EMPLOYMENT TRIBUNALS

Claimant		Respondent
Mr Martin Warren-Jones	v	**EEF Ltd trading as Make UK**

PRELIMINARY HEARING

Heard at: **Leeds** **On:** **4 December 2020**
Before: **Employment Judge T R Smith**
Appearance:
For the Claimant: **In person**
For the Respondent: **Mr Varnham, of counsel**

Note: This has been a remote hearing. The parties did not object to the case being heard remotely. The form of remote hearing was V-video. It was not practicable to hold a face-to-face hearing because of the Covid19 pandemic.

JUDGMENT

1. The Tribunal declares the Respondent has made an unlawful deduction from wages of the Claimant.

2. The Respondent is ordered to pay the Claimant forthwith the sum of £1363.05

3. The Tribunal declined to make any adjustment under section 207A of the Trade Union and Labour Relations (Consolidation) Act 1992.

Written reasons provided pursuant to Rule 62 (3) of the Employment Tribunals Constitution and Rules of Procedure) Regulations 2013

Background

1. Oral judgement was given in this case on 04 December 2019.

2. A request for written reasons was made by the Respondent's solicitors on 17 December 2019.

3. The written reasons set out below are supplied pursuant to that request.

Evidence

4. The Tribunal had before it a bundle consisting of 67 pages together with a statement from Mr Matthew Corkan, HR Director and executive board member of EEF Ltd. Mr Corkan was not called to give evidence.

5. A reference to a page number is a reference to a page in the bundle.

The Issue

6. Did there exist an implied contractual right that permitted the Respondent to make unilateral variations to pay of its employees, including the Claimant. That right being subject to an obligation to act reasonably in doing so.

Findings of Fact.

7. The factual background to this matter is not disputed.

8. The Claimant is employed by the Respondent as a solicitor and senior legal adviser.

9. The Respondent provides advice, representation and training services for businesses in the manufacturing sector.

10. Under the terms of the claimant's contract, as varied, he was entitled to a salary of £50,400.

11. The Respondent's business was adversely affected by the national lockdown in late March 2020 as a result of the Covid 19 epidemic. This particularly impacted upon that sector of the Respondent's business that supplied accommodation and training services.

12. In an email dated 06 April 2020 all staff were informed that those earning over £50,000 were to be asked to take a 10% pay reduction *"for the next few months"* (45). The arrangements were to be reviewed in three months' time although there was no promise that pay would be returned to the contractual level or that, at some time in the future, the deductions would be reimbursed (45A).

13. Indeed, in a further communication dated 09 April 2020 (47) the Respondent stated: – *"However, I must be honest and say that we should all be prepared for this to last longer than the initial three-month period, given that it is unlikely that the pandemic will have ended and the business environment restored to normal levels within that timeframe…"*

14. The Claimant did not agree to the reduction as evidenced by his email of 09 April 2020. (49). The email made no specific reference to a grievance although the Claimant was highly critical of the way the Respondent had acted. He received no response to the email.

15. Despite the Claimant's objection the Respondents then made deductions from the Claimants contractual remuneration.

16. The Claimant again expressed concern in an email dated 29 April 2020 (52) that, despite the fact he not consented to any deduction, a deduction had been made. He stated that if the deduction was not reversed, he would seek early conciliation via ACAS. Given the Respondents field of expertise it must have known that this was a potential precursor to Employment Tribunal proceedings. Once again, the Claimant made no reference to a formal grievance.

17. On 29 May 2020 the Claimant once again complained as regards deductions and said, *"I do not wish for you or anyone else to contact me to deal with my grievance as the ship has sailed I have no faith in this company to act in a reasonable and appropriate manner"* (59).

18. A complaint to the Tribunal was ultimately presented on 29 September 2020.

19. On 19 June 2020 (62) all employees of the Respondent earning over £30,000 were asked to agree to a 10% pay reduction commencing from 01 July 2020. The pay reduction for those earning £50,000 or more, which included the Claimant, was extended for a further three months. The further pay reduction was to be monitored over the following three months.

20. The Claimant, having already suffered one deduction then fell into the pool of employees who are subject to a second deduction.

21. The Claimant refused to agree to the further proposed deduction as evidenced by his email of 22 June 2020 (63).

22. Despite the Claimant's express refusal to agree to a further deduction the Respondent unilaterally made a deduction from the Claimants contractual salary.

23. It was common ground between the parties that the total deductions made by the Respondent from the Claimant's contractual salary amounted to £1363.05.

24. Initially the Respondent contended in its response that it did not made an unlawful deduction and that such deductions were made in accordance with the relevant provision within the Claimants contract. That argument was rightly abandoned at the hearing.

25. In addition, the Respondent contended in its response that the Claimant had agreed to the variation in his contract as he had not resigned. Again, rightly, that argument was not pursued at the hearing.

26. No suggestion was made that the Respondent did not receive the Claimant's emails of objection to any deductions from his salary.

27. It was conceded that the Respondent had no right under the terms of the Claimants contract to make any deduction, in the circumstances in which they did.

28. It was further conceded that there was no collective agreement incorporated into the Claimant's contract which allowed the Respondent to make any deduction in the circumstances in which they did.
29. There was no dispute that the money deducted constituted "wages" within the meaning of section 27 of the Employment Rights Act 1996 and that none of the deductions were excepted deductions within the meaning of section 14 of the same act.

Submissions.

30. The Claimant made brief submissions with particular reference to his contract and the Employment Rights Act 1996.

31. The Tribunal has concentrated upon the Respondent's submissions, given the Respondent was asked the full written reasons.

32. The Tribunal had before it a written submission from Mr Varnham which he amplified upon orally before the Tribunal.

33. At the core of his submission was that the Respondent, in the extraordinary circumstances such as those that pertained in March and June 2020, were entitled to reply upon an implied contractual right that permitted the Respondent to make unilateral variations to pay of its employees, including the Claimant. That right was subject to an obligation to act reasonably in doing so.

34. Firstly, he addressed the question of whether there could be implied into a contract the concept of business efficacy. He submitted that such a concept existed and relied upon the decision in **Marks and Spencer plc v BNP Paribas Securities Services Trust Co (Jersey) Ltd [2016] AC 742.**

35. In terms of whether this could apply to the variation of pay he relied upon, by analogy, the decision of the Employment Appeal Tribunal in **Luke -v- Stoke-on-Trent City Council [2007] IRLR 305**. Whilst Mr Varnham accepted the case was not directly upon the point of salary, but on mobility, he contended principles could be drawn from the decision which supported the Respondent's contention. In particular he contended a principle could be derived from the judgement that in sufficiently exceptional circumstances, an employer had a unilateral right to vary pay for a temporary period.

36. Whilst he accepted that the decision of the Court of Appeal in **Security and Facilities Division v Hayes [2001] IRLR 81**, appeared to be against him (a case on an employer seeking to unilaterally vary the rate of overtime subsistence allowances) he said the case was distinguishable because firstly it was not a case against the backdrop of the extreme circumstances the Respondent faced and secondly it predated the decision in Marks & Spencer's and contained an apparent error in that paragraph 44 reliance was placed on the intention of the parties, which in **Marks & Spencer** was held not to be a determinative consideration.

Discussion

37. The Tribunal accepted that a term would be implied into a contract of employment if it was so obvious that both parties would have regarded it as a term, even though they had not expressly stated it is a term or if it was necessary to imply the term in order to give the contract business efficacy – **Scally -v- Southern Health and Social Services Board 1991 ICR 771.**

38. The Tribunal considered there were fundamental difficulties with Mr Varnham's argument as to implication. Here there was an express clause as regards remuneration. There was no suggested vagueness as to the clause. Further there was no reason to imply such a clause in order to give the contract business efficacy. The contract was perfectly workable without any such implication. The simple fact was the Respondent did not wish to be bound by the express bargain it had made.

39. It is trite law to say that where there is an express clause it cannot be ousted by an implied clause.

40. Further the Tribunal was not persuaded that **Luke**, upon which Mr Varnham relied supported his general proposition. Care must be taken to examine **Luke** carefully.

41. The first and obvious point to make is that it was a case of mobility and arose out of extremely unusual facts. It is on that basis that the judgement should be examined.

42. The Tribunal was not satisfied that he set out a general principle that the Respondent had a unilateral right to make a unilateral variation in salary in exceptional circumstances.

43. The Tribunal noted in particular the judgement of Mr Justice Underhill (as he then was) at paragraph 8 of **Luke** when he said: –
There is no reason in principle why a tribunal should not find an implied term in a contract of employment that the employee may be obliged to perform duties which go beyond, or are different from, those expressly required by the contract, or to perform them at a different workplace. But such a finding can only be made in accordance with the normal strict rules governing the implication of terms. Generally speaking – though there can be no blanket rule, and each case will turn on its own circumstances – we would expect such a finding to be rare: normally, where a written contract clearly defines an employee's contractual duties he ought to be entitled to proceed on the basis that he is not obliged to undertake different duties. In such a case it is likely to be legitimate to find an implied obligation to undertake a duty which is "outside the contract" (more accurately, outside the express terms of the contract) only, if at all, where the circumstances are exceptional, where the requirement to work the duty in question is plainly justified and where all the conditions stated in Millbrook – namely that the work is suitable, that the employee suffers no detriment in terms of contractual benefits or status and that the change in duties is on a temporary

basis - are satisfied. It is important that employers should not be permitted to resort to an implied term in order to be able to impose what is in truth a unilateral permanent variation of the terms of the contract. Having said all that, we see no reason why an implication cannot be made in a proper case.

44. The reference to exceptional circumstances upon which Mr Varnham relied is clearly in reference to a mobility clause.

45. The learned judge also emphasised where the contract was clear, as he here, he considered seeking to go behind an express mobility clause would be rare.

46. Sight must not be lost of the fact that the impact upon an employee in respect of varying or implying a mobility clause is unlikely to have as significant consequences as a unilateral variation of remuneration.

47. Mr Justice Underhill clearly took into account when making reference to what were exceptional circumstances that an employee should suffer no detriment in terms of contractual benefits. Here there was a significant detriment to the claimant. He lost over £1000 which you will never recover.

48. Whilst Mr Varnham made reference to the temporary nature of the cut in salary, as the documents showed, whilst it was for an initial period of three months there was a real possibility that it would extend beyond that time as is evidenced by the letter of the 09 April 2020 (47)

49. There were other options open to the Respondent including a termination of the contract and offering to re-employ the Claimant on new terms and conditions. No evidence was before the Tribunal that such an option was explored.

50. If there was no work for the Claimant he could have been furloughed.

51. The Claimant sought an uplift pursuant to section 207A of the Trade Union and Labour Relations (Consolidation) Act 1992.

52. It is not disputed that the unlawful wages claim falls within schedule A2 to the 1992 act.

53. For adjustment to be made the Claimant must show the employers failed to comply with the relevant ACAS code of practice and that failure was unreasonable. If those preconditions are satisfied a Tribunal may adjust an award if it is just and equitable in all the circumstances by no more than 25%.

54. The relevant ACAS code is the ACAS Code of Practice (1) Code of Practice for Disciplinary and Grievance Procedures (2015).

55. The Claimant contended that he set out his grievance in writing and there was a failure by the Respondent to hold a formal meeting.

56. It is important to remember that the Claimant was a solicitor and a senior legal adviser.

57. Under the terms of the Claimant's contract if he had a grievance, he was required to report the same in accordance with the Respondents grievance procedure, set out in the Respondent's handbook.

58. It is not clear looking at the documentation upon which the Claimant relied mainly his emails of the 09 April 2020 (49) and 29 April 2020 (52) that they might reasonably be taken to be a grievance under the Respondents grievance procedure. The Claimant was signifying his objection to the request to agree to a deduction in his salary. Whilst he also explained why he considered it was unfair due to a lack of collective consultation he did not expressly use the word grievance. The documentation was equally referable to the fact the Claimant was objecting to the deductions from his salary. Whilst the Tribunal does not say that it is fatal to a claim not use the word "grievance"; the importance being the substance of the communication or communications; the substance of the documents must be looked at, given his particular position he would have well known the importance of making it clear that he was seeking to invoke the grievance procedure.

59. Whilst it is true the Claimant did use the word grievance, for the first time, in an e-mail of 22 May 2020 he was at that stage indicating that he didn't want the grievance procedure invoked.

60. In the circumstances the Tribunal did not consider that there had been a failure by the Respondent to comply with the ACAS code or that that failure was unreasonable. For those reasons it rejected the Claimant's application for an uplift.

61. Almost as an afterthought Mr Varnham asked whether there should be a reduction in the award to the Claimant as he had not raised a grievance. The Tribunal found the Claimant had not complied with the ACAS code but that failure was not unreasonable because the Respondent continually ignored all his communications protesting as to the deductions and did not even acknowledge receipt. It made no enquiries of him as to whether he wanted his communications to be treated as a grievance.

62. As has already been noted, having made the first set of deductions and knowing that the Claimant objected, the Respondents then made a second set of deductions.

63. Looking at the evidence in the round it would not be just and equitable to reduce the Claimant's award.

Employment Judge T R Smith

Dated: 20 January 2021