EMPLOYMENT TRIBUNALS

Claimant: **Mrs F Stone**

Respondents: **(1) The Finance Store Limited**
(2) TFS Loans Limited

Heard at: **East London Hearing Centre**

On: **18 October 2019 and 19 October 2019 (without the parties)**

Before: **Employment Judge Gardiner**

Representation

Claimant: Mr P Strelitz, counsel
Respondent: Mr N de Silva, counsel

JUDGMENT

The judgment of the Tribunal is that:-

1. Permission is granted to the Claimant to amend its claim as exhibited to the amendment application dated 31 January 2019, and for the Respondent to make a consequential amendment as exhibited to the Respondent's Skeleton Opening.

2. The First Respondent has made an unauthorised deduction of the Claimant's wages, contrary to Section 13 of the Employment Rights Act 1996 in reducing her monthly payments in January 2017 and thereafter from £3250 gross to £500 gross.

3. The total amount of the unauthorised deduction of wages at the date on which these proceedings were issued is £60,500 gross.

REASONS

1. During 2016 the Claimant, Mrs Fiona Stone, was paid £3250 per month. The payment was made under a contract describing her role as Funding Director. From January 2017, the payment reduced to £500 per month, and continued to be paid at this rate thereafter.

2. She claims this was an unauthorised deduction of wages, contrary to Section 13 of the Employment Rights Act 1996. She seeks to recover the continuing shortfall from January 2017 until October 2018 when these proceedings were issued. The dispute between the parties is whether the contract had been varied by agreement so that the First Respondent was only obliged to pay £500 a month during this period. The Second Respondent is a wholly owned subsidiary of the First Respondent and administered the payroll system on behalf of the First Respondent.

3. The Tribunal heard oral evidence from Mr Trevor Stone, the Claimant's husband, from the Claimant herself, and from Mr Robert Smoker, the First Respondent's CEO. There was a further witness statement from Howard Snell, the Chairman of both the First and Second Respondents. Mr Snell was not called as a witness and the Tribunal was not asked to read his witness statement.

4. The Tribunal was referred to several documents in an agreed bundle running to 309 pages. Mr Niran de Silva, counsel instructed by the Respondent, had prepared a Skeleton Opening. Both he and Mr Paul Strelitz, counsel for the Claimant, made oral closing submissions. Evidence and submissions were completed on the first day of the two days allocated for this Final Hearing. It had previously been decided by Employment Judge Russell that the parties need not attend on the second day. That day would be used for the Tribunal's deliberation.

5. In her Case Management Summary prepared after a Preliminary Hearing held on 28 January 2019, Employment Judge Russell had identified four issues for determination. These were:

   a. Was the Claimant an employee or worker of the First Respondent and/or the Second Respondent ?

   b. If so, what sums were properly payable to her from January 2017 ?

   c. Has the Claimant suffered an authorised deduction from her wages since January 2017 ?

   d. If so, in what sum ?

6. Midway through the hearing, Mr de Silva conceded that the Respondents were no longer arguing that the Claimant was not a worker. As a result, the Respondents accept that the Tribunal had jurisdiction to decide whether there had been an unauthorised deduction. The Respondents do not accept that the Claimant had

employee status. It is not necessary to decide the Claimant's status to determine the deduction issue.

7. At the hearing before Employment Judge Russell, the Claimant had produced an Amended Particulars of Claim. Judge Russell did not decide whether the Claimant could rely on the proposed amendment because, at that point, the Respondents' counsel had not had an opportunity to consider the scope of the proposed amendment and to take instructions. As a result, she directed that that issue would need to be the subject of a formal application and a response from the Respondents and then would be determined on the papers. In the event, no decision was taken before the start of the hearing.

8. Mr Strelitz asked at the start of the hearing for permission to amend. Mr de Silva, for the Respondents, did not object to the proposed amendment, on condition that he was entitled to make a consequential amendment to the ET3 in terms attached to his Opening Skeleton. As a result, both amendments were granted by consent.

9. The parties agreed that the sum in dispute was £60,500 gross.

Findings of fact

10. The First Respondent provides unsecured consumer loans. It has been in existence since May 2003 albeit initially operating as a broker. Its focus switched to consumer loans in around 2010. At that point, the Claimant provided the First Respondent with significant finance to enable it to operate in this new area of financial services. She has since been repaid for this finance with interest. From 1 July 2010 until around November 2014 she was a statutory director of the First Respondent. She was, and remains, a shareholder in the First Respondent, holding around 12% of the issued share capital.

11. Trevor Stone, the Claimant's husband, was the First Respondent's CEO until around November 2014. Mr Stone was not FCA Registered. Having someone as CEO with this registration was seen as potentially important to the success of the business. As a result, in November 2014 Mr Stone stepped down and the role of CEO was assumed by Mr Robert Smoker. Mr Stone continued to provide consultancy services to the First Respondent, through a consultancy agreement.

12. From July 2010 the Claimant received regular payments under a signed document titled "Statement of Main Terms of Employment". The document refers to the Employee as Ranjit Narwal, although it is common ground that this is an error and the contract applies to the Claimant. Despite the document referring to 'Employment', the Respondents do not accept that the Claimant had the status of employee as a matter of law. That issue does not need to be determined in these proceedings. The document describes her role as that of Funding Director. In practice, at least during the period with which this claim is concerned, the Claimant has never carried out any work for either Respondent. Rather, on her evidence, she has been ready willing and able to work if called upon to do so.

13. Under the heading “Pay”, the Statement of Main Terms of Employment states that the Claimant would be paid at the rate of £60,000 per annum by BACS at monthly intervals on or around the last day of the month. Such a payment was made each month from 2010 until around November 2014. Thereafter, by oral agreement, payments were reduced to £39,000 gross per annum, a sum of £3250 per month, and these payments continued until the end of December 2016. The Statement also sets out that in the event that the contract ended by reason of redundancy, the Claimant would receive a total payment equivalent to four years earnings, namely three years gross salary for loss of office and 12 months gross pay for payment during the notice period.

14. In late 2016, there were discussions about the First Respondent buying the Claimant’s shareholding. A complicating factor was that the First Respondent had previously made a substantial loan to a business owned by the Claimant and her husband, known as TW and FC Properties Limited. This was described as a bridging loan. The parties proceeded on the assumption that any agreement between the Claimant and the First Respondent about buying her shareholding would include provision for the repayment of the bridging loan. In addition, this proposed agreement would deal with the Claimant’s ‘employment’. Because she was being treated as if she was an employee, she would apparently be entitled to a tax benefit known as Entrepreneurs’ Relief. It was important to the Claimant that she continue to receive this tax benefit, if possible.

15. Throughout the relevant period, these discussions took place between Mr Smoker and Mr Stone. Even though the potential agreement concerned the Claimant’s finances at least in part, it was Mr Stone who conducted the discussions on her behalf. She did not have any direct involvement in these matters. It was for that reason, amongst others, that Mr Stone gave evidence to the Tribunal before the Claimant herself gave her evidence.

16. Initially, in an indicative term sheet prepared for discussion purposes and sent to Mr Stone on 22 November 2016, it was proposed that a payment would be made of £836,840 for the Claimant’s shareholding, from which would be deducted the current balance under the loan. The payments would be made over a period of a year, with the last payment on 1 November 2017. It was proposed that, in the meantime, the Claimant’s employment would end in December 2016 with a £30,000 redundancy payment. No further interest would accrue on the loan.

17. A further and different proposal was put forward on 12 December 2016. Whilst the sale price for the Claimant’s shareholding was the same, this provided for payment by the Respondents over a longer period, namely 18 months from 1 January 2017, with the last payment being made on 1 June 2018. The proposed arrangement recognised that the Claimant would need to remain employed throughout this period in order to be eligible for Entrepreneur’s Relief. As part of the deal, the Claimant would receive £500 each month going forwards as salary. There would be £500 nominal interest per month on the bridging loan. At the conclusion of her employment she would again receive a redundancy payment of £30,000.

18. This was put forward as 'final document' to address the issues, and effectively was a take it or leave it offer from the company. However, it was expressed to be 'subject to contract and documentation'. The term sheet recorded that the arrangements would need to be agreed by all shareholders.

19. By return email, Mr Stone signified his agreement to what was proposed and Mr Smoker agreed to instruct lawyers to draw up the required documentation. That documentation, as identified by the Respondents' lawyers in an email on 19 December 2016 and forwarded to Mr Stone on the same date, would require a new employment contract as well as 11 other documents. The parties clearly contemplated that the revised monthly payments under the 'employment contract' would be set out in that newly drafted document.

20. As had been the monthly pattern, the Claimant received a payment of £3250 through the payroll system at the end of December 2016. Nothing further of significance occurred in January 2017, save that the monthly payment at the end of January 2017 was £500 rather than £3250. There is no evidence that the Respondents provided any explanation to accompany the reduction. Around this time, the Respondents stopped charging interest in relation to the loan. They continued to pay £500 each month thereafter to the Claimant, but did not make regular monthly payments to Mr Stone under the consultancy agreement.

21. On 15 March 2017, Mr Smoker wrote to Mr Stone and the Claimant stating that "as discussed for a variety of reasons to date it has unfortunately not been possible to finalise the documentation for the share options with the result that you have asked for a further interim payment to you of £9,500". A further payment of £9,500 would be made as a further advance to him in respect of the loan "in line with before". The letter indicated that there would be no further payments made until all the necessary and remaining documentation in respect of the Framework, Share Option and other related agreements have been duly completed and signed. Both Mr Stone and the Claimant signed this letter to confirm their agreement to these terms. Although not explicitly stated, it is clear from the context that the related agreements would have included the Claimant's proposed new contract of employment.

22. On 20 April 2017, there was reference in an email from the Respondents' lawyers which was forwarded to Mr Stone to an attached "New Employment Contract". That document was not included in the hearing bundle. As a result, the Tribunal has not seen what was said about monthly payments.

23. By May 2017, the Respondents were experiencing cash flow difficulties prompted in part by the need to make further payments under an existing agreement with a previous funder called Machlin. However, three potential new investors had been identified. Their proposals assumed that the vast majority of existing shareholders remain, but their shareholdings would ber heavily diluted. This made it less likely that the Respondents could offer the same price for the Respondents shares as previously discussed, if the Claimant exited as a shareholder.

24. One of the proposed investors, Alchemy and Partners Venture Capital Private Equity, continued discussing a potential cash injection until October 2017. At that point they decided that they did want to improve their offer and would not be proceeding. They had been discussing a potential investment for 10 months by that stage.

25. On 18 October 2017, the Minutes of a Board meeting recorded Mr Stoker as saying:

> We are not currently paying [the Claimant] any salary which has been the case for the past few months whilst we try to finalise the investor discussions and the position regarding [the Claimant's] 12% shareholding.

26. The Minutes went on to say :

> The Board agreed the need for a discussion with Trevor and Fiona Stone to work out a resolution once the position on a likely investor is clearer and we have resolved the David Lloyd position.

27. From the context, this proposed discussion appears to be an anticipated resolution on all issues, including putting the issue of the Claimant's salary on a permanent footing. The Tribunal had no evidence as to whether there was a further discussion following this Board meeting as anticipated and, if so, what was discussed.

28. In the event, the position on a likely investor did not become clearer until around Springtime in 2018. In the meantime, other potential funders were discussed including a subsidiary of Alchemy called Swift, who were apparently considering making an offer in January 2018.

29. In February 2018, Mr Smoker emailed Mr Stone about the loan interest which had not been added since around the start of 2017, saying as follows:

> "… you cannot conceivably believe that interest is not payable – it is documented in the loan agreement and at the cost of funding to TFS rather than their normal commercial rates … Interest has not been charged for some time as you know and without getting into the usual argument there is a case that the amount due should actually be higher"

30. In Mr Smoker's CEO report to a shareholder and Board meeting on 9 February 2018, the first bullet point under "Remaining issues from the past" was the bridging loan and the issue of the Claimant's 12% shareholding. The notes record that Mr Stone had put forward an offer in relation to the bridging loan and the Claimant's shareholding. It also noted that Mr Stone had threatened that the Claimant could bring unfair dismissal proceedings in relation to her employment contract. Mr Smoker commented that "the matter needs to be brought to a conclusion" and suggested a counter proposal.

31. As the report was to the shareholders, the Tribunal infers that it would have been sent to the Claimant.

32. Mr Smoker emailed Mr Stone again on 17 April 2018 referring to the need to resolve the bridging loan and asking whether there was any interest in a third-party purchase

of the Claimant's shareholding. That shareholding and the bridging loan were on the Agenda for the Board Meeting on 26 April 2018. Mr Smoker's report for that Board meeting states he had previously advised Trevor Stone that the Board and shareholders were not prepared to take the shares in the First Respondent against the value of the bridging loan. The date on which this was said is not recorded.

33. The Minutes of the meeting on 26 April 2018 confirm that discussions were still ongoing about the purchase of the Claimant's shareholding. Mr Stone was investigating alternative funding which was regarded as a positive move. A timeframe of the end of May was set to have resolution or a clear plan. A formal demand would be made for repayment of the bridging loan, but there would be a prior discussion with Mr Stone to try to find a solution or potential compromise.

34. On 3 May 2018, the Claimant was sent a letter by the Respondents' solicitor formally demanding repayment of the bridging loan. Notwithstanding this, Mr Smoker emailed Mr Stone on 14 May 2018, inviting him to discuss the bridging loan.

35. There are no further documents until November 2018. As a result, it is unclear whether there were any further discussions on these topics between Mr Stone and the Respondents.

36. The David Lloyd position concerned an outstanding loan which was payable by David Lloyd to the Respondents. This situation was not resolved until Spring 2018. Mr Stone and David Lloyd were friends and the Respondents attempted to benefit from this friendship in reaching an arrangement with David Lloyd over the repayment of the loan.

37. Given this sequence of events, no binding agreement was reached between the company and the Claimant, as originally discussed in November, and as drafted by lawyers in April 2017. Notwithstanding the absence of any overarching agreement, there were two changes to the ongoing financial arrangements between the parties. Firstly, interest on the loan made to the Claimant was frozen from January 2017 for a period of time. Secondly, in the January 2017 payroll, and thereafter, the Claimant received a total gross payment of £500, rather than £3250.

38. There was no written agreement varying the monthly salary payment as recorded in Statement of Main Terms and Conditions of Employment. Nor was there a verbal agreement to this effect. The Respondent's case is that the Claimant's agreement to accept a lower monthly sum of £500 gross can be implied from her conduct. Specifically, her continued receipt of £500 each month without protesting that this was lower than the sum to which she was entitled under the agreement.

39. Under Mr Stone's consultancy agreement, he received £9,500 per month. Those payments ceased around December 2016, although there were no documents produced to the Tribunal on this point. However, there were three further payments of £9500 in the first three months of 2017. These were each described in a later spreadsheet as "further advance" and were paid on 7 February 2017, 15 February 2017 and 16 March 2017.

40. Save for one email from Mr Stone sent on 27 April 2017, it is common ground that the Claimant continued to accept £500 a month rather than £3250 a month without raising any protest until these proceedings were issued in October 2018.

41. There is a dispute as to the meaning of the email sent on 27 April 2017. It is worded in the following terms :

> "Hi Bob
>
> Unfortunately this is no good for us – our monies should not have been stopped until our share sale deal had been finally agreed.
>
> As I explained to Howard we need funds by tomorrow to pay debits due on the 1st.
>
> We have had no monies in April and the share deal has been halted.
>
> If you cannot transfer the full £9500 tomorrow then £5000 would be ok with balance as soon as possible afterwards.
>
> Please get back to me urgently.
>
> Trevor"

42. On behalf of the Claimant, it is argued that this email should be read as Mr Stone disputing not merely the failure to pay his consultancy fee, but disputing the First Respondent's failure to pay the Claimant's fee under the Statement of Main Terms of Employment. Neither Mr Stone nor the Claimant stated in their witness statements that this email was a protest about the failure to pay the Claimant. Mr Stone was recalled to give evidence on this point, at the conclusion of the oral evidence. He said, for the first time, that his email was referring to the failure to pay both his money and also that of the Claimant.

43. The Respondents contend that this is reading too much into this email, which related only to payments under Mr Stone's consultancy agreement.

44. In the event, two payments of £5000 were made, the first on 14 June 2017 and the second on 10 July 2017. They were each described as "further advance". Subsequently, they were treated as further loans. Thereafter they were repaid with interest as well as the remainder of the sums which had been loaned to the business owned by the Claimant and Mr Stone.

45. I do not regard Mr Stone's email as a protest about the failure to pay the Claimant the monthly sums she had previously been receiving. Rather it was intended to be a protest about the failure to pay sums under Mr Stone's consultancy agreement. The immediate context is the fact that the Respondents had stopped paying monthly payments of £9500 under the consultancy agreement, even though Mr Stone had still

been engaged in some work for the Respondents. Three payments had been made of £9500 in the first three months of 2017, but none since 16 March 2017, well over a month earlier. "The full £9500" appears to be a reference to the sum due under the consultancy agreement. Furthermore, as a matter of fact, the Respondent had not stopped payment of the Claimant's monthly payments, merely reduced them. Repeated references in the email to "our" appear to be treating the Claimant's rights and those of Mr Stone interchangeably. Thus, it refers to "our share sale deal" but the deal only concerned the Claimant's shareholding, because Mr Stone did not own any shares. In the same way the reference to "our monies should not have been stopped" is more likely to be a reference to the stopping of regular payments under the consultancy agreement.

46. It is telling that neither Mr Stone nor the Claimant identify the email as a protest in their witness statements, even though they have been legally represented throughout these proceedings. Rather, speaking of the Claimant, Mr Stone says in his witness statement (paragraph 18), that "if it meant that she could assist in the Respondents' cashflow such that the purchase of the shareholding could go through in the near future, she was prepared to suffer that". When cross examined about that passage, Mr Stone said that he and the Claimant were prepared to suffer forgoing the Claimant's monthly payment in order to facilitate the overall deal, up until the point at which he realised that the Respondents were 'stringing him along' about the prospects of buying the Claimant's shareholding, which was not until after completion of the David Lloyd transaction in early 2018. His statement (at para 19) goes on to say that "we decided it would not be worth rocking the boat by expressing how difficult surviving on £500 a month was for us as a family and therefore [the Claimant] remained quiet".

47. These proceedings were issued on 12 October 2018. Subsequently, on 29 November 2018, the Claimant emailed Mr Stoker and Mr Snell in the following terms :

> Dear Robert and Howard
>
> I would like to raise a Formal Grievance in respect of the unilateral reduction in my salary from £39,000 to £6,000 in January 2017. This was decided upon without my consent and I would request immediate reinstatement of my full salary (£39,000 per annum) and to be repaid the full amount owed since this reduction took place.
>
> Kind regards
>
> Fiona Stone

48. A grievance hearing took place on 13 December 2018, before Daniel Everitt. The notes of the grievance meeting recorded the Claimant as saying :

> [The Claimant] advised that if she had known that the purchase of her shares would go on so long or never happened, then she would never have agreed to the salary reduction.

49. Mr Everitt wrote to the Claimant on 20 February 2018, apologising for the delay in responding with an outcome to the grievance. He stated that the grievance and the employment tribunal proceedings were one and the same dispute. For the same reasons that those proceedings were in dispute he could not uphold her grievance at this time.

Legal principles

50. The legal principles which apply in this situation were considered by the Court of Appeal in the case of *Abrahall v Nottingham City Council* [2018] IRLR 628. Several hundred Nottingham City Council employees brought claims for unlawful reduction of wages under Part II of the Employment Rights Act 1996, arguing that they had an annual right to pay progression. The respondent disputed this was a contractual entitled but argued that by their conduct in continuing to work without protest after implementation of a pay freeze, the claimants were to be taken to have accepted a variation in their contracts under which pay progression was suspended for the two years in question. The tribunal found that there was a contractual right to annual pay progression and that the claimants had not agreed to a variation. The tribunal's decision was upheld in the Court of Appeal. In deciding the case, Underhill LJ reviewed the applicable caselaw and gave guidance as to how this issue should be considered.

51. The claimants' counsel had argued for a blanket rule that an employee could never be held to have accepted a pay-cut simply because they have continued to work without protest. Having recorded this submission, Underhill LJ continued as follows :

> 85. However, to take the position that to continue to work following a contractual pay-cut could never constitute acceptance would be contrary to the dicta of both Browne-Wilkinson J in *Jones* and Elias J in *Solectron,* in an area where the specialist expertise of the EAT must be accorded particular respect; and I do not believe that it would be right in principle. A contractual offer can of course be accepted by conduct, and that must include the offer of a variation. Under a contract of employment, the parties are in a complex relationship in which they are both required to perform their mutual obligations on a continuous basis, and those obligations are frequently modified by their conduct towards each other. I can see no reason why an employee's conduct in continuing to perform the contract, in circumstances where the employer has made clear that he wishes to modify it, may not – in principle – be reasonably understood as indicating acceptance of the change. As for *Khatri*, the general language of para. 46 of Jacob LJ's judgment must be read in the context of his overall reasoning. He did not rely on the simple proposition that silence can never indicate consent: rather, he went on to give particular reasons why it was not proper in the circumstances of that case to infer the employee's acceptance of the new terms which the employers sought to impose – namely that those terms had not yet bitten, and also that the employers had expressly sought the employee's acceptance in writing but he had not given it.

86. However, to say that in some circumstances continuing to work following a contractual pay-cut may be treated as acceptance does not mean that it will always do so. On the contrary, what inferences can be drawn must depend on the particular circumstances of the case. Neither Browne-Wilkinson J in *Jones* nor Elias J in *Solectron* went further than saying that continuing to work following a contractual pay-cut *might* constitute acceptance: the language used was "may well be taken to have … agreed" and "it may be possible to infer". The authorities illustrate some specific points about the proper approach to the question of when continuing to work may constitute acceptance. I briefly identify them as follows.

87. First and foremost, the inference must arise unequivocally. If the conduct of the employee in continuing to work is reasonably capable of a different explanation it cannot be treated as constituting acceptance of the new terms: that is why Elias J in *Solectron* used the phrase "only referable to". That is simply an application of ordinary principles of the law of contract (and also of waiver/estoppel). It is not right to infer that an employee has agreed to a significant diminution in his or her rights unless their conduct, viewed objectively, clearly evinces an intention to do so. To put it another way, the employees should have the benefit of any (reasonable) doubt.

88. Secondly, protest or objection at the collective level may be sufficient to negative any inference that by continuing to work individual employees are accepting a reduction in their contractual entitlement to pay, even if they themselves say nothing. This is clear from *Rigby v Ferodo*: see para. 74 above.

89. Thirdly, Elias J's use in para. 30 of his judgment in *Solectron* of the phrase "after a period of time" raises a point of some difficulty. It is easy to see how it may not, depending on the circumstances of the particular case, be right to infer acceptance of a contractual pay-cut as from the day that it is first implemented: the employee may be simply taking time to think. Elias J's formulation is intended to recognise that a time may come when that ceases to be a reasonable explanation. However, it may be difficult to identify precisely when that point has been reached on anything other than a fairly arbitrary basis. In *Khatri* Jacob LJ discomforted counsel for the employers by making that very point: see para. 47 of his judgment. But, again, that passage needs to be read in the context of the fact that in that case the variation had not yet bitten, and I do not think that the difficulty in identifying the precise moment at which an employee should be treated as first accepting a contractual pay-cut means that the question has to be answered once and for all at the point of implementation.

Respondents' submissions

52. Mr de Silva, for the Respondents, referred to the cases of *Solectron Scotland Limited v Roper* [2004] IRLR 4 at paragraphs 30 and 31, and *Abrahall v Nottingham City Council* [2018] IRLR 628. He relies on the length of time from the salary reduction in January 2017 to the point when objection was first raised in October 2018. He says that there was no protest during this intervening period. In carrying on as before, the Claimant

was agreeing to a variation such that she would be paid the lower sum of £500 per month for as long as a payment was to continue.

53. He says that the Tribunal should reject the Claimant's evidence in her witness statement that the reduction was temporary – because, as she herself accepted in evidence, this was never said to her or (to her knowledge) to her husband. He argues that the email of 27 April 2017 was not a protest from her or on her behalf about the reduction in her pay, and any belated reliance on this document is opportunistic. Paragraph 6 of the Amended Particulars, he submitted, merely reflected the Claimant's understanding rather than what she had been told. This paragraph was worded as follows :

    "I was told that the payment of my annual salary would be temporarily reduced to £6000 from the start of 2017 on the basis that I was always owed the difference (ie between £39,000 and £6000; "the Shortfall") but that this would be encapsulated in (but, for the avoidance of doubt, in addition to) the payment that I was to receive for the purchase of my shareholding and that this payment would be made within a reasonable time frame for me.

54. He relies on the passage from Mr Stone's witness statement at paragraph 18, cited above, in relation to his wife being prepared to suffer a reduction, and what the Claimant said in her grievance hearing, also as recorded above.

55. Finally, he says that there were two particular advantages for the Claimant in accepting the reduction in her pay. Firstly, the First Respondent was engaged in cost cutting at the time and if she did not agree to a reduction there was a real risk that she would be made redundant. Her continued employment was of some benefit to her in tax terms. Secondly, taking a reduced monthly payment improved the Respondent's cashflow and so put her in a better position to secure a fair payment for her shareholding.

56. Mr de Silva considered that if there was a need to find consideration supporting such a variation then it was provided by the Respondent's decision to continue employing her, rather than making her redundant.

57. He contended that the variation took effect as early as January 2017, because the Claimant's conduct by that point was sufficient to effect a contractual change.

58. At one point in time, as identified in his Opening Skeleton, Mr de Silva had been arguing that the facts gave rise to an estoppel by convention. He confirmed in his Closing Submissions that he was no longer advancing that argument.

Claimant's submissions

59. Mr Strelitz for the Claimant relied heavily on the first and third specific points made by Underhill LJ at paragraphs 87 and 89 in *Abrahall v Nottingham City Council*.

60. He argued that the first of Underhill LJ's three points presents an insurmountable hurdle for the Respondents. It assumes that the employee is continuing to work without

protest. In the present case, he argues, the Claimant was not carrying out any work, and so there is no conduct from which acceptance can be inferred. In any event, the inference of acceptance must arise unequivocally. If the Claimant's failure to protest is reasonably capable of a different explanation, then it cannot be treated as constituting acceptance of the new terms. He said that there is a different explanation here. The Claimant was hoping to receive a payment in excess of £800,000 for her shareholding and, in that context, chose not to protest about the payment of comparatively small monthly shortfalls, expecting a swift embodiment of the indicative term sheet into legal documentation. This negotiation in relation to a potential share sale continued until April 2018 and provides a different explanation for the delay.

61. In relation to the third of Underhill LJ's three points, he notes that it was only after the end of the April 2018 Board Meeting that a decision was taken to demand repayment of the loan. The evidence was that up until that point, a potential deal to buy the Claimant's shareholding could still have been done. There was nothing communicated to her until early May 2018 to indicate that a potential deal was dead. Silence was not unequivocal but it was the Claimant waiting to see when the deal would be done. There was a very good reason to bide time rather than take a clear stance on the underpayment. She then went to ACAS on 15 August 2018 and issued proceedings shortly after the ACAS conciliation period had ended in the middle of September 2018.

62. He referred to the key documents referred to in cross-examination saying there was no unequivocal variation, and in fact Mr Stone's email of 27 April 2017 amounted to a protest about the failure to pay the Claimant the sums to which she was entitled under the agreement.

63. He stated that the Respondents' case was overwhelmingly implausible. It was most unlikely that without being required to do so and without it being linked to a deal, the Claimant agreed to a reduction in her salary of £2750 per month in perpetuity.

64. He confirmed that the Claimant was not seeking to recover sums payable after the date on which the proceedings had been issued in October 2018, and that the sum sought was the shortfall between the £3250 that she should have been paid and the £500 that she was paid.

Conclusion

65. The starting point is the agreed contractual position in December 2016. This is that the Claimant would be paid £39,000 gross per year, or £3250 gross per month. Unless this contractual position was subsequently altered by a contractual variation, she remained entitled to the same monthly payments thereafter, and any reduction would be an authorised deduction from wages.

66. My conclusion is that there was no variation to the contract, and therefore there has been an unauthorised deduction from wages. The significance of the Respondents' reduced monthly payment and the Claimant's failure to protest about that reduction needs to be understood in the context of the ongoing discussions about the future of

the Claimant's employment. Seen in that context, the reduction was an advance step in anticipation of proposed changes that were never subsequently finalised.

67. By January 2017 there had been a broad agreement that the Claimant's monthly pay would reduce to £500, and this was to be recorded in a new employment contract. That new employment contract was part of a bigger package of proposed agreements to be drawn up by the lawyers and signed by the parties. The summary document dated 16 December 2016 was headed "Subject to Contract and Documentation". As a result, on an ordinary understanding of the phrase, none of the proposals were to have legal effect until they were embodied in contractual documents and until they were signed. This included the salary reduction to £500 per month. Those documents were not drafted until April 2017, but never finalised and never signed. In the meantime, discussions continued between Mr Stone on behalf of himself and the Claimant and the Respondents about the sale of the Claimant's shareholding.

68. The Respondents' understanding that the Claimant's salary reduction was linked to the purchase of the Claimant's shareholding is confirmed by its own Minutes of the Board Meeting in October 2017 as recorded above. That entry implies the Respondents recognised that there had yet to be a formal resolution to the salary issue, even though "currently" it was being paid at a reduced rate. The same Minute also stated that the Respondents were not currently charging interest on the loan.

69. Essentially by that point in time, full payment of both interest on the bridging loan and the Claimant's salary had been put 'on hold' whilst discussions took place about a proposed deal. Notwithstanding this pause so far as interest was concerned, the Respondents subsequently reinstated their claim to full interest throughout the period as is shown by the spreadsheet sent at the start of May 2018. That was subsequently paid in full. In the same way as the parties appeared to recognise that had never been a binding variation to the interest payable under the loan agreement, there was no binding variation to the terms on which 'salary' payments were due to the Claimant.

70. Even if the Respondents had intended to vary the monthly payments with immediate contractual effect, this would not be how the fact of the reduction would be reasonably interpreted by someone in the Claimant's position. Given that context, a reasonable person in the Claimant's position would have understood the first payment of £500 in the January 2017 payroll to be the Respondents acting consistently with one aspect of the proposed composite deal which had been agreed in principle, at a point in time when the legal documentation had not yet been signed, and therefore nothing was yet binding. It would not be reasonably understood as a proposed unilateral reduction in the Claimant's salary independent of whether the share purchase proceeded as proposed.

71. The Claimant's failure to protest about the reduction would reasonably be understood by a reasonable person in the Respondents' position as acting consistently with the spirit of the proposed overall deal, rather than agreeing to a binding contractual variation. In circumstances where negotiation had achieved agreement in principle to an acceptable deal, it would be potentially inconsistent with the goodwill necessary to embody the deal in binding legal documents for the Claimant to demand higher

monthly payments for each month until the legal documents were signed. At that point and thereafter until about April or May 2018, it was hoped that the deal could be finalised within weeks.

72. Accepting a reduced monthly payment in these circumstances was therefore reasonably capable of a different explanation to that put forward by the Respondents. Her conduct was not consistent only with agreeing to accept a lower monthly payment as long as the 'contract of employment' continued in force.

73. The Respondents argue that the variation took effect immediately, such that there had been a variation around the time of the first reduced payment in January 2017. The difficulty for the Respondents is showing that her conduct at or shortly after this payment was received evinces an unequivocal intention to agree to a lower payment regardless of whether any binding agreement was reached in relation to the purchase of her shareholding. She was not attending for work as the claimants did in *Abrahall.* Therefore she was not through this 'business as normal' conduct acting in a way that was only consistent with agreeing to accept new lower salary payments. Her conduct in failing to protest was entirely consistent with acting in anticipation with one aspect of an overall deal to exit the company in eighteen months' time with a payment for her shareholding as proposed on 12 December 2016. That conduct did not necessary imply she accepted she was only entitled to be paid a lower salary regardless of whether her shareholding was sold. Whatever she or her husband might have been prepared to forgo in the event that an overall deal was done does not affect this contractual analysis.

74. If the initial reductions were unauthorised, then there did not come a point when ongoing deductions became authorised as a result of a later variation to the contract. The Respondents do not identify, in the alternative, a later point in time by which point the alleged variation would have taken effect if it had not taken effect in January 2017. As the sequence of events shows, the backdrop for the ongoing acceptance of reduced payments at least until April or May 2018 was the hope that a deal could be achieved for the purchase of the Claimant's shares by the Respondents. Given that context, there was no unequivocal inference that the Claimant was accepting new terms in relation to her salary at a later point in time.

75. As a result, the Claimant's unauthorised deduction of wages claim succeeds in the agreed sum of £60,500 gross.

Employment Judge Gardiner

22 October 2019