



# EMPLOYMENT TRIBUNALS

**Claimant:** S Symonds-Cassells

**Respondent:** Motorline Limited

**Heard at:** Birmingham Employment Tribunal (Via CVP)

**On:** 12 March 2021

**Before:** Employment Judge Noons

## Representation

Claimant: Himself

Respondent: Mr Cook (Counsel)

**JUDGMENT** having been sent to the parties on 15 March 2021 and written reasons having been requested in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided:

## REASONS

The hearing was held via CVP and I had an agreed bundle of documents running to 95 pages as well as written witness statements for the claimant, Mr Lewis, Mr Richards, Ms Young and Mr Isaacs on behalf of the respondent. I heard oral evidence from all of the witnesses. Where I have had to determine a dispute of fact I have set out my findings below.

### The Facts

1. The respondent is a reasonable sized car dealership who employs approximately 1800 people at various locations throughout the UK.

2. The claimant was made a conditional offer of employment on 11 March 2020. On 19 March 2020 he signed and returned the contract, and the claimant says that he met all the terms of the offer. On 23 March 2020 due to the COVID 19 pandemic the offer was unilaterally withdrawn by the respondent. The respondent says it was withdrawn because the start date, of 13 April 2020, could not be met and therefore they were able to unilaterally withdraw it. The timing of the withdrawal of the offer coincided with the UK government announcing the first national lockdown and that all non-essential retail (which included the respondent's business) had to close.
3. On 24 March 2020, the claimant spoke to Rob Lewis, a Manager for the respondent, who said that the claimant would be re-employed once the respondent reopened. On 25 March 2020, Iain Sercombe confirmed to the claimant that Mr Lewis would call him later. At this point Mr Sercombe was not employed by the respondent. Mr Sercombe had worked with the claimant at his previous job, had been recruited by the respondent at around the same time as the claimant and was going to be the claimant's boss when they both started with the respondent.
4. On the same call on 25 March 2020, Mr Sercombe told the claimant that he, the claimant, would be paid £2500 per month whilst he was not able to attend the respondent's premises and that Mr Lewis had said this was ok. The claimant says he then spoke to Mr Lewis about reinstating the offer of employment. The claimant says that Mr Lewis said it would be a furlough type arrangement of £2500 per month to start as of 1 April 2020. The claimant says he accepted this offer. Mr Lewis's evidence is that he did not say to claimant that he would start on 1 April 2020 with payment of a furlough type arrangement of £2500 per month.
5. On 26 March 2020, the claimant was informed by Mr Sercombe that he, Mr Sercombe, was to act as the go between for the claimant and Mr Lewis as Mr Lewis was on furlough. On 30 March 2020, Mr Sercombe confirmed to the claimant that his employment with the respondent would start on 1<sup>st</sup> April 2020 with a furlough type payment of £2500 per month. This was again said before

Mr Sercombe's own employment had started with the Respondent, although the claimant had been told previously that Mr Sercombe would be his line manager at the respondent.

6. On 31 March 2020 the claimant checked with Daniel Richards, HR Business Partner, about the reinstated job offer and pay. The claimant says Mr Richards confirmed that he knew of the reinstated job offer but not about the pay. Mr Richards's evidence is that it was the claimant who advised him of the reinstated job offer and that he was not aware of this until the claimant had told him and therefore he said to the claimant he would check. The evidence from the respondent today, from Ms Young, Mr Isaacs and Mr Lewis was that there had been informal discussions about reinstating the offer to the claimant around this time.
7. On 8 April 2020, the claimant chased as he had heard nothing in writing from Mr Richards who had emailed Ms Young, the Group HR Manager. The claimant also emailed Ms Young setting out that he believed that Mr Lewis had reinstated the job offer with a start date of 13 April 2020 and asking if she could clarify. Mr Sercombe helped the claimant in drafting this email. By this time Mr Sercombe was employed by the respondent. The claimant had no response to this email.
8. On 15 April 2020, the claimant sent a text to Mr Lewis this text is consistent with the claimant's stated belief that he had started employment with the respondent and that he was to be paid. Mr Lewis's evidence is that he did receive the text but that he did not respond as he was on furlough. Mr Lewis also confirmed that he did not forward the text to anyone in the respondent either whilst he was on furlough or when he returned to work. It is notable that even after his return to work from furlough Mr Lewis did not respond in writing. He did not query why the claimant believed he was employed by the respondent or why the claimant thought that he was being paid £2500 a month in a company furlough type arrangement.
9. On 22 April 2020, given the lack of response the claimant emailed Colin Isaacs, General Manager, explaining that he understood his employment had started

and that he would be paid a furlough style arrangement. The claimant's evidence is he sent this email on the back of a call with Mr Lewis on 20 April 2020 where Mr Lewis had confirmed his employment and that the claimant would be paid £2500 per month in a furlough type arrangement. Mr Lewis says he did not say this and in fact there was no call on this date. The claimant in response says the only reason he contacted Mr Isaacs on 22 April 2020 was because Mr Lewis had given him his details during the call of 20 April 2020 as Mr Lewis was still on furlough. Mr Lewis says that the conversation where he gave the claimant Mr Isaacs's details was in fact at the end of March before he went on furlough.

10. Mr Isaacs did not respond to the claimant. He did not query where claimant had got the idea that he was employed and due to be paid from or to say that his understanding was incorrect.
11. The claimant received further communications from Mr Sercombe, who by this time was employed by the respondent as a manager. These reference 'RTW' which refers to return to work. At page 71 of the bundle there is a message from Mr Sercombe to the claimant saying, "looks like RTW 11 May".
12. At the end of April 2020, the claimant sent a text to Mr Lewis with a copy of the email he had sent to Mr Isaacs on 22 April 2020 to say that he had not been paid. Mr Lewis did not respond. On 6 May 2020, the claimant received a further text from Mr Sercombe saying "RTW 11 May but waiting for government confirmation so it might be 18 May". Then the claimant received another message from Mr Sercombe, saying "pending government announcement Monday will go ahead". There is no mention in any of these communications that claimant will be a new starter or needs a new offer and new contract. All the messages talk of a return to work.
13. On 10 May 2020, Mr Sercombe messaged the claimant and others saying that he would be in contact regarding a start date as all "phase 2 staff" were not allowed back in yet. On 20 May 2020 there was a further text sent to everyone who was not yet back at work.

14. On 26 May 2020, the claimant received an email from Mr Lewis which purported to give him a start date of 1 June 2020, there was no mention of a £2500 furlough type arrangement. Rather surprisingly this email does not address any of the previous points the claimant has raised regarding his employment with the respondent.
15. On 4 June 2020, the claimant sent a very detailed email setting out his concerns to the owners of the respondent. On 11 June 2020, the respondent sent a detailed letter in response from Ms Young. Nowhere in this response does Ms Young say that the claimant did not start employment.
16. The difference between the respondent and the claimant, as highlighted in Ms Young's letter, was whether the claimant should have been paid, not whether his employment had started. In the letter Ms Young says that the claimant was on a period of unpaid leave. In evidence to the tribunal, she has now said this was an error, however, this letter was written directly in response to the claimant's email of 4 June 2020.
17. In the letter of 11 June 2020, the respondent gave the claimant one week's notice of termination of employment. They confirm that the claimant would be paid this sum by Friday 12 June 2020.
18. Ms Young confirmed in evidence that some employees of the respondent, who did not qualify for the government furlough scheme, were paid a company furlough type arrangement of £2500 per month. This is the sum that the claimant says he was told that he would be paid.

**The issues**

19. The issues for me to determine were agreed with the parties at the start of the hearing. The claimant was pursuing two claims, one for breach of contract and the other for unlawful deduction from wages. These claims cover the same period in time.

20. The first issue for me to consider is whether the claimant an employee or worker of the respondent. To determine this, I need to know was the offer of employment conditional, had those conditions been met and did the respondent do anything to confirm that the claimant's employment with them had started?
21. The second issue is what was agreed with the claimant in relation to payment from the period 13 April to 12 June 2020? To determine this, I need to know was the claimant placed on unpaid leave from 13 March to 12 June 2020 as per the respondent's letter of 11 June 2020. If I find that the claimant was on leave from the respondent, I need to determine was there an agreement in writing that this period would be unpaid or was there a contractual right to lay off without pay.
22. In considering this I have to determine what Mr Sercombe said to the claimant about pay and what Mr Lewis said to the claimant about pay. Did he say that the claimant would be paid £2500 per month in a furlough type arrangement? If Mr Sercombe did say to the claimant he would be paid £2500, was the claimant entitled to rely on this?
23. The third issue is, if there was a contract of employment was it frustrated by the government's lockdown restrictions due to COVID 19. This is an objective test, I also have to consider did respondent do anything to indicate that the contract could or did continue? Does the letter of 11 June 2020 confirm that the contract was not frustrated and does payment of a week's notice by the respondent confirm that the contract was not frustrated?
24. The final point for me to consider is if there was a breach of contract or unlawful deduction from wages what monies are properly due to the claimant.

### **The Law**

25. An employer will be in breach of contract if they fail to pay an employee the monies that they are properly due under their contract of employment. Under Article 3 of the Employment Tribunals Extension of Jurisdiction (England and Wales) Order 1994 ('**1994 Order**') an employee can bring a breach of contract

claim in the tribunal as long as it does not relate to a contractual term referenced in Article 5 of the 1994 Order and it is outstanding at the point of termination of employment.

26. Section 13(1) of the Employment Rights Act 1996 ('**ERA**') provides that an employer shall not make a deduction from wages of a worker employed by him unless the deduction is required or authorised by virtue of a statutory provision of the worker's contract or the worker has previously signified in writing his agreement or consent to the making of the deduction. An employee has a right to complain to an Employment Tribunal of an unauthorised deduction from wages pursuant to Section 23 ERA. In accordance with section 13(3) ERA non-payment of wages amounts to a deduction for the purposes of Section 13(1).

### **Findings**

27. The claimant gave clear and consistent evidence as to what he was told by Mr Sercombe. The claimant's contemporaneous messages and emails are also consistent with what he says he was told by Mr Sercombe. The respondent still employs Mr Sercombe but chose not to call him to give evidence today. The respondent therefore did not present any evidence to counter the claimant's account of what Mr Sercombe said. None of the respondent's witnesses could confirm what Mr Sercombe said to the claimant. This is notable as Mr Sercombe is specifically referenced in the claimant's email of 4 June 2020 which Ms Young had but she confirmed she did not speak to Mr Sercombe. I therefore accept the claimant's evidence and I find that the claimant was told by Mr Sercombe that he would start employment in April 2020 and that he would be paid a company furlough type arrangement of £2500 per month until he could physically start work.
28. The first time Mr Sercombe said to the claimant he would be employed and paid was before Mr Sercombe was employed by the respondent, however, the claimant had already been told Mr Sercombe would be his line manager. The claimant attempted to check what Mr Sercombe has said with Mr Lewis, Ms Young and Mr Isaacs none of whom said that this was not the case. The

subsequent use of the phrase of “return to work” by Mr Sercombe is consistent with there being an ongoing employment relationship.

29. Turning to deal with the disputed conversation of 20 April 2020 alleged to have occurred between the claimant and Mr Lewis, I have to determine what happened. My conclusions are based not only the witness evidence I have read and heard, I have also taken into account the contemporaneous evidence of the various text messages and the email to Mr Isaacs on 22 April 2020 referencing claimant’s understanding of his position. The claimant must have got that understanding from somewhere. He had already on 15 April set out his position to Mr Lewis without any response.
30. I find that on the balance of probabilities the conversation with Mr Lewis did take place on 20 April 2020 as alleged by the claimant. During this conversation, the claimant’s employment status and pay of £2500 whilst on company furlough was confirmed by Mr Lewis. This is supported by Mr Sercombe’s texts which talk about RTW and not starting employment.
31. Therefore, whilst the initial offer of employment was conditional and was withdrawn, subsequent to its withdrawal the claimant was made a verbal unconditional offer of employment to start on 13 April 2020 which he accepted. Given this finding I do not need to go on to consider whether or not at the point the original offer was withdrawn all the conditions had been met.
32. As the claimant could not attend work he was put on a company funded furlough arrangement at a rate of £2500 per month. Although the letter of 11 June 2020 said that the claimant was on unpaid leave the respondent did not pursue this argument before me today. In any event there was nothing in writing entitling to the respondent to put the claimant onto a period of unpaid leave nor did the claimant agree in writing that he would not be paid by the respondent. I find that both Mr Sercombe and Mr Lewis confirmed to the claimant he would be paid £2500 a month.
33. Furthermore, the fact of his employment was confirmed in the letter of 11 June 2020 and whilst it was an extremely difficult time for the HR team at the



respondent given the lockdown, I do not find it credible that as an experienced Group HR Manager as Ms Young would have made such a fundamental mistake as to whether or not the claimant was an employee of the respondent.

34. On the issue of frustration, I was not addressed on this point by the respondent but in any event given my findings that the respondent confirmed the claimant's employment with pay any argument on frustration fails.

**Conclusion**

35. I therefore find that claimant was employed by the respondent from 13 April until 12 June 2020 when his employment was terminated with 1 week's notice. I also find that claimant was promised payment of £2500 per month for April and May 2020 to cover a period on company furlough. The claimant was not paid this money and I find this non-payment was a breach of contract. I also find that this non-payment amounts to an unlawful deduction from wages.

36. The claimant is seeking to claim consequential loss in relation to his breach of contract claim and there is significant dispute between the parties as to whether such sums can be recovered. The tribunal did not have time to hear evidence or arguments on this point today and therefore the matter is listed for a remedy hearing on **26 March 2020**.

Employment Judge Noons

Date 29/04/2021