EMPLOYMENT TRIBUNALS

Claimant: **Mr S Gul**

Respondent: **Financial Ombudsman Service**

Heard at: **East London Hearing Centre (by telephone)**

On: **8 March 2021**

Before: **Employment Judge Gardiner**

Representation
Claimant: In person
Respondent: Ms F Onslow, counsel

JUDGMENT has been sent to the parties on 11 March 2021 and the Respondent has requested written reasons by email also sent on 11 March 2021.

WRITTEN REASONS

1. This is a dispute about the Claimant's pay in his current role as an investigator for the Financial Ombudsman Service. In short, the Claimant complains about the reduction in his monthly pay from 1 July 2020 onwards. He argues that this amounted to an unauthorised deduction from wages. The Respondent accepts that the Claimant's pay reduced on 1 July 2020. Its position is that this occurred in accordance with a contractually agreed pay protection arrangement. As a result, it was not an unauthorised deduction of wages.

2. At this hearing, the Claimant has represented himself. The Respondent has been represented by Ms Onslow of counsel. The Claimant has given evidence and been cross examined. On behalf of the Respondent, there was a witness statement from Ms Kearns. She confirmed the truth of her statement but has not been questioned by the Claimant. The Respondent had produced a paginated bundle of documents numbering 198 pages. In addition, there was a Skeleton Argument from Ms Onslow supporting her client's position.

3. There were two preliminary issues. The first concerned whether the Tribunal should accept the ET3 presented by the Respondent given that it was presented outside the time limit specified in the document serving the claim. The Respondent had applied for an extension of time and had explained why it had not had notice of the

claim at the outset. This application had been opposed by the Claimant. This had been referred to me on the papers. On 15 December 2020, I granted the Respondent an extension of time, for the reasons given by the Respondent. For some reason that judicial decision does not appear to have been communicated to the parties. As a result, this is no longer a live issue, although it is regrettable that the parties were not aware of this before today.

4. The second issue is that the Respondent had previously applied to strike out the claim, or alternatively for a deposit order. I told the parties in correspondence that there would insufficient judicial time to schedule a Preliminary Hearing to consider those applications in advance of the Final Hearing. As a result, there has been no outcome on those applications. With the agreement of the parties, it was decided I would not spend time during this Final Hearing to consider this strike out application but instead would consider the merits of the claim.

5. Section 13 ERA 1996 is worded as follows:

13Right not to suffer unauthorised deductions.

(1)An employer shall not make a deduction from wages of a worker employed by him unless—

(a)the deduction is required or authorised to be made by virtue of a statutory provision or a relevant provision of the worker's contract, or

(b)the worker has previously signified in writing his agreement or consent to the making of the deduction.

(2)In this section "relevant provision", in relation to a worker's contract, means a provision of the contract comprised—

(a)in one or more written terms of the contract of which the employer has given the worker a copy on an occasion prior to the employer making the deduction in question, or

(b)in one or more terms of the contract (whether express or implied and, if express, whether oral or in writing) the existence and effect, or combined effect, of which in relation to the worker the employer has notified to the worker in writing on such an occasion.

(3)Where the total amount of wages paid on any occasion by an employer to a worker employed by him is less than the total amount of the wages properly payable by him to the worker on that occasion (after deductions), the amount of the deficiency shall be treated for the purposes of this Part as a deduction made by the employer from the worker's wages on that occasion.

(4)Subsection (3) does not apply in so far as the deficiency is attributable to an error of any description on the part of the employer affecting the computation by him of the gross amount of the wages properly payable by him to the worker on that occasion.

(5)For the purposes of this section a relevant provision of a worker's contract having effect by virtue of a variation of the contract does not operate to authorise the making of a deduction on account of any conduct of the worker, or any other event occurring, before the variation took effect.

(6)For the purposes of this section an agreement or consent signified by a worker does not operate to authorise the making of a deduction on account of any conduct of the worker, or any other event occurring, before the agreement or consent was signified.

(7)This section does not affect any other statutory provision by virtue of which a sum payable to a worker by his employer but not constituting "wages" within the meaning of this Part is not to be subject to a deduction at the instance of the employer.

6. As a result, the essential issue for the Tribunal to decide in the present case is whether there was a contractual term, agreed between the parties, whereby the Claimant's salary would be capped at £42,800 with effect from 1 July 2020.

7. In May 2016, the Claimant started a new role, namely that of Investigator. The Claimant was issued with a new employment contract, which contained the following term in relation to pay.

> **"pay** Your basic salary is £40,690 a year. We call this your "basic pensionable salary", because it's also used as part of the calculations for your pension.
>
> Please note that with effect from the second anniversary of your start date, your salary in this role will be capped at £40,000. Even if it had previously gone above £40,000 because of pay rises.
>
> This means that from the second anniversary of your start date, your salary can't be higher than £40,000, unless we notify you otherwise.
>
> Your salary accrues from day to day, and is paid to you in arrears. We'll pay you by credit transfer, or any other appropriate method that we may adopt in the future.
>
> Annual pay reviews occur on 1 July each year. This is a review, and any pay increase is entirely at our discretion."

8. The Claimant agreed to this term. The effect was that the Claimant agreed that from 3 May 2018, his salary would not be higher than £40,000 unless he was notified otherwise. In November 2016, I find the Claimant was sent a document which was intended to clarify this pay term. Indeed, it stated that it was replacing the wording in the contract with replacement wording by way of clarification. There is no evidence that this wording was expressly agreed by the Claimant. It does not matter on my analysis, because the effect was the same as the wording in the April 2016 contract – the Claimant's pay would be capped at £40,000 from the second anniversary, unless the Respondent notified the Claimant otherwise.

9. Because many investigators were taking longer to progress within their roles, a decision was taken to extend the transition period. As a result, the Claimant was notified that the transition period was extended. This notification was given on 26 February 2018 in a communication which was worded in the terms at page 177 of the bundle, albeit addressed to the Claimant. This extended the transition period until 31 March 2019. As a result, the Claimant's salary was not reduced to £40,000 on 3 May 2018. In fact, the Claimant received a pay increase on 1 July 2018. As notified to the Claimant, his pay was therefore due to reduce to £40,000 on 3 May 2019. However, on 1 April 2019, he was told that the salary cap period would be

extended until 30 June 2019, and then on 5 July 2019 he was told that this would be extended until 30 June 2020.

10. As a result, the Claimant received a further pay increase on 1 July 2019. By that point the effect of the pay increases was that the Claimant was now being paid £43,606 plus £1090 in a non-pensionable payment.

11. However, there were no further extensions. The effect of the extensions meant that what was intended to be a two year pay protection period became a four year pay protection period. With effect from 1 July 2020, the Claimant's pay was capped at £42,800, which was the higher pay cap figure to take account of inflation since the original pay cap date. This meant that there was a reduction of approximately £1900 gross.

12. The Claimant's argument is that this pay cut was not in accordance with the contract. He says that he had not agreed to such a pay cut. His argument is that because the two-year period had expired, thereafter it was too late to impose a pay cap without his agreement. I disagree. The clear wording of the contract was that the pay cap would apply after two years. The Respondent did not act in an unequivocal way to indicate either before or after the two-year anniversary that it would not rely on the two-year transition period. Rather it continued to insist in subsequent communications that there would be a transition period but it would be longer than originally intended at the time of the April 2016. This was a concession to the Claimant and meant that he was entitled to higher salary payments than he would have been if that contract had been strictly applied. It was a case of the Respondent notifying the Claimant otherwise, as provided in the contractual wording. In those circumstances, it was open to the Respondent to apply this contractual term, namely that the period of pay protection would end on 30 June 2020.

13. From that date onwards, the Respondent was contractually entitled to pay the Claimant the pay to which he has been paid since. There has been no unauthorised deduction of wages.

14. As a result, it is not necessary to analyse whether there are any implied terms which impact on the Claimant's pay. It would be unusual for matters of contractual salary to be dealt with by way of implied terms rather than express terms. I do not find that there are any relevant implied terms here governing the Claimant's pay on which he can rely. The matter is governed by the express terms of the employment contract.

15. Further the Respondent was not required under the contract to grant the Claimant a pay rise. The contract makes it clear that all pay rises are discretionary. Indeed, to have granted the Claimant a pay rise above the level of the pay cap would have been inconsistent with the existence and level of the pay cap.

16. For these reasons, the Claimant's claim fails and will be dismissed.

Employment Judge Gardiner
Date: 2 June 2021