EMPLOYMENT TRIBUNALS (SCOTLAND)

Case Numbers: 4106741/2020 & 86 others

Hearing held in Glasgow on 29 April 2021

Employment Judge M Whitcombe

Mr William McLaughlan & others	**Claimants** **Represented by:** **Ms A Bowman** **(Solicitor)**
Travel 2 Limited	**Respondent** **Represented by:** **Mr Frain-Bell (Advocate)** **Instructed by:** **Mr D Parry (Solicitor)**

JUDGMENT

The judgment of the Tribunal on the agreed preliminary issues is as follows.

1. In about March or April 2020 the claimants by their conduct agreed to a 3 month temporary reduction in wages from 1 April 2020 to 30 June 2020, but did not agree that the respondent could unilaterally extend that period without further agreement.
2. The claimants did not, by their conduct, subsequently agree to an extended period of wage reduction from 1 July 2020.
3. The claimants did not waive any of their rights to claim deductions from wages or damages for breach of contract in relation to the above.

REASONS

Introduction and background

1. This is a multiple claim brought initially by 87 current or former employees of the respondent for unlawful deductions from wages. A small number of claimants have withdrawn their claims but the vast majority are still pursued.

2. The commercial background to this litigation is the well-known and catastrophic effect of the Covid-19 pandemic on the travel industry. The respondent's travel sector business experienced an almost instantaneous collapse in demand and revenue around the time of the first UK lockdown announced on 23 March 2020. It was also obliged to issue refunds to customers whose holidays were cancelled or re-booked, sometimes before receiving a refund itself from the ultimate supplier.

3. In brief summary, during the spring and summer of 2020 the respondent felt that it had no alternative but to introduce a range of measures to reduce costs, including but not limited to furlough, wage reductions for staff who were not furloughed, and ultimately redundancies. The justification for those business decisions is not a matter for me and it makes no difference to the questions I have to decide. I am concerned with the contractual effect of the respondent's actions, the contractual effect of the claimants' responses, whether those actions led to the claimants being paid less than was "properly payable" to them and whether there was therefore a deduction from wages as defined by section 13(3) of the Employment Rights Act 1996.

Issues and essential questions

4. On 1 March 2021 EJ Bradley directed that this hearing would not consider remedy. He also set out a draft list of issues relevant to liability, but suggested that the parties might want to develop and refine it. No further written list of issues was available by the start of the hearing so we discussed, agreed and recorded the essential questions before the hearing began.

5. The claimants took no issue with the formal requirements of subsections (1) or (2) of section 13 of the Employment Rights Act 1996 and there was no doubt that any deductions were properly authorised in *that* sense. The sole issue was the question what was "properly payable" and therefore whether there was a "deduction" for the purposes of subsection (3). We agreed that the position with respect to any particular claimant would be clear if the Tribunal were to answer three essential questions.

   a. It was agreed that certain staff were subject to a reduction in pay with effect from 1 April 2020 and that no claim arose in relation to the first three months after that. It was also agreed that the respondent had not sought express oral or written consent to that variation, but that the claimants nevertheless accepted it through conduct. **The question was whether the affected claimants had, by their conduct, *also* agreed to a potential extension after the initial 3 month period (i.e. from 1 July 2020 onwards) or whether any such extension would require a separate variation of the contract and therefore separate agreement on the part of the affected claimants.**

   b. **If the answer to the above question was that a further variation was required, did the claimants (or any of them) agree to it by their conduct?** It was accepted that none of them gave express written or oral consent.

   c. **If not, and if the reduction in pay therefore amounted to a breach of contract, did the claimants (or any of them) waive the breach such that they lost the right to claim unlawful deductions from wages?**

6. Having agreed the issues on that basis, I checked that neither side wished to amend their case. Arguably, the respondent's full point in relation to the 1 April 2020 reduction was not accurately reflected in a pleaded case, referring only to a "temporary three-month reduction", but Ms Bowman had anticipated

the point and was happy to deal with it. Neither side wished to amend their case and the hearing began on that basis.

Arguments about "partial frustration"

7. It was therefore a surprise to see that in written submissions received at the end of the hearing the respondent also relied on the "partial frustration" of the contract by the pandemic itself, allegedly relieving the respondent of its obligation to pay full wages. I decided that a novel and important point of that magnitude was not disclosed by a fair reading of the ET3 or its attachments. It had not been part of the discussion of the issues at the oustset of the hearing either, which was confined to the three questions set out in bold above. It had not been discussed with or recorded by EJ Bradley at the case management stage. In those circumstances I ruled that the point could not be raised at this hearing without a successful application to amend, which the respondent was disinclined to make. I nevertheless directed that an application for permission to amend to raise the argument could still be considered as long as it was made in writing, attaching a written draft, within 14 days of the date on which this judgment is sent to the parties. If an application for permission to amend is made then it will no doubt be decided in accordance with standard ***Selkent***/***Abercrombie*** principles.

Evidence

8. The parties provided a joint file of relevant documents running to 137 pages plus an index. I heard from the following witnesses:

   a. Lynsay Quinn, most recently an Air Operator Support Assistant, who was employed by the respondent until dismissed for redundancy on 23 October 2020.

   b. Elaine Dougall, a very experienced full time trade union official and currently Unite Regional Co-ordinating Officer for the Glasgow area.

   c. Mary Wilson, Chief People Officer of the dnata Travel (UK) division of the dnata group of companies, itself part of the Emirates Group. She

led a team of human resources professionals advising businesses within the dnata Travel group, including the current respondent Travel2.

9. All three witnesses gave evidence on oath or affirmation and adopted their written witness statements before cross-examination. I had reservations about Mary Wilson's credibility on some central issues which I will deal with below. There was very little dispute about the important facts. Where facts were in dispute I made my findings on the balance of probabilities.

Submissions

10. The representatives made most of their submissions in writing and I gave them time to do that. Those written submissions were supplemented with concise oral submissions. I will deal with the essential points in the course of my reasoning below.

The first question – the scope of the variation agreed with effect from 1 March 2020

Findings of fact

11. On 16 March 2020 the respondent's Ian Delaney (Senior VP, New Ventures Europe) and John Bevan (CEO – dnata Travel Group UK) wrote to all UK staff to outline a number of measures to reduce costs. They included a recruitment freeze, the suspension of annual pay reviews, bonuses and overtime, the cancellation of all staff travel, the release of contractors, a full review of all supplier contracts, the freezing of staff expenses and an encouragement for staff to take unpaid leave, shorter working hours and sabbaticals. The message anticipated that those measures alone would not be sufficient to deal with the situation and that further measures would have to be introduced in the future.

12. On 20 March 2020 the UK government announced a series of wide-ranging measures to assist businesses and employees through the crisis including the Coronavirus Job Retention Scheme (CJRS). The respondent regarded the CJRS as a lifeline because its financial position was deteriorating uncontrollably on a daily basis.

13. On 27 March 2020 Ian Delaney and John Bevan sent a further communication to all UK staff. With effect from 1 April 2020 staff who were *not* engaged in key operational functions were placed on furlough leave in accordance with the CJRS. About 329 employees across UK businesses were affected.

14. Also with effect from 1 April 2020, staff engaged in key operational functions were *not* furloughed but would instead be subject to a basic pay reduction of either 20% or 30% (the latter for senior management roles). I will reproduce the exact wording.

"… the following measures will be applied with immediate effect to protect and preserve our businesses in the long-term:

- *…*
- *Staff who are required to maintain the key specific operational functions essential to supporting agents and customers with bookings have been identified, and will continue to work as normal subject to a basic pay reduction of 20% for three months from 1st April, with the potential to extend. This rises to 30% for senior team members.*
- *…"*

15. The communication concluded (with errors reproduced), "*Further information on how this policy will be applied are detailed attached. If you have any questions, however, please don't hesitate to speak to us, your manager, or to your HR business partner.*" That was a reference to a FAQ document also dated 27 March 2020 which stated in response to the question "REDUCED PAY – GENERAL **For how long?**", "*It is not possible to determine this at this time and we will continue to review this. As an indication only, this is expected to be a three-month period but may be extended.*"

16. The possible extension mooted in the above documents became a reality. On 16 June 2020 a communication sent on behalf of John Bevan stated, "*it is with a very heavy heart that we must confirm that we are extending the reduction in pay for retained (unfurloughed) staff, until the end of September. These reductions will remain at the same level be set in April (20-30% depending on seniority).*" There were some other changes in arrangements which, though important, are not relevant for present purposes.

Legal principles

17. The question is essentially one of contractual interpretation. The applicable legal principles are well-settled.

18. The following principles can be derived from the well-known cases of ***Reardon Smith Line Limited v Yngvar Hanser-Tangen*** [1976] 1 WLR 989, HL, ***Investors Compensation Scheme Limited v West Bromwich Building Society*** [1998] 1 WLR 896, HL, ***BCCI v Ali*** [2001] UKHL 8, ***Chartbrook v Persimmon Homes*** [2009] UKHL 38, ***Rainy Sky SA v Kookmin Bank*** [2011] UKSC 50, SC and ***Arnold v Britton*** [2015] UKSC 36, SC. There is absolutely no doubt that these principles apply in Scotland: see for example ***Fife Council v Royal and Sun Alliance Insurance Plc*** [2017] CSOH 28 in which Lady Wolffe noted that the principles had been accepted and applied by the Inner House in many cases.

19. The essential task is to ascertain the meaning which the contractual document would convey to a reasonable person having all of the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of the contract.

20. The question must be approached from an *objective* perspective, focussing on what would have been known to a reasonable person at the time the contract was entered into.

21. The process of interpretation involves examining the context in which words were used. The concept of 'natural and ordinary meaning' of words is not

helpful where, on any view, the words have not been used in a natural and ordinary way. The Tribunal must seek to understand the words *in context*. The (admissible) surrounding circumstances should be examined, *whether or not at first sight the words appear ambiguous*, since in order to identify whether words have been used in a 'natural and ordinary way' it is first necessary to understand the meaning of those words in context. The context includes absolutely anything which would have affected the way in which the language of the document would have been understood by a reasonable man.

22. However, the law excludes from that context evidence of the previous negotiations of the parties and their declarations of subjective intent. Such evidence will be inadmissible *for the purpose of drawing inferences about what the contract means*. However, it might be admissible for other purposes, for example to show that a fact which might be relevant as background was known to the parties. However, neither party suggested that this important principle had any bearing on the present case – there is no evidence of any negotiation anyway.

23. There is otherwise no conceptual limit to what can be regarded as admissible background, as long as it is relevant.

24. The fact that one or both parties might actually have taken no particular interest in certain aspects of the factual background does not prevent them from forming part of the objective setting in which the contract is to be construed.

25. The meaning which a document would convey to a reasonable person is not the same thing as the meaning of its words. The *meaning of words* is a matter of dictionaries and grammars whereas the *meaning of a document* is what the parties using those words against the relevant background would reasonably have been understood to mean. The background may not merely enable the reasonable person to choose between possible meanings of *ambiguous* words but may even enable the reasonable person to conclude

that the parties must, for whatever reason, have used the wrong words or syntax.

26. The interpretation of words in accordance with their 'ordinary and natural' meaning reflects the common sense proposition that we do not easily accept that people have made linguistic mistakes, particularly in formal documents. On the other hand, if the background would lead a reasonable person to conclude that something must have gone wrong with the language, then the law does not require Tribunals to attribute to the parties an intention which they plainly could not have had.

27. If detailed semantic and syntactical analysis of words in a commercial contract would lead to a conclusion which flouted business common sense then it must yield to business common sense.

28. Words and phrases could have a customary meaning in a particular market which is different from their 'ordinary and natural' meaning, in which case evidence to that effect could support an argument that words in a contract should bear a similarly unconventional meaning. This is the "private dictionary" principle. However, neither side relied on that principle in this case. Neither party suggested that any of the relevant wording had a specific and unconventional meaning in the travel sector.

29. Where the language used by the parties is capable of more than one meaning then the court is entitled to prefer the construction which is consistent with business common sense and to reject the other. It was not necessary to conclude that a particular construction would produce an absurd or irrational result before having regard to the commercial purpose of the agreement.

30. How should the interpretative principles above be balanced where they are in tension? ***Arnold v Britton*** [2015] UKSC 36, SC distilled six principles of general application and indicated how they were to be reconciled (the seventh principle related to service charges and is not relevant for present purposes).

    a. The reliance in some cases on commercial common sense and the

surrounding circumstances should not be invoked to undervalue the importance of the language of the provision to be construed. Save perhaps in a very unusual case, the answer to the question what the parties meant (seen through the eyes of a reasonable reader) was most obviously gleaned from the language of the provision. Unlike commercial common sense and the surrounding circumstances, the parties have control over the language they use in a contract. Save in a very unusual case, the parties must have been focusing specifically on the issue covered by the provision when agreeing the wording of that provision.

b. The less clear the words, the more ready a court can properly be to depart from their natural meaning.

c. Commercial common sense must not be invoked retrospectively. The mere fact that a contractual arrangement interpreted according to its natural language had worked out badly or even disastrously for one of the parties was not a reason for departing from the natural language. Commercial common sense is only relevant to the extent of how matters would or could have been perceived by reasonable people in the position of the parties as at the date when the contract was made.

d. While commercial common sense is a very important factor to take into account when interpreting a contract, a court should be slow to reject the natural meaning of a provision as correct simply because it appeared to be a very imprudent term for one of the parties to have agreed, even ignoring the benefit of hindsight. The purpose of interpretation is to identify what the parties have agreed, not what the court thinks they should have agreed.

e. When interpreting a contractual provision, the court can only take into account facts or circumstances which existed when the contract was made and which were known or reasonably available to the parties.

f. In some cases, an event subsequently occurs which was plainly not intended or contemplated by the parties, judging from the language of their contract. In such a case, if it is clear what the parties would have intended, then the court would give effect to that intention.

Application and conclusion

31. There is no dispute that, by their conduct, the claimants accepted a contractual variation in terms of the documents referred to above: the question is what that term meant.

32. My finding is that when read fairly, in context and with the background knowledge that the respondent and its employees would have had at the time, the meaning the communications dated 27 March 2020 would have conveyed to a reasonable person was as follows: an extension of the indicative 3 month period of pay reduction was *possible*, though *not certain*, and that *if* extended the duration of the extension was *unspecified and uncertain*.

33. On that basis, I find that the affected employees agreed (by their conduct) to a 3 month period of pay reduction only. They were aware that the respondent might ultimately seek to extend that period, but any extension would have to be the subject of a separate agreement and was not agreed by the employees in advance.

34. I reject the submission that by continuing to work without protest the affected employees effectively agreed to give the respondent an option to extend the period of pay reduction at its sole discretion and for whatever period, without further agreement. I see no ambiguity in the words used, nor do I think that commercial common sense or the surrounding circumstances compel the opposite conclusion. I do not think that a reasonable person with the requisite knowledge would believe that to be the agreement, since otherwise employees would be agreeing to a potential extension of uncertain length, at the employer's sole option, whatever the circumstances of the business or the personal circumstances of the employees at the time. Those circumstances could change dramatically and rapidly in any 3 month period, especially during the unprecedented circumstances of the Covid-19 pandemic.

35. No doubt in theory sufficiently clear express words *could* have conferred on

the respondent an option to extend the period of pay reduction without seeking further agreement, but the wording of the documents of 27 March 2020 does not go that far.

36. I also find that the way in which the respondent replied to objections in mid-June 2020 was entirely consistent with the conclusion reached above. I refer in more detail below to the sample letter of 24 June 2020, but for present purposes I highlight the fact that the respondent makes no reference whatsoever to the contention now advanced before this Tribunal, that all affected employees had already agreed to a possible extension and that the respondent was simply acting in accordance with an agreement already reached in March or April 2020. Instead, the letter refers to the "choice" facing staff, and seeks to persuade the objector that they should "confirm you are in agreement with the proposed change" or else the change might be imposed "without your agreement". The respondent would not have used that language if it really did think that it was already contractually entitled to extend the period of wage reduction.

37. Mary Wilson valiantly attempted to finesse these difficulties in her witness statement, saying that her "*phraseology…was perhaps a little confusing*". I do not think it was confusing at all, it just contradicts the fundamentals of the respondent's case. I find Mary Wilson's evidence that "*it simply did not occur to me that we needed to obtain consent for the extension of the pay reduction period*" impossible to accept. Why else would she devote so many words to seeking it? She is an experienced and senior employee with responsibility for HR issues. I find it inconceivable that she would have referred to the need for "consent" and "agreement" if that was not exactly what she meant. I am afraid that I do not believe her when she says that "it simply did not occur to me" that she needed to obtain any consent, because the terms of her letter are inconsistent with any other conclusion.

The second question: if a further variation was required, did the claimants (or any of them) agree to it by their conduct?

Findings of fact

38. The email of 16 June 2020 announcing the extension of the period of pay reduction did not make any attempt to secure the agreement of staff to that extension. While it did say, "*If you have any questions, however, please don't hesitate to speak to us, your Manager, or to your HR Business Partner*" it certainly did not suggest that the respondent acknowledged any right to reject the new terms. Similarly, the letter did not warn employees that their silence, or continuing to work without protest in accordance with the varied terms might be taken as, or might amount to, acceptance of those terms.

39. On 18 June 2020 the respondent announced a collective redundancy consultation in consequence of a proposal to close its Glasgow office. The redundancy consultation process commenced on 1 July 2020 and concluded on 17 August 2020, at which point a large number of employees were issued with notices of dismissal for redundancy. Since the redundancy dismissals form no part of the current litigation it is not necessary to record any further details.

40. In mid-June 2020, 16 of the claimants (I will call them "Group A") took issue with the extension of the pay reduction period from 1 July 2020 to the end of September 2020. Their names are set out in paragraph 21 of Mary Wilson's witness statement. None of the other claimants raised issues regarding the pay reduction period at that time.

41. The precise terms of the 16 objections raised in June 2020 are unclear, but I have seen an example in the form of an email from Ashley McMillan dated 12 June 2020. The writer said that they were unwilling to accept the pay cut unless hours were also reduced. I have also seen what I take to be a representative example of the respondent's reply in the form of letters to Ashley McMillan and Pamela Stevenson dated 24 June 2020. I have already

referred to the latter letter for other purposes above. The letter made the business case for an extension of wage reductions and said, "*You now have a critical choice to make; we either collectively play our part meaning that you agree to the necessary temporary changes to your terms and conditions of employment in an attempt to safeguard the future of the wider business or you continue to object to the change.*" The letter went on to ask for confirmation of agreement by 26 June 2020, or else the extended salary reduction would be applied "*without your agreement*". I find that the letter clearly acknowledges a lack of agreement on Pamela Stevenson's part to the extension of pay reduction. I find that she and all other claimants in the same group had objected to it by mid-June 2020. I take that date from paragraph 21 of Mary Wilson's statement.

42. Following the announcement of redundancies on 18 June 2020, one worker set up a Facebook Group called "Support our T2 Family". None of the workers were unionised at that point, but a poll of group members indicated that over 100 workers would be interested in joining one. No trade union was recognised for the purposes of collective bargaining or consultation. Various trade unions were contacted in order to obtain advice about two things: redundancy and the reduction in wages. The objective was to obtain advice on the legality of the respondent's actions and the possibility of challenge. The group wished to save as many jobs as possible and to secure their wages. All of these findings are supported by Lynsay Quinn's witness statement. She appeared to me to be a thoroughly credible witness.

43. Since none of the group were current trade union members they struggled to obtain advice at first but eventually joined Unite the Union. Unite's normal rules are that a member must have been a member for at least 4 weeks before being allowed union representation, although exceptional authority could sometimes be obtained. Elaine Dougall (Regional Co-ordinating Officer) learned of the dispute on 25 June 2020 and provided initial advice to Ms Quinn by phone. She also encouraged Ms Quinn to recruit colleagues to join Unite in order to increase leverage. About 100 workers joined Unite over the period of 26-28 June 2020, which included a weekend. Ms Quinn then

acted as a workplace representative of Unite and communicated issues between workers and Ms Dougall. Initially Ms Dougall was restricted to providing advice and could not provide representation. Exceptional authority to provide representation before the end of the normal 4 week qualification period was granted by Pat Rafferty, Regional Secretary on an unknown date, though it must logically have been within 4 weeks of 26 June 2020. On 9 July 2020 several emails were exchanged in which Ms Dougall advised that workers unwilling to agree to an extension of the wage reduction period should raise a grievance stating that they were unwilling to accept a reduction and requesting reinstatement of the full rate. Ms Dougall also offered to lodge a collective grievance if the members agreed that it would save time. On 13 July 2020 Ms Dougall and Ms Quinn met by Zoom to discuss the workplace issues and the appropriate response. The initial focus was on the redundancy situation but it was also planned to lodge a collective grievance about wages. Ms Quinn began to gather signatures for the collective grievance. That took some time and some members had to be chased to confirm their wishes. Communication was mostly by means of the Facebook group and email rather than face to face

44. A collective grievance was lodged on 11 August 2020 by Elaine Dougall of Unite in relation to “failure to consult and unlawful deduction of wages”. In slightly more detail, it alleged that the respondent had failed to consult with all staff in relation to a reduction in their wages, that it had reduced wages without seeking authorisation from all staff, and that the reduction had been imposed without any thought for the financial impact on staff. A list of the members on whose behalf it was lodged was attached to an email dated 12 August 2020. I understand that there are 83 names, and I will call them “Group B”. There may well be overlap with “Group A”, above. The union sought a date and time at which it could be discussed in more detail. A meeting took place on 10 September 2020 and Mary Wilson of the respondent sent a letter summarising the outcome of the collective grievance on 14 September 2020.

45. According to that letter, Unite said that its members accepted the first 3 month

period of salary reductions but regarded the second as unacceptable, given that a redundancy programme was announced two days after its implementation. The respondent explained that it did not have time to enter into a lengthy consultation process to seek agreement, and that the tabling of a collective grievance five months after the temporary salary reductions would imply that employees did "understand why such action was necessary".

46. The outcome letter does not assert that employees had *agreed* to the salary reduction and it misrepresents the extent of the relevant delay in bringing the collective grievance. It might have been 5 months since the original pay reductions (which are not in dispute), but it was less than 6 weeks since the start of the extension with effect from 1 July 2020. The respondent declined to repay the deductions. The letter was signed by Mary Wilson (Chief People Officer) alone, but also written on behalf of Lisa McAuley (Managing Director) and Kath Sharples (Operations Director – UK). On 15 September 2020 the respondent declined to offer an appeal against its decision on the basis that the decision had already been taken at the highest level.

Legal principles

47. Consent to a contractual variation *may* be implied by the employee continuing to work for the employer without protest for a significant period of time while being aware of the change imposed by the employer. Where a change is imposed by the employer and the employee continues to work without objection, it *may* be that the employee will be held impliedly to have consented to the change (see ***Abrahall v Nottingham City Council*** [2018] EWCA Civ 796, CA, which reviewed many well-known authorities). First and foremost, the conduct of the employee in continuing to work for the employer must give rise *unequivocally* to an inference of consent. Such conduct cannot be relied upon as implied consent if it is reasonably capable of a different explanation. That is simply an application of the ordinary principles of the law of contract, and of waiver. 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. Employees should have the

benefit of any (reasonable) doubt. Collective protests or grievances may be sufficient to negative any inference of agreement by continuing to work, even if employees themselves say nothing.

48. It will be relevant to consider whether the change had an immediate effect on the employee since a court should exercise caution before inferring consent where the change does not have an immediate practical effect (***Jones v Associated Tunnelling Co Ltd*** [1981] IRLR 477, EAT ***Solectron Scotland Limited v Roper*** [2004] IRLR 4, EAT).

49. However, this point was considered again in ***Abrahall***. In ***Solectron*** Elias J (as he then was) stated that "it may be possible to infer that [employees] have by their conduct after a period of time accepted the change in terms and conditions", but it might not always be right to infer acceptance of a contractual pay cut as from the day that it is first implemented. The employee may simply be taking time to think. Elias J's formulation merely recognised that a time may come when that ceases to be a reasonable explanation. It may be difficult to identify the precise moment at which that point is reached, but that does not mean that the question has to be answered once and for all at the point of implementation. The Court of Appeal in ***Abrahall*** had considerable insight into the relevant passages of ***Solectron*** because Sir Patrick Elias (as he had by then become in retirement) was part of that court too.

Application and conclusion

50. I bear in mind that the situation in late June and early July 2020 was difficult, stressful and confusing for the claimants as well as for the respondent's management. Not only were the claimants dealing with the significant financial implications of the respondent's decision to extend pay reductions for another three months, they were also dealing with a large-scale redundancy exercise and the prospect of unemployment. The situation was changing and deteriorating rapidly and it is easy to see why the redundancy

exercise might have been an even more pressing priority than objecting to the extension of a reduction in wages.

51. Further, the employees did not initially have easy access to legal advice or representation. Their solution was to organise and that inevitably took time. First employees organised through social media and subsequently they organised by joining a trade union, taking advice and securing representation from that source. As noted above, exceptional procedures were necessary in order for Unite to grant representation to such new members.

52. The respondent did not initially put matters to employees on the basis that their consent was required, or that they were entitled to object. They were not put on notice of the full extent of their legal options, or of the risks of delay. This was also a feature of the reasoning in ***Abrahall***.

53. The reduction in wages was entirely to the detriment of the affected employees. That is relevant because the authorities show that consent might be inferred more readily where variations are either partly or wholly to the benefit of the affected employees.

54. On the question whether the change had "immediate effect" the extension of the period of pay reduction was announced on 16 June 2020 and took effect on 1 July 2020.

55. In submissions and in cross-examination the respondent appeared to suggest that the effect of complaints, objections and grievances might in some way be undermined if part of the motivation for making them was the redundancy exercise as well as the reduction in pay. I find that it makes no difference at all. If the scope of a complaint included the reduction in pay then its effect was not undermined simply because other actions taken by the respondent were challenged at the same time.

56. Some employees raised individual grievances or other complaints before the extension of pay reduction took effect. See for example Pamela Stevenson

and Ashley McMillan, who must both have objected at some point prior the respondent's letters to them of 24 June 2020. The respondent's evidence was that the 16 claimants in Group A "took issue" with the extension of pay reduction in "mid-June 2020". Those employees therefore made their objections clear before the extension had taken effect, and must have done so very promptly after the announcement of 16 June 2020 in order to be dated "mid-June 2020" by Mary Wilson.

57. In those circumstances I find it impossible to infer that any of the employees in Group A had by their conduct agreed to an extension of the period of pay reduction beyond 30 June 2020. They objected promptly and in advance of the first day of the proposed extension. The evidence falls well short of supporting an inference of consent and agreement to an extension. Viewed objectively, the conduct of Group A employees does *not* clearly evince an intention to accept a significant diminution in their right to remuneration.

58. As for those in Group B, the relevant factors are different but I reach the same overall conclusion. In my assessment the evidence does not unequivocally support an inference of consent by conduct or inactivity. The conduct of the Group B employees does not clearly evince an intention to accept a significant variation of terms, when viewed objectively. Those are both key parts of the test. Put a third way, the employees have the benefit of a very reasonable doubt. See generally the points made by Underhill LJ in ***Abrahall*** at paragraph 87. My reasons are as follows.

59. The collective grievance was lodged on 11 August 2020, 41 days after the day on which the extension of pay reduction took effect. Alternatively, it was 55 days from the date of the announcement. That was a period of significant turmoil during which employees had to consider not only the implications of the attempt to impose a significant pay reduction unilaterally, but also the prospect of redundancies. All of that took place in the stressful context of the pandemic itself. The respondent's communication of the position did not warn staff of the implications of continuing to work without protest and it did not even acknowledge that employee consent was required. The workplace was

not unionised, but Group B employees began to organise themselves. They looked for a suitable trade union. They joined that union. They supplied information to a full time official and they took advice. The trade union lodged a collective grievance within 2 weeks or so of the Group B employees joining the union. In all the circumstances I do not find the alleged delay to be so significant that it would support an inference of agreement to the extended pay reduction. The delay is not only referable to acceptance, it is equally consistent with confusion, uncertainty and a desire to organise and obtain advice before deciding on the appropriate response. By 11 August 2020, the time had not yet come when those matters ceased to be a reasonable explanation.

60. I therefore find that claimants in Groups A and B did *not* by their conduct accept the extension of the period of pay reduction with effect from 1 July 2020.

The third question - waiver

61. My reasoning on waiver can be much shorter. While no submissions were made on waiver in the respondent's written or oral closing submissions it remains one of the agreed issues and I must deal with it for the sake of completeness.

62. While I recognise that waiver is conceptually distinct from the acceptance of a contractual variation by conduct, some similar considerations apply. It is possible in principle for employees to waive a breach of contract in respect of wages and to lose the right to sue for it, whether as damages for breach of contract or as unlawful deductions for wages. However, I reject the submission (if made) that there was any waiver in this case. The respondent does not suggest that any claimant waived the breach by their express words, whether oral or written. Once again, the argument is that waiver can be implied from conduct. For the same reasons, I reject that argument. Viewed objectively, neither Group A claimants nor Group B claimants acted in a way which demonstrated a clear and unequivocal intention to waive their rights in

relation to breach of contract or deductions from wages.

Next steps

63. The claimants have therefore succeeded on all three of the questions identified for determination at this preliminary hearing. The parties are now required to write to the Tribunal within 14 days of the date on which this judgment is sent to them setting out their position (to be agreed if possible) on the following matters:

a. whether the respondent seeks permission to amend to raise a "partial frustration" point;
b. mutually acceptable dates and a reasoned time estimate for the next hearing;
c. the issues for that hearing;
d. appropriate directions.

Employment Judge: Mark Whitcombe
Date of Judgment: 12 May 2021
Entered in register: 18 May 2021
and copied to parties