



# EMPLOYMENT TRIBUNALS

***Claimant***

***Respondent***

Mr J Hetherington

**AND**

ETZ Technologies Limited

**Heard at:** London Central

**On:**

4 November 2019

**Before:** Employment Judge Nicolle

**Representation**

**For the Claimant:** Mr U Zilik, Trade Union Official

**For the Respondent:** Ms S Omeri, of Counsel

## RESERVED JUDGMENT

1. The claims for unauthorised deduction for wages and consequential reduced employer pension contributions are upheld and the Respondent is ordered to pay the Claimant the sum of £2,087.12.

## REASONS

The Hearing

2. On the day of the hearing the Tribunal received various emails on behalf of the Respondent requesting a postponement of the full merits hearing listed for 3 hours from 2pm that day. This included an email at 11.38am from Solange Semedo, Managing Director/Head Legal Counsel for the Respondent (Ms Semedo). The Respondent requested a postponement as it wished to call additional witnesses, namely Karl Furnell and Nick Woodward. The Claimant resisted the request for a late postponement of the hearing. I directed that the parties should attend the hearing listed at 2pm and any applications regarding the conduct of the hearing would be addressed then.

3. The parties attended for the 2pm hearing and produced an agreed bundle of documents comprising 191 pages. The Respondent had three witnesses comprising Ms Semedo, Keisha Roberts, Payroll Manager (Mrs Roberts) and Erene Procopiou, Marketing Executive (Ms Procopiou). The Claimant had a witness statement in his own name.

4. Notwithstanding the morning's request, Ms Omeri did not make any representations regarding the postponement and the hearing proceeded on the basis of the listed 3 hours for a full merits hearing. Whilst there was some concern whether the 3-hour listing would be sufficient it was agreed that the hearing should commence, and the evidence and submissions were completed by 6pm but given the time I reserved my decision.

### The Claims

5. The claims were for an unauthorised deduction from wages and/or breach of contract in respect of the Claimant's contention that the Respondent had failed to pay him his full wages in the period from 1 April 2019 until the termination of his employment on the grounds of redundancy with effect from 10 May 2019 to include his one month notice period. Whilst the parties referred to 10 May 2019 as being the termination date the reality is that the Claimant left employment on 10 April 2019 and received pay in lieu of his one-month notice period, so his termination date was 10 April 2019. The Claimant also claimed in respect of a consequential reduction in the employer's pension contributions based on what he contended was the unilateral reduction in his salary from the previous £65,000 to £50,000 with effect from 1 April 2019.

### The Issues

6. Which contract of employment applied? Was it the employment contract dated 28 November 2018 (**28 November 2018 Contract**) or a revised contract of employment effective 20 March 2019 (**20 March 2019 Contract**)?

7. Did the Claimant consent to the 20 March 2019 Contract and the revised salary therein?

8. Did the Claimant consent to a further reduction in salary from £50,000 to £45,000?

9. Did the Claimant affirm the 20 March 2019 Contract by his subsequent conduct?

10. What were the Claimant's "wages" post 1 April 2019 under s.27 of the Employment Rights Act 1996 (the ERA)?

11. Was there a deduction from the Claimant's wages under s 13 ERA and if so, how much?

12. Was there any shortfall in the employer's pension contributions and if so, how much?

Findings of Fact

13. The Respondent is a small technology company, employing 17 staff. The Respondent provides automated back office assistance to its clients who are recruitment agencies.

14. The Claimant was employed by the Respondent from 2 January 2018 until his dismissal by reason of redundancy on 10 April 2019. He was first employed by the Respondent as a graduate Account Executive but with effect from 28 November 2018 was employed as the Respondent's Managing Director. Shortly thereafter, he also acted as the Respondent's Sales Director.

15. The Respondent's position is that the Claimant was demoted to the role of Trainee Finance Manager with effect from 20 March 2019.

16. The parties agree that the Claimant attended a meeting with Paul Andersen, the Respondent's Chief Financial Officer (Mr Andersen) on 20 March 2019 and that a discussion took place regarding the Claimant's performance, role and salary.

17. The Claimant's position is that this meeting merely represented a "heads up" regarding his employment, role and salary. He disputes that any agreement was reached regarding a diminution in his salary whether to £45,000, £50,000 or at all. Further, the Claimant does not accept that the outcome of the meeting was that he ceased to be the Respondent's Managing Director and henceforth occupied the much more junior position of Trainee Finance Manager.

18. The Respondent's evidence is that at the 20 March meeting the Claimant was given, and verbally accepted, the 20 March 2019 Contract and that henceforth he was entitled to a reduced salary of £50,000 as opposed to the £65,000 he was entitled to under the 28 November 2018 Contract. The Claimant does not accept that either at the meeting on 20 March 2019 or at any point thereafter that was he provided with the 20 March 2019 Contract. The parties agree that the 20 March 2019 Contract was never signed.

19. Whilst Ms Semedo gave evidence that the 20 March 2019 Contract had been prepared by a para legal working under her supervision, and she believes it was presented to the Claimant at the 20 March 2019 meeting with Mr Andersen, I find that whilst this meeting took place that on the balance of probabilities the 20 March 2019 Contract was not presented to him at this meeting. I make this finding based on the inclusion of the salary as £45,000 in the version in the bundle, when this only became applicable as at 21 March 2019, the Claimant's evidence that he did not receive the Contract and the absence of any evidence that the Claimant was subsequently chased to sign the Contract.

20. It was originally intended that the Claimant's salary be reduced from £65,000 to £50,000. However, the Respondent subsequently realised that Mrs Roberts, as the Finance Manager, was paid £50,000 and it was deemed inappropriate for the Trainee Finance Manager to receive an equivalent salary

and it was therefore decided that the Claimant's salary should be reduced to £45,000.

21. On 21 March 2019, Mr Andersen sent an email to Mrs Roberts asking her to adjust the Claimant's salary to £50,000 from the following month (from 1 April 2019). The intention had been to reduce the Claimant's salary to £45,000 but for the remaining period of the Claimant's employment from 1 April 2019 until 10 April 2019 (plus his pay in lieu of notice) he was in fact paid at the higher rate of £50,000.

22. On 27 March 2019 Mrs Roberts had a discussion with the Claimant informing him that she had actioned the reduction to his salary. Mrs Roberts gave evidence that during this meeting she showed the Claimant Mr Andersen's email regarding the reduction in his salary. She says the Claimant joked with her that she should keep his salary at £65,000 per annum. I find that a meeting and discussion to this effect took place but do not consider that it involved the Claimant's acceptance of the salary reduction.

23. On 10 April 2019 Ms Semedo had a meeting with the Claimant at which she informed him that his position was being made redundant. At this meeting the Claimant asked if the salary reduction would be rescinded.

24. The Claimant's redundancy was confirmed in a letter from Ms Semedo dated 10 April 2019. This provided that he would receive a payment in lieu of his one-month notice period.

#### The Claimant's Contract of Employment

25. A dispute exists between the parties as to whether the Claimant's employment was subject to the terms set out in 28 November 2018 Contract or the 20 March 2019 Contract. For the purposes of determining this claim the relevant provisions are as follows:

#### 28 November 2018 Contract

**7.1** The Employee shall be paid an initial salary of £65,000 per annum.

**Schedule B** The Company will pay 2% into [the pension scheme] and the Employee will pay 3% into his pension.

**23** No variation or agreed termination of the agreement shall be effective unless it is in writing and signed by the parties (or their authorised representatives).

#### 20 March 2019 Contract

The relevant provisions are as follows:

**Commencement Date:** 20 March 2018

**4.1** The Employee shall serve the Company as Trainee Finance Manager.

7.1 The Employee shall be paid an initial salary of £45,000 per annum.  
**Schedule 1** The Company will pay 2% into the Pension Scheme.

The 20 March 2019 Contract is unsigned by either party.

26. Given that the Respondent's evidence was that the original intention had been to reduce the Claimant's salary to £45,000 and not £50,000 I find the fact that the 20 March 2019 Contract contained £45,000 a strong factor indicating that it was not presented to the Claimant at the meeting on 20 March 2019.

### The Law

#### Variation of Contract and Affirmation

27. When an employer wishes to change the terms and conditions of an employment contract, the simplest course from a legal perspective, is for both parties to agree to the change. Agreement can be in writing or orally.

28. The basic legal position is that the terms of an employment contract are determined at its formation and strong evidence of mutual agreement is required to establish that they have been lawfully varied. Any change that is imposed by the employer in the absence of agreement is likely to be a breach of contract entitling the employee to seek damages or, where the breach is fundamental, to resign and claim unfair constructive dismissal.

29. An employer who is determined to introduce a change in the terms and conditions but is unable to do so by agreement, or under a variation clause in the contract, may either:

- introduce the new term as a *fait accompli*, or
- terminate the relevant contract and offer a new contract of employment which include the variation.

30. Absent agreement the Claimant must not have affirmed any breach. An employee may affirm a continuation of the contract in various ways. He may demonstrate by what he says or does an intention that the contract continue. Delay in resigning is not in itself affirmation, but it may be evidence of affirmation. Mere delay, unaccompanied by any other action affirming the contract, cannot amount to affirmation. However, prolonged delay may indicate implied affirmation.

31. Key issues involved in determining whether or not there has been a deduction that infringes the provisions of Part II of the ERA are whether the wages are 'properly payable' to the worker; and whether the payment of less than the properly due sum is authorised. The courts have consistently held that the question of what is properly payable to a worker turns on the contract of employment. Consequently, many of the same considerations will apply to claims under Part II as apply to contractual claims, with the key issues being whether

the purported change was covered by the contract and, if not, whether the employee can be said to have accepted the change.

32. An employee must make it clear that he objects to the unilateral variation and is working under protest. While it is ideal to state such an objection at the earliest opportunity, the courts are likely to give some leeway to employees, with the result that a delay does not necessarily mean that the employee will be taken to have agreed to the breach.

33. If the employer reduces salary in breach of contract the relevant legislation is Sections 13 and 27 of the ERA.

#### S.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.

#### S.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.

34. Alternatively, was the reduction a breach of contract giving rise to a claim under the Employment Tribunals Extension of Jurisdiction Order 1994?

#### Conclusions

35. Ms Omeri argued that the Claimant had agreed to a variation in his employment terms to include a reduction in his salary. Alternatively, she argued that by his conduct and continuing employment that the Claimant had affirmed the terms of 20 March 2019 Contract and the reduced salary. She argued for the purposes of s.27(1) of ERA that the Claimant's "wages" comprised the reduced sum of £50,000 (it being agreed that the Claimant was paid at £50,000 in error) with effect from 1 April 2019. She therefore argued that there had been no unauthorised deduction from the Claimant's wages contrary to s.13 of the ERA.

36. In relation to the matters discussed at the 20 March 2019 meeting I find that the Claimant was advised that there was to be a change in his role and that he would cease to be Managing Director with immediate effect. I reach this decision for the following reasons:

- (i) Ms Semedo and Mrs Roberts gave clear evidence that such a change in the Claimant's role had taken place;
- (ii) there was no evidence that subsequent to 20 March 2019 that the Claimant performed any duties or attended board meetings or other management meetings indicative of his continuing performance as Managing Director;
- (iii) the comments made by the Claimant at the meeting on 10 April 2019, in which he was advised that his position was being made redundant, are consistent with his being aware of there being a change in his role to include him asking whether the reduction in his salary would be "rescinded"; and
- (iv) the previous history of the Claimant's employment with the Respondent is consistent with ad hoc and significant changes being made to the Claimant's job title and status.

37. I find that whilst it had undoubtedly been the Respondent's intention to reduce the Claimant's salary from £65,000 to £50,000 (and £45,000 with effect from 21 March 2019) that the Respondent had not evidenced the Claimant's acceptance of the 20 March 2019 Contract and the significant reduction in his wages. I reach this decision primarily as a result of the Claimant not having signed the 20 March 2019 Contract and further absent any written agreement or consent from the Claimant to a reduction in his salary under the 28 November 2018 Contract.

38. I find that a demotion did take place, and the Claimant consented to it, as the Claimant's role thereafter did not have any elements pertaining to the Managing Director's position. Whilst I find that the Claimant was aware that his salary was to be reduced, evidenced by his conversation with Ms Roberts on 27 March 2019 and his comment regarding "rescinding" of the reduction on 10 April 2019, I do not find that he consented to this reduction absent a signed variation to the terms under the 28 November 2018 Contract.

39. I consider it significant that the 28 November 2018 Contract contains a one-month notice period at clause 2.1 and it is accepted by the Respondent that no notice was given to the Claimant to terminate this contract. Further it contained at clause 23 a provision that no variation of the agreement shall be effective unless it is in writing and signed by the parties. This did not occur. If there had been a consensual variation to the Claimant's terms of employment, it would not have been required for notice to be given under the existing contract. I nevertheless find that in the absence of unequivocal evidence of acceptance (and in particular signed agreement from the Claimant) that the failure to provide notice under the 28 November 2018 Contract is a significant factor militating against a change to the Claimant's terms of employment. I consider that this is of particular significance in the context of what would constitute a substantial reduction in the Claimant's salary of circa 25%.

40. I do not accept the Respondent's argument that the Claimant's continuing employment constituted affirmation of his employment on the revised terms to include reduced salary. Whilst the Claimant did not expressly state, whether in writing or orally, that he was working under protest I find that on the basis of a relatively short period of only three weeks between the 20 March 2019 meeting and the Claimant's redundancy with effect from 10 April 2019, part of which the Claimant was absent from work on account of ill health, that insufficient time had elapsed for affirmation to apply. Further, the first pay slip showing the reduced salary was not until the pay period ending 25 April 2019 and the reduced salary only took effect from 1 April 2019. Therefore, the Claimant did not receive a pay slip with the reduced salary during his employment as he was paid in lieu of notice.

41. I therefore find that the Respondent made an unauthorised deduction from the Claimant's wages contrary to s.13 of the ERA on the basis that the wages to which the Claimant was entitled for the period 1 April until 10 April 2019, and in respect of the payment in lieu of his one month notice period, remained at £65,000 under the 28 November 2018 Contract. Given that the Claimant continued to receive pay at £65,000 for the remainder of March the period of the reduction was for 40 days at a daily reduced rate of £57.67 giving a total deduction from wages of £2,306.80.

42. There is also the issue of reduced employer pension contributions to consider. The Claimant had originally claimed that there had been a failure by the Respondent to make employer pension contributions of circa £6,000. However, during the course of the hearing he confirmed that this no longer remained a live issue and his claim was solely in respect of the Respondent's failure to calculate employer pension contributions based on his salary at £65,000.

43. Whilst what I have decided is the operative 28 November 2018 Contract, provided for employer contributions at 2%, the parties agreed that this had increased to 3% with effect from 5 April 2019. It was further agreed that an overpayment of employer pension contributions of £285.99 should be discounted from the outstanding amount owed by the Respondent to the Claimant.



44. During the course of the hearing the shortfall in pension contributions was calculated as follows:

5 days at 2%	=	£ 5.76
35 days at 3%	=	£60.55
Total	=	<b>£66.31</b>

45. When added to the short fall in wages of £2,306.80 this gives a total of £2,373.11. However, from this sum the overpayment of pension contributions of £285.99 needs to be deducted giving a total figure owed to the Claimant by the Respondent in respect of wages and employer pension contributions of **£2,087.12.**

46. I therefore order that the Respondent pay the Claimant the sum of £2,087.12.

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Employment Judge Nicolle

Dated: ...**5 December 2019**

Judgment and Reasons sent to the parties on:

6 December 2019

For the Tribunal Office