



EMPLOYMENT TRIBUNALS

Claimant

Respondent

v

Mr T Blankley

15below Ltd

Judgment

Heard at: Southampton

On: 12 February 2021

Before: Employment Judge Rayner

Appearances

For the Claimant: In Person

For the Respondent: Ms C Pallett (HR Director)

1. The hearing was conducted by the parties attending by video conference (CVP). It was held in public with the Judge sitting in open court in accordance with the Employment Tribunal Rules. It was conducted in that manner because a face to face hearing was not desirable in light of the restrictions imposed by the Health Protection (Coronavirus, Restrictions) (England) (Amendment) (No. 4) Regulations 2020 and the Health Protection (Coronavirus, Restrictions) (All Tiers) (England) Regulations 2020, as amended.
2. The claimants claim of breach of contract in respect of Notice Pay is dismissed.

REASONS

3. Oral reasons were given. The judgement was sent to the parties on 24 February 2021 and the respondent requested reasons for the job on the same day, the 24 February 2021.

4. The claimant was employed by the respondent as a business analyst from 8 January 2018 until 31 August 2020. At point of the termination of his contract he had been employed for two years and seven months.

5. The claimant was issued with a contract of employment which set out amongst other things his rate of pay and his entitlement to notice. The claimant's basic gross pay was £4017.08 per calendar month and a contractual three-month notice period.

6. In the spring of 2020, as a result of the covered 19 pandemic, the respondent discussed with its employees, including the claimant, the measures it would be taking in respect of the business and in particular its intention to apply for and make use of the government's employee retention scheme, or furlough, scheme.

7. The furlough scheme enabled an employer to apply to be reimbursed from government funds for 80% of an employee's wages, up to a maximum of £2500 per calendar month, per employee.

8. On the 28 April 2020 the respondents wrote to the claimant regarding the measures that they were proposing to take to implement the furlough scheme.

9. The letter stated as follow:

Further to our recent discussions about the measures 15 below is taking during the copied 19 Crisis please find below the following changes to the terms and conditions of your employment.

With effect from 30 April 2020 you shall be on furlough leave. This means your contract of employment continues, but you shall not be required to come into work. We will pay you 80% of your salary to a maximum of £2500 per month during that time.

Your furlough leave shall end on the earliest of the following events:

- *the governments coronavirus job retention scheme ending*

- *either you or us ceasing to be eligible for funding under the scheme*
- *us deciding to cancel furlough leave and bring you back to work*

10. The letter goes on to inform the claimant that he cannot work for 15 below whilst on furlough and that if he wants to work for any other organisation in a paid capacity that he must inform 15 below in advance.

11. In respect of holidays, the letter stated *we may give you notice to take some of your accrued holiday entitlement during your furlough leave but you will not be asked to take more holiday than you have accrued up to that point during the holiday year. Any holiday taken during furlough leave will be paid at the furlough rate (above).*

12. The claimant was asked to sign the letter as confirmation of his agreement to the adjustment and to return it within five days.

13. At the end of the letter and above the claimant's signature a declaration was set out as follows: *I understand that by signing this letter I am confirming my agreement to the above amendments to my terms and conditions of my employment and that I will not undertake work for 15 below whilst this agreement is in place.*

14. Mr Blankley agrees that he signed the agreement that he was then paid the amount of £2,500 per calendar month instead of his original pay.

15. During May 2020 the respondent decided that it needed to take further steps in order to reduce costs, due to the significant reduction in their forecast revenue. This arose as a result of the reduced travel resulting from national and international measures such as lockdown, taken to deal with the pandemic.

16. The claimant attended consultation meetings on the 5 and 11 of May and on 28 May 2020, following a further meeting with the claimant, the respondent wrote

to the claimant confirming that he would be made redundant and that his notice period would start on 1 June 2020 .

17. The letter stated that the claimant's contractual notice period was three months and confirmed that the last day of his employment would be 31 August 2020.
18. The letter also stated that *you will remain on furlough leave and are not required to work during your notice period the rate of pay you will receive during the notice period is determined by statutory notice you are entitled to by law . You will receive as a minimum your contractual notice period of three months which is more generous than the statutory entitlement someone with less than 12 years of service. Due to the more generous period of notice being given the rate of pay applicable during the notice period is the current furlough rate of 80% of salary £2500. Any agreed future extension to your notice period will also paid at this rate.*

You have two years of employment and are entitled to a statutory redundancy payment of £1,076.00.

19. The letter continued with some instructions regarding company property and with a reminder that the claimant could appeal the decision to terminate his employment for reasons of redundancy in writing within seven days of the date of letter.
20. The claimant does not make a complaint about the process or the fact of the redundancy before me.
21. that during his three months' notice period he should have been paid at his higher rate or his original rate of pay prior, to variation of contract
22. The complaint that he makes is about the rate of pay he received during his notice period. The claimant considered that he ought to have been paid at his pre-furlough contractual rate of pay during his notice period, which would have been a significantly higher rate. He said in evidence that he considered that by

giving of him notice of redundancy, the employer had in effect brought the scheme to an end.

23. On 29 May 2020 the claimant wrote to the respondents stating that he did not accept the offer as proposed. He stated that he was prepared to return to work to work out his three-month notice period at normal pay or he was prepared to serve his notice period on furlough, only provided his salary was paid at 100% of the normal rate. By this the claimant meant his pre-furlough, pre-contractual amendment rate of pay.
24. On 1 June 2020 the Ms pallet the claimant HR director, who represented the respondent before me today , replied to the claimant. She rejected the claimant's offer to work during his notice period and to be paid at hundred percent of his salary. She explained that this was not an option because of reasons of cost, those reasons being the financial conditions which had driven the business to make redundancies in the first place. She stated that the financial conditions had driven the business to pay redundancy pay at statutory levels only and to continue making use of the coronavirus job retention scheme for as long as possible. It was for that reason that the claimant was being paid his notice pay at the prevailing rate of pay, that is the rate paid whilst on furlough.
25. She also said that the business had sufficient work only for 1.4 business and the lists and that this was being met by team members who had not been impacted by redundancy. Effectively there would be no work for the claimant to do.
26. The claimant replied on 3 June 2020, again raising the concern that when he signed the furlough agreement there was no reference to any changes in respect of the termination of employment set out within his contract or that his basic salary would change, but rather that he would be paid 80% to a maximum of £2500 per month during his furlough period . He referred to his contract of employment and said that his contract stated that his notice pay should be served and his basic salary paid either in the notice or as garden leave.

27. He stated that there had been no change to his basic salary.
28. The claimant raised a formal grievance stating that the agreement did not mention any change to his basic salary but rather that during the job retention scheme he would be paid at the applicable level.
29. A Grievance hearing took place on 10 June 2020 and the claimant's grievance was rejected.
30. The reasons for the rejection of the claimant's grievance, which was that he should be paid at the higher pre-furlough rate of pay whilst serving his notice, were set out in a letter dated 12 June 2020.
31. The respondent asserted that by signing the furlough agreement the claimant agreed to a variation of the terms and conditions of employment including his pay.
32. Ms Hallet had also considered the provisions within the employment rights act 1996 under section 87(4) ERA 1996, and concluded "that the legal position" where the employee was entitled to at least one week's greater notice under their contract that the statutory minimum notice period then the right to minimum pay during statutory notice would not apply. She understood this to mean that because the claimant was entitled to a contractual three-month notice period rather than the basic two weeks statutory notice period that the exclusion in section 87 (4) ERA would apply.
33. In those circumstances the claimant's grievance was rejected.
34. The complaint that the claimant brings before the employment tribunal is the same complaint. He asserts that he should have been paid at his pre-furlough salary rate during his three-month notice period and not the capped amount of £2500 per month.

The Relevant Government Provisions and The Relevant Law.

35. The government furlough scheme was introduced in the spring of 2020. The provisions of the scheme provided a grant for employers and businesses whereby they could claim reimbursement of up to 80% of the wages of those employees who were retained in employment where there was no work for them to do.
36. Furlough could not be imposed on an employee, but where an employee agreed to be furloughed, the employer could claim the reimbursement of 80% of wages up to the £2500.00 cap.
37. Under section 87 Employment Rights Act 1996, an employee who has worked for more than one month and who is given notice of termination, is entitled to be paid a sum not less than the amount of remuneration for his normal hours. That is the normal rate.
38. Section 87(4) provides an extra, and does not apply in relation to the value of the if the notice to be given by the employer more than 86(1).
39. Section 87 ERA 1996 ensures that an employee who is entitled to statutory minimum notice only, is paid their normal rate of pay.
40. An employee who is entitled to a longer contractual notice period, is excluded from these provisions.

Variation of Contract

41. A contract of employment is a legally binding agreement. Once it is made, both parties are bound by its terms and neither can alter those terms without the agreement of the other.

42. An employee's terms and conditions may be changed or varied by mutual consent.

43. The terms in individual employment contracts can be changed validly by the employer and employee agreeing a change, or the employee accepting a change by conduct, e.g. by carrying on working under the changed contract without protest. This means that a change notified to an employee, and accepted by them, will be binding. This does not necessarily have to be reflected in a written agreement, but can be evidenced by the actions of the parties.

44. In this case, I must determine whether or not the contract was varied and whether or not the new terms and conditions were accepted by the Claimant, and enforceable by him against the Respondent.

Conclusions

45. I conclude that as a result of the written agreement between the claimant and the respondents of April 2020, there was an express variation of the contract of employment albeit on a temporary basis, that the claimant would accept the amount of £2,500 per calendar month as pay, as long as furlough continued.

46. I find that it was agreed between the parties that the furlough would continue and therefore the reduced rate of pay would continue, until one of the three events set out within that letter took place. These three events were the only events which would bring the variation of contract to an end. There was no provision in the letter for the claimant or the employee to bring the furlough scheme in respect of themselves to an end unilaterally.

47. I conclude that the variation meant that the claimant agreed that, during the course of the furlough period, his normal rate of pay would be varied, and he accepted pay of £2500.00 PCM, instead of his higher, pre-furlough rate of pay, because of the extraordinary circumstances of the pandemic.

48. It was the claimant's view that the spirit and purpose of the scheme being to retain jobs and not to make people redundant meant that the respondent giving him notice of redundancy ought to have brought the scheme to an end, I find as a matter of fact that it did not do so for the following reasons:
49. First of all, the Government provisions did not at the point the claimant was given notice, prevent the employer from claiming during a notice period. This is underlined by the fact that the guidance and regulations in respect of the coronavirus job retention scheme were changed in December 2020 specifically in respect of notice periods and the specific change that was made was that an employer would no longer be entitled to recover the grant from Government in respect of notice pay.
50. Secondly, the coronavirus job retention scheme was not ended by any other mechanism and the claimant did not, I find, cease to be eligible and nor did the employer therefore cease to be eligible under the scheme. The scheme continued, the respondent continued to be entitled to claim in respect of the period of notice pay and further, the respondent did not cancel furlough leave to bring the claimant back to work.
51. I conclude that there was no termination of the furlough scheme at that point.
52. I have also considered section 87 of the Employment Rights Act but conclude that the claimant is not covered by it because of section 87(4) which states that it does not apply in relation to notice given by an employer or an employee if the notice to be given by the employer to terminate the contract is one week more than the notice required by section 86. What this means is, because the claimant was entitled to a three-month notice period which was significantly more than one week in excess of the two-week statutory notice than he would have been entitled to otherwise in the absence of a contractual provision, that the requirements for ordinary pay to be paid during the notice period or the statutory notice period do not apply in his case.

53. I conclude that at the point that the claimant was made redundant and given notice, there had been a valid variation of the claimant's contract regarding pay, that was understood and accepted by Mr Blankley. The contractual agreement between the parties was that the claimant's rate of was £2,500 per month.

54. The agreement had not been terminated and none of the three events set out to terminate the agreement had taken place and in the absence of any rule or regulation, and I have not been referred to one, that there was an alternative obligation upon the employer to pay a different amount during the notice period, I find that the respondent has paid what they were obliged to pay under the contract in force and according to the rules at the time.

55. I dismiss the claimant's claim of breach of contract in respect of notice pay.

Employment Judge Rayner

Date: 19 March 2021

Reasons sent to the parties: 19 March 2021

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