment status. I also explained that, given that I might make a finding of tax evasion (a criminal offence in certain circumstances) by one or both of the parties, witnesses would not be obliged to answer a question, if doing so might incriminate them in any future criminal proceedings.

19. I then gave the parties some time to consider their respective positions. After about half an hour they returned and confirmed that they wished to proceed. None of the witnesses who subsequently gave evidence, including the Claimant, declined to answer any questions.

20. At the beginning of the last day of the hearing, I was informed by my clerk that the Claimant's representative had made an allegation of witness intimidation of two of the Claimant's witnesses by two of the Respondent's observers. The observers were said to have taken pictures and videos of the witnesses in the ground floor reception area and used words to the effect that they would 'see them later' and 'sort you lot out'. They then left the building. The Claimant's representative said that there had also been an incident the day before, involving a third Respondent observer allegedly threatening the Claimant. That

[1] Quotations from contemporaneous documents are shown in their original form

observer was still in the building. I was told that the witnesses were upset and feeling nervous about giving evidence.

21. I explained to the parties that conduct of the sort alleged was completely unacceptable and that I would take immediate action if there was any repeat of it, including considering whether the Respondent's defence should be struck out for unreasonable conduct of the proceedings. I asked Mr Bansal to consider whether he wished to ask the third observer to leave the building, since his presence was not necessary. Mr Bansal did so. I gave the Claimant's representative an opportunity to speak to the witnesses to ask them if there were any further steps they asked me to take to reassure them; if not, whether they were still willing to give evidence. After a short break he confirmed that they were willing to proceed and were not asking me to take any further action at that stage.

22. Over the five days of the hearing I heard evidence from the following witnesses on behalf of the Claimant:

    22.1. the Claimant, Mr Gurdial Singh;

    22.2. Ms Manpreet Kaur (the Claimant's daughter);

    22.3. Mr Sarbjeet Singh (the Claimant's son);

    22.4. Mr Urvinder Singh (the Claimant's son-in-law);

    22.5. Mrs Gurmeet Singh (the Claimant's wife); and

    22.6. Mr Manmohan Singh Kundi (friend of the Claimant);

    and on behalf of the Respondent from:

    22.7. Mr Major Singh Bassi (President of the Respondent's executive committee at the material time); and

    22.8. Mr Karnal Singh Narwal (Vice President of the Respondent's executive committee).

Findings of fact

23. I record at this point that the quality of the evidence presented by both parties was in many respects unsatisfactory: relevant contemporaneous documents were few (despite the size of the bundle) and I was mostly reliant on competing oral accounts; I formed the view that all the witnesses I heard from were, at one point or other in their evidence, evasive or self-serving. I have considered the evidence carefully, such as it was presented to me, and made my findings, and reached conclusions, on the balance of probabilities.

<u>The Claimant's appointment and the contract</u>

24. The Claimant worked as head Granthi at the Singh Sabha London East Gurdwara in Barking ('the temple') from 2 July 2018 to 4 July 2022. The parties referred to the Claimant throughout the proceedings as the 'head priest of the temple'. I adopt that language in this judgment.

25. Shortly before he was appointed, the Claimant was interviewed by members of the temple's executive committee, including Mr M.S. Bassi and Mr K.S. Narwal. Both parties agree that they entered into a contract which remained in force throughout the material period. There is no contemporaneous record of the meeting. There was some suggestion (by Mr Narwal) that such agreements were usually in writing and retained, which is consistent with the clause in the constitution quoted in the next paragraph. If there was such a document, it was not adduced by either party.

26. The Respondent's constitution referred to priests as employees:

> 'EMPLOYEES
>
> A Granthi and any other employee of the Sabha shall be appointed under the terms agreed in writing between the Executive Committee and the employee concerned. No appointment or sponsorship is made without the approval of the Executive Committee.'

27. Mr Narwal's evidence as to this was equivocal: at one point he stated that 'normally priests are contracted as self-employed … they are hired, they are given wages, but they are self-employed'; he then said 'when there is a need we do employ them'; he also said that at one point that the executive committee had made 'an offer' to the priests, but the priests had said they were happy to remain self-employed 'because they were making a loss otherwise'. Asked what that 'offer' consisted of, Mr Narwal was evasive. I infer that it was an offer of a formal contract of employment.

28. I find that it was agreed at the outset between the parties that the Claimant would be treated as being 'self-employed'. The precise status of that self-employment (in terms of the categories in UK employment law) was probably not discussed. I think it unlikely that the terms 'independent contractor' or 'worker' was used by either party.

29. It was also agreed that he would be paid a monthly basic wage of £390.

30. I find it was agreed from the outset that the Claimant would be responsible for his own tax affairs. The Claimant's evidence was that he was told by the executive committee that the Respondent would be responsible for paying tax and national insurance on his behalf. I find that was not said. I found his evidence on this issue implausible for reasons which I will return to later in this judgement. At this stage, I record that there was no mention of PAYE anywhere in the documents before me; the Claimant did not receive a single payslip, nor a P60 or P45. I think it very likely that it was his preference to receive his income from the temple gross and that the Respondent was content to proceed on that basis.

31. I am satisfied that there was no imbalance of power between the Claimant and the Respondent in reaching this agreement. If anything, the Claimant may have had the upper hand because the Respondent an experienced priest, most of whom had to be recruited from India to work in the UK. There is no evidence that he was persuaded to agree to anything which was not to his liking.

Hours of work and duties

32. The Respondent accepts that it was obliged to offer the Claimant work seven days a week. The Claimant was obliged to attend the temple every day.

33. His core hours of work were between 5.30 a.m. and 8 p.m., although he might be required to work outside those hours, for example during the ritual of Akhand Path, which lasts for more than 48-hours, day and night.

34. He worked long hours but did not have to be present all day. The Respondent effectively delegated to him the management of his hours and those of his fellow priests. He coordinated the fair division of work between all four priests, including himself; he was effectively the supervisor, and he arranged the rota.

35. At least two priests were required to be present at the beginning and end of each day to conduct the opening and closing ceremonies. At least one priest was required to be present in the temple at all times. The priests, including the Claimant, were obliged to conduct the ceremonies, such as weddings and funerals (referred to by the parties as 'programmes'), which were booked on any given day. They were also required to perform such duties as were requested of them by members of the community, such as blessings and prayers.

36. The Claimant was free to leave the temple to attend to other matters when he was not needed to carry out duties or programmes according to his schedule. While at the temple, the Claimant and the other priests could take rest breaks. They could sleep, if they wished, in the shared accommodation provided by the temple.

37. The Claimant needed the Respondent's permission to be absent from the temple altogether on any given day or to take a period of leave. He took three weeks' holiday at one point (the dates were not specified). He notified the Respondent, and permission was given. He arranged for another priest to cover him during his absence, for whom he vouched. Had the Respondent thought that person unsuitable, it would have rejected him and made its own arrangements. The Respondent paid the replacement priest directly. It did not pay the Claimant during his absence. The Respondent accepts that it did not provide for the priests to take paid holiday.

38. The Claimant was not permitted to work for other temples. He was, however, permitted to go to the houses of members of the temple's own community to conduct private ceremonies. This was done with the knowledge and approval of the Respondent, often at its request. The Claimant was paid in cash for these duties directly by members of the community, with no requirement to account to the Respondent for the sums received.

Remuneration

39. The Respondent paid to the Claimant a £390 basic wage monthly, without deductions for tax or national insurance, sometimes in cash and sometimes by cheque. These payments were recorded in 'invoices', with the Claimant's name and address entered at the top; at the bottom of the page, the document stated 'NB: I am responsible for Income tax/National Insurance etc'. The payments out were then recorded in schedules of payment, which the parties referred to as 'vouchers'. I think it likely that both the invoices and vouchers were generated

by the Respondent. The Claimant was not provided with payslips, nor with P60s. I reject his evidence that he asked for them; there is no evidence of his doing so beyond a generalised assertion by him.

40. Programmes were accepted from members of the community and booked in by the Respondent's office, which then informed the Claimant of the date and type of event. For each programme that was carried out, the temple charged the family a flat fee for the priests, typically £300, which the family paid to the temple, who then paid it on to the Claimant in cash without any deduction for tax or national insurance. The Claimant divided the fees between the priests; the Respondent had no involvement in that process. If there were only two programmes a week (a very conservative estimate), and the fees were divided equally between the four priests, each would receive £150 a week, i.e £600 per month. I emphasise that these (and the figures below) are my best estimates. Neither party made its own calculations in their statements; the issue was addressed to some extent by Mr Bansal in cross-examination.

41. At these programmes, members of the community made donations to the temple, but also donations specifically to the priests, placing cash in a pile directly in front of them. The Claimant told me in cross-examination that donations might be one or two pounds per person. In the bundle was a photograph showing a pile of notes, not coins. I prefer Mr Narwal's evidence that there was a degree of genial competition among the community to be more generous/devoted than others and that the average donation per person was probably £10. At a small wedding there might be 100 to 200 guests; at a large wedding 400 to 500. Thus, the donations to the priests might be anything between £1,000 and £5,000, an average of £3,000. On a conservative estimate, there were two weddings a week. Thus, the average donations in a week would probably be around £6,000. Divided equally between the four priests, each probably received £1,500 per week in donations from weddings alone, i.e £6,000 per month.

42. I reject the Claimant's evidence that the money was collected by the office, that tax was deducted and the sums only then paid net to him. There was no evidence whatsoever to support that contention. I accept Mr Narwal's evidence that the priests gathered the cash donations at the end of the programme and placed them in their own safe. They were not required to account to the Respondent for this money, but the Claimant was obliged to make a fair division of those donations between him and his three colleagues. Neither the Respondent nor the Claimant kept a record of them.

43. When members of the community came to the temple during the day and asked a priest to say a prayer or carry out a blessing, they made a cash payment to the priest on each occasion of perhaps £50, or even as much as £100. The priest who carried out the duty kept the money without any requirement to account to the Respondent for them. If (on a conservative estimate) the Claimant carried out one prayer or blessing each day, on an average of £75, he would receive £525 per week, i.e. £2,100 per month. The Claimant was entitled to retain these sums without accounting to the Respondent for them. Neither the Respondent nor the Claimant kept a record of them.

The Claimant's bank statements

44. Because of the complete absence of any form of record-keeping in relation to these donations, it was impossible for the Tribunal to establish exactly how much the Claimant received in a typical month from his work at the temple, other than that it was far in excess of the £390 basic monthly wage paid to him by the Respondent. On the estimates set out above, it was a very substantial amount. The Claimant's bank statements for the material period were in the bundle and they are consistent with that.

45. Focusing on entries showing payments in 'cash credit' alone, and ignoring for the moment the substantial payments from other sources, by way of example in January 2019 the Claimant paid cash into his account amounting to £4,250; in February 2019, £3,280; in March 2019, £5,240. He was unable to explain clearly where this money came from. He accepted that some of it represented income from the temple but said that that most of it was cash which his family gave him so that he could pay the household expenses.

46. Payments of the basic £390 wage showed from time to time, but this was the exception rather than the rule.

47. There was also evidence of substantial payments into the Claimant's account from members of his family and others by way of cheques and bank transfers. In an extremely brief, collective statement the Claimant's wife, Mrs Gurmeet Kaur, his daughter, Ms Manpreet Kaur and his son, Mr Sarbjeet Singh, stated that, because the Claimant was responsible for the expenses of the family:

> 'we as a family helped him out whatever we could. As he was not paid full wages by the gurdwara for his full-time work, we all worked full-time and shared our reasonability as a family and help out for all the bills and rent to the property. Most of the expenses was paid from his account.'

48. I had significant concerns about the evidence given in support of that statement.

    48.1. The bank statements do not suggest that the Claimant was in financial difficulties at all: his account was always in credit at the end of the month, sometimes very substantially so (for example, January 2019, £3860.83; February 2019, £1953.43; December 2019, £1963.23).

    48.2. There was no evidence in the statements of the Claimant paying household expenses (which I understood meant such things as rent and utility bills) from his account. Ms Manpreet Kaur told me that the rent was always paid in cash. She could not explain why his family would give the Claimant cash to pay into his account (see above), if he was then going to take money out again to pay the rent in cash.

    48.3. Ms Kaur told me that her net monthly earnings from the beauty salon where she worked were £1,382. I noted that in May 2020 she made payments to the Claimant totalling £1,780. She was unable to explain satisfactorily how she was able to give him more than she was earning.

    48.4. Mrs Gurmeet Kaur told me that she did two jobs, earned around £1,500 a month, and helped her husband out because he needed money. She

was unable to explain why there was a period of a year and four months when she made no payments at all to him.

48.5. As for payments from Mr Sarbjeet Singh's account, although I could see the logic of his paying his father a certain amount each month each month to contribute to the family's expenses, I could not see the logic of his paying the Claimant three separate payments within four days in June 2021 of £400, £500 then £300, rather than a single payment of £1,200. Mr Singh was unable to explain to my satisfaction why he did this.

48.6. There were multiple instances of payments out to bookmakers. In March 2019 alone they totalled £1,800. The account was still in credit at the end of the month. The Claimant's son, Mr Sarbjeet Singh, said that these were bets which he placed using his father's card and with his father's permission. I found that implausible. Mr Sarbjeet Singh's evidence was that he worked as a labourer on construction sites and earned over £2,000 a month. He was unable to explain satisfactorily why he used his father's account to gamble, when he had his own income and his own bank account, nor indeed why he would pay money into his father's account to help with household expenses and then spend it himself at the bookmakers. If it were true that the Claimant were in financial difficulties, it was inconceivable that he would permit his son to gamble with his money in this way.

48.7. There was also a schedule of payments entitled 'Bookmakers', showing payments into the Claimant's account totalling £18,302.35 between 24 January 2019 and 2 July 2021. Between 24 and 31 January 2019 alone, £8,372 was paid into his account in five instalments. The Claimant said that this was 'the money my son has won.' When Mr Sarbjeet Singh, was taken to the schedule and asked if this was anything to do with him, he replied 'I am not sure about this, it is possible'. Asked how he had won this money, he said that he used to go to go to the casino in Westfield (i.e. not to a bookmakers).

48.8. I had a witness statement from Ms Rekha Kaur, in which she said that she 'borrowed £13,000 from Gurdial Singh over the year and paid him in instalments of what I could afford. The fund was paid into his account'. This was supported by a schedule showing eight payments from her to the Claimant between 8 August 2018 and 1 June 2019, totalling £13,174. Ms Kaur did not attend the hearing to give evidence. The Claimant agreed that he had lent her the money but disagreed about the period. He could not explain how he could afford to lend her £13,000.

48.9. I also note that the bank statements show substantial sums being transferred from the Claimant's account to his immediate family, rather than the other way round: for example, on 4 July 2019 he transferred £500 to his wife and £500 to his son; on 23 December 2019 he transferred £1,000 to his daughter and on 2 January 2020 a further £1,500 to her; on 6 February 2020, he transferred £1,300 to his son.

49. The Claimant says that he also worked nights as a security officer for a company called Nanak Construction Ltd. His evidence about this was also unsatisfactory in several respects:

    49.1. he could not satisfactorily explain how it was possible to combine the long hours he worked at the temple during the day and evening with night work somewhere else;

    49.2. although his bank statements showed payments from Nanak going into his account (usually of £1,404.24), the number of those payments did not tally with the schedule of payments which was in the bundle or the payslips and P45 he produced on the last day of the hearing;

    49.3. on the letter from Nanak provided for these proceedings, confirming that the Claimant worked for it between September 2018 and August 2019, purportedly on letterheaded paper, the name of the company is misspelled ('Nanak *Construcation* Limited');

    49.4. although the Claimant told me that he worked for Nanak for a year, and that he drove himself to work, he struggled to remember the location of his place of work.

50. Mr Bansal put to the Claimant that he never worked for Nanak and that this was merely part of a scheme executed by him and his family to launder his income from the temple in order to demonstrate the level of earnings needed to satisfy Home Office requirements. Mr Bansal put to him that the money his family appeared to pay to him was, in fact, money he had previously passed to them out of that income.

51. Although I have identified multiple anomalies in the accounts given to me about the Claimant's finances, I did not consider that the evidence on either side was sufficiently clear or cogent to allow me to make such serious findings, nor was it necessary for the purposes of these proceedings. Neither of these matters were relied on by Mr Bansal as separate heads of illegality.

52. I do record, however, that I found the explanations of the Claimant and his family as to the sums paid into and out of his account incoherent and I reject them. One thing is certain: the Claimant's bank statements are irreconcilable with the central plank of his case: that he was in constant financial distress as a result of the inadequate income he received from his work at the temple. On the contrary, I find they suggest that he was a person of very considerable means. Taken together with my rough estimates as to his income from the temple, I find that was largely (if not exclusively) as a result of his work for the Respondent.

53. I consider I am also able to make one further, relevant finding. According to the payslips from Nanak, no tax was deducted for the months up to the point where the earnings exceeded the Claimant's personal allowance. That is consistent with HMRC not being aware that the Claimant had another job, working for the Respondent. When asked about this, the Claimant claimed not to have noticed it. I found that implausible.

The tax position

54. The Respondent accepts that it did not pay tax or national insurance on the Claimant's behalf in respect of any of his income from the temple. I find that it made no enquiries of the Claimant as to whether he was declaring his income to HMRC. It turned a blind eye to the matter.

55. The Claimant accepts that he did not declare any of his income from the temple to HMRC. He did not even keep a record of the amount of income he received each month. His evidence was that he believed the Respondent was paying tax and national insurance on his behalf. When I asked the Claimant what evidence he had to support that belief, his only answer (which he repeated several times) was that this was what had been agreed at the beginning of his employment. I have already found that it was not. Even if it were true that he was told this, as soon he received the first monthly wage of £390 in full, he must immediately have realised that no tax or national insurance had been deducted from his basic wage. If he thought it was net, he was unable to say what the gross sum was in respect of that amount.

56. There is no question that he knew that no tax was being paid by the Respondent in respect of the cash donations he received because the money did not pass through the Respondent's hands.

57. The Claimant accepted that he did not receive a P60 at the end of each year. He knew what a P60 was because he received one from Nanak. There is no evidence to corroborate his account, which I disbelieved, that he asked at any stage during his employment for a written contract, for payslips or for confirmation that tax and national insurance was being paid on his income. The fact that his payslips from Nanak showed that he benefited in full from the personal tax threshold removes any possibility that he might genuinely have believed that the Respondent was paying tax on his behalf.

58. At one point in his evidence, the Claimant said: 'I am not sure whether the gurdwara deducts tax or not, I am just an employee of theirs.'

59. I am satisfied that the Claimant knew at all times that the Respondent was not deducting tax from any of the money he received or paying national insurance. I think it likely that he preferred to receive all his income from the temple gross, and wherever possible in cash, without any deductions being made.

60. In closing submissions, the Claimant's representative suddenly mentioned in passing (while dealing with another issue) that the Claimant had an accountant. I asked him to confirm that with the Claimant, who was sitting next to him, which he did. I asked whether the accountant prepared accounts for the Claimant. The Claimant confirmed that he did. I asked if his accountant put in a tax return on his behalf. The Claimant could not remember whether he did or did not. No documents generated by his accountant had been disclosed in these proceedings. If they exist, they are plainly disclosable.

61. Even before I knew this, and for the reasons given above, I had already reached the conclusion that the Claimant was deliberately failing to account to HMRC for any of his earnings from the temple, knowing that the Respondent was not doing so. The eleventh-hour discovery that he had an accountant removed any

residual possibility that the Claimant was naïve or ill-informed when it came to financial matters.

Other matters relevant to employment status

62. The Respondent had a power under its Constitution (paragraph 18) to discipline the Claimant for breaches of discipline. That paragraph required prompt investigation of any alleged misconduct, written notice of the allegations and an opportunity for the employee to be heard. The committee had the power to suspend or remove the Claimant, if he was found guilty of misconduct or indiscipline, provided at least seventeen members of the Committee voted in favour.

63. The Respondent also had the power to caution the Claimant if it considered he was not performing his duties to the required standard, for example if any member of the community complained about the Claimant's manner of singing hymns or reciting scripture.

64. Although the Claimant provided his own clothing, the Respondent provided all the instruments he required to carry out his duties.

65. The Claimant did not market his services as a priest to other temples, nor did he hire his own helpers. He did not carry any financial risk in carrying out his duties.

The termination of the Claimant's employment

66. The parties' respective cases as to the circumstances of the termination of the Claimant's appointment (to use a neutral term) were as set out above. The Respondent accepted that the charges against him were not formulated in writing, there was no formal investigation and no formal disciplinary procedure was carried out. There was no documentary evidence relating to these events, other than the letter referred to below from the Respondent's solicitor to the Claimant.

67. The findings below are my own findings, relevant to the issues of whether the Claimant resigned or was dismissed, wrongful dismissal, *Polkey* and contribution.

68. On 2 July 2021, there was an argument between one of the other priests and a caretaker at the temple. The argument escalated into a fight – or, perhaps more accurately, a scuffle in which the two men pushed each other aggressively. The CCTV footage showed that the priest instigated the scuffle, not the caretaker. There was no evidence that the caretaker pulled a knife on the priest, as the Claimant later alleged.

69. The Claimant was not present at the incident but found out about it afterwards. He was angry and defensive of his colleague. He went to the office and repeatedly demanded of Mr Bassi and other members of the committee that the caretaker be sacked, otherwise he would not carry out any ceremonies for the temple. He knew that this would cause the temple difficulties, especially during the pandemic when recruiting a priest from India would be impractical. He had leverage over the Respondent. He did not resign, however.

70. Mr Bassi refused to do as the Claimant asked until he had looked into the matter. He viewed the CCTV and concluded that the caretaker had done nothing wrong. He told the Claimant that he would not ask the caretaker to leave.

71. The Claimant refused to accept this and, over the next two days, continued to demand that the caretaker be sacked. He was insistent and warned Mr Bassi and the other members of the committee that he would cause trouble for them if they did not do as he said. The Claimant also repeated his demands in public in front of members of the community. The committee instructed him to resign. The Claimant refused to do so. At one point Mr Bassi's son (who is not on the committee) threatened the Claimant that, if he tried to return to the temple, he should 'watch what I will do to you'. Although the Claimant behaved very inappropriately, I am not satisfied that he behaved aggressively.

72. On 5 July 2021, the Claimant arrived at the temple early in the morning. He was refused entry by Mr Bassi's son. The Claimant left and went home.

73. On that day or the next (the letter is undated), the Respondent wrote to the Claimant instructing him not to return to the temple. If he did, they would consider seeking an injunction because of what it referred to as his threatening behaviour. I am satisfied that the terms of this letter amounted to an unequivocal statement of the employer's intention to terminate the Claimant's employment and constituted a dismissal.

The law

Employment status

74. S.230 ERA, so far as relevant, provides:

> **(1) In this Act "employee" means an individual who has entered into or works under (or, where the employment has ceased, worked under) a contract of employment.**
>
> **(2) In this Act "contract of employment" means a contract of service or apprenticeship, whether express or implied, and (if it is express) whether oral or in writing.**
>
> **(3) In this Act "worker" (except in the phrases "shop worker" and "betting worker") means an individual who has entered into or works under (or, where the employment has ceased, worked under) -**
>
> > **(a) a contract of employment, or**
> >
> > **(b) any other contract, whether express or implied and (if it is express) whether oral or in writing, whereby the individual undertakes to do or perform personally any work or services for another party to the contract whose status is not by virtue of the contract that of a client or customer of any profession or business undertaking carried on by the individual;**
>
> **and any reference to a worker's contract shall be construed accordingly.**

75. Section 203(1) provides as follows:

> **Any provision in an agreement (whether a contract of employment or not) is void in so far as it purports-**
>
> **(a) to exclude or limit the operation of any provision of this Act, or**

> **(b) to preclude a person from bringing any proceedings under this Act before an employment tribunal.**

76. There are thus three categories of relationship, conveniently summarised in *Bates van Winkelhof v Clyde & Co. LLP* [2014] ICR 730 (*per* Baroness Hale at [24] and [25]):

> **'24. First, the natural and ordinary meaning of "employed by" is employed under a contract of service. Our law draws a clear distinction between those who are so employed and those who are self-employed but enter into contracts to perform work or services for others.**
>
> **25. Second, within the latter class, the law now draws a distinction between two different kinds of self-employed people. One kind are people who carry on a profession or a business undertaking on their own account and enter into contracts with clients or customers to provide work or services for them. The arbitrators in *Hashwani v Jivraj (London Court of International Arbitration intervening)* [2011] ICR 1004 were people of that kind. The other kind are self-employed people who provide their services as part of a profession or business undertaking carried on by someone else. The general medical practitioner in *Hospital Medical Group Ltd v Westwood* [2013] ICR 415, who also provided his services as a hair restoration surgeon to a company offering hair restoration services to the public, was a person of that kind and thus a "worker" within the meaning of section 230(3)(b) of the 1996 Act.'**

77. The definition of employee in s.230(1) ERA turns on the meaning of the phrase 'contract of service' in s.230(2) which, impliedly, is to be contrasted with a 'contract for services'.

78. The usual starting-point is the passage in *Ready Mixed Concrete (South East) Ltd v Minister of Pensions and National Insurance* [1968] 2QB 497 at p.515, in which MacKenna J. said:

> **'A contract of service exists if these three conditions are fulfilled. (i) The servant agrees that, in consideration of a wage or other remuneration, he will provide his own work and skill in the performance of some service for his master. (ii) He agrees, expressly or impliedly, that in the performance of that service he will be subject to the other's control in a sufficient degree to make that other master. (iii) The other provisions of the contract are consistent with its being a contract of service.'**

79. As for personal performance, the Supreme Court in *Pimlico Plumbers v Smith* [2018] ICR 1511 endorsed the principles set out by Sir Terence Etherton MR in his judgment in the same case in the Court of Appeal ([2017] ICR 657 at [84]:

> **'84. In the light of the cases and the language and objects of the relevant legislation, I would summarise as follows the applicable principles as to the requirement for personal performance. Firstly, an unfettered right to substitute another person to do the work or perform the services is inconsistent with an undertaking to do so personally. Secondly, a conditional right to substitute another person may or may not be inconsistent with personal performance depending upon the conditionality. It will depend on the precise contractual arrangements and, in particular, the nature and degree of any fetter on a right of substitution or, using different language, the extent to which the right of substitution is limited or occasional. Thirdly, by way of example, a right of substitution only when the contractor is unable to carry out the work will, subject to any exceptional facts, be consistent with personal performance. Fourthly, again by way of example, a right of substitution limited only by the need to show that the substitute is as qualified as the contractor to do the work, whether or not that entails a particular procedure, will, subject to any exceptional facts, be**

> **inconsistent with personal performance. Fifthly, again by way of example, a right to substitute only with the consent of another person who has an absolute and unqualified discretion to withhold consent will be consistent with personal performance.'**

80. No contract of employment can exist in the absence of 'mutual obligations subsisting over the entire duration of the relevant period': *Clark v Oxfordshire Health Authority* [1998] IRLR 125 at [22]. In *Carmichael v National Power plc* [1999] ICR 1226 (at 1230) Lord Irvine cited this passage with approval, in support of the proposition that, if there were no obligation on the employer to provide work, and none on the putative employee to undertake it, there would be 'an absence of that irreducible minimum of mutual obligation necessary to create a contract of service.'

81. If there is sufficient mutuality of obligation that the contract might be one of employment/service, the next question which falls to be determined is control. Although not the sole means of identifying a contract of employment, control remains an essential element of the test. The question is not whether the employer controls the way the putative employee does the work, rather whether the employer can, under the terms of the contract, direct him/her in what s/he did (*Wright v Aegis Defence Services (BVI) Ltd*, UKEAT/0173/17/DM at [35]). That is distinct from showing that the employer controls the way that the employee does the work. Even an absence of day-to-day control may not be relevant, if the employer retains the ultimate contractual power to direct what work should be done (*White v Troutbeck SA* [2013] IRLR 949, CA).

82. As for the third element of the test in *Ready-Mixed Concrete*, there is no definitive list of the features of any agreement which point towards, or away from, its being a contract of employment. In *Market Investigations Ltd v Minister for Social Security* [1969] 2 QB 173, Cooke J. reviewed the primacy, or otherwise, of control and, having referred to authorities in the Privy Council, Court of Appeal and US Supreme Court, held (at p.184):

> **'The observations of Lord Wright, of Denning L.J. and of the judges of the Supreme Court suggest that the fundamental test to be applied is this: "Is the person who has engaged himself to perform these services performing them as a person in business on his own account?" If the answer to that question is "yes," then the contract is a contract for services. If the answer is "no," then the contract is a contract of service. No exhaustive list has been compiled and perhaps no exhaustive list can be compiled of the considerations which are relevant in determining that question, nor can strict rules be laid down as to the relative weight which the various considerations should carry in particular cases. The most that can be said is that control will no doubt always have to be considered, although it can no longer be regarded as the sole determining factor; and that factors which may be of importance are such matters as whether the man performing the services provides his own equipment, whether he hires his own helpers, what degree of financial risk he takes, what degree of responsibility for investment and management he has, and whether and how far he has an opportunity of profiting from sound management in the performance of his task.'**

83. In the context of employment, where, taking into account the relative bargaining power of the parties, the written documentation might not reflect the reality of the relationship, it is necessary to determine the parties' actual agreement by examining all the circumstances, of which the written agreement was only a part, and identifying the parties' actual legal obligations (*Autoclenz Ltd v Belcher and others* [2011] ICR 1157 SC at [17-35]).

Unfair dismissal

84. S.94 Employment Right Act 1996 ('ERA') provides that an employee with sufficient qualifying service has the right not to be unfairly dismissed by his employer.

85. S.98 ERA provides so far as relevant:

> **(1) In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show –**
>
> **(a) the reason (or, if more than one, the principal reason) for the dismissal, and**
>
> **(b) that it is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.**
>
> **(2) A reason falls within this subsection if it— ...**
>
> **[…]**
> **(c) relates to the conduct of the employee ...**
>
> **(4) ... where the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer) –**
>
> **(a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and**
>
> **(b) shall be determined in accordance with equity and the substantial merits of the case.**

86. In *Orr v Milton Keynes Council* [2011] ICR 704 at [78], Aikens LJ summarised the correct approach to the application of s.98 in misconduct cases:

> **'(1) The reason for the dismissal of an employee is a set of facts known to an employer, or it may be a set of beliefs held by him, which causes him to dismiss an employee.**
>
> **(2) An employer cannot rely on facts of which he did not know at the time of the dismissal of an employee to establish that the "real reason" for dismissing the employee was one of those set out in the statute or was of a kind that justified the dismissal of the employee holding the position he did.**
>
> **(3) Once the employer has established before an employment Tribunal that the "real reason" for dismissing the employee is one within what is now section 98(1)(b), ie that it was a "valid reason", the Tribunal has to decide whether the dismissal was fair or unfair. That requires, first and foremost, the application of the statutory test set out in section 98(4)(a).**
>
> **(4) In applying that subsection, the employment Tribunal must decide on the reasonableness of the employer's decision to dismiss for the 'real reason'. That involves a consideration, at least in misconduct cases, of three aspects of the employer's conduct. First, did the employer carry out an investigation into the matter that was reasonable in the circumstances of the case; secondly, did the employer believe that the employee was guilty of the misconduct complained of; and, thirdly, did the employer have reasonable grounds for that belief."**

> **If the answer to each of those questions is 'yes', the employment Tribunal must then decide on the reasonableness of the response of the employer.**
>
> **(5) In doing the exercise set out at (4), the employment Tribunal must consider, by the objective standards of the hypothetical reasonable employer, rather than by reference to its own subjective views, whether the employer has acted within a 'band or range of reasonable responses' to the particular misconduct found of the particular employee. If it has, then the employer's decision to dismiss will be reasonable. But that is not the same thing as saying that a decision of an employer to dismiss will only be regarded as unreasonable if it is shown to be perverse.**
>
> **(6) The employment Tribunal must not simply consider whether they think that the dismissal was fair and thereby substitute their decision as to what was the right course to adopt for that of the employer. The Tribunal must determine whether the decision of the employer to dismiss the employee fell within the band of reasonable responses which 'a reasonable employer might have adopted'.**
>
> **(7) A particular application of (5) and (6) is that an employment Tribunal may not substitute their own evaluation of a witness for that of the employer at the time of its investigation and dismissal, save in exceptional circumstances.**
>
> **(8) An employment Tribunal must focus their attention on the fairness of the conduct of the employer at the time of the investigation and dismissal (or any appeal process) and not on whether in fact the employee has suffered an injustice.'**

87. At (4) above, Aikens LJ was summarising the well-known test in *British Homes Stores Ltd v Burchell* [1980] ICR 303 at p.304.

88. In *Turner v East Midlands Trains Ltd* [2013] ICR 525, Elias LJ (at paras 16–17) cited paragraphs (4) to (8) from that extract in Aikens LJ's judgment in *Orr* and added:

> **'As that extract makes clear, the band of reasonable responses test does not simply apply to the question whether the sanction of dismissal was permissible; it bears upon all aspects of the dismissal process. This includes whether the procedures adopted by the employer were adequate: see *Whitbread plc (trading as Whitbread Medway Inns) v Hall* [2001] ICR 699; and whether the pre-dismissal investigation was fair and appropriate: see *J Sainsbury plc v Hitt* [2003] ICR 111.**

89. Even if the dismissal decision falls within the band of reasonable responses, it may still be unfair, if the Respondent has not followed a fair procedure. The Tribunal must evaluate the significance of the procedural failing, because 'it will almost inevitably be the case that in any alleged unfair dismissal a Claimant will be able to identify a flaw, small or large, in the employer's process' (*Sharkey v Lloyds Bank Plc* UKEATS/0005/15/JW at [26]).

Polkey

90. Where a Tribunal finds that a dismissal was unfair, it must go on to consider the chance that the employment would have terminated in any event, had there been no unfairness (the *Polkey* issue). The relevant principles relating to a Polkey deduction are as set out in *Software v 2000 Limited v Andrews & Others* [2007] IRLR 568 at [54]. Further guidance is set out in *Hill v Governing Body of Great Tey Primary School* [2013] IRLR 274, and *Shittu v South London & Maudsley NHS Foundation Trust* [2022] IRLR 282.

Contribution

91. S. 123(6) ERA provides, in relation to the compensatory award:

> **Where the tribunal finds that the dismissal was to any extent caused or contributed to by any action of the complainant, it shall reduce the amount of the compensatory award by such proportion as it considers just and equitable having regard to that finding**

92. S.122(2) ERA provides, in relation to the basic award:

> **Where the tribunal considers that any conduct of the complainant before the dismissal (or, where the dismissal was with notice, before the notice was given) was such that it would be just and equitable to reduce or further reduce the amount of the basic award to any extent, the tribunal shall reduce that amount accordingly.**

93. In order for a deduction to be made, the conduct in question must be culpable or blameworthy in the sense that, whether or not it amounted to a breach of contract or tort, it was foolish or perverse or unreasonable in the circumstances (*Nelson v BBC (No.2)* [1980] ICR 110. The EAT in *Langston v Department for Business, Enterprise and Regulatory Reform*, EAT 0534/09 confirmed that the same criteria apply to deductions from the basic award.

Wrongful dismissal

94. A complaint of wrongful dismissal is a common law action based on breach of contract and is quite different from a statutory complaint of unfair dismissal. The EAT considered the distinction in *Enable Care and Home Support Ltd v Pearson* EAT 0366/09, where both were claimed. In a wrongful dismissal claim the Tribunal was concerned not with the reasonableness of the employer's decision to dismiss but with the factual question: was the employee guilty of conduct so serious as to amount to a repudiatory breach of the contract of employment, entitling the employer to summarily terminate the contract?

Holiday pay

95. Reg 14 Working Time Regulations 1998 provides that a worker/employee is entitled to be compensated for accrued but untaken leave upon termination of his employment:

> **14.—(1) This regulation applies where—**
>
> **(a) a worker's employment is terminated during the course of his leave year, and**
>
> **(b) on the date on which the termination takes effect ("the termination date"), the proportion he has taken of the leave to which he is entitled in the leave year under regulation 13(1) differs from the proportion of the leave year which has expired.**
>
> **(2) Where the proportion of leave taken by the worker is less than the proportion of the leave year which has expired, his employer shall make him a payment in lieu of leave in accordance with paragraph (3).**
>
> **[…]**

96. In *Smith v Pimlico Plumbers Ltd* [2022] IRLR 347 the Court of Appeal held that, in a case where the employer did not consider that the claimant was a worker, and therefore did not offer paid annual leave under the Working Time Regulations, (*per* Simler LJ at [77]) that there was:

> **'a well-established principle […] that the right to paid annual leave cannot be lost unless the worker has had the opportunity to exercise that right before the termination of the employment relationship. This applied both to workers who do not take leave, and those who take unpaid leave, where in both cases, their**

> **contracts do not recognise the right to paid leave and their employers refuse to remunerate leave. In both cases, like the worker who is prevented by illness from taking annual leave, they are prevented by reasons beyond their control from exercising the single, composite right.'**

Failure to pay the national minimum wage

97. A failure to pay to an employee the National Minimum Wage entitles the employee to commence proceedings in the employment tribunal to recover the difference between what has been paid and what ought to have been paid under the National Minimum Wage Act 1998 ('NMWA'). By amendments to s.17 NMWA, where a worker has been paid at a rate less than the national minimum wage, he can claim the difference based on the rate of the national minimum wage applying at the time of the arrears being determined as if it had been at that rate throughout the periods the employer was in default.

98. As for the burden of proof, it will be presumed that the employee is paid less than the minimum wage unless the employer establishes the contrary (s 28 NMWA).

Illegality

99. It has conventionally been the position that a contract is void and unenforceable if it was unlawful, either because it was entered into with the intention of committing an illegal act, because it was expressly or implicitly prohibited by statute (statutory illegality), or because it was being performed in an illegal fashion (common law illegality).

100. The position as regards common law illegality is now more flexible following the decision of the Supreme Court in *Patel v Mirza* [2017] AC 467. The Court held that the essential rationale of the illegality doctrine is that it would be contrary to the public interest to enforce a claim if to do so would harm the integrity of the legal system (or, possibly, certain aspects of public morality). In assessing whether allowing a claim would harm the integrity of the legal system, it is necessary to consider:

    100.1. the underlying purpose of the law that had been breached, and whether that purpose would be enhanced by the claim being refused;

    100.2. any other relevant public policy which might be affected by the denial of the claim;

    100.3. and whether denial of the claim would be a proportionate response to the illegality (bearing in mind that punishment is a matter for the criminal courts).

    A range of factors will be relevant, which might include: the seriousness of the illegal conduct; its centrality to the contract; whether it was intentional; whether the party seeking enforcement knew of the illegal conduct; and whether there was a marked disparity in the parties' respective culpability.

Submissions

101. Both representatives made oral submissions.

102. On behalf of the Claimant, Mr Singh submitted that the Claimant was hired as an employee. He reminded me of the clause in the constitution which referred to 'A Granthi and any other employee'. He argued that the Claimant was dismissed; there is no evidence that he resigned. He did not commit any misconduct: he did not ask for the caretaker to be removed and was not aggressive; quite the reverse he was threatened himself. If he did commit misconduct, the Respondent did not follow its own procedure under clause 18 of the Constitution. If there had been a fair procedure, the chances of dismissal were very low because there was no misconduct. He did not contribute to his own dismissal. He was not given notice pay. He was not paid the minimum wage. There was no illegality because he believed that management was paying tax and national insurance on all his earnings; the donations were taken by the office and only then given to him to distribute priests. Mr Singh accepted that, if I were to find that the Claimant knew that the Respondent was not paying tax on his earnings, the Claimant was involved in the illegality: 'they are both in the same boat', to use his words.

103. For the Respondent, Mr Bansal submitted that the Claimant was an independent contractor. He was free to come and go as he pleased, he could be absent for hours at a time and could sleep at the temple. He could take leave when he wanted, provided he found cover for the Respondent. There were no restrictions on what he could and could not do. Because he was an independent contractor, he was not entitled to holiday pay or to be paid the national minimum wage. Alternatively, Mr Bansal submitted that the Claimant was paid £390 a month which was in respect of the morning and evening ceremonies only. He contended that this amounted to 'just above the national minimum wage' for those duties. The Respondent paid the Claimant £300 per programme. Mr Bansal did not make any submission that these payments represented the national minimum wage in relation to the duties other than the morning and evening ceremonies. The Respondent did not rely on the donations (which Mr Bansal referred to as 'tips') to discharge its obligations under the national minimum wage. Donations went straight to the priests from the community and did not pass through the Respondent's hands. Mr Bansal made no positive submission as to whether, while he was sleeping, the Claimant was entitled to be paid. The Claimant was not dismissed but resigned. If I were to find that he was dismissed, Mr Bansal accepted that no procedure was followed but asserted that his conduct was such that it was fair to dismiss him without any procedure. He was not entitled to notice pay because he had committed gross misconduct. If I find that he was unfairly dismissed, there was a 100% chance that he would have been dismissed fairly. He contributed to his own dismissal by reason of his gross misconduct. As for illegality, the performance of the contract was illegal and he should not benefit from it. He knew full well what his obligations were: he had an accountant but did not disclose the fact, nor any documents. He must have shown his accountant the Nanak payslips. The Claimant's bank statements suggest that the Claimant was distributing cash among various family members and friends for him to receive it back in legitimate form. He was positively hiding the earnings he received from his work at the temple.

Conclusions: employment status

The contract

104. The parties agreed that the Claimant worked under a single, overarching contract, which was agreed at the outset and which persisted throughout the material period. However, there is no written record of the terms which were agreed. I must seek to construe the contract based on what the parties have told me and the way in which they conducted themselves throughout the material period, in order to determine, objectively, the intention of the parties when they entered into the contract.

105. I have already found that both parties believed that it was legitimate for the Claimant to be treated as being self-employed. However, that subjective belief is not determinative of his status. I must have regard to the objective evidence of the true agreement between them.

Personal performance

106. From the outset the Claimant undertook to provide his own work and skill in the performance of the duties of head priest at the temple. I have concluded that he did not have a right to substitute another person to conduct his duties on his behalf, other than in very limited and occasional circumstances, and with the agreement and approval of the Respondent, who undertook to pay that other person. The fact that the Respondent could withhold consent is, in my judgment, consistent with personal performance.

107. I am satisfied that the obligations which I have set out in my findings of fact above, including in relation to hours, duties and remuneration, represent the true agreement between the parties. The Claimant worked in accordance with it for three years without any dispute arising between the parties as to its terms.

Control

108. As for control, the Respondent decided where the work should be done (in the temple and, on occasion, at the homes of members of the community). It decided the times at which the work should be done (see my findings above as to the hours of work the Claimant was obliged to observe). The great majority of the work (the daily ceremonies and programmes) was assigned by the Respondent to the Claimant. Although he was then responsible for sharing the work out between the priests that was a duty which was delegated to him, as a supervisor. It is not indicative of independent contractor status.

109. As for the manner in which the work was to be done, while it is right that the Respondent did not instruct the Claimant how to perform his duties, that is not determinative in a case of this sort: the nature of the work was such that, as an experienced priest, the Claimant would be expected to exercise a high degree of autonomy and would not expect or require instruction. To a large extent, the performance of his duties was determined by the traditions and requirements of the Sikh faith.

110. Even so, the Respondent had the power to caution him as to how to carry out his duties, if they fell short of the standards expected of him. He was also subject to the Respondent's disciplinary policy, whether for reasons of conduct or performance. The Respondent had the power to suspend or dismiss him.

111. In all the circumstances, I am satisfied that the right to control existed in a sufficient degree to render this a contract of service (an employment contract) rather than a contract for services (a worker or independent contractor contract).

Mutuality of obligation

112. There was an obligation on the Claimant's part to work: his attendance was required every day; he could not simply absent himself without permission, when there were duties and programmes to perform. Mr Narwal accepted without hesitation, in response to a question from the Tribunal, that there was an obligation on the Respondent's part to offer the Claimant work ever day.

113. There was no evidence (at least prior to July 2021) that the Claimant ever withheld work, or the Respondent did not offer work. In my judgment, that is consistent with the fact that they knew there was mutuality of obligation. When the Claimant did threaten to withhold his services, the Respondent regarded that as a disciplinary matter; when the Respondent prevented the Claimant from working, he regarded that as a dismissal.

Other factors

114. It is still not uncommon for an organisation to engage employees in the belief that it is a matter of choice between it and them as to whether they should be treated as employees or self-employed people. Those doing the work often prefer the latter because they benefit financially; those providing the work often prefer it because it absolves them of the statutory responsibilities that come with employment. In my judgment, that is what happened here. The fact that the parties chose to see themselves is not determinative.

115. The Claimant worked for the Respondent full-time, in a role at the very heart of the organisation, totally integrated within it and not offering his services (as a priest, at least) to other employers. He was not in business on his own account.

116. The fact that the Respondent did not deduct tax or national insurance, pay holiday pay, sick pay or provide any of the other statutory benefits associated with employment determinative of the issue of status. In my judgment that merely reflected their shared wish that the Claimant be treated as self-employed, rather than the objective reality of the relationship.

117. The Claimant was paid every month a fixed basic wage, which was then supplemented by the other earnings I have identified above. I am satisfied that the practical arrangements in respect of that additional remuneration, in particular the donations, must have been agreed between the parties on his appointment; they operated throughout the material period. Of course, other arrangements would have been possible: the Respondent could have collected all the donations, deducted tax and passed them on net to the Claimant (indeed, that was the Claimant's evidence as to what happened, which I have rejected).

118. The Respondent provided the instruments the Claimant required to carry out his duties.

119. For all these reasons, I am satisfied that the Claimant was, at all material times, an employee of the Respondent. Further, in my judgment, the Respondent either knew that that was the case, or ought reasonably to have known it; I have no doubt it would have been so advised, had it taken the simple step of seeking some legal advice.

Conclusions: holiday pay and failure to pay the national minimum wage

120. In the light of the Respondent's concession, it follows that the Claimant's claim for accrued but untaken holiday pay is well-founded, subject to the issue of illegality.

121. In a claim for failure to pay the national minimum wage ('NMW'), there is a presumption that the NMW was not paid, unless the Respondent can prove that it was. Mr Bansal did not rely on the fixed fees for programmes or any of the donations given to the Claimant directly by members of the community (which he submitted were analogous with tips in other industries) as discharging the minimum wage. Consequently, the only remuneration which the Respondent could rely on for these purposes was the monthly basic wage. Those sums could not possibly represent the minimum wage, by reference to the hours I have found the Claimant worked. Consequently, the Respondent has not discharged the burden on it to show that it paid the Claimant the national minimum wage. The claim is well-founded, subject to the issue of illegality.

Conclusions: unfair dismissal

122. I am satisfied that the sole or principal reason for the dismissal was conduct: the Claimant's inappropriate behaviour in dealing with the aftermath of the scuffle between the priest and the caretaker between 2 and 4 July 2023. The executive committee genuinely believed that he had committed the misconduct and had reasonable grounds for that belief; they had witnessed some of the conduct themselves.

123. However, there was a wholesale failure to conduct any sort of fair procedure. The Respondent did not comply with its own process, as set out in the section from the constitution referred to above, nor with ordinary principles, including that the employee is entitled to know the precise charges he is facing and to have a proper opportunity to consider them and respond.

124. I do not consider that the position was so clear-cut as to allow the Respondent to waive the necessity to conduct a reasonable investigation into the circumstances of the Claimant's conduct, including giving him an opportunity to explain his conduct and to advance any mitigating factors. There was no consideration of the Claimant's otherwise clean disciplinary record, nor of whether a sanction short of dismissal (such as a warning or final warning) would be appropriate. In my judgment, the Respondent acted outside the band of reasonable responses in proceeding directly to summary dismissal. The claim is well-founded, subject to the issue of illegality.

Conclusions: wrongful dismissal

125. Although I am satisfied that the Claimant committed misconduct in the manner in which he conducted himself, I am not satisfied that the Respondent has discharged the burden on it to show that the Claimant's conduct was so serious as to amount to gross misconduct, so as to entitle it to dismiss the Claimant without notice. The claim is well-founded, subject to the issue of illegality.

Conclusions: *Polkey* and contribution

126. Given my findings above, that there was a significant chance that the Claimant would have been fairly dismissed in any event, had a fair procedure been followed; further, he contributed to his dismissal by his own inappropriate conduct.

127. I have not determined the extent of any reductions to compensation pursuant to these conclusions. Had I not reached the conclusions on illegality set out below, I would have given the parties an opportunity to address me on that issue at a remedy hearing.

Conclusions: illegality

128. The Claimant's claims all arise out of his contract of employment with the Respondent. There was no suggestion that the contract was itself illegal. However, if it was performed in an illegal manner, the claims may be dismissed, subject to the application of the principles set out in *Patel*.

129. I have found that the Claimant and the Respondent decided between themselves to treat the Claimant as self-employed. That was a mischaracterisation of the true relationship between them. In fact, he was an employee and I have concluded that the Respondent either knew or ought to have known that this was the case. It failed to declare to HMRC that it had an employee in respect of whom it was obliged to pay PAYE.

130. The parties proceeded over the next three years to treat this arrangement as one of self-employment. The Claimant accepted the basic wage and programme fees paid to him by the Respondent, knowing them to be gross figures. Further, pursuant to the agreement he had reached with the Respondent, he accepted very substantial sums in cash directly from members of the community, which he knew that the Respondent could not possibly be declaring to the revenue because they did not pass through its hands. Although at one point in oral evidence, in response to a question from me as to whether he had ever contacted HMRC about his income from the Respondent, the Claimant replied that he thought he 'might have done' but he 'could not recall'. I consider that was an evasive and self-serving answer. There is no cogent evidence that he did so.

131. I am satisfied that the Claimant knew from the outset that the Respondent would not be deducting any tax or national insurance from any of his income. If support were needed for this conclusion, I find it in the fact that he was receiving payslips from Nanak, which indicated that he had a tax code consistent with his having no other income. He took no steps to declare the income from his work at the temple to HMRC over a period of three years and failed to account for any tax

or National Insurance in relation to that work. In my judgment, this was neither careless nor inadvertent; it was deliberate and seriously wrong.

132. The Respondent took no steps to ensure that the Claimant was declaring his income, in circumstances where they knew that they were not doing so. That was, at best, reckless and seriously wrong.

133. Given the underlying purpose of the tax system, it is of the utmost importance to the integrity of the legal system, and to society as a whole, that employers and employees pay tax and national insurance on all earnings.

134. I reminded myself that, under the range of factors approach, illegal performance of a contract does not result in the automatic dismissal of claims; respect for the integrity of the justice system is not enhanced if it appears to produce results which are arbitrary, unjust or disproportionate. I must go on to consider proportionality.

135. The illegal conduct was extremely serious. This was tax evasion. The illegal conduct was central to the contract of employment. It did not relate to a part only of the Claimant's income earned during his employment by the Respondent but to the whole of it. The sums involved, over the three years of his employment, were very substantial indeed. The Claimant directly benefited from the illegal conduct.

136. I considered whether there was any disparity in the relative degree of the parties' culpability and concluded that the Claimant was, if anything, more at fault: the Respondent knew it was not paying tax or national insurance on his behalf, and chose to turn a blind eye to what the Claimant was or was not doing; by contrast, the Claimant knew for a fact that no tax or national insurance was being paid on any of his income, either by the Respondent or by him.

137. In circumstances where I have concluded that all the Claimant's claims were meritorious, denial of those claims is plainly a very serious sanction. Although remedy in relation to the wrongful and unfair dismissal claims would probably have been modest (the former claim being confined by the statutory period of notice and the statutory cap; the latter subject to reduction by reason of *Polkey* and contribution), the compensation in relation to failure to pay holiday pay and national minimum wage was potentially substantial.

138. However, I think it likely that the sums which the Claimant retained by not paying tax or National Insurance far exceeded the losses he would be claiming under these causes of action. There is a real risk that the Claimant would be unjustly enriched if the claims were upheld and compensation awarded. There would be additional harm to the integrity of the legal system if I were to permit that to occur.

139. Taking all these factors into consideration, I have concluded that it would be contrary to the public interest to enforce the Claimant's rights in respect of all his claims because it would harm the integrity of the legal system to do so. I am satisfied that the denial of the Claimant's claims is a proportionate response to the illegality involved.

140. Accordingly, I dismiss all the Claimant's claims.

141. These proceedings are now concluded. The dates which had been listed for a remedy hearing on 4 and 5 May 2023 have been vacated.

Employment Judge Massarella
Date: 14 April 2023