EMPLOYMENT TRIBUNALS

Claimant:	Gregory Nurse
Respondent:	Enelco Limited t/a EBC
Heard at:	Southampton (via Cloud Video Platform) Employment Tribunal
On:	29 June 2021 (2-hour hearing)
Before:	Employment Judge Lowe
Representation-	
Claimant:	In Person
Respondent:	Mr Allendyke, Director of the Respondent Company

JUDGMENT

In a claim presented to the Employment Tribunal on 18 November 2020 the Claimant brings the following claims:

1. Unlawful deduction of wages in respect of non-payment of contractual notice pay.

With the agreement of the parties this hearing was conducted by CVP video platform and was a fully digital hearing.

The Tribunal received evidence from Mr Nurse, the Claimant and Mr Allendyke, CEO of the Respondent Company.

The Tribunal was not provided with a bundle. However, both parties have submitted a number of documents in support of their respective positions.

The Tribunal gave an oral decision at the conclusion of the hearing, with written Judgment being sent to the parties on 29 June 2021. On 13 July 2021 the Respondent requested written reasons for the decision.

References in this judgment are in the form **[Document/date]**.

The issue for determination

Was the Claimant entitled to contractual pay or payments in accordance with the Coronavirus Job Retention Scheme (CJRS) during his notice period.

Summary of the position of the parties:

Claimant -

The Claimant avers that the Respondent used the CJRS as a means of avoiding notice pay liability. The Respondent had previously terminated the Claimant's employment, without notice, on 17 March 2020. The Respondent sought the agreement of the Claimant to accept reduced notice pay terms (half of contractual pay). This was not agreed by the Claimant and following the introduction of the CJRS a week later, the dispute became superfluous.

The Claimant also avers those other staff members were also made redundant at this time, but received their full contractual notice pay.

Respondent-

The Respondent avers that the Claimant, following agreement to participate in the CJRS from 25 March 2020, agreed to a reduced pay rate whilst on furlough in line with the maximum allowance under the CJRS. The Claimant remained on furlough throughout his notice period and was paid appropriately.

The Respondent avers that acceptance of the CJRS necessitates accepting a change in two fundamentals of the contract of employment, namely, working hours and renumeration to be received.

The Respondent denies that other employees made redundant at this time received full contractual pay. The Claimant was treated on an equal basis with other employees.

Agreed Background

The factual matrix in relation to this matter, is in large part, agreed.

The Claimant was employed as a Design Manager by the Respondent between March 2018 until 21 August 2020.

The Claimant's contractual notice period was 12 weeks. The Statement of Main Terms of Employment dated 18 February 2019 confirms this: "Notice of termination to be given by Employer/Employee - 12 weeks' notice of termination by Employer".

The Claimant was dismissed by the Respondent on 17 March 2020 and placed on gardening leave for a period of 12 weeks. All contractual benefits were to be paid to the Claimant during this period [Letter to Paul Clark dated 23 March 2020].

The decision to terminate the Claimant's employment was rescinded on 25 March 2020, with the Claimant being notified that his role would be incorporated within the temporary CJRS [email from Matt to the Claimant dated 25 March 2020]. The terms of the CJRS letter to staff attached to the email states:

"Through the CJRS, the government has committed to cover 80% of wage costs, up to a maximum of £2500 per month. Many of the details of this scheme have yet to be clarified but for the duration of this furlough, the payments made to you in the April payroll onward, will be in accordance with this scheme once clarified. We will write to you again with more detail on this as soon as it is available".

The Claimant accepted being placed on the CJRS on 25 March 2020:

"I therefore, as per the attached, accept the action of placing me on an employee furlough status" [Email from the Claimant dated 25 march 2020].

The follow up letter was sent to the Claimant on 17 April 2020 confirming salary (£2500 per month gross pay) and pension details.

The position of Design Manager was made redundant on 1 June 2020, with a 12-week notice period being provided. The effective date of termination was therefore 21 August 2020.

On the same date, a grievance meeting was held, attended by the Claimant and Mr Allendyke. The notes provided outline the grievance as being notice pay renumeration.

The Claimant's grievance was not upheld, the Respondent notifying the Claimant that:

> "There is no requirement for the ordinary pay for furloughed employees to be paid at the full rate simply because the employee is on notice" [Letter from Respondent to Claimant dated 1 September 2020].

Other employees

The Claimant has provided email confirmation from a colleague following his successful request for full salary during his notice period. The email dated 14 July 2020 addressed to him from the Respondent states:

"I have spoken to Matt about your request for payment of your full salary for your notice period – June, July and August 2020. He has agreed to this, subject to you signing a "full and final settlement of all employment claims" letter.

I have not been provided with any further information in relation to the contractual terms of this employee. However, what is clear is that a formal request had to be made for full salary notice payment. This was agreed at approximately the halfway point of the employees notice period.

I therefore find that another employee was paid at the rate below their contractual rate during their notice period, and this individual was successful in challenging that rate of payment.

The Law

The CJRS 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 not work for them to do.

CJRS 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 monthly cap of £2,500.

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 of not less than the amount of renumeration for his normal hours. That is the normal rate.

Variation of contract

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.

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

The terms in individual employment contract can be changed validly by the employer and employee agreeing a change, or the employee accepting a change by conduct, for example, carrying on working under the changed contract without protest. This means that a change notified to an employee, and accepted, 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.

Conclusions

I conclude that there was an acceptance by the Claimant that he would be subject to the terms of the CJRS. Further, that this agreement between the parties would only apply whilst the Claimant was subject to the CJRS. There was an express variation of the contract terms to this extent. However, I conclude that there was no express variation in respect of any of the underlying contractual terms.

The CJRS letter dated 17 April 2020 from the Respondent recognises the distinction in status between staff subject to the CJRS and those who were not:

> "If you are called back to work, you will be notified in writing beforehand, and your salary will be paid at your usual contracted rate for the time that you are working".

There is a clear acknowledgement that the full underlying contractual terms became operational again once employees were no longer subject to CJRS. The CJRS terms were only applicable whilst employees remained subject to that Scheme. It was temporary in nature and did not change the underlying contractual terms of the parties. To have agreed otherwise would have resulted in returning staff members continuing to receive 80% of their pay and be subject to the £2500 cap indefinitely. This was not the case, and the Respondent recognised this position.

The Claimant accepted inclusion on the CJRS, nothing further. He was not offered, nor did he accept, any further contractual variation. He simply accepted, that whilst he was subject to the CJRS, that he would not be required to attend work and that his renumeration would be £2500 per month.

There were no express of implied agreement to vary the underlying terms of the contractual position between the parties. The agreement was only applicable in relation to CJRS. It was provisional and contingent upon retention in the CJRS exclusively.

From 1 June 2020 the Respondent gave notice to the Claimant that his position was redundant. In effect, he was no longer being retained for the purpose of job retention.

As such, the terms of Claimant's agreement to vary the terms of his contract ceased. His agreement was in relation to the CJRS in isolation for a temporary period; not CJRS coupled with his notice period. There was no clearly defined contractual variation that applied to an employee having concurrent employment status, namely being a member of the CJRS at the same time as serving a notice period.

I therefore conclude that at the point that the Claimant was made redundant and given notice, the valid variation of contract was no longer applicable; it had been terminated by the change in employment status of the Claimant.

I find therefore, that the Claimant has not been paid his contractual entitlement and consequently uphold his claim in respect of notice pay.

Employment Judge Lowe
Date: 18 August 2021

Sent to the Parties: 23 August 2021

FOR THE TRIBUNAL OFFICE