EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Ms P Tung	**v**	**Mace Limited**

Heard at: London Central (by video) **On**: 11 December 2020

Before: Employment Judge P Klimov, sitting alone

Representation

For the Claimant: in person

For the Respondent: Ms C Waller (solicitor)

This has been a remote hearing which was not objected to by the parties. The form of remote hearing was by Cloud Video Platform (CVP). A face to face hearing was not held because it was not practicable due to the Coronavirus pandemic restrictions and all issues could be determined in a remote hearing.

JUDGMENT having been sent to the parties on 11 December 2020 and reasons having been requested by the respondent, in accordance with Rule 62(3) of the Rules of Procedure 2013:

REASONS

Background

1. By a claim form presented on 12 August 2020 the claimant brought complaints of unauthorised deduction from wages and breach of contract (wrongful dismissal).

2. The claimant claims that the respondent has made unauthorised deductions from her wages by failing to pay her full salary for the period of her employment with the respondent between 23 March 2020 and 15 May 2020. She further claims that the respondent was in breach of contract by dismissing her without giving the requisite one month's notice of the termination.

3. The respondent denies that it has made authorised deductions from the claimant's wages. It also denies the allegation of breach of contract. It avers that it rescinded the claimant's offer of employment and the claimant's employment with the respondent did not start. In the alternative it avers that, if the claimant's employment had commenced before the offer was rescinded, it discharged any liability to the claimant by making two payments, the total of which is equivalent to the claimant's one month's salary, and under the terms of the contract the respondent was entitled to terminate the claimant's employment on giving one month's notice.

4. The claimant appeared in person. The respondent was represented by Ms C Waller (solicitor)

5. The respondent called sworn evidence of Ms Samantha Hindhaugh, Operations Director, Human Resources.

6. The claimant did not submit a witness statement and did not give oral evidence at the hearing. I do not consider that was because the claimant wished to avoid giving evidence under oath and being cross-examined by the respondent, but rather because of her not being familiar with the tribunal's rules and procedures. The respondent did not seek a witness order to compel the claimant to give evidence. In any event, I was satisfied that based on the evidence presented by the parties I was able to make the relevant findings of fact, and the respondent was not unduly prejudiced by not being able to cross-examine the claimant.

7. I was referred to various documents included in the bundle of documents of 99 pages, which the parties introduced in evidence, and a single page document with the claimant's reply to the respondent's grounds of resistance.

Issues for the Tribunal to decide

8. At the start of the hearing, I discussed with the parties the issues I needed to decide.

Unauthorised deduction from wages

9. The respondent's position was that there was an agreed variation of the claimant's employment contract to postpone her start date, initially until 1 May 2020 and thereafter until a later date to be confirmed by the respondent. At no time before the termination of the claimant's employment, the respondent had asked the claimant to commence work. Thus, the claimant never started her employment with the respondent and therefore was not entitled to any wages.

10. The claimant argued that her offer of employment was unconditional. It had 23 March 2020 as the start date, and she never agreed to vary the terms. She accepted that she never did any work for the respondent but that was because the respondent did not give her any work to do. However, she remained ready and willing to work and therefore was entitled to her wages starting from 23 March 2020 until her dismissal on 15 May 2020. She pointed out that the

respondent had paid her salary for March. She said that she operated under the assumption that the respondent had placed her on furlough. When the respondent failed to pay her for April, she started to make enquiries about her employment status, which resulted in the respondent finally telling her on 15 May 2020 that her offer was "rescinded" and there was no longer a role for her.

11. The issue, therefore, I needed to determine was whether there was a valid variation of the claimant's contract of employment to the effect that the employment commencement date was postponed from 23 March 2020 until: (a) 1 May 2020, or (b) the respondent tells the claimant to commence work.

12. If there was such a valid variation, the claimant would not be entitled to her wages for the period from 23 March 2020 until either (a) 1 May 2020, or (b) her dismissal date (15 May 2020).

13. If the variation were only valid to delay the commencement date until 1 May 2020 and not beyond that date, the claimant would not be entitled to her wages for the period from 23 March 2020 until 1 May 2020 but would be entitled to her wages for the period between 1 and 15 May 2020.

14. If the variation were not valid, the claimant would be entitled to her wages for the entire period of her employment, from 23 March 2020 until 15 May 2020.

Wrongful dismissal

15. Ms Waller for the respondent conceded that by the time the respondent had purported to rescind the offer of employment, it was too late to rescind it, as the claimant had already accepted the offer, and therefore the "rescission" was in fact the termination of the claimant's employment.

16. The claimant argued that her contract of employment required a written notice of termination. She, however, accepts that she was dismissed on 15 May 2020 when the respondent's senior manager, Ms Mikyla Dodd, told her on the telephone that her offer of employment had been rescinded due to Covid-19 and there was no longer a role for the claimant.

17. Therefore, the issues I needed to determine was whether the respondent breached the claimant's employment contract by dismissing her as it did on 15 May 2020, and if so, whether the claimant was entitled to an award of damages.

Findings of fact

18. On 25 February 2020, the respondent sent to the claimant an offer of employment together with a copy of her employment contract.

19. The following are the relevant terms of the contract: (***my emphasis***):

> This document sets out ***the terms and conditions of your employment*** with Mace Limited, whose registered office is at 155 Moorgate, London, EC2M 6XB ("the Company") ***from 23 March, 2020*** and incorporates a statement of the terms and conditions as required by current legislation.

This contract together with any documents referred to in it constitutes the entire agreement and understanding between you and the Company and any Group Company and supersedes any previous agreement between us relating to your employment (which shall be deemed to have been terminated by mutual consent). ***The terms are capable of being amended by subsequent written notification***.

1. Commencement of Employment

Your period of employment on these terms begins on 23 March, 2020. Your service is noted as continuous from 23 March, 2020. This service will count for all related benefits.

17. Notice

Up until successful completion of the Probationary Period and your employment being confirmed on a permanent basis, your notice period will be one calendar month.

[…….]

Notice must be given in writing, to your line manager and copied to the Human Resources Department and will be deemed to be received on the day it is received by the Human Resources Department.

[…….]

In the event that we issue notice to terminate your employment, or terminate your employment without notice, this will be issued to you in person and will take effect when received. If it is not possible to issue notice to terminate your employment or terminate your employment without notice in person, it will be sent to you by email. Notice will be deemed to be received by you 24 hours after it has been sent to you via email. If it is not possible to issue notice to you by email, it will be sent to you via post or courier services. Notice will be deemed to be received by you at the date and time provided by proof of delivery or 48 hours after the date of posting, whichever is the earlier.

We have the right to dismiss you without notice (or pay in lieu of notice) if an allegation of gross misconduct is upheld against you following a disciplinary hearing.

22. Additional Conditions

Your appointment is subject to the terms and conditions outlined above and other Company policies and procedures relating to your position. ***The Company reserves the right to change your terms and conditions and relevant policies and procedures after consultation with a view to reaching agreement***.

20. On the same day, the claimant accepted the offer by signing it electronically. The respondent acknowledged the acceptance by a letter to the claimant stating: "*This is the copy of your employment contract as signed electronically by yourself. Thank you for accepting the offer*."

21. On 20 March 2020, the claimant received a phone call from her direct manager, Ms Mel Baker, who advised the claimant that due to Covid-19 her start date had to be delayed.

22. Neither Ms Baker nor the claimant gave oral evidence to the tribunal. Ms Hindhaugh, who gave oral evidence for the respondent, said that her colleague had informed the claimant that due to Covid-19 it was not possible to commence the claimant's employment on 23 March 2020, but accepted that she was not privy to that conversation.

23. In her ET1 the claimant refers to that telephone conversation and avers that "*[t]he was no indication of when the new start date would be but [she] was assured that employment with Mace was guaranteed*". The respondent in its grounds of resistance states that "*On 20" March 2020 the Respondent contacted the Claimant to advise that as a result of the COVID19 global pandemic it was not possible for the Claimant to commence employment on the following Monday as intended. The Claimant was advised that the Respondent would contact her further".* The respondent did not argue that there was an oral agreement to vary the start date concluded in that telephone conversation.

24. In any event, on the balance of probabilities, I find that in that conversation the claimant did not agree to vary her contract of employment to the effect that the commencement date in clause 1 were to be amended from 23 March 2020 to an unspecified future date.

25. My finding on this issue is further supported by the fact that on 26 March 2020 the respondent sent to the claimant a letter containing an amended version of clause 1. The letter read (***my emphasis***):

> Dear Prabhjyot,
>
> **Addendum to Contract**
>
> Further to your recent offer of employment dated 25 February 2020, I can confirm the following changes to your contract -
>
> **1. Commencement of Employment**
> Your period of employment on these terms begins on 01 May, 2020. Your service is noted as continuous from 01 May, 2020. This service will count for all related benefits.
>
> ***All other terms and conditions from your contract of employment document remain unchanged.***
>
> ***Please sign this letter and return along with a signed copy of your employment contract to the Human Resources Department.***
>
> Yours sincerely
>
> Tia Sultana
> HR Assistant

I have read, understood and accept the terms of this letter detailed above.
Signed …….
Prabhjyot Tung

Date ……..

26. The claimant did not sign and return the letter to the respondent.

27. In her ET1 she says that following receipt of the letter she called her manager, Ms. Mel Baker, "*to query but she [Ms. Baker] had no knowledge of this amendment, she [Ms. Baker] said that HR would contact me to clarify*". The claimant further stated in her ET1 that she did not want to agree to the amendment.

28. The claimant did not give oral evidence and the respondent could not cross-examine her on this issue. However, because she did not sign and return the letter, as was requested by the respondent (which the respondent accepts), I find that she did not wish to agree to the change put to her by the respondent in that letter, and for that reason did not sign and return the letter.

29. On 31 March 2020, the respondent paid the claimant the sum of £599.07, which was the equivalent of her net salary for March. The payslip (**page 55 of the bundle**) describes the payment as "*Basic Salary 23/03-31/03*".

30. The respondent evidence is that it was done because the claimant had been set up on the respondent's payroll and HR systems in anticipation of her 23 March 2020 start date, and it was too late to stop the payment. The claimant claims that the payment made her to assume that her employment had started.

31. The respondent did not contact the claimant during April 2020. It did not pay her wages for that month. From the internal email exchanges (**pages 46-54 of the bundle**) it appears that the respondent was planning to send the claimant a "rescind letter" in April but due to some internal issues failed to do so.

32. On 3 April 2020 (**page 52 of the bundle**), the respondent instructed payroll to stop making any further payments to the claimant.

33. On 30 April 2020, the claimant called Ms Baker asking about her starting work the following day. In her email to HR on the same date Ms Baker says that "*[she] didn't know what to say as [she] thought [the claimant] had received a letter rescinding her offer*".

34. On 4 May 2020, the claimant wrote to Ms Sylvia Crick, the respondent's HR manager, asking to clarify the situation. She said that she thought she was on furlough and querying why she was not paid in April. Ms Crick apologised to the claimant and said that she had passed her email to her HR colleagues to contact the claimant urgently, and that if the claimant had not had a response by midday the following day to contact her again.

35. On 5 May 2020, the claimant asked Ms Crick for an update. Ms Crick replied saying that the claimant was not on furlough and that was the reason why she

had not been paid in April and promising that an HR representative would contact the claimant "*shortly*".

36. On 7 May 2020, the claimant wrote to Ms Crick telling her that no one had contacted her, to which Ms Crick replied that she would follow up with the HR Team Leader.

37. On 11 May 2020, the claimant again chased Ms Crick, who replied saying that she was escalating the issue to her manager and would contact the claimant the following day to confirm who was dealing with the matter.

38. On 13 May 2020, the claimant sent another email to Ms Crick expressing her frustration with having to chase for "*a definitive answer on [her] employment status*" and asking for an urgent update.

39. On 14 May 2020, Ms Crick replied saying that the matter was escalated to the HR Operations Director and that the claimant should receive a confirmation of her employment status by the end of that week.

40. On Friday, 15 May 2020, Ms Mikyla Dodd, the senior manager of the respondent, telephoned the claimant and told her that her offer of employment had been rescinded and there was no longer a role for the claimant due to Covid-19.

41. The respondent did not send the claimant a written notice rescinding the employment offer or a notice of the termination of her contract. In her ET1 the claimant claims that she asked Ms Dodd for a written notice as "*per terms of [her] contract*".

42. On 29 May 2020, the respondent paid the claimant £1,157.85, which together with the first payment was the equivalent of her one month's net salary. The pay slip describes the payment as "*Pay In Lieu (pen) 23/03*" (**page 56 of the bundle**).

Submissions

43. The respondent accepts that the claimant did not sign the letter of 26 March 2020 changing the commencement date of her employment. However, it argues, she was told that due to Covid-19 her employment could not commence on the originally envisaged date. She was given a new start date, 1 May 2020. By her conduct of not commencing her work, the claimant accepted the change and therefore it was valid and binding on her.

44. It further submits that although the letter of 26 May 2020 changed the commencement date to 1 May 2020, the claimant did not commence work on 1 May 2020 and therefore, and in the absence of an express agreement between the parties that the claimant should commence work, the deferral of her commencement date continued.

45. On the notice issue, the respondent argues that the contract allows the employer to terminate it orally. It points out the difference in the wording in clause 17 (Notice) of the contract, which says that the notice must be in writing

when given by the employee, however in the paragraph below, dealing with notices by the employer, there is no express requirement for the notice to be in writing. In any event, it argues, the oral communication on 15 May 2020 was sufficient to terminate the claimant's employment and it did terminate her contract.

46. The respondent, however, accepts that, even if oral notice was a valid method of the termination, the contract did not give the respondent the right to terminate it without giving the claimant one month's notice (except for gross misconduct) by making a payment in lieu of notice. However, because the claimant was paid in two installments a sum of money equivalent to her notice pay, she received what she would have received had the due notice been given to her, and therefore was not entitled to any damages for breach of contract.

47. The claimant submits that during her conversation on 20 May 2020 with Ms Baker there was no mention of any contractual variation. She did not sign the variation letter of 26 May 2020 because she did not accept the proposed change to the terms. She was paid in March and assumed that she had been placed on furlough.

48. The claimant accepts that she was dismissed on 15 May 2020 and her employment with the responded ended on that date. However, she argues that she was not given a valid notice. She says that she asked for a written notice but never received it, and that she was never told that she would be paid in lieu of notice.

The Law and Conclusions

49. A contract of employment is no different to other types of contract in so far as it, once made, binds the parties to the agreed terms, and any variation to those requires the parties' agreement.

50. The respondent did not argue that the contract gave it the right to unilaterally vary the terms, by virtue of the so-called flexibility clauses. In any event, having examined the terms of the contract, including the terms I quoted above, my conclusion is that the respondent did not have the right to unilaterally change the commencement date term of the claimant's contract of employment.

51. The respondent did not argue that the claimant had expressly accepted the variation during her telephone conversation with Ms Baker on 20 March 2020. My finding of fact (see paragraph 24) is that there was no such express agreement.

52. The respondent admits that the claimant did not sign the 26 March letter and therefore has not expressly accepted the variation to her start date. However, it relies on the claimant's conduct, from which it invites me to find that there was an implied acceptance of the variation.

53. The Court of Appeal and the Employment Appeal Tribunal on several occasions guided employment tribunals that implying an agreement to a variation of contract was a "*course which should be adopted with great caution*" (**Jones v**

Associated Tunnelling Co Ltd 1981 IRLR 477). To treat the employee's conduct as their acceptance of the variation, the conduct must be "*only referable*" to the employee having accepted the new terms imposed by the employer (**Solectron Scotland Ltd v Roper and ors 2004 IRLR 4**). If the employee's conduct is reasonably capable of a different explanation, it cannot be treated as constituting acceptance of the new terms (**Abrahall and ors v Nottinghman City Council and anor 2018 ICR 1425, CA**).

54. While those cases were concerned with the question of whether acceptance should be implied from the employee's conduct by continuing to work under the new terms imposed by the employer, I do not see any reason why the same principles should not equally apply to the situation when the employee does not actually do any work because he or she is instructed by the employer to refrain from working. If the employee's conduct, by not working, is not inconsistent with the terms of the original contract, this should not be taken as him or her accepting the variation to the terms imposed by the employer.

55. I find that in the circumstances as they were in March 2020 there was nothing unusual in the claimant's conduct, by her not attending work and by not doing any actual work for the respondent, and her conduct was not inconsistent with the terms of her original contract. I find this because:

    a. She, as millions other people across the country, was told by the government to stay at home.
    b. The furlough scheme, which was being rolled out at that time, specifically required that employees did not do any work for their employer.
    c. She did not sign the variation letter of 26 March 2020.
    d. Her manager told her that she was not aware of the amendment to the commencement date in the contract and would get HR to contact the claimant.
    e. HR did not contact the claimant.
    f. She was paid her salary in March.
    g. The respondent knew that the payment had been made (**see pages 51-53 of the bundle**).
    h. It did not tell the claimant that the payment had been made in error and did not try to reclaim it.

56. Therefore, it was reasonable for the claimant to assume that her employment had started and that she had been placed on furlough. She was only told by the responded that she was not on furlough on 5 May 2020, and even then, the respondent did not tell her that her employment had not commenced.

57. Consequently, I do not find that the claimant's conduct, by not attending work and by not doing any work for the respondent, is not reasonably capable of a different explanation, other than her accepting the variation of her employment contract. I am satisfied that the claimant's assumption that she was on furlough can reasonably explain her conduct.

58. My conclusion is that her conduct cannot be taken as her accepting the variation of her contract to postpone the commencement date of her

employment from the originally agreed date of 23 March 2020. It follows that there was no valid variation of the terms of her contract.

59. I shall also observe that the respondent's conduct in paying the claimant's wages in March and not seeking to reclaim the payment, keeping her as an active employee on HR and business systems (that was confirmed by Ms. Hindhaugh in her evidence and further corroborated by the documentary evidence – **see page 50 of the bundle**) indicates that it regarded the claimant as an employee whose employment had started and continued.

60. It is a well-established common law principle (see **Beveridge v KLM UK Ltd 2000 IRLR 765, EAT**) that absent any express provision in the employment contract entitling the employer to withhold wages, the employer is obliged to pay the employee's wages even if the employee does not do any work, so long as the employee offers his or her services. The claimant was ready and willing to offer her services to the respondent from 23 March 2020. That position never changed until she was dismissed. She chased the respondent on numerous occasions to clarify her position. She did not receive any definitive response until she was dismissed. The contract of employment did not give the respondent the right to withhold the claimant's wages in the circumstances where the respondent was unable provide work to the claimant.

61. Therefore, my conclusion is that the claimant was entitled to her wages for the period from 23 March 2020 until 15 May 2020 and by failing to pay her wages in full the respondent has made an unauthorised deduction from her wages contrary to section 13 of the Employment Rights Act 1996.

62. Turning to the issue of termination, I do not need to decide whether oral notice was a permitted method for the respondent to "issue" notice to terminate the claimant's employment. That is because it is accepted by both parties that the claimant was dismissed on 15 May 2020, and that the dismissal was wrongful, in so far as the respondent failed to give the claimant the required one month's notice (whether orally or in writing). Therefore, the claimant is entitled to an award of damages calculated on the usual breach of contract principles to put her in the position she would have been if the respondent had given her the due notice.

63. If the respondent had given her one month's notice, she would have been paid her monthly salary of £2,333.33 (gross). The respondent paid the claimant a sum of £1,579.48 (less usual deduction). Therefore, the claimant is entitled to receive the balance of £758.85 (gross) as damages for breach of contract.

64. After I gave my oral judgment, the respondent requested, and the claimant agreed, that the payment of £758.85 made by the respondent to the claimant on 31 March 2020 be set off against the respondent's liability for damages for wrongful dismissal and not be treated as payment of the claimant's wages for March 2020.

65. Because the claimant was content with that, I entered the judgment that the respondent must pay the claimant's the sum of £4,307.60 (gross) for the wages unlawfully deducted for the entire period of her employment (23 March 2020 to

15 May 2020) and to account to HMRC for any tax and NI due. However, having received from the respondent two payments in the total amount equivalent to her one month's salary, the claimant was not entitled to an award of damages for breach of contract.

66. In making this judgment I am very much alive to the fact that the Covid-19 pandemic caused severe disruptions to the respondent's operations and put significant pressure on its HR resources. I accept Ms Hindhaugh's evidence on this. I also note the respondent's sincere apology to the claimant for mishandling the situation. Nevertheless, I must apply the law as it stands to the facts as I found them and draw my conclusions from that. The understandable operational difficulties the respondent was facing do not give the respondent a legally valid excuse for not honouring its contractual obligations to the claimant. Therefore, and for the reasons set out above, the claimant's claim succeeds.

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Employment Judge P Klimov
22 December 2020

Sent to the parties on:

29/12/20....

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For the Tribunals Office

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