EMPLOYMENT TRIBUNALS

BETWEEN

Claimant		**Respondent**
Mr A Thow	**AND**	Rawlings And Sons (opticians) Ltd

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

HELD AT Southampton (by Video) **ON** 5 March 2021

EMPLOYMENT JUDGE GRAY

Representation

For the Claimant: In person
For the Respondent: Mr T Perry (Counsel)

JUDGMENT

The judgment of the tribunal is that the Claimant's claim for unauthorised deductions from wages fails and is dismissed.

JUDGMENT having been delivered orally on the 5 March 2021 (and then having been sent to the parties on the 11 March 2021) and written reasons having been requested by email dated 6 March 2021, in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided:

REASONS

CLAIM BACKGROUND AND THIS HEARING

1. In this case the Claimant Mr Thow brings monetary claims for unauthorised deduction from wages against his now ex-employer Rawlings And Sons (opticians) Ltd. The Respondent denies the claim.

2. For reference at this hearing I was provided with:

    a. An agreed hearing bundle of 106 pages;

    b. The Claimant's witness statement;

    c. A witness statement of Claire Shipway on behalf of the Respondent;

    d. The skeleton argument of Respondent's Counsel with copies of the three main case authorities relied upon.

3. By a claim received on the 16 July 2020 the Claimant claimed, "other payments" (as at page 9 of the bundle). In short this was for a shortfall in wages and pension contributions caused by being paid 80% of his salary during the first lock down of the COVID-19 pandemic.

4. He had also claimed for a redundancy payment and notice pay. However, at the start of this hearing the Claimant confirmed that he was not seeking a redundancy payment or notice pay, he only seeks the alleged deductions. This position would appear correct on the Claimant's part because when he submitted his claim to the Tribunal he was still employed by the Respondent, so the Tribunal would not have jurisdiction to determine them, and he has not sought to add these complaints since the termination of his employment.

5. The Claimant sets out in his Schedule of Loss (at page 32 of the bundle) that he is "asking the tribunal to award the difference between my contracted pay, pension contributions, and the pay received from March 2020 to and including May 2020.". This comes to a total of £2,995.02 over the three-month period.

6. The Claimant's claim arises he says because his employment contract was not varied as the Respondent asserts so that he suffered underpayments from 25 March 2020 to 9 May 2020.

7. The Respondent denies the claimed monies are owed as it says the employment contract was varied to allow them to pay what they paid.

8. The dates of the ACAS early conciliation certificate are 30 May 2020 to 18 June 2020 (page 3 of the bundle). Claims about matters on or after 29 February 2020 will be in time, so there is no time limit jurisdictional issue raised in this claim.

THE FACTS

9. I heard from the Claimant. I also heard from Claire Shipway (who says in her witness statement that she is employed by the Respondent as Director responsible for HR and that in her professional role she says she is a Dispensing Optician Director for the Respondent).

10. I found the following facts proven on the balance of probabilities after considering the whole of the evidence, both oral and documentary, and after listening to the factual and legal submissions made by and on behalf of the respective parties.

11. The Claimant states (as per paragraph 5 of his witness statement) that on "Tuesday 24th March @ 14:20 I received the Email from Richard Rawling with attachment dated 23rd March from Mrs Claire Shipway Human Resources Director. I read the Email and attached letter. I interpreted it as, other than Furlough, there were no alternatives for employees.".

12. Looking at these documents which are at pages 51 and 52 of the bundle it is noted that the email says (at page 51) … "Since there is no legal definition of the term 'furlough' being used by the government, the term lay-off has been used in order to follow HR law.".

13. It is noted that the attached letter says (at page 52):

    "To do our best to protect the business and your jobs after the coronavirus crisis has passed and as a consequence of the above, it is necessary to lay off/furlough a large number of our workforce commencing on 25th March 2020. This is an alternative to having to implement a redundancy situation.

    It is our intention to use the Government's 'Coronavirus Job Retention Scheme' whilst it is in operation so as to be able to pay those 'furloughed' (laid off) employees at least 80% of salary (capped at £2,500 per month) and we will keep you all updated as we find out more of the terms and conditions of the Scheme.

    We will send out individual letters to those of you that we have no alternative but to layoff/furlough during this closed-door stage. This is a temporary arrangement, unfortunately, we do not know as yet how long this temporary arrangement is expected to last for, but please be assured we will resume normal business as soon as we possibly can. We will monitor the situation and keep you informed of when the lay-off may be lifted and when you may return to work.

    Should you wish to discuss any of the above, or have any queries during the period of lay-off, please do not hesitate to contact Claire Shipway HR Director."

14. The Claimant then states (as per paragraph 6 of his witness statement) … "Later that Tuesday 24th March an Email from Claire Shipway this confirmed that I had been laid off /furloughed. I believed this to be compulsory. [49-50]".

15. Considering this document at pages 49 to 50, it says:

    "Please be assured that we will be making an appropriate salary payment for March to include full pay for the period of normal working and the reduced pay for the furlough period which will be made by 31st March. At times we have paid this slightly early, around the 28th but this is simply not possible at present.

    As an alternative to redundancy, and in order to remain viable as a business, it is necessary to lay off/furlough a large number of our workforce commencing on 25th March 2020.

    It is our intention to use the Government's 'Coronavirus Job Retention Scheme (CJRS)' whilst it is in operation so as to be able to pay 'furloughed' (laid off) employees at least 80% of salary (capped at £2,500 per month) and we will keep you updated as we find out more of the terms and conditions of the Scheme."

16. It also refers to the Respondent's hope that it is a temporary situation and invites employees to make contact if they wish to discuss matters.

17. This evidence of the Claimant mirrors the evidence of Mrs Shipway as to what was said and what correspondence the Claimant received at that time.

18. The Claimant then explains in paragraph 7 of his witness statement that … "I have no qualifications in HR, and as a lay person believed, no other options were open to me. Therefore, from 24th March I stayed at home and continued, along with my sister, to care for my father as I had been since January 2020.". Then at paragraph 8 … "If my services were required, I was a phone call away.".

19. The Claimant did not seek to clarify the position despite both correspondences from the Respondent inviting such contact.

20. The Claimant then sets out at paragraph 13 of his witness statement that on …. "Wednesday 22nd April Text Received from Bridget. Interested in my opinion on the Email from HR. It came to light that my copy had gone into my spam folder.". Then at paragraph 14 … "Having read the agreement, I replied to Bridget confirming my intention to respond as I was concerned, and this would take time.". Then at paragraph 15 … "Meanwhile on 23rd

April 2020 I received an Email from HR entitled furlough concerns. It confirmed several employees were concerned about the variation, and Furlough agreement. I was not alone in my concerns.". Then at paragraph 16 … "Claire Shipways reply to these concerns did nothing to allay my fears of being laid off or put-on short time working for an indefinite period without any pay.".

21. What is clear from this evidence and the documents referred to is that Claimant does not express a concern about being paid a reduced salary while on furlough.

22. As he sets out in his statement at paragraph 22 it is by a letter dated 2 May 2020 to Claire Shipway that he outlines his concerns to the Respondent (pages 68 to 69), and he says that these are:

- "Unlawful deduction of wages.
- I do not accept a variation to my contract.
- I cannot sign back dated agreement.
- The agreement was back dated and suggested it was a replacement for a previous version, which it was not.
- Clause 6 asking me to waive my employment rights and provide an open-ended agreement to both short hours working and lay off without pay.
- There is no indication it is temporary."

23. Referring to the letter itself the relevant part for the matters in this claim is on page 69:

"The shortfall in both my salary and my pension contributions

Given that no appropriate furlough agreement has been in place for the period 24th March until now, I believe that my existing employment contract should remain in force. In the absence of such an agreement, I believe that I should have been paid in accordance with the terms of my contract. In fact, to fail to pay me, without an agreed variation to my contract may amount to both breach of contract and an unlawful deduction of earnings under the current legislation as it applies to Wages."

24. This appears to be a retrospective assertion by the Claimant as to why his contract was not varied on the 24 March 2020 to pay him a reduced salary while he is on furlough.

25. What appears to vex the Claimant and his colleagues at this stage is the inclusion of clause 6 in the proposed Furlough agreement (as referred to in paragraph 28 of the Claimant's statement) … "I felt it unprofessional to slip

in unfavourable variations to my contract by attempting to make them appear as part of a furlough agreement. [63, clause (6)]".

26. Clause 6 (on page 63) reads … "When your Furlough Leave ends, while we will always endeavour to provide you with work, in the event of insufficient work being available you agree we are entitled to place you on short time or lay off without any pay except for statutory guarantee payments.".

27. The Claimant at paragraph 46 of his statement says …. "I was misled, and therefore any suggestion that I affirmed the variation to my contract is flawed. I felt deceived as it is impossible to object when there had been a material failure to disclose all facts.".

28. However, looking at what the material facts are, namely that as from the 25 March 2020 the Claimant will be paid a reduced salary while he is on furlough. This was made clear to the Claimant by the correspondence he received on the 24 March 2020. He also receives reduced pay in the monthly pay cycles at the end of March and April 2020. He is paid in the way the Respondent says he will be and he accepts the payments made. The Claimant remains on furlough for that period. There does not therefore appear to be a material failure to disclose all the facts as the Claimant asserts.

29. Then at paragraph 67 of his witness statement the Claimant says … "On Tuesday 19th May, after repeated indications the only other option available was short time working. I agreed to be furloughed from 9th May 2020, with the proviso it does not apply to the period in dispute. I felt coerced into signing, the tactic worked.".

30. This creates the crystallised period of dispute being the 25 March 2020 to 9 May 2020.

THE LAW

31. Having established the above facts, I now apply the law.

32. The Claimant claims in respect of deductions from wages which he alleges were not authorised and were therefore unlawful deductions from his wages contrary to section 13 of the Employment Rights Act 1996.

33. Section 13(3) of the Employment Rights Act 1996 confirms that an employee can claim for an amount that is less than the total amount of the wages properly payable to them.

34. As is helpfully summarised in the skeleton submissions of Respondent's Counsel:

35. "The law regarding unilateral variation of a contract with acceptance by failure to object was reviewed by the Court of Appeal in **Abrahall v Nottinghamshire County Council** [2018] IRLR 628. JL Underhill set out the main points from a review of the case law:

'[85] … 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 …

[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 … 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 Scotland v Roper*** *[2004] IRLR 4] 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 Ltd [[1987] IRLR 516] …

[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 … 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.'"

36. **"Abrahall** was applied by the High Court in the context of the Coronavirus pandemic in **Re Carluccio's Ltd (in administration)** [2020] IRLR 510 in which, on the facts, failure to respond to a letter putting staff on furlough did not amount to acceptance of the variation of the contract (see paras 50-54). However, **Re Carluccio's** differs from the current case in a number of important aspects:

    a. The variation letter included a statement that "if the Company does not receive an e-mail from you by the above deadline, the Administrators will need to review your position within the Company and may be required to consider the possibility that your role is redundant." Snowden J held that this suggested that failure to respond to the letter would be considered a rejection of the variation (see para 51).

    b. Due to unusual circumstances of the administration, the High Court was being asked to rule on the effect of this letter on employees who had failed to respond to this letter within only 7 days.

    c. There was no evidence that the employee who had not responded to the variation letter had received it.

    d. several employees had rejected the letter."

37. "At para 54 of the judgement Snowden J stated:

"I do not say that such an inference might not be capable of being drawn if the letter had been differently phrased, if it could be proven to have been received, if more time had elapsed, or if the particular circumstances of the Non-Responding Employees had been explained in more granular detail (though I acknowledge that such an inquiry and explanation would be virtually impossible in the limited time available). As Underhill LJ observed in Abrahall, the inferences that can be drawn must depend on the particular circumstances of each case.""

THE DECISION

38. Based on the circumstances of this claim it is for the Claimant to prove he has been subjected to an unauthorised deduction of wage in that he has been paid less than the amount properly payable to him.

39. The correspondence received by the Claimant dated 24 March 2020 is not in dispute, in that the Claimant received it and it sets out the unique furloughing of employees with reduced pay to be covered by the Government's 'Coronavirus Job Retention Scheme'.

40. The Claimant receives the reduced pay from the 25 March 2020 to 9 May 2020 he says without his agreement so the reduced pay he says is an unauthorised deduction of wage. He submits an objection to it by letter dated 2 May 2020.

41. Therefore, the relevant consideration in determining what is properly payable to the Claimant based on this backdrop is whether there has been a unilateral variation of a contract with acceptance by failure to object.

42. I have considered the case authorities of Abrahall and Carluccio and the inferences that can be drawn on the particular circumstances of this case.

43. Considering the conduct of the Claimant when viewed objectively:

    a. He is informed of the variation on the 24 March 2020.

    b. He remains on furlough for the disputed period 25 March 2020 to 9 May 2020, he does not apply to change his work status or enquire as to alternatives, despite invitation in the correspondence from the Respondent to discuss matters.

    c. He receives the lower salary, as paid in March 2020 and April 2020 and he does not raise objection before or after receipt of those payments.

44. There is no protest until his letter dated 2 May 2020 and that appears to be a retrospective assertion as to why his contract was not varied with effect from the 25 March 2020. There has been nothing evidenced about this particular variation being objected to on a collective level either.

45. Considering the time that elapsed between the 24 March 2020 and the 2 May 2020, there is no indication in the submitted protest to the change that the Claimant was impaired in asserting what he does then. He accepts being furloughed from the 25 March 2020 and is paid in line with that in March and April 2020.

46. It does seem on the particular circumstances of this case that the reduced salary level was accepted by the Claimant by his conduct, accepting payments in March and April 2020 while on furlough, and not raising any protest until a retrospective argument being made in May 2020.

47. Therefore, I find that what was properly payable to the Claimant in the window of 25 March 2020 to 9 May 2020 was paid, so there have been no unauthorised deductions made.

48. The judgment of the tribunal is therefore that the Claimant's claim for unauthorised deductions from wages fails and is dismissed.

49. For the purposes of Rule 62(5) of the Employment Tribunals Rules of Procedure 2013, the issues which the tribunal determined are at paragraph 1; the findings of fact made in relation to those issues are at paragraphs 9 to 30; a concise identification of the relevant law is at paragraphs 31 to 37; how that law has been applied to those findings in order to decide the issues is at paragraphs 38 to 48.

Employment Judge Gray
Date: 17 March 2021

Judgment & Reasons sent to the parties: 23 March 2021

FOR THE TRIBUNAL OFFICE