# EMPLOYMENT TRIBUNALS

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**<u>SITTING AT:</u>** **LONDON CENTRAL**
**<u>BEFORE:</u>** **EMPLOYMENT JUDGE MCKENNA (sitting alone)**
**<u>BETWEEN:</u>**

**Mr A Shabir**

**Claimant**

AND

**CBL Business Solutions Ltd**

**Respondent**

**<u>ON</u>: 8th July 2021**

**Appearances:**
**For the Claimant:** **In person**
**For the Respondent:** **Ms Samantha Lam, Mr. Leng Vang, Directors**

# RESERVED JUDGMENT

The Judgment of the Employment Tribunal is as follows:

1. The claim for a redundancy payment is dismissed on striking out.

2. The claim for unauthorised deductions from wages is not well founded and is dismissed.

# WRITTEN REASONS

**The claims**

1. By an ET1 received on 23 September 2020, the claimant, who was employed by the respondent as the General Manager of its new gym franchise, brought claims of unfair dismissal, to a redundancy payment and for arrears of pay. The arrears of pay were said to arise from "forced unpaid leave and not fulfilled

contract with hours*. The ET1 said that the claimant had not signed any document agreeing to be placed on unpaid leave. The claimant was dismissed by the respondent during his probationary period on 17th August 2020

2. The claims were fully defended. In essence, the respondent said that the claimant had agreed to be placed on unpaid leave when the respondent's gym business was forced to close due to government restrictions announced on 20th March 2020.

**The proceedings**

3. A strike out warning was issued to the claimant on 2nd December 2020 on the basis that he had not been employed for two years and therefore could not bring an unfair dismissal claim.

*Preliminary hearing on 25th February 2020*

4. A final hearing was listed for 2 days commencing on 25th February 2020 before Employment Judge Wisby. As the parties were not ready to proceed, she converted that hearing into an open preliminary hearing. The complaint of unfair dismissal was struck out as the claimant lacked the necessary qualifying service to bring an ordinary unfair dismissal claim. A number of case management orders were made.

*The issues*

5. Employment Judge Wisby identified the issues as:

   <u>Unauthorised deductions</u>

   Did the respondent make unauthorised deductions from the claimant's wages in accordance with ERA section 13 by not paying the claimant's wages and, if so, how much was deducted? The respondent's position is that the claimant was not paid between 24th March 2020 and the termination date as he had agreed to be placed on unpaid leave.

*Hearing on 27th May 2021*

6. The claim was then listed for a final merits hearing on 27th May 2021 before me. The final merits hearing could not proceed due to the claimant's connectivity problems. The claimant had been sent a strike out warning by as he had failed to comply with Employment Judge Wisby's case management orders most notably by failing to serve a witness statement and schedule of loss.

7. The respondent applied for a strike out order against the claimant. I therefore converted the final merits hearing to a public preliminary hearing to deal with the strike out application giving the claimant time to consider the application. I

refused the strike out application for the reasons which I gave orally at that hearing. New case management orders were made and the final merits hearing was listed for 8th July 2021.

## This hearing

8. The hearing was a hybrid public hearing conducted using the cloud video platform (CVP) under rule 46. A hybrid hearing was organised as at the previous hearing on 27th of May 2021, the claimant had an unstable Internet connection. The claimant intended to attend London Central in person where I was located with the respondent attending by video. In the event, the claimant had been able to restore his Internet connection and both parties attended by video. I considered it just and equitable to conduct the hearing in this way.

9. Members of the public were able to attend and observe the hearing.

10. The parties were able to see and hear what I was able to hear. There were no technical difficulties. I ensured that there were regular breaks and asked the parties to let me know if they required additional breaks.

11. All parties had access to the written evidence. The parties were advised by the clerk that it was an offence to record the proceedings.

## Evidence

12. I heard evidence from the claimant. The respondent tendered two witnesses; Ms Samantha Lam and Mr. Leng Vang, both of whom are company directors.

13. There was an electronic bundle of documents of 126 pages. There was also a bundle of witness statements.

14. Both parties made oral submissions.

## Findings of fact

15. I found the following facts.

16. On 4th February 2020, the claimant was offered employment with the respondent as General Manager of a franchised Energie Fitness gym which the respondent planned to open in Willesden. He accepted the offer of employment, leaving his previous job at another local gym. Given the competitive nature of the gym industry, relations with his former employer became strained when he announced his intention to leave and work for a competitor business. He was advised by Mr. Vang that the respondent would take possession of the gym premises that month. The claimant anticipated that the new gym would open in March 2020 as he had been told by the respondent that the agreement to acquire the site for the gym was almost complete.

17. Terms were agreed with the respondent on 17th February 2020 and the claimant commenced employment with the respondent on 2nd March 2020 at a basic rate of pay of £33,000 gross per annum. His monthly pay was paid in arrears on or around the fifth day of each month. His employment was subject to a six-month probationary period. The contract of employment was signed by both parties on 3rd March 2020. This was a binding contract.

18. Clause 29 of the contract of employment (p.52) provided for the employer to make unilateral variations to the contract as follows:

> "We reserve the right to reasonably amend your terms and conditions in order to meet the needs of the business. Any revisions to these conditions will be notified to you within one month of the change. Any such changes will be deemed to be accepted by you unless you notify us of your objection in writing within one month of the date of the notice".

19. As the gym was not yet open and the premises in which it was intended to operate were still occupied by another business, the claimant began work remotely on what was termed pre-sales work. This meant that he worked on plans to market the gym to new members.

*Government public health restrictions*

20. On 20th March 2020, the Government announced public health restrictions due to the Coronavirus 19 pandemic. Those lockdown measures included the immediate closure of gyms and other fitness businesses.

21. On the same day Mr. Vang emailed his HR advisers for advice; p.54. He wrote:

> "Without any cash flow coming in, we do not want to support the salary of a GM as there is no club and no presale activities to be conducted and no realistic view of when we able to commence presale. The GM is a great individual and we wouldn't want to lose him but we're also conscious of paying someone where we are unable to get any return. I'm sure you might have a few conversations like this. Can you advise what are some scenarios we can approach this with?"

22. The HR manager responded advising Mr. Vang to dismiss the claimant by either invoking the probation clause or making him redundant. In either case, the cost would be one week's notice plus any accrued holiday pay. She advised that they explain that they had no option other than to terminate his employment but that they would seek to re-employ him as soon as they were able.

23. Mr. Vang and Ms Lam were reluctant to follow this advice as they thought it would be unfair to the claimant and they wrote back to the HR adviser on the following day asking for advice as to how they might furlough the claimant; p.56.

24. A one-hour telephone conversation took place on 24th of March 2020 between Mr. Vang and the claimant. Ms. Lam also took part in the call. The purpose of

this phone call was to discuss options with the claimant to maintain his employment while the lockdown continued. At this time, of course, the likely duration of the public health restrictions was not known. The government had announced that it would operate a furlough scheme to support employees where businesses were forced to close due to the pandemic. The details of the scheme were still being developed.

25. The claimant's primary concern was that he should not be made redundant. During the telephone conversation, Mr. Vang said that he proposed to place the claimant on unpaid leave during the lockdown while he explored the possibility of placing the claimant on furlough and that the claimant readily agreed. He said in his oral evidence that the claimant asked him on a number of occasions during this call "is my job at risk?". Mr. Vang said that both he and Ms. Lam reassured the claimant that as he would be on unpaid leave that his job would not be at risk. Mr. Vang's and Ms. Lam's evidence was that the claimant agreed to be placed on unpaid leave during this telephone discussion. They said that he was not happy with the situation but that he agreed to it. The claimant's oral evidence was that he was told by Mr. Vang and Ms. Lam that the business would have to be put on pause due to the lockdown. He said that they told him that the only option was to put him on unpaid leave. He said that the possibility of furlough would be looked into and that he would have daily updates.

26. The claimant denied that he raised the risk of his position being terminated during this phone call. He also disputed that the question of termination was mentioned at all. He said that had the risk of termination been discussed, that he would have asked the respondent to dismiss him. I did not accept the claimant's evidence on this point. I found that he raised the question of his continued job security. Indeed, it would have been highly unusual given his circumstances of having recently changed jobs for him not to have raised this subject.

27. I considered that his comment that had he been told by Mr. Vang on 24th March 2020 that his job was at risk that he would then have asked the respondent to dismiss him was implausible. I believe that this comment was made by the claimant with the benefit of hindsight and his current knowledge that the period of unpaid leave would continue long after the lockdown had been lifted and extend into August.

28. The tenor of Mr. Vang's email correspondence to the HR advisor makes it plain that the respondent was strongly advised to terminate the claimant's employment but that it rejected that advice. On balance, I accept the evidence of Mr. Vang that he told the claimant during this telephone conversation that he and Ms. Lam had disregarded advice to dismiss him as they thought that it would be unfair to dismiss him. They wished to preserve his job but this would require them to make a firm agreement for him to go on unpaid leave.

29. The claimant, throughout these proceedings made several references to giving up stable employment to work for the respondent. He said that during this telephone conversation, he reminded the respondent that he had left a stable job “burning his bridges with his old employer” and that he hoped that Mr. Vang appreciated this. The risk of becoming unemployed was therefore at the forefront of his mind and led him, I concluded, to agree to the variation of the contract of employment.

30. He accepted during this phone call that the gym was not able to open due to Government restrictions and for this reason the respondent was not able to pay him. Whilst understandably disappointed at the prospect of not being paid, I found that the claimant agreed to being placed on unpaid leave not least as this would allow the option of furlough to be explored. He was very unhappy at the situation but nonetheless agreed to unpaid leave.

31. I found therefore that the claimant unequivocally agreed to be placed on unpaid leave while furlough was explored. The reason why he agreed to this variation was in order to retain his employment. At this point, as far as both parties were concerned, it was an open-ended agreement. This meant that no specific time limit was fixed for the duration of the period of unpaid leave. As events unfolded, the period of unpaid leave would endure for several months. This does not, however, alter the fact that such an agreement was entered into by the claimant on 24th March 2020.

*Furlough scheme*

32. The first iteration of the Government furlough scheme allowed employers to furlough any member of staff who had been employed from 28th February 2020. The claimant who had not started work with the respondent until two days later could not avail of this scheme.

33. On 2nd April 2020, the government varied the furlough scheme to allow employees who had left their jobs for a new job which had fallen through due to the pandemic to approach their previous employer to ask if they could be rehired and placed on furlough.

34. On 3rd April 2020, the claimant contacted the respondent by WhatsApp message (p.57) to ask for an update. Mr. Vang said that he would do some investigations during the following week.

35. Around this time, Mr. Vang contacted the claimant and suggested that he approach his previous employer to ask if he could be placed back on their payroll and furloughed. The claimant’s previous employer, not surprisingly, was not willing to enter in such an arrangement. The claimant notified the respondent by a WhatsApp message saying that he was disappointed with the response from his former employer “during this tough period” adding “I hope we can come to some sort of arrangement quickly”.

36. The respondent had delayed paying the claimant his wages. This was on the advice of its accountant who advised Mr. Vang that he should delay paying the claimant until further information was available about the scope of the furlough scheme. On 12th April 2020, the respondent paid the claimant his wages for the period from 2nd to 24th March 2020. On 15th April the claimant contacted the respondent to ask if there was any update on the possibility of his being furloughed by the respondent. The respondent said that it was still waiting to hear from its accountants who had a backlog of work due to the pandemic.

37. The Government modified the furlough scheme on 15th April 2020 to allow employers to furlough staff who had been on their payroll on 19th March 2020. The claimant contacted Mr. Vang on the same day to ask if he could be furloughed as part of the revised scheme. The respondent took advice from its accountants and was told that the claimant would not qualify due to the timing of the respondent's payroll and its late submission of real-time information to HMRC. In order to qualify, the claimant would have had to have been on the respondent's payroll notified to HMRC on 19th March 2020. At this time, Mr. Vang told the claimant that he should ameliorate his situation by claiming benefits or seeking other employment.

38. The claimant contacted the respondent by WhatsApp on 2nd May 2020 (p.62) all to say that he had not been successful in obtaining other work. He said that things were getting very tough for him financially. He had recently taken out a mortgage and was having difficulty in making the payments. He sent screen shots of his bills. By this time, the claimant clearly regretted having agreed to be placed on unpaid leave. The claimant suggested asked if there was "a rough time where I can look to getting back to work". He suggested that he begin by contacting potential gym customers to let them know that the new gym would comply with any new government rules and that it would be safe for them to attend.

39. Mr. Vang was reluctant for the claimant to do this work and said that they would have to wait for an all clear from Energie Fitness. The claimant said that he understood but that he was in a difficult situation:

> "It is awful to leave a role and start a new role and to be put in this position where I cannot qualify for the furlough scheme and there is no timeframe in where I can resume working and earning again"

40. I found that by this time the respondent was experiencing severe problems with the lease for the Willesden gym premises. Energie Fitness was also undergoing financial restructuring. Neither Mr. Vang nor Ms Lam was completely transparent with the claimant regarding the scale of difficulties which the new business then faced in opening for reasons unrelated to the pandemic. These difficulties were due not only to problems with the lease for the premises but also related to the recapitalisation of Energie Fitness.

41. During this unpaid leave, the claimant was asked to watch an industry webinar by Mr. Vang, He was aggrieved by this request as the material was not relevant. He asked to do marketing work but was rebuffed.

*Lifting of public health restrictions*

42. When, the Government announced that gyms could reopen, the claimant assumed that he could return to work immediately. I found that this indicated that Mr. Vang had not been truthful with him up to that point about the precarious nature of the new business.

43. On 9th July 2020, the claimant messaged Mr. Vang to ask for an update. This was because the government had just announced that gyms were free to reopen from 11th July 2020. The claimant anticipated, therefore, that he would soon be able to return to work and to resume being paid.

44. Mr. Vang told him that he was busy and that he would call him back on 13th July 2020. It was not until 13th July 2020 which was almost 16 weeks after the parties had agreed that the claimant should be placed on unpaid leave that Mr. Vang first acknowledged to him that the gym was unlikely to open very soon. Mr. Vang told the claimant that he could hand in his notice if he was not happy to continue being employed on unpaid leave. It is likely bearing in mind this conversation with the claimant that, up to this time, Mr. Vang had downplayed the wider difficulties with the business.

45. The claimant was unhappy and told Mr. Vang that he had signed a contract and expected to have it fulfilled. He said that the company's lack of communication to him indicated that it was waiting for him to walk away. Mr. Vang repeated that the claimant could accept being on unpaid leave or have his contract terminated either by the company or by his resignation. The claimant said that he had continued to stay on unpaid leave as he had been waiting for new furlough announcements. Mr. Vang told him then that notwithstanding the Government announcements that the gym would not be able to open for some time as Energie Fitness was undergoing recapitalisation and there was still no agreement with the landlord of the Willesden gym premises.

*Grievance*

46. The claimant had become increasingly frustrated at being on unpaid leave without the possibility of furlough and was angry at Mr. Vang's suggestion that he resign. He took advice from the Citizens Advice Bureau. On 4th August 2020, the claimant emailed the respondent stating that he wished to claim his unpaid wages from 24th March 2020; pp.72-73. The letter said that the claimant was angry as contracts had still not been signed between the respondent and the owner of the intended gym premises meaning that he could not start work. He said:

> "I have stressed and stressed to you on a number of occasions how tough this period has been for myself and pleaded with you to keep me in the loop with updates and this

> has not been the case for it has always been me taking that step in chasing you and asking for updates constantly….
>
> This made me feel as though you are on purpose waiting for me to just quit and walk away from all this putting me under even more stress."

47. The letter concluded with the claimant saying that he wished to claim back his loss of earnings and would go to a Tribunal if he did not receive a satisfactory response.

48. On 7th August 2020, the respondent invited the claimant to attend a grievance meeting to be held remotely; pp.74- 75.

49. The grievance meeting was held virtually on 10th August 2020. Mr. Vang conducted the meeting and Ms. Lam attended as a note taker. The notes appear at pp.89- 97. The meeting was heated. The claimant was unhappy and said that he felt that the respondent had "kept stringing (him) along'" by telling him that they had "meetings with the CEO about reopening". He said that:

> "The stress and misery you have put me through these six months is unforgivable."

50. Mr Vang said at the meeting that, throughout, the company had wanted to be fair to the claimant and, against their better judgement, they had rejected the advice from HR to terminate his employment from the onset of lockdown on 20th March 2020. Instead, there had been a mutual agreement made on 24th March 2020 that the claimant would be placed on unpaid leave while the option of furlough was investigated. Mr. Vang said that the "amendment to the existing contract was made and agreed by all parties as the fairest and most preferable option for all." At the meeting, the claimant accepted that he had consented to unpaid leave. He was unhappy that he could not be furloughed by the respondent and attributed this to the respondent's delay in processing payroll information.

51. At the grievance hearing, the claimant said that he "had no choice but to stay on unpaid leave". Further, he said that the company's inability to complete the lease now prevented him having paid employment and that had he known this he would never have left a good and stable job to join the respondent. Mr. Vang said that this was immaterial to the fact that the claimant had consented to unpaid leave.

52. Mr. Vang said that at no point had the claimant challenged "the lack of pay checks" and nor had he signalled that he withdrew his consent to the variation of contract. He had not queried the pro rata pay from 2nd to 24th of March.

53. The outcome of the grievance was sent to the claimant on 13th August 2020; p.26. The grievance was rejected. In summary, Mr. Vang said that the claimant had agreed to be placed on indefinite unpaid leave on 24th March 2020. He had been advised to claim benefits or seek other employment whilst retaining

his employment. The business did not have any revenue due to difficulties with the lease and the franchisor's financing and it was in no position to pay the claimant. The delay in his receiving pro rata pay from 2nd to 24th March 2020 was due to the respondent waiting to see the detail of the furlough scheme.

54. The claimant appealed against the grievance outcome. Ms. Lam decided the appeal. She did so without a hearing noting that a hearing would be undesirable as the claimant's emails "have taken a somewhat hostile turn". The relationship between the claimant and the respondent had become very poor by this stage. Ms Lam refused the grievance appeal on the basis that the claimant had not produced any new evidence and advised him that the outcome of the original grievance hearing stood; pp.30 – 34.

55. The claimant responded by email on the same day; pp.98-100. The claimant objected to the timing of the grievance hearing and to the role played by Ms Lam at the grievance meeting. He also disputed the accuracy of the hearing minutes. The claimant said that he had subsequently challenged the lack of payment and had told the respondent on many occasions that he was financially and mentally struggling due to not being paid. He was unhappy about the delay to his March pay for which he blamed the respondent. At the grievance meeting, he had repeatedly asked Mr. Vang why he had given him a contract if he did not have the money to open a gym and that this amounted to fake promises. Mr. Vang had failed to answer this question. The email concluded by saying that the claimant had been employed for 40 hours a week as a general manager with a clearly visible salary and that the respondent had not fulfilled the contract by its failure to pay him; p.100.

56. On 17th August 2020, Mr. Vang wrote to the claimant dismissing him with one week's notice; pp.116 – 117. The letter of dismissal said that he was being dismissed for the following reasons:

> "You have made it clear that you were unprepared to remain on unpaid leave status while the business continues to be unable to trade.
>
> The business has no expectation of being able to open for the foreseeable future due to difficulties in securing trading premises. This situation is a direct consequence of the Covid 19 situation."

**The relevant law**

57. As both parties were unrepresented, I guided them on the meaning of section 13 of the Employment Rights Act 1996 and the legal rules relating to variations to the contract of employment.

*s. 13 Employment Rights Act 1996*

58. S.13 provides that no deductions may be made from a worker's wages unless either the deduction is required by a statutory or contractual provision or the

worker has given their prior written consent to the deduction. A complete failure to pay wages will amount to a deduction; **Delaney v Staples [1991] ICR 331.** In order to decide whether there has been a deduction, it is necessary to calculate the amount properly payable to the worker; section 27 ERA 1996. Section 27(1) defines wages as any sum payable to the worker by his employer in connection with his employment.

*Variation to a contract of employment*

59. The general rule is that an employee's contract may not be changed without their consent. Consent can come from an employee's express or implied agreement to a change. Equally, the contract of employment may provide for unilateral changes by the employer. In either case, strong evidence is required that the contract of employment has been lawfully varied. A variation may be made orally or in writing; **Simmonds v Dowty Seals Ltd 1978 IRLR 211, EAT**.

60. Case law establishes that a variation to contract requires the following essential elements:

    a. the intention to create legal relations or to create a legally binding contract,
    b. sufficient certainty as to the new or changed terms; and
    c. consideration for the variation

*Intention to create legal relations*

61. Ordinarily, it is not necessary to prove an intention to create legal relations. It is necessary however to show that any variation is intended to have contractual effect by affecting the parties' rights. A distinction must be made therefore between off the cuff comments which might be made at a work social event and those which are intended to create a legally binding contract; **Judge v Crown Leisure Ltd [2005] IRLR 823, CA**. In all cases, context is important; **Blakely v On-Site Recruitment Solutions Ltd and anor EAT 0134/17.** The Tribunal must analyse all the relevant circumstances.

62. The parties must both intend the variation to be legally binding; **Edwards v Skyways Ltd 1964 1 All ER 494, QBD**.

*Sufficient certainty as to the new or changed terms*

63. The parties must be clear as to what they are agreeing to. A term of a contract or a variation of that term may lack contractual force because it is vague or uncertain; **G Scammell & Nephew Ltd v Ouston [1941] AC 251.** In case of doubt, the employee must be clear that the variation is intended to apply to them; **Cowey v Liberian Operations Ltd. 1966 2 Lloyd's Reports 45.**

*Consideration for the variation*

64. In order for a variation to a contract to be valid it must be supported by consideration; **Lee v GEC Plessy Communications [1983] IRLR 383 QBD.** This means that there must be some benefit or advantage passing from each of the parties to each other. Where the change is beneficial to the employee, it will generally be easy to demonstrate that some benefit flows to the employee from the variation. Where the change is not to the employee's benefit as in this case, the employer must establish that there is a monetary or other benefit to the employee. In **Burke v Royal Liverpool University NHS Trust 1997 ICR 730, EAT**, the employer made adverse changes to employees' pay and conditions of service to enable the employer to submit competitive in-house bids for services subject to competitive tendering. A dispute arose as to whether or not a particular change had been agreed. A number of employees complained that they had suffered unlawful deductions from wages as a result of the implementation of this change. The EAT had to consider whether or not there was consideration from the employees for the adverse changes. It found that there was consideration for the reduction in wages from the employees in that there was "real fear as to what would have happened to them had their bid not succeeded". The EAT held that:

> "In those circumstances, what has happened is that the employees have exchanged, in some sense, the pay which they would otherwise have received for a greater sense of security in their employment with the trust."

*Express agreement to variation*

65. An employee must have agreed to any change in terms and conditions voluntarily and will not be taken to have agreed to changes if their consent was only acquired through duress. As a matter of contract law, where a contract (or contract variation) has been entered into under duress, the contract or varied contract is voidable not void. This means that the person subjected to duress may either affirm the contract or avoid or terminate the contract. Duress bears a strict legal meaning.

66. While the courts have historically been slow to find that there has been a consensual variation where an employee has been faced with the alternative of dismissal; (**Air Canada v Lee [1978] ICR 1202**), in **Hepworth Heating Ltd v. Akers and others EAT 846/02**, the EAT more recently held that a threat by an employer to do something which it is legally entitled to do cannot be duress.

67. In that case, a threat to terminate the contracts of employment with due notice was not an unlawful act and could not be "duress in the legal sense"; **Hepworth Heating para 20**. Furthermore, economic duress could only provide a basis for avoiding a contract if there was no real alternative. The employees in that case had had a very clear alternative:

> "Namely to complain to an Industrial Tribunal and to draw Social Security meanwhile. It may have been a highly unattractive alternative, but nevertheless it was a real alternative".

68. The employees' alternatives were considered further by the EAT:

> Paragraph 22.

> Taking that proposition, which was not disputed on behalf of the Applicants by Mr. Gorton, Mr. Fodder submitted that the Applicants had real alternatives. They could declare their view unambiguously that they had been dismissed and claim unfair dismissal, or leave, or make clear that they were accepting the change under protest and sue for damages for breach.

## Submissions

69. The respondent said that it had reached a firm agreement with the claimant on 24th March 2020 for him to be placed on unpaid leave. This was to provide the claimant with a safety net. He had been told that his job was not at risk for so long as he agreed to be on unpaid leave. The claimant sought to resile from this agreement in August 2020 when he wrote requesting the payment of his wages from 24th March 2020.

70. The claimant said that the respondent's treatment of him had been wicked. He had withdrawn his consent to unpaid leave in early April 2020. The respondent should not have entered into a contract of employment with him as it had never been in a position to open the gym.

## Conclusions on liability

71. The central question I had to determine was whether or not there had been a verbal variation to the contract of employment dated 3rd March in the telephone conversation between Mr. Vang and the claimant on 24th March 2020. I needed to decide this in order to determine the sums to which the claimant was entitled in connection with his employment pursuant to s.27(1) of the ERA 1996. The claimant would not succeed in his complaint under s.13(1) of the ERA 1996 that he had suffered unauthorised deductions from his wages unless he had first established that he was entitled to any wages. The respondent maintained that there was no entitlement to wages as the claimant had agreed to be placed on nil pay from 24th March.

72. I was satisfied on the basis of the claimant's oral evidence, that of Mr. Vang and Ms. Lam and the surrounding documents that the claimant had expressly verbally agreed to be placed on unpaid leave on 24th March 2020 to allow furlough to be explored. As this was an express verbal agreement, clause 29 of the contract of employment which deals with unilateral variations by the respondent did not apply.

73. Turning to the first of the three legal requirements for variation to contract, on any reading of the phone call on 24th March 2020, the parties intended to be bound by a legal obligation. This was clear from the context and taking into account all relevant circumstances.

74. The context here was clearly commercial and related to extreme circumstances. The respondent's business was in jeopardy at that time to the recently announced pandemic restrictions prohibiting gyms operating. The claimant's circumstances were that he had recently left employment to join the respondent's gym business. He wished to remain in employment. Given these circumstances, the common intention of the parties was that the claimant's

employment would continue but that he would be placed on unpaid leave. This promise was made in the context of a pre-existing relationship and the natural inference was that any variation made would take legal effect.

75. Second, I found that there was sufficient certainty as the variation to the contract. The parties agreed on 24th March 2020 to the claimant going on to unpaid leave while furlough was explored. The claimant gave oral evidence that he allowed the variation to the agreement to remain on foot as the government rules to furlough kept changing.

76. Finally, the consideration for this variation was the preservation of the claimant's job. **Burke v Royal Liverpool University NHS Trust 1997 ICR 730, EAT** is authority for the proposition that an adverse change to pay or terms and conditions can be supported by consideration in the form of enhanced job security. At that point, the claimant's employment could be terminated by a mere one month's notice.

77. I came to the conclusion that there had been an express mutual agreement for the claimant to go on unpaid leave. I reached this conclusion for a number of reasons.

78. First, during his oral evidence, the claimant acknowledged on a number of occasions that he had agreed to the variation. The following exchange, for example, took place during Ms. Lam's cross-examination of him:

| | |
|---|---|
| Ms. Lam | Did you agree to be put on unpaid leave? Yes or no? |
| C. | You said that you can't afford to pay me but you would look at options. |
| Ms Lam | Yes, or no? |
| C | What was the question? |
| Ms Lam | You agreed to be put on unpaid leave and agreed to it to explore options |
| C | Yes |

79. Another exchange is set out below:

| | |
|---|---|
| Ms Lam | Are you aware you varied the contract so we could explore furlough options during the phone call on 24th March |
| C | I cannot hear you the connection is bad |
| Ms Lam | Are you aware variation took place on 24th March |
| C | I had no choice. You said on the phone we cannot pay you. I was on the phone saying I left a stable job and hope you can appreciate that. I did not expect. When phoned me you can't deny I was not happy. |
| Ms Lam | No-one was happy in that situation. Difference between providing consent and being unhappy with the situation. Alternative was to take HR advice. Asked HR what to do and was told give one week's notice. A lot of people were terminated. We decided not to as govt policy was changing. We explained this in a one -hour phone call. We sought your prior agreement. This was a big risk for us. We gave you the chance to seek work or claim benefit. |
| CONNECTION LOST THEN RESUMED | |
| Ms Lam | You said that you had no choice but to agree to unpaid leave. |
| C | Can't sit there and beg you to pay me. What choice did I have? |

80. He also said that he was “not giving his consent until August”. This suggested that he had given his consent to the variation in March but that he hoped that the agreement would be of short duration and that his pay would be restored before too long through the resumption of the payment of his salary by the respondent or through the mechanism of furlough.

81. He said that he had hoped that he would be placed on furlough and so would be paid by the Government in place of the respondent and that he did not give “a flying monkey’s who paid him”. The claimant’s oral evidence indicated to me that the claimant had agreed to being placed on unpaid leave on 24th March 2020 to preserve his job but that he subsequently felt that he had made a bad bargain as time dragged on. This was accentuated by his growing feeling that Mr. Vang and Ms Lam were not being open with him about the true nature of the fundamental difficulties which their business was experiencing regarding the lease and the financing of Energie Fitness. By the time his employment was terminated, the claimant believed, with some good reason, that he had been offered a job which did not exist.

82. In the second place, in his statement of grievance (pp.103-105) he confirms that he was advised that he would be placed on unpaid leave during this telephone conversation on 24th of March 2020. He records his disappointment and unhappiness but does not state that he had not agreed to the variation of his contract. He did not state that he had not consented to the variation until his grievance appeal.

83. Third, the claimant suggested that his emails and messages to Mr. Vang about his financial difficulties including articulating his problems in paying his mortgage and other bills were evidence that he had withdrawn his consent to the variation. His oral evidence was that he had withdrawn his consent to the variation on 3rd April 2020 when he wrote to Mr. Vang to tell him that he could not pay his mortgage. This only highlighted to me that a variation had been made on 24th March 2020 with his consent.

84. The legal position is, of course, that once a variation has been made to a contract of employment, that variation will continue to apply until either the contract is terminated by either party or the parties mutually agree to different terms. It would not therefore have been possible for the claimant unilaterally to withdraw his consent to the variation and require the respondent to restore his pay. There was no evidence that the parties mutually agreed to reinstate the claimant’s pay at any point after 24th March 2020.

85. Fourthly, the claimant did not query being paid for the period from 2nd March to 24th March only. This suggested that he understood that there was an agreement that he was on unpaid leave after that point. Additionally, as subsequent pay dates elapsed, he did not query why he had not been paid. He voiced his continuing unhappiness about his money problems but it is clear to

me from the texts and other messages that the claimant fully understood why he was not being paid and that this was because there had been a variation to his contract of employment. The text messages set out his unhappiness at the fact that he remained on unpaid leave. Although the claimant's email to the respondent after the refusal of his grievance appeal states

> "**You claim I made no case regarding me being on unpaid leave and I was happy with this**:
>
> I challenged that a number of times with me clearly stating to you I have a contract in black and white which clearly states my hours and salary".

86. When asked to identify documents which showed this by Ms Lam during cross examination, the claimant was unable to do so.

87. Finally, at the grievance hearing the claimant was asked to comment on his response to the 24th March telephone conversation. His response was that he was disappointed. He did not state that there had never been an agreement to place him on unpaid leave. He repeated on a number of occasions at the hearing that he had been told that he would be unpaid at the discussion on 24th March 2020 while other options such as furlough would be looked at. He expressed his frustration that the discussions about furlough had come to nothing and blamed the respondent for this.

88. I considered whether or not the claimant had voluntarily agreed to the change to his contract and concluded that he had. There was no evidence that the agreement had been entered into as a result of duress bearing in mind the narrow legal definition of that word. In so far as he had been persuaded to agree to going on unpaid leave faced with the risk of dismissal, the respondent was entitled to dismiss him with notice. I note that at the point that the variation was agreed, the claimant had only been entitled to one week's notice.

89. In conclusion, the claimant had been placed in an invidious position. The unfortunate timing of his move from his old employment to the respondent coincided with a global pandemic. His move had been too late to qualify for the initial furlough scheme. When that scheme was extended to other employees, a mix up with his recruitment information due to no fault of his meant that he was excluded from the revised furlough scheme. The nature of his industry meant that his old employer was not disposed to take him back on to its books to allow him to be paid under the furlough scheme.

90. He had very good reason to become frustrated as matters dragged on and it became increasingly apparent that his new employer was not in a position to open the new gym. The claimant is clearly very committed to his work and wanted the respondent's new gym to be a success. While on unpaid leave, to his credit he continued to develop ideas for the new gym to thrive. It is regrettable that the respondent did not explain the difficulties with the new gym to the claimant at an earlier stage.

Redundancy payment

91. It is not clear whether or not the claim for a redundancy payment has been struck out. This claim is struck out as the claimant lacks the necessary qualifying service to bring a claim for a redundancy payment.

Employment Judge McKenna
27th July 2021

Order sent to the parties on

28/07/2021

For the Tribunal Office

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