EMPLOYMENT TRIBUNALS

Claimant: Mr A Taylor

Respondent: Bread Roll Bakery (NW) Limited

HELD AT: Manchester **ON:** 23 January 2018
27 March 2018 (In Chambers)

BEFORE: Employment Judge Holmes

REPRESENTATION:

Claimant: Ms P Del Monaco, Solicitor
Respondent: Mr R Morton, Solicitor

JUDGMENT

It is the judgment of the Tribunal that the claimant's complaints of unlawful deduction from wages fail and are dismissed.

REASONS

1. The Tribunal convened to hear the claimant's claims of unlawful deductions from wages on 23 January 2018.

2. The claimant was represented by Ms Del Monaco, solicitor, and the respondent by Mr Morton, solicitor. The claimant gave evidence, but called no witnesses, and the respondent called Alec Fleck, the Managing Director, and Julie Fleck, his wife and the company secretary. There was an agreed Bundle, with a further respondent's Bundle, before the Tribunal. References to pages in the Bundle are to the agreed Bundle, unless expressly made to the respondent's Bundle.

3. The evidence was heard, but there was insufficient time for the parties to make their submissions. The Tribunal accordingly reserved its judgment, directing the parties to supply their written submissions by 2 February 2018. Ms Del Monaco for the claimant, however, who was expecting a baby, was unable to make hers within that timeframe, and an extension of time was granted to both parties for their submission to be received by 2 March 2018. The claimant's representative duly did file her submissions by that date, but the respondent's did not. After further reminder the respondent's written submissions were finally received by the Tribunal on 26 March 2018 at 08.38. Notwithstanding this tardy, and unexplained, submission, the Tribunal has considered the respondent's written submissions in arriving at its judgment, which it has done in Chambers on 27 March 2018.

4. Having heard the evidence, considered the documents and read the submissions of the parties, the Tribunal finds the following relevant facts:

4.1 The respondent is a small bakery carrying on business from an industrial estate in Darwen, Lancashire. Alec Fleck is its Managing Director, and joint owner of the company, and Julie Fleck, his wife, and the claimant's sister is the company secretary.

4.2 The claimant was employed in the employment giving rise to these proceedings in September 2013, although he had worked for Alec Fleck previously.

4.3 His job title was bakery operative, and he was subsequently provided with a written statement of principal terms of employment (pages 76 to 78 of the Bundle) which he signed on 6 May 2015. At that time his wage was £405 per week, and his normal hours of work were 40 hours, Monday to Sunday in accordance with published rotas.

4.4 Additionally, the claimant received £20 per week, in respect of health and safety responsibilities, but this was part of what he was paid, and was not an additional payment. By November 2016 his total gross wage was £435.00 per week.

4.5 By November 2016 the claimant considered that he had regularly worked more than 40 hours per week, but he received no overtime or other payment for these hours. He raised this with Alex Fleck, orally, on a couple of occasions, and again on 26 November 2016. Julie Fleck was, unbeknownst to the claimant, within earshot, and heard some of the conversation n this occasion..

4.6 The claimant made it clear that he would, thereafter, only work his 40 hour contracted week. In the discussion with Alec Fleck there was also a discussion about what work the claimant would then do. Alec Fleck suggested that the claimant go onto the flow wrap machine, as this would avoid a conflict between two other employees.

4.7 The claimant agreed to do this. The claimant was not told that his wages would be reduced, although in Alec Fleck's mind this would be so, as he considered that the work that the claimant was then going to do was of lesser worth, and should not commend the same wage.

4.8 The claimant's next payday was 2 December 2016. His payslip of that date (page of the Bundle) shows that he was again paid at the rate of £435.00 per week.

4.9 The following week, however, (page 16 of the respondent's Bundle) his payslip for 9 December 2016 shows he was paid £340.00 per week gross, and the following week 16 December 2016 (page 17 of the respondent's Bundle) , which showed the same, save that this payslip contains a breakdown showing £320.00 as his wage, plus the further £20.00 for the health and safety element.

4.10 Having received those payments, and payslips, the sought legal advice, and wrote a letter to Alec Fleck on 20 December 2016 (pages 79 to 80 of the Bundle). In this letter he referred to the complaint he had raised about working over his contracted 40 hour week for no additional payment,.and the fact that he had now been underpaid, with a shortfall of at least £90. He referred to having taken legal advice, and sought reimbursement of the monies deducted from his usual wage. He also reiterated that he would not work overtime unless at agreed rates.

4.11 By letter to the claimant dated 21 December 2016, but not actually given to him until 5 January 2017, Alec Fleck said this:

"Further to you coming to see me on Saturday 26th November 2016 requesting less hours, this letter is to confirm that I have thought about our request and am agreeing to it. This offer is made on the following terms and conditions:

1.Your job title is Bakery Operative and you will be directly responsible to Carl Vickers, Production Manager.

2.Your wage is £8.00 per hour with a £20.00 weekly payment should you carry out any Health and Safety work. If you do it needs to be documented and presented to Alexander Fleck in order for it to be included in your wage.

3.Your hours of work are 40 per week, Sunday to Friday, You are allowed a 20 minute paid lunch break daily. You will work on 5 of these days 9.00 am to 5.00 pm and will be let know on a rota that you will receive monthly.

4.Whilst overtime is not a normal occurrence you may be expected to work a limited amount when necessary.

5.In accepting the new hours with Bread Roll (NW) Limited you automatically accept a "duty to show good faith".This involves an obligation not to reveal to a third party any of the Company's secret and confidential information.

6.Your holiday entitlement is 20 days, pro rata plus 8 statutory day. Holidays run from 1st April to 31st March the following year.

You agreed to all these points when you came to see me on 26th November 2016. I have now put them in writing for you."

4.12 There then ensues a paragraph about this being a permanent change to the claimant's terms and conditions of employment, and how he had no right to revert back to his previous working pattern. Further, it informed the claimant that he would be unable to make "another request for flexible working" under the statutory procedure for 12 months from the darte his application had been made.

4.13 The claimant had not made a flexible working request. This paragraph is presumed to be an error , probably on the part of the respondent's employment law advisers , who drafted this letter.

4.14 The letter ended with this:

"Please sign and date the enclosed copy of this letter to indicate your agreement to the variation in your contractual terms of employment, and return one copy of the letter to me. you should keep your copy of this letter safe, as it will form part of your contractual terms of employment. Aside from the clauses referred to above, the remaining terms of your employment are unaffected by this change."

4.15 The claimant replied by letter of 5 January 2017 (pages 83 to 84 of the Bundle) . He pointed out that he had not been handed the respondent's letter until that day, and he went on to refer to the fact that Alec Fleck seemed to be under the impression that the claimant had , firstly, requested, and ,secondly, had agreed to a Contract of Employment outlined in the letter. The claimant made it clear that he had done neither. He then set out his account of the meeting on 26 November 2016, and how he had simply been asking to work the hours he was contracted to. He did not seek a decrease in hours, he sought not to be taken for granted. He recorded how this appeared to have caused some confusion. He went on to set out the effect of the proposed change to his hourly rate upon his earnings. He said he would not be agreeing to this level of pay decrease. He implored the respondent to seek legal advice, and then went through the six terms set out in the letter dated 21 December 2016, disagreeing with some of them. He repeated that the respondent had breached his contract of employment, he would not work overtime for no pay, and suggested that future meetings were minuted to avoid any lack of understanding. He hoped the matter could be resolved within 14 days, or he would have no choice but to progress the matter further.

4.16 By letter of 1 February 2017 (page 87 of the Bundle) Julie Fleck acknowledged the claimant's letter, treating it as a grievance and inviting him to a meeting, which she would chair, with a note taker present. .in her letter she said:

"Your grievance is you asked the company for change of job at the end of the flowrapper and a fixed 40 hours per week.

The company believed that a mutual accommodation had been reached to accommodate your request but you are now disputing this."

She went on to set out the claimant's right to be accompanied by a fellow work colleague , and asked him to provide any documents in support of his grievance to her in advance of the meeting.

4.17 The claimant duly attended a meeting on 7 February 2017 with Julie Fleck. The claimant explained his grievance, that he wanted to work 40 hours per week as per his contract, and there was a discrepancy of £90 per week . Julie Fleck did not reveal to the claimant that she had overheard the discussion he had with Alec Fleck on 26 November 2016, but asked him if he had asked go on to the flowrapper, which he disputed. He went on to explain what he had discussed, and how he would not do more than 40 hours per week. He agreed that he was doing a different job, but he was still a bakery operative. Other than to discuss how he had come to work for the respondent some 41/2 years previously, and to suggest that his treatment had started since he had

intervened with a member of staff who was being bullied, he had little else to say.

4.18 By letter of 14 February 2017 (pages 90 to 91 of the Bundle) Julie Fleck dismissed the claimant's grievance. She did not in this document either reveal that she had overheard the discussion on 26 November 2016. She reiterated the second paragraph of the invitation letter, and went on to set out her findings thus:

"I have a reasonable belief that on the 26/1116 you approached the Managing Director to request a fixed 40 hours per week and a change of job and to go on the flowrapper.

This was agreed by the Managing Director and you were advised that your pay would reduce accordingly.

You asked if this meant you would be on the national minimum wage but were informed that your hourly rate would be £8.00, £320 per week gross plus £20.00 per week for your Health and Safety work.

£8.00 per hour is the appropriate rate for this job – both an ex-employee and a current employee receive this rate for this job.

It would appear that you are now attempting to backtrack and change the goal posts."

4.19 She advised the claimant of his right of appeal to Anne McNally, which he exercised by letter of 14 February 2017 (page 92 of the Bundle). He objected to Anne McNally dealing with the appeal, as she was related to Alec Fleck. He reiterated that he did not ask for a decrease of hours or of wage. He made further reference to his legal representative.

4.20 After some delay due to illness (and after further correspondence not all of which is before the Tribunal) Anne McNally contacted the claimant on 5 May 2017 (page 94 of the Bundle) to arrange a grievance appeal hearing.

4.21 The appeal was held on 10 May 2017 by Anne McNally, with a note taker. The claimant was unaccompanied. The notes of the appeal are at pages 95 to 97 of the Bundle. The claimant explained more about his discussion with Alex Fleck on 26 November 2016, stating that this was an informal discussion. He again disputed that he had agreed to receive £8 per hour. The claimant again referred to instructing solicitors and then going to ACAS.

4.22 Anne McNally said she would speak to Alex Fleck, but there is no record of her investigations with him. By letter of 12 May 2017 Anne McNally wrote to the claimant, dismissing his appeal, observing that the situation could have been avoided if an amended contract of employment had been issued, but stating that as she too believed that the there was a reasonable belief that the claimant had accepted a change of position and a change in his salary to £8 per hour, she could not overturn Julie Fleck's decision.

4.23 On 6 June 2017 the claimant commenced the ACAS early conciliation process. A certificate was issued on 6 July 2017.

4.24 On 7 November 2017 the claimant presented the claim in these proceedings.

4.25 The same day, although it is unclear which occurred first, the claimant attended a formal disciplinary hearing to discuss allegations about his .absence notification and procedures on 20, 23, 24 and 25 October 2017.

4.26 On 9 November 2017 the claimant was issued with a written warning (pages 5 to 6 of the respondent's Bundle) in relation to three issues relating to attendance and sickness notification. The claimant appealed that warning by letter dated 13 November 2017 (page 7 of the respondent's Bundle), saying he was being victimised and targeted.

4.27 Anne McNally heard that appeal on 22 November 2017. The minutes are at pages 9 to 13 of the respondent's Bundle (wrongly dated 7 November 2017).

4.28 In no written communication, nor verbally, after the dismissal of his appeal on 12 May 2017 did the claimant express any further protest at his hurly rate of £8 per hour, and he continued to work for the respondent for that rate thereafter up to, and after the commencement of this claim.

5. Those then are the relevant facts. In assessing the credibility and reliability of the witnesses, the Tribunal does accept that the claimant was not always the most accurate historian, dates and figures not being his strong suit. One example was where he claimed that ACAS early conciliation "was rejected" on 7 August 2017, when the early conciliation certificate is dated 7 July 2017.That said, his letters of 20 December 2016 and 5 January 2017 are very clear on the central issue of whether he did or did not agree to work for a reduced hourly rate of £8. By contrast there is virtually no documentary corroboration of the respondent's position, and the only really significant document dated 20 December 2016 is rather undermining of its case, as will be seen below. Further, the late introduction of the evidence of Julie Fleck , and lack of any previous reference to what she supposedly overheard on 26 November 2016 has undermined the reliance the Tribunal feels it can place upon her testimony.

The Submissions.

6. The parties made written submissions. They are on the Tribunal's file, and it is not proposed to repeat them in this judgment. Suffice it to observe that Ms Del Monaco's submission are full, and invite the Tribunal to find as a fact that the claimant did not orally agree to the variation contended for by the respondent on 26 November 2016. Further, and in relation to issues that she has anticipated may arise, she has cited ***Bleazard v Manchester Central Hospitals & Community Care (NHS) Trust UKEAT/278/93*** **(**a case on series of deductions), and ***Rigby v Ferodo Limited [1987] IRLR 516*** , discussed further below. Mr Morton's rather briefer submissions effectively simply encourage the Tribunal to make the finding of fact that the claimant did indeed verbally agree to the variation contended for by the respondent, making observations upon the comparative merits of the evidence of the claimant and of the respondent's witnesses, He made no submissions as to any legal issues that may arise on the facts. Neither party has made any reference to the relevant statutory provisions, which are not contentious, and are of course, contained in s.13 of the ERA, which it is not intended to rehearse .in this judgment.

Discussion and Findings
i)The alleged express oral agreement to vary on 26 November 2016.

7. There are a number of stages that the Tribunal will have to go through in order to arrive at its judgment. The first is a factual one. It is a simple issue, but could be determinative of the claims. The respondent's case is that the claimant, orally, in the meeting on 26 November 2016, agreed a variation of the terms of his contract of employment. He verbally so agreed , it is contended, when agreeing to change his job onto the flowrapper , to work for £8 per hour, £320.00 per week. This is, of course, seriously disputed by the claimant, who says he agreed no such thing.

8. There is a straight forward conflict of evidence here, with Alec Fleck , and , belatedly, his wife, saying one thing, and the claimant another. The Tribunal has had to address this issue, and decide whose evidence is to be preferred. As ever, the Tribunal looks for consistency, and corroboration for each position. In making its decision, the Tribunal has been very influenced by the claimant's letter of 20 December 2016. That is a very swift response to the deductions which had by then occurred, and sets out very clearly that the claimant had not agreed to such a reduction in pay. The response to it, however, which is not delivered until 5 January 2017, from Alec Fleck, though doubtless with advice, is not consistent with the respondent's position. That position is that there was nothing to discuss, an agreement had already been made, verbally, on 26 November 2016. The opening paragraph expressly makes an "offer", in response to the claimant's request for reduced hours. There then ensue further terms, which Alec Fleck agreed had not been part of the verbal discussion, and hence must be part of an offer.

9. Whilst the letter goes on to say that the claimant had "agreed to all of these points", the claimant had not in fact done so. At the very least this letter betrays a lack of certainty about the discussion on 26 November 2016. Had there been an express , clear , agreement to vary the existing terms of the claimant's contract of employment on that occasion, one would have expected this letter to day so, and then to go on to recite then, as agreed terms, not to then seek the claimant's agreement to them in writing. This letter suggests that the claimant still had the choice as to whether to accept these terms or not, when, on the respondent's case now, he had no such choice, he had already done so. The claimant's reply to that letter on 5 January 2017 is a further consistent account of the meeting on 26 November 2016, and what was discussed.

10. With respect to him, Alec Fleck's rationale of the supposed variation does not make much sense. His statement, and communication to the claimant suggest that he thought the claimant wanted to "reduce his hours", but the proposed new terms did nothing of the sort, the claimant was still contracted to work 40 hours per week. It was the hourly rate that was changed, and there is no suggestion that the claimant wanted that.

11. Further, the Tribunal cannot accept the evidence of Julie Fleck as to what was said during the meeting on 26 November 2016. her evidence was very late, being served on the day of the hearing, and there had been no suggestion in any of the

documentation prior to that statement being served , that she had overheard not only the conversation, but that the claimant had agreed to accept £8 per hour. Given that she heard the grievance (without, of course, disclosing that she had heard the conversation) and would have been in a position from an early stage to contradict the claimant's account of the meeting, she never did so. Whilst she explained her approach to the grievance meeting on the basis that she wanted to see what the claimant (her brother, of course) would say, he gave no plausible explanation as to why, when giving him the grievance outcome on 14 February 2017, when the need for any such subterfuge had evaporated, she did not then tell him what she had heard with her own ears.

12. The burden of establishing the agreed variation of the contract of employment lies upon the party asserting it, in this case the respondent. It has failed to discharge that burden. Either on the grounds of credibility, or, alternatively, construction (whatever was said, did the parties actually make an agreement on 26 November 2016 – the Tribunal does not find so) , and the Tribunal accordingly finds that there was no agreed variation on 26 November 2016, or, indeed, subsequently.

ii)The effect of the claimant continuing to work for the respondent under the new terms.

13. That , however, does not dispose of the matter. The unilateral imposition of the variation as to the rate of pay to £8 per hour was first made in the week of 9 December 2016. The wageslips produced show that from then onwards the claimant worked for the rate of £8 per hour. The claimant, of course, from 20 December 2016 protested, and argued , unsuccessfully, that he had not agreed to this variation. Nonetheless , he continued to work for the respondent, and has done ever since, being paid at the rate each week. He did not present this claim until 7 November 2017, just under 12 months from the unilateral variation of his contract.

14. The question therefore arises as to what the effect of that delay is upon his claims. This has, perhaps surprisingly, not been a feature of the respondent's submissions, which have rested on the respondent's prime, but unsuccessful, defence that the claimant expressly agreed to the variation. Ms Del Monaco submits that the claimant can just "stand and sue", and indeed has done so. It has therefore been necessary for the Tribunal to consider the effect of the delay, a matter clearly in the contemplation of Ms Del Monaco, as in her submissions she makes reference to it, and the case of ***Rigby v Ferodo Limited [1987] IRLR 516 .*** In that case Mr Rigby's weekly wage of £190 per week was reduced by about £30 when his employer got into financial difficulties. Mr Rigby responded by continuing to work at the lower wage although it was clear he had never consented to a variation in his pay. He then issued proceedings in the High Court for damages for breach of contract. The case reached the House of Lords which confirmed that, although the reduction in pay was a repudiatory breach of contract, Mr Rigby was entitled to refuse to accept the breach and instead could choose to keep the contract alive. In those circumstances, given that he was clearly working under protest, he could sue for the shortfall and the employer would remain liable for as long as short wages were paid.

15. On the other hand, it is clear that the right to accept a repudiatory breach and terminate the contract may well be lost if the employee accepts the short wages and continues to work without protest for a significant period: a point made by Mitting J in ***Abrahall v Nottingham City Council UKEAT/0010/16*** . So for example in ***Dixon v London and General Transport Services Ltd EAT/1265/98*** the EAT (Burton J presiding) suggested obiter that employees who resigned a year after a wage cut had waited too long to resign and claim constructive dismissal. However, as Mitting J emphasised in the ***Abrahall*** case, the proper interpretation of the case law (in particular ***Solectron Scotland Ltd v Roper [2004] IRLR 4***) is that in practice the circumstances must be such as to make silently continuing to work 'a clear and unequivocal indication' of agreement to an adverse variation of the contract.

16. It has to be remembered when dealing with this body of caselaw that the issue often arises in the context of constructive dismissal , i.e the issue is whether the employee can rely upon an allegedly repudiatory breach if he had delayed too long in resigning. Further, not every reduction in wages will amount to a continuing breach .In ***Dixon v London and General***, referred to above, the EAT decided that the employer's conduct in cutting wages did not amount to a continuing repudiatory breach. Although the initial change in terms and conditions constituted a repudiatory breach of an express term of the contract, the subsequent payment of lower wages was merely a consequence of that breach. Consideration of the caselaw also reveals that a different approach may be taken in relation to variations of terms of the employment contract which do not have an immediate effect, and those which impact more significantly on the employment relationship.

17. In his judgment in the EAT decision in ***Solectron Scotland Ltd v Roper [2004] IRLR 4*** Elias , J., as he then was, said this (paras. 30 and 31 of the judgment):

"The fundamental question is this : is the employee's conduct , by continuing to work, only referable to his having accepted the new terms imposed by the employer ? That may sometimes be the case. For example, if an employer varies the contractual terms by, for example, changing the wage or perhaps altering job duties and the employees go along with that without protest, then in those circumstances it may be possible to infer that they have by their conduct after a period of time accepted the change in terms and conditions. If they reject the change they must either refuse to implement it or make it plain that, by acceding to it, they are doing so without prejudice to their contractual rights. But sometimes the alleged variation does not require any response from the employee at all. In such a case if the employee does nothing , his conduct is entirely consistent with the original contract continuing, it is not only referable to his having accepted the new terms. Accordingly, he cannot be taken to have accepted the variation by conduct.

So, where the employer purports unilaterally to change terms of the contract which do not immediately impinge upon the employee at all – and changes in redundancy terms will be an example because they do not impinge until an employee is in fact made redundant – then the fact that the employee continues to work , knowing that the employer is asserting that that is the term for

compensation for redundancies, does not mean that the employee can be taken to have accepted that variation in the contract."

18. The position in this case, however, is very different. The change in the claimant's hourly rate was one that immediately impinged upon him, form early December 2016. Further, it did so every week, as he was weekly paid.

19. Whilst the claimant has asserted to the contrary in the ET1 , and to a lesser extent in para. 25 of his witness statement, which is very vague, there is no evidence before the Tribunal of any continued protest after the claimant's final grievance appeal which he submitted on 14 February 2017, was heard on 10 May 2017, and the outcome of which was communicated to the claimant on 12 May 2017. Thereafter the claimant commenced the early conciliation process with ACAS, on 6 June 2017. Assuming , in the claimant's favour, that to be capable of amounting to a continuing form of protest, that process ended on 6 July 2017.

20. Thereafter there was no written protest, nor any evidence of any further oral protest being made. The claimant continued to work, and was paid at the rate of £8 per hour. He finally issued this claim on 7 November 2017, 4 months, and some 16 or so paydays after the end of the early conciliation process. There has been no explanation for this delay, nor as to why the claimant decided then to issue this claim. The Tribunal considers it not without significance that the claim was issued the same day that the claimant was subjected to a disciplinary meeting, which then led to a written warning.

21. In essence, though, it does not matter so much as to why the claimant issued the claim when he did, what matters more is why did not do so earlier. He was clearly in receipt of legal advice from an early stage.

22. The basic problem for Ms Del Monaco's submission is that whilst the claimant was undoubtedly entitled to "stand and sue", whilst he stood, he did not sue. On the most generous interpretation, the time for suing had come , at the latest, by July 2017, and had come arguably even earlier than that. By the time he did sue, the unilateral variation had been in place for just under 12 months. His last protest to his employer directly was on 10 May 2017, and even counting the ACAS early conciliation period, which is itself also generous to the claimant, the claimant needed to have commenced proceedings, at the latest, by the end of July 2017.

23. The Tribunal appreciates that there is a degree of artificiality about the deeming of an acceptance of a variation on the part of an employee who has not in fact done so, but the law is clear, and well – established contractual principles, applied objectively to the facts of this case brook no other result. Whilst the imposition of the £8 per hour rate (and possibly also the change onto the flowrapper, but this is less of an issue) was a unilateral variation of the claimant's contract of employment in December 2016, by continuing to work on those terms, as a weekly paid employee, even initially under protest up until 7 November 2017, and delaying bringing this claim until that date, the claimant is deemed to have accepted the variation, and hence there were no unlawful deductions from

his wages in respect of which he can claim before this Tribunal. His claims are dismissed.

Employment Judge Holmes

Dated : 28 March 2018.

JUDGMENT AND REASONS SENT TO THE PARTIES ON
6 April 2018

FOR THE TRIBUNAL OFFICE