EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: S/4102592/2019

Hearing Held at Aberdeen on 2 May 2019

Employment Judge: Mr A Kemp (sitting alone)

Miss L Johnson	**Claimant** **In person**
Lloyds Register	**Respondents** **Represented by:** **Mr M Estafanous** **Solicitor**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The Judgment of the Tribunal is that:

(i) The Claimant's employer at the time of the termination of her employment was Senergy Wells Limited,

(ii) the Tribunal does not have jurisdiction to consider the claim as to the compressed working week as an unlawful deduction from wages under Part II of the Employment Rights Act 1996,

(iii) the Respondents did not make unlawful deductions from the wages of the Claimant,

(iv) there was no breach of contract by the Respondents

and the Claim is dismissed.

REASONS

Introduction

1. The Claimant presented a Claim alleging that there had been unlawful deductions from wages which may also have been argued as a breach of contract.

2. At the commencement of the hearing I explained to the parties that I had read the file, and had noted that although the claim had been directed against "Lloyds Register", the Respondents had indicated that the claim ought to have been taken against Senergy Wells Limited. I had also perused the documents produced for the hearing, and had noted reference to earlier employment with Senergy Resources Limited. I explained that I had acted for that latter company when in private practice prior to my becoming an Employment Judge, which was on 30 April 2018, and that I knew some of the HR staff at the Respondents, including Ms Gillies who was then attending with Mr Estafanous, the solicitor for the Respondents, although at that stage he did not intend to call her to give evidence. I gave the parties time to consider whether they wished me to recuse myself in light of my having acted for Senergy Resources Limited. After a break, the hearing resumed, and the Claimant asked for clarification as to my role in advising Senergy Resources Limited, and I explained that I had acted in the period prior to that company becoming part of the Lloyds Register group of companies but did not recall precisely when I last

did so. She then indicated that she was content that I hear the case, as were the Respondents.

3. The Respondents had sought a strike out of the Claim and deposit order in their Response Form and later email. The Tribunal had directed that that be considered at the commencement of the hearing. Mr Estafanous indicated that in the circumstances of the hearing being about to commence, the applications were withdrawn.

Evidence

4. The Tribunal heard evidence from the Claimant herself, her partner Mr Ben Gardiner, and Ms Jodie Gilles for the Respondents. Mr Estafanous had originally indicated that he did not intend to call witnesses but would rely on the documents. Ms Gilles was called as a witness after the Claimant denied receipt of documents or other information in her own evidence.

5. The parties had produced a single bundle of documents, not all of which was spoken to in evidence, and which was added to at the start of the hearing. Over the lunch break, after the Claimant's evidence had concluded and despite having indicated during the Claimant's evidence that they did not wish to lodge further documents, the Respondents then sought to lodge two further documents. The Claimant did not object, and the documents were then spoken to by her when she was recalled to give her evidence in relation to them in a further period of cross examination. That took place prior to the Respondents' witness giving her evidence.

Issues

6. The following issues were identified:

   (i) Had the Respondents made unlawful deductions from the wages of the Claimant in not awarding her a bonus under the Colleague Incentive

Plan, in not paying overtime, and in not compensating for the inability to work a compressed working week?

(ii) Were the Respondents in breach of contract in any of those matters?

(iii) If there was any unlawful deduction, what was the amount of the deductions?

(iv) Did the Tribunal have jurisdiction to consider the Claim in any event?

Findings in fact

7. Having considered the evidence led, the Tribunal made the following findings in fact.

8. The Claimant is Miss Lesley Johnson. She commenced employment with Senergy Resources Limited on 11 January 2016 as an HSEQ Engineer.

9. A statement of particulars of employment was issued to her, which had reference to a Company Bonus Scheme being applicable, which she would be eligible to join on commencement of employment. No details of that scheme were provided in that document.

10. Senergy Resources Limited became a part of the Lloyds Register group of companies in 2017. The precise date of that was not given in evidence. The Respondents employer continued to be Senergy Resources Limited at that time.

11. On 31 May 2017 the Claimant received a letter from her employer with regard to a collective consultation process to harmonise contractual terms between her employer Senergy Resources Limited with those of Lloyds Register. It attached a revised contract of employment. Under the heading “LR Policies and Procedures” it was stated that there were to be a few legacy policies to remain in force, which included one as to “Overtime On-Call and Callout Guidelines”, and another as to Compressed Working Week. The letter stated

that in the event of any conflict between the terms of the letter and new contract "the contents of this letter shall take precedence".

12. The said Overtime, On-Call and Call-out Guidelines included the statements: "The Company does not normally pay for overtime/weekend work, but this may be required of staff members in order to meet the needs of the Company and its clients from time to time. Any overtime/Weekend worked must be with the pre-approved and agreement of the staff members' line manager……where there are no specific provisions in the employment contract such work must be agreed with the line manager".

13. Also on 31 May 2017 the Claimant received a Temporary Contract Variation Agreement, which had a reduction in salary from £78,000 to £70,200 per annum. The Claimant accepted that offer, on the terms set out in the letter, on 20 June 2017.

14. The Claimant accepted the terms of the letter with regard to harmonisation in writing on 20 June 2017.

15. On 1 July 2017 the Claimant accepted the new contract of employment with the Senergy Resources Limited, who were then described within it at "(LR)". The contract referred in clause 2.2 to complying "with LR's policies and procedures communicated to …her and available on LR's intranet."

16. Under the heading "Hours of Work" was provided – "The Employee's normal working hours shall be 36.25 hours per week on Mondays to Fridays and such additional hours including weekends or during public holidays as are necessary for the proper performance of …her duties. The Employee acknowledges that …she shall not receive further remuneration in respect of such additional hours."

17. A document was issued to staff, including the Claimant, titled "Guidelines for the compressed working week (4.5 days)", It is an undated document. It was introduced at about the same time as the salary reductions took effect. It permitted staff to leave work at noon on Friday subject to conditions that included having worked the minimum of 36.25 hours, attending any meetings, client or otherwise, that fall on a Friday afternoon and "Staff will be expected to work on Friday afternoons if working on project work, billable work or any such work that requires them to be physically present and/or working on that afternoon."

18. On 12 October 2017 a company magazine was sent by email to all staff in the Lloyds Register group of companies, including the Claimant. It was called Re:Connect. It had reference to the "performance for 2016/17 and news about your bonus". A link on it took the viewer to the Rules of the 2016 scheme. The Claimant received a bonus under that scheme for 2016/17.

19. On 24 October 2017 the Claimant received a letter stating that effective on 27 October 2017 her employment was to transfer to Senergy Wells Ltd with all existing terms and conditions unchanged.

20. Until November 2017 the Claimant worked in the Respondents' office in Kingswells, Aberdeen. From that month onwards she worked at the offices of a client company, Chryasor. She required to start work at around 7.45am each day to prepare for a call at 8.30am. She would normally work to 5.15pm each day. She took about 30 - 45 minutes each day for lunch breaks.

21. On 11 December 2017 the Lloyds Register Group Ltd 2017-18 Colleague Incentive Plan Rules and Guidance document was drafted. It set out the arrangements for that Plan. It related to the financial year of the group, which commenced on 1 July each year. It therefore related to the period 1 July 2017 to 30 June 2018. Clause 7.5 stated "If you give notice of leaving before 01 November following the end of the plan year (even if your actual leave date is after that date) you will not be eligible to receive an Incentive Award."

22. On 12 December 2017 the Group Head of Reward sent an email with the draft for comment, and stating that the scheme would appear in Re:Connect on "Thursday". That was a reference to 14 December 2017. An email was sent on 13 November 2017 by Nick Williams in HR at Lloyds Register to a number of HR staff confirming that the CIP would be announced that day.

23. On or around 14 December 2017 an email was sent to all staff, including the Claimant, with the Re:Connect magazine. There were approximately 30 individual matters referred to in it. One of them was the announcement of the CIP for 2017/18. It also had a banner display at the top which highlighted individual matters in a series. If the viewer clicked on "read more" they would be taken to the Rules and Guidance document for 2017/18.

24. At the same time, the Rules and Guidance document for 2017/18 was placed on the intranet for the Lloyds group of companies, and could be searched for and found by any employee seeking it on that intranet.

25. Had any employee been unable to find it from such a search, she could have asked a member of the Respondents' HR team for a copy and would then have been sent it. The Respondents' HR team did send about three such copies to staff who had made requests for it.

26. The Respondents' Wells Manager Mr Dave Robb, a superior to her line manager, emailed her on 17 January 2018 to advise her to enter 8 hours per day when working for that client as that was the basis that the client was billed.

27. On 30 March 2018 he informed her not to enter the 9 hours she had for work but to do so with 8 hours, as to enter more than 8 hours "screws up the invoicing process."

28. The Claimant did not have written approval from her line manager to be paid for overtime she might claim to have worked whilst at the Chryasor offices.

29. Whilst working at the Chryasor offices the Claimant believed that she was not able to take half a day off on Fridays under a Compressed Working Week policy because of the requirements of her role there.

30. On 15 June 2018 Mr Robb emailed the Claimant and others about booking time for that client, and how to enter time if taking a half day off on Friday. His message was to make arrangements to invoice the client for the time worked. He made reference to those working the compressed working week, and taking Friday afternoon off.

31. On 29 June 2018 the Claimant met her line manager Mr Matt Rothnie to discuss the terms of her employment. Her salary was then increased to the level it was before the reduction referred to above with effect from 1 July 2018. He referred to other issues being addressed by Mr Stuart Gray, and HR.

32. On 20 July 2018 the Claimant emailed Mr Gray to intimate her resignation with three months' notice. She did so as she had been offered a staff position with Chryasor, at the same salary as she had received from the Respondents.

33. When she intimated that resignation she was not aware of the terms of the CIP for 2017/18. She had not asked HR for advice about the terms, nor for a copy of the Rules of that scheme. She had not undertaken a search of the intranet of the Respondents for those Rules.

34. On 10 September 2018 she and others received a reminder about the need to complete her Personal Performance Planning (PPP) form by 30 September 2018 as to do so was a requirement to receiving a bonus under the CIP. The Claimant duly did so.

35. Subject to the terms of the CIP for 2017-18, those with a PPP of 4:4 were entitled to a bonus equating to 5.04% of annual salary.

36. Shortly afterwards she met two members of the HR team of the Respondents namely Nicola Myles and Graeme Williamson and was informed that she had completed the PPP form sufficiently. She was shortly afterwards assessed as a 4:4 for performance under that process.

37. On 15 October 2018 Ms Mary Waldner the CFO of the Respondents emailed employees to advise about the 2017/18 performance and award of bonus. It had a link to a frequently asked questions page. That page gave details about the bonus, and related arrangements, including as to who was eligible and what the exclusions were, but did not refer to a lack of eligibility to any employee who had resigned prior to 1 November 2018.

38. The Claimant left the Respondents' employment on 20 October 2018 and commenced to work with Chryasor.

39. At or around the same time the Claimant's partner Mr Ben Gardiner gave notice of his resignation to the Respondents, and when he did so he was unaware of the terms of the Rules and Guidance of the CIP for 2017/18. He would have delayed his resignation had he been aware of those Rules in order to receive his bonus.

40. On 22 November 2018 the Claimant emailed Mr Rothnie raising issues she wished to discuss with him. It included the following "In addition I have not received a bonus for my performance last year. I am aware of the Ts and Cs related to the bonus, but considering the efforts that I made during my time at LR I do not feel that I have been fairly treated."

41. She commenced Early Conciliation on 13 December 2018. The Certificate was issued on 16 January 2019 and the present Claim was presented on 12 February 2019.

42. The Claimant did not receive any bonus for 2017/18, any payment of overtime for the hours she worked above 7.15 per day at Chryasor, or any compensation for any inability to benefit from the CCW arrangement.

Claimant's Submission

43. The Claimant argued that she had fulfilled the conditions for the 2017/18 bonus, including having completed her PPP in time. She argued that under her contract she had a normal working week of 7.25 hours, and was entitled to overtime with for a period of 11 months a contracted 8 hours per day. She had accepted the reduced salary on the basis of the compressed working week arrangements, but could not work them when at the client Chryasor, and was entitled to the former salary. The letter of 31 May 2017 took precedence over the contract of employment and that letter refers to overtime as a guideline policy. She also asked whether the contracts were compliant with the TUPE Regulations, as the former contract had reference to a bonus.

Respondents' Submissions

44. Mr Estafanous argued on the bonus that the policy was clear and explicit. The Claimant had resigned in July 2018 and all that followed was irrelevant. The real question was whether the terms were incorporated. There was confirmation of the arrangements communicated by the intranet, with documents in December 2017. The Claimant had received a link to the 2016/17 plan by email. The Claimant was put on notice that a resignation might affect her rights. The Claimant was well versed in using the intranet, had obtained documents from it herself. It was odd that she had not searched it prior to resigning. She had been put on notice that she should have. The Connect intranet facility is mentioned three times in the contract of employment. It is a form in which employees are expected to look for policies. It is the first port of call if something cannot be found. If not there, HR or line management could be asked. There was ample opportunity to facilitate that. On a number of occasions the Claimant had said that she could not remember if she had read

emails sent to her. She specifically stated to Mr Rothnie that she was aware of the terms and conditions. She explained that by a reference to the letter of 31 May 2018 but that letter doesn't say that someone was not entitled to a bonus. She was frustrated that she hadn't received the bonus but had no right in contract or in law.

45. He turned to the claim for overtime. The contract of employment could not be more specific, he argued. Additional hours would not be paid. She had read and signed the contract. There was no evidence of her line manager approving overtime in writing in any event. It was clear that the summary document was irrelevant.

46. He argued that the claim in respect of the CWW policy was out of time, and that in any event even if she had not been able to work on Friday afternoons the remedy would not be reverting to the former salary. There were no complaints in writing up to June 2018 and the salary was then increased. There were other solutions. It was clear from the CWW policy that employees were expected to attend necessary meetings, and that there was no guarantee of a Friday afternoon off. The policy had been emailed to her, but she had not recalled receiving it.

The law

47. The provisions as to unlawful deduction from wages are within Part II of the Employment Rights Act 1996. The relevant provisions are as follows:

> "**13 Right not to suffer unauthorised deductions**
>
> (1) An employer shall not make a deduction from wages of a worker employed by him unless—
>
> (a) the deduction is required or authorised to be made by virtue of a statutory provision or a relevant provision of the worker's contract, or

(b) the worker has previously signified in writing his agreement or consent to the making of the deduction.

(2) In this section 'relevant provision', in relation to a worker's contract, means a provision of the contract comprised—

(a) in one or more written terms of the contract of which the employer has given the worker a copy on an occasion prior to the employer making the deduction in question, or

(b) in one or more terms of the contract (whether express or implied and, if express, whether oral or in writing) the existence and effect, or combined effect, of which in relation to the worker the employer has notified to the worker in writing on such an occasion.

(3) Where the total amount of wages paid on any occasion by an employer to a worker employed by him is less than the total amount of the wages properly payable by him to the worker on that occasion (after deductions), the amount of the deficiency shall be treated for the purposes of this Part as a deduction made by the employer from the worker's wages on that occasion……..

23 Complaints to employment tribunals

(1) A worker may present a complaint to an employment tribunal—

(a) that his employer has made a deduction from his wages in contravention of section 13 (including a deduction made in contravention of that section as it applies by virtue of section 18(2)),……..

27 Meaning of 'wages' etc

(1) In this Part 'wages', in relation to a worker, means any sums payable to the worker in connection with his employment, including—

(a) any fee, bonus, commission, holiday pay or other emolument referable to his employment, whether payable under his contract or otherwise".

48. The reference to the wages being "properly payable" requires some form of legal obligation to do so – ***New Century Cleaning Co Ltd v Church [2000] IRLR 27.***

49. Any claim for unlawful deduction from earnings must be taken within three months of the last such deduction. Early conciliation is then required under the provisions for the same, unless it was not reasonably practicable for the Claimant to have pursued the claim timeously. In the event that that is not done, the Tribunal does not have jurisdiction to consider the claim.

50. This issue arose in relation to the claim as to the compressed working week, as with effect from 1 July 2018 the Respondents did increase the Claimant's salary to the prior level and any claim for losses ceased at that point. The claim in that respect was then pursued over three months late. It is out of time in so far as a claim for unlawful deduction from earnings is concerned, but as there was a separate potential remedy as a breach of contract claim which was a claim outstanding as at the date of termination. The Tribunal has jurisdiction to consider a complaint as to breach of contract under the Employment Tribunals (Extension of Jurisdiction) (Scotland) Order 1994, which includes such a claim which is outstanding as at the date of termination. The issue of jurisdiction did not arise in relation to that breach of contract claim, as it was pursued within the statutory framework from the date of termination.

51. It was also clear from the evidence that the identity of the employer was, latterly and at the time of the termination of employment, Senergy Wells Limited, and the Claimant did not have any issue with that party being substituted for the original Respondent she had given.

Observations on the evidence

52. There was some, but limited, dispute between the parties on the material facts. All of those who gave evidence before the Tribunal were seeking to do so honestly. I generally accepted the evidence that was given, save as to specific

issues as I comment on below. The dispute centred around what the Claimant did in fact know, or ought reasonably to have known. Mr Gardiner gave brief evidence to confirm that he was unaware of the terms of the Colleague Incentive Plan, and that had he been he would have delayed his resignation in order to achieve a bonus. Ms Gillies gave evidence on HR practice, and the terms of emails sent with regard to the introduction of the 2017/18 Plan, which again is referred to in more detail below.

Discussion

(i) Bonus

53. It was clear, and not disputed, that the Claimant was a strong performer, who had completed her PPP in time and had been awarded a high score of 4:4. All other things being equal, that entitled her to a bonus under the Colleague Incentive Plan (CIP). It was for the work in the period 1 July 2017 to 30 June 2018. There was however a set of Rules, and Guidance, for the CIP for that period.

54. The Claimant resigned on 20 July 2018 with notice of three months. Before she did so, she did not carry out a check of any entitlements to the bonus. She was not aware of the conditions that applied.

55. The question in law is not whether it is fair to award the Claimant the bonus she seeks, but whether it is legally payable to her. It requires either a direct contractual entitlement, such that the failure to pay is a breach of contract, or a sufficient legal entitlement (which may not be under the contract of employment itself) as explained in the ***New Century*** case.

56. Clearly the best way to send important details such as the terms of a plan such as the CIP is to email them to all employees affected. That is not however the only way to do so. It appeared to me that providing the information in an emailed magazine to all of the staff in the group of companies, which referred

to the plan for the 2017/18 year, was sufficient. There was a link within that which led to the Rules document.

57. I also found that the full Rules and Guidance for that year were on the intranet, from on or around 14 December 2017, and could be searched by any employee to find them. Separately, had there been an enquiry of the HR department, the document would have been sent to the person asking for it. That had been done by other employees, who were then sent the document.

58. I accepted that the Claimant and other employees of the group of which the Respondents were a part had been put on notice sufficiently that there were Rules for the scheme, and that they could be accessed on the intranet. I took into account also the reference to "Connect" which is the intranet used at the group, and to the fact that the Claimant herself did search it for some documents. The scheme was also one for the group as a whole, not just the Respondents.

59. I also took into account her email to Mr Rothnie, her line manager, on 22 November 2018. In that she did refer to the terms and conditions (as "T's and C's"). It appeared to me that the only sensible reading of that phrase was as a reference to the said Rules and Guidance document. Her email argued that she was not being fairly treated "considering the efforts" she had made. That appeared to me to be an argument that it was not fair to apply the strict terms of the Rules to her because she had made such efforts during the financial year. She was perfectly entitled to make that argument, and there is more than a little strength in it in the non-legal sense, but it does tend to support the conclusion that she both could have been aware of the terms of the Rules or was so aware at least as at 22 November 2018. It is hard to read the phrase as a reference to the letter of 31 May 2017 which the Claimant suggested in her evidence. I did however accept her evidence that when she resigned, she was no so aware.

60. It is very unfortunate that the Claimant did not make any check as to the rules for the bonus scheme for the financial year 2017/18 before she decided to resign, or to seek advice from HR, or to ask for a copy of the Rules document. Had any of those steps been taken the outcome may have been different. It is also unfortunate that in resigning in circumstances where she might have delayed that resignation to achieve the bonus she acted in a manner that she did not require to.

61. That lack of knowledge was also evident from Mr Gardiner's evidence. He too was not aware of the terms of the Rules, and the requirement not to have resigned before 1 November of the year following the financial year for that bonus. I did not consider however that that evidence was sufficient to establish that there had not been adequate attempts to communicate the terms of the Rules, nor that it was not readily discoverable by searching the intranet or asking HR. It had also been clear from the 2016 scheme that there were rules that applied to such schemes.

62. The Claimant also made a reference to the change in contract being in breach of TUPE. By that she was referring to the Transfer of Undertakings (Protection of Employment) Regulations 2006. There was no indication in the evidence that there had been any relevant transfer under those Regulations when Senergy Resources Limited became a member of the Lloyds Register group of companies. For there to be a relevant transfer, there must generally be a change of the legal entity that employs the employee. In the event that there is such a degree of change in control that in fact there has been a transfer, as was found in the case of ***Millam v Print Factory London (1991) Limited [2007] EWCA Civ 322,*** but there was no evidence of a similar kind put forward in the present case. There was a transfer to Senergy Wells Limited later, as found above, and that was a relevant transfer, but the transfer was on the then existing terms and conditions which were unchanged. There was no basis therefore to find that there had been any change to terms and conditions of employment which may have been unlawful under the 2006 Regulations.

63. I am driven to the conclusion that the CIP scheme for the financial year 2017/18 did have as a requirement that there be no resignation prior to 1 November 2018, that the Claimant had resigned prior to that date, and therefore was not entitled to the bonus under the Rules by which the scheme operated. The legal entitlement required by the ***New Century*** case did not therefore exist. The claim for bonus I therefore require to dismiss.

(ii) Overtime

64. It is clear that the Claimant did work hours longer than those initially described as "normal". The terms of her contract of employment are however clear. The natural meaning of the provision on hours of work is that she requires to work such additional hours as are necessary, and is not paid additional sums for doing so.

65. That analysis is subject to the terms of the letter dated 31 May 2017, which in turn referred to the policy titled as to Overtime, On-call and Call out Guidelines. It is at least potentially possible for those guidelines to amount to a contractual obligation, but even if that were the case the terms that applied included the need for written prior approval by the line manager. The Claimant accepted that she did not seek that. She argued firstly that she was doing so in these proceedings, but that does not meet the terms of the guidelines. She argued secondly that Mr Robb instructed that she work 8 hours per day in emails that are referred to. What he was doing however, according to the terms of those emails, was providing for the recording of the time worked for the purposes of invoicing the client. The emails indicated that the client was charged on the basis of an 8 hour working day, and that even if more than that was worked, it should not be recorded. That was in the context of a separate contract between the client, and either the Respondents or another member of the Lloyds Register group, although that client was not produced to the Tribunal. Those separate contractual arrangements do not apply to the Claimant's contract. There is nothing unusual in a contractual arrangement with a client as to the

basis of invoicing for the services of a member of staff not being the same as the terms of employment for that member of staff.

66. I consider that in light of the terms of the contract of employment, which the Claimant accepted, the Claimant is not entitled to overtime for the hours she worked over those she considered to be normal. That is not to say that she did not work such hours, as it was clear that she worked longer hours than she had when at the Respondents main office, and did so effectively as her rating indicates, but I do not consider that there is a legal entitlement to be paid for them. I must therefore dismiss that claim

(iii) Compressed Working Week

67. The Claimant can pursue this part of the claim as one of breach of contract. The Claimant argued that she had not been able to take Friday afternoons off because of the requirements of working for the client, had been deprived of the benefit of the CWW policy, that she had agreed to a reduced salary on account of that policy and was entitled to revert to her former salary because of that.

68. There are a number of difficulties with that argument. The first is that the email from Mr Robb dated 15 June 2018 which was sent to those at the client including the Claimant, referred specifically to working the CWW. It may have been that the Claimant was particularly conscientious in not doing so, but there did not appear to be any formal impediment to her seeking to do so, at least if and when that became possible.

69. The second and fundamental difficulty is that the CWW policy itself makes it clear that if client requirements are that a meeting is to take place on a Friday afternoon, that takes precedence. It also stated that it could not be taken if working on billable work. There was no right to take the time off in those circumstances. If it was the case that the client arrangements prevented the Claimant taking the time off, that was unfortunate for her but was within the terms of the policy, not a breach of it.

70. The third difficulty is that even if there was a finding that the guidelines were contractual in effect and had been breached by the Respondents, contrary to the earlier finding, the Claimant did not raise any issue with regard to it until June 2018. The principle of acquiescence operates where there is a breach of contract which is not challenged at the time, such that after a period the right to make a claim of breach of contract is lost as there is an inference from the lack of any challenge that there is consent.

71. If there is such delay before the resignation indicating that the individual has acquiesced (affirmed is the term used in English law) in any breach, there will not be a dismissal. The leading case on that principle is ***W E Cox Toner (International) Ltd v Crook [1981] IRLR 443***.

72. One issue of relevance in the assessment of delay is where the employee has been off sick during the period. The issue has been addressed in a number of authorities, but not in a manner that is always easy to reconcile.

73. In ***Bashir v Brillo Manufacturing Co [1979] IRLR 295***. a two-month delay while off sick and claiming sick pay was held not to amount to affirmation.

74. In ***el-Hoshi v Pizza Express Restaurants Ltd UKEAT/0857/03*** the employee was off sick with depression for three months after the alleged repudiation, submitting sick notes and receiving sick pay; his claim for constructive dismissal was allowed to proceed as there was no affirmation, the EAT saying that receipt of sick pay is at best a neutral factor which should not prejudice the employee's rights.

75. In ***Fereday v South Staffordshire NHS Primary Care Trust UKEAT/0513/10*** it was held that the employee had affirmed after a delay of six weeks while receiving sick pay, it being said that such receipt is not necessarily a neutral factor, depending on the facts.

76. In ***Hadji v St Luke's Plymouth UKEAT/0095/12*** a period of four months between repudiation and resignation, spent on sick leave (but with the complication that the employee did not receive sick pay), was held to constitute affirmation, in the light of consideration being given by him to possible alternative roles within the organisation, up to the eventual decision to leave.

77. In ***Chindove v William Morrison Supermarkets Ltd UKEAT/0201/13*** a period of sickness absence of six weeks before resigning was held not to amount to affirmation. The then President of the EAT indicated that, as a general principle, a tribunal might be more indulgent towards the period of delay because the need to make a decision one way or the other is arguably less pressing than if the employee is continuing actually to work for the employer.

78. In ***Mari (Colmar) v Reuters Ltd UKEAT/0539/13*** the Claimant was in a senior position, was off sick with stress and when she returned claimed that she was given no work commensurate with her position and was badly treated by the employer and fellow employees. She went off sick again, this time for 19 months, at the end of which she resigned and claimed constructive dismissal. She had claimed sick pay for 39 weeks during this period. The employer argued that she had affirmed her contract and the tribunal agreed. The employer relied on her receipt of sick pay as only one of four factors showing affirmation, the others being (i) her insistence on having access to work email reinstated, (i) her request to be considered for permanent health insurance payments and (iii) continuing discussions with the employer about other matters consistent with wishing to return to work.

79. There is no specific period of time during which such a principle operates, it is essentially a question of fact and degree in the circumstances of each case, but given the fact that the CWW guidelines were introduced when there was a salary reduction, that reduction took place following the acceptance of the letter dated 31 May 2017, and the Claimant then worked at the Chryasor offices from November 2017 onwards, I consider that a challenge only made in June

2018 was of such a delay that the principle of acquiescence did operate. There was therefore no breach of contract.

80. For the reasons set out above however I consider that there is no breach of contract in respect of the CWW policy, and in any event no jurisdiction in so far as an unlawful deduction from earnings claim is concerned. The claim in relation to the CWW policy must therefore also be dismissed.

Conclusion

81. The result of the decisions above is that I regret that I must dismiss the Claim.

Employment Judge: **Alexander Kemp**
Date of Judgment: **29/05/2019**
Entered in Register: **30/05/2019**
Copied to Parties