

## Can employees bring a claim when they are in breach of their contract?

Can an employee, who has been in breach of their contract in the past, successfully bring a claim for breach of contract by their employer following their dismissal?

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Can an employee, who has been in breach of their contract in the past, successfully bring a claim for breach of contract by their employer following their dismissal? In the recent case of *Robinson v His Highness Sheikh Khalid Bin Saqr Al Qasimi* UKEAT/0106/19, the EAT said that an employee cannot enforce the terms of their contract whilst they are in breach of their contract, however, if the breach has been rectified, the contract may be enforceable after this point.

In this case, the claimant, Ms Robinson, was engaged by the respondent under a contract which stated that she would be paid a management fee for her services, and that “[She] will be responsible for [her] own tax on that payment.” The claimant proceeded to be engaged by the respondent from 2007 to 2014 and did not pay tax on the management fee received.

In 2014, the respondent began to pay the claimant the management fee net of income tax and national insurance contributions, due to potential tax liabilities arising in respect of the claimant as a result of a dispute regarding her employment status.

The claimant was then dismissed in May 2017, primarily due to her responsibilities being diminished and disparaging comments made by the claimant about the respondent’s wife. The claimant brought a claim of whistleblowing (in respect of disclosures made to the respondent about not paying the national insurance contributions and income tax on her salary, and her belief that she was an employee), together with claims of unfair dismissal and wrongful dismissal.

At first instance, the Tribunal said broadly that the claimant could not enforce her contract because she had been knowingly acting in breach of her contract by failing to pay her income tax and national insurance payments, despite an express term in her contract requiring her to do so, therefore dismissing claims that would have otherwise been upheld.

However, upon appeal to the EAT, the Honourable Mr Justice Lewis overturned this decision, stating that, as the claimant had been acting in compliance with her contract since 2014, with the respondent deducting the required income tax and national insurance contributions at source, the period she spent being in breach of her contract did not prevent her from enforcing her contractual and statutory rights when dismissed three years later, whilst acting by her employment contract.

This raises interesting points on the enforceability of an employment contract in light of the employee’s actions when they are acting in breach of the terms of their contract of employment, which they then seek to rely on later to bring a claim. This is certainly something to bear in mind if you receive a breach of contract claim in the future. This decision also highlights the importance of being clear on an employee’s status from the point of engagement, to ensure that adverse liabilities do not arise either during or after the engagement.

## Contact

Mark Hickson



## Head of Business Development

onlineteaminbox@brownejacobson.com

+44 (0)370 270 6000

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