



EMPLOYMENT TRIBUNALS (SCOTLAND)

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Case No: 4110124/2021

**Hearing Held in Glasgow by Cloud Video Platform (CVP) on 1 September
2021**

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Employment Judge B Beyzade

Miss Olivia Reilly

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**Claimant
In person**

Consilium Accountancy Group Limited

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**Respondent
Represented by:
Mrs Julia Barnett,
Lay Representative**

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JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The Judgment of the Tribunal is that:

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1. The complaint of unauthorised deduction from wages in respect of arrears of pay between 1 November 2020 and 22 June 2021 is well founded and the respondent is ordered to pay the claimant the sum of **ONE THOUSAND NINE HUNDRED AND THIRTY-THREE POUNDS (£1,933.00)** from which tax and national insurance requires to be deducted, provided that the respondent intimates any such deductions in writing to the claimant and remits the sum deducted to Her Majesty's Revenue and Customs (and that sum is payable immediately).

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REASONS

Introduction

1. By a Claim Form dated 21 June 2020 the claimant presented a complaint of
5 unlawful deduction from wages (arrears of pay) which the respondent denied.
2. A final hearing was held on 1 September 2021. This was a hearing held by
Cloud Video Platform (CVP) pursuant to Rule 46. The Tribunal was satisfied
that the parties were content to proceed with a Cloud Video Platform (CVP)
hearing, that it was just and equitable in all the circumstances, and that the
10 participants in the hearing were able to see and hear the proceedings.
3. The parties prepared and filed a Joint Inventory and Joint Bundle of
Productions in advance of the hearing consisting of 46 pages, to some of
which reference was made in evidence and submissions. References to page
numbers in this judgment and reasons are references to page numbers in the
15 Joint Bundle.
4. Prior to the hearing I was also provided with a copy of the Claim Form,
Response Form, the Tribunal's Case Management Order dated 16 July 2021,
the claimant's Details of Financial Loss Statement, the respondent's written
submissions, and the Tribunal file containing copy correspondences between
20 the Tribunal and the parties.
5. At the outset of the hearing the parties were advised that the Tribunal
proposed to investigate and record the following issues as falling to be
determined, and both parties agreed the following list of issues:
 - (i) Is the claimant owed any payment in respect of arrears of pay from
25 1 November 2020 and notice pay payable during the period of time
in which the claimant worked her notice from 22 March 2021 and if
so, should the claimant be awarded arrears of pay in the gross
sum totaling £1933.00?

6. The claimant confirmed that she brought her claim under both section 23 of the Employment Rights Act 1996 (“ERA 1996”) and alternatively as a breach of contract claim. The respondent did not object to the Tribunal considering the claimant’s claims both under the ERA 1996 and alternatively as a breach of contract claim. Mrs Barnett’s written submissions sets out the respondent’s position in relation to both types of claim.
7. The claimant gave evidence at the hearing on her own behalf and Mr Raymond Clarke, a Partner at Consilium Accountancy Group Limited gave evidence on behalf of the respondent.
8. Both parties made submissions.

Findings of Fact

9. On the documents and oral evidence presented the Tribunal makes the following essential findings of fact restricted to those necessary to determine the list of issues -
10. The claimant was employed by the respondent from 3 April 2018 until 22 June 2021 as a Senior Corporation Tax Advisor. The respondent is a private limited company and an accountancy firm who offer expertise in a range of areas including audit, tax compliance and advisory, business services and accounts and corporate finance.
11. The claimant agreed to work 35 hours per week. Her gross monthly pay according to her contract dated 7 October 2019 was £2833.33. The claimant was paid monthly in arrears on the last working day of the month.
12. In terms of her contract dated 7 October 2019 (which refers to the claimant’s employment commencing on 3 April 2018), at page 5 under the heading ‘*Deductions From Wages*’ it provides that:

5 *“The Company reserves the right to seek reimbursement by deduction from wages, in accordance with the provisions of the Employment Rights Act 1996 in the event of any deficiencies attributable to you, or in the event of overpayment of salary, recovery of unearned holiday pay or other remunerations, or if other sums are due by you to the Company arising from your employment.”*

13. The claimant’s contract [page 5] states that in the event that the claimant proposed to leave her employment she was required to give three months’ notice. Furthermore if the claimant did not give proper notice of termination or
10 she left before the said notice period expired, the respondent reserved the right to withhold any pay to which the claimant may have been entitled.

14. The claimant’s contract also states [page 1]: *“The Company reserves the right to make reasonable changes to any of your terms and conditions of employment and will notify you in writing of such changes at the earliest
15 opportunity and, in any event, within one month of such changes taking effect.”*

15. Furthermore page 1 of the contract stated: *“The Company will review your pay at yearly intervals in October and advise you in writing of any pay change which will be effective from 1st November annually. For the avoidance of
20 doubt, any such review does not guarantee an increase in pay; therefore, there is no automatic entitlement to an annual increase in your pay.”*

16. The claimant was entitled to receive her pay at the rate of £2833.33 per month gross up to and including 31 October 2020.

17. The respondent decided in November 2020 to defer its annual review of
25 salaries considering the ongoing uncertainties and challenges being experienced by the firm and the economy in general.

18. On 16 March 2021 Raymond Clarke, a partner telephoned the claimant to advise her she will receive a pay rise of £250.00 per month gross (her new gross monthly salary was therefore £3083.33) and that this will be backdated
30 to 1 November 2020.

19. The claimant was sent a letter by email dated 16 March 2021 at 2.06pm. The letter from Raymond Clarke confirmed the claimant's pay increase and stated:

5 *"As you will be aware, we announced last November that we would be deferring our annual review of salaries. This decision was made in the context of the ongoing uncertainties and challenges being experienced by the firm and the economy in general. We continue to manage the business in a prudent manner and we remain cautious about the trading environment for*
10 *the remainder of 2021 (and beyond).*

We made a commitment to review our position on salaries with effect from 1 May 2021. However, we have decided that now is an appropriate time to undertake this review.

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We are now four months into the current financial year. All parts of the business are performing either in line or ahead of FY21 budget, which is clearly very encouraging. Whilst we remain cautious about the future, we are aware of the need to recognise the contribution that our staff continue to make
20 *to the business.*

In this context I am delighted to inform you that your salary will be increased from £34,000 to £37,000 with immediate effect. The increase in salary will be reflected in your March salary.

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In addition, we have decided that we are in a position to back date your salary increase to 1 November 2020, the date that we would normally have reflected any salary increases. This ensures that you have not been disadvantaged by our decision to defer our annual review. Your March salary will also include
30 *the impact of the back-dated salary increase.*

Please note that your salary forms only a part of your remuneration package. In addition to your salary, your total remuneration package includes:

- *Membership of the Consilium pension scheme which includes Company funded contributions;*
- 5 ▪ *Membership of Consilium's Private Medical Insurance Scheme. The Company currently pays your premiums for this on your behalf. These premiums are treated as a benefit-in-kind for you and are taxed through the payroll; and*
- 10 ▪ *Membership of Consilium's Life Assurance Scheme. In the event of your death whilst still employed by Consilium, the policy will pay out five times your salary into your estate. All premiums relating to this scheme are borne by the Company.*

15 *The partners remain committed to ensure that your overall remuneration package remains highly competitive in our market. We remain cautious in our future outlook for the business given the unprecedented events of the past 12 months. However, as evidenced by this letter, we are keen to reward our staff for their efforts and loyalty when we are in a position to do so.*

20 *On behalf of the partners may I once again thank you sincerely for your contribution to the firm over the past year."*

20. Following a conversation between the claimant and Raymond Clarke on 22 March 2021, the claimant sent an email to him on the same date at 7.02pm attaching a copy of her letter of resignation.

25 21. David Holt, a partner of the respondent, replied on 24 March 2021 at 7.02pm by email attaching a copy of a letter confirming the details relating to the claimant's resignation. He confirmed his agreement that the claimant's last date of employment will be 22 June 2021, her last day of work will be 11 June 2021 and the period between 14 -22 June 2021 will be used as the claimant's

holiday entitlement. The letter concluded: “*On behalf of the partners, may I thank you for your contribution to Consilium over the last 3 years.*”

22. On 31 March 2021, the claimant received her pay slip. The claimant sent an email on 31 March 2021 at 08.19am complaining to James Goodman, a partner at the respondent, that she did not receive her pay increase or backdated salary. James Goodman replied on the same day at 10.52am by email confirming that following her call with Raymond Clarke on 22 March 2021, her ...”*proposed pay rise and back dating of this have been rescinded due to your resignation.*” The claimant replied at 10.59am by email that having spoken to ACAS she was advised that this could amount to an unlawful deduction of wages, but no response was received to this email.

23. On 7 April 2021 at 12.19pm the claimant sent an email to James Goodman enclosing a copy of her letter of grievance in relation to her continued dissatisfaction following non-receipt of her pay increase and backdated pay. Following a meeting on 9 April 2021, the respondent sent a copy of a letter to the claimant by email dated 20 April 2021 rejecting her grievance.

24. The claimant appealed against the grievance outcome by way of an email dated 22 April 2021 sent at 10.24am enclosing a copy of a letter setting out her grounds of appeal. The claimant agreed that no appeal hearing was necessary and by email dated 26 April 2021 she provided copies of 2 articles from the Financial Times as part of her appeal. David Holt sent an email to the claimant on 09 May 2021 at 12.19pm containing a copy of a letter which rejected the claimant’s grievance appeal and the respondent’s reasons.

25. The claimant commenced the ACAS Early Conciliation process on 10 May 2021, and ACAS issued the ACAS Early Conciliation Certificate on 21 June 2021. The claimant started her Tribunal claim on 21 June 2021.

Observations

26. On the documents and oral evidence presented the Tribunal makes the following essential observations on the evidence restricted to those necessary to determine the list of issues –

27. Paragraph 2 of the respondent's submissions indicated that the following facts were not in dispute:

a) *"The Claimant was employed by the Respondent from 3 April 2018 until her termination of employment on 22 June 2021;*

5 b) *The Claimant was awarded a salary increase on the 12 March 2021, and the pay rise was to be backdated to 1st November 2020;*

c) *The Claimant resigned from her employment on the 22 March 2021*

d) *The Respondent rescinded the salary increase on the 22nd March 2021."*

10 The claimant confirmed at the outset of the hearing that a) to c) were agreed. She did not agree that the respondent rescinded the salary increase.

28. Raymond Clarke stated in his evidence that the claimant's pay rise was rescinded on 22 March 2021. He said that this was not a knee-jerk reaction. Notwithstanding this, the contract of employment states that any changes to
15 the claimant's employment terms were required to be notified to the claimant in writing (the pay increase was confirmed in writing on 16 March 2021).

29. He explained that the letter sent to the claimant on 16 March 2021 stated that the increase was awarded due to her loyalty and that the claimant's behaviour thereafter did not show loyalty, and that the claimant left her employment.
20 There was no mention of any conditions in the letter dated 16 March 2021.

Relevant law

30. To those facts, the Tribunal applied the law –

31. Section 13 of the Employment Rights Act 1996 ('ERA 1996') provides that an
25 employer shall not make a deduction from wages of a worker employed by him unless the deduction is required or authorised by statute, or by a provision in the workers contract advised in writing, or by the worker's prior written

consent. Certain deductions are excluded from protection by virtue of s14 or s23(5) of the ERA 1996.

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32. A worker means an individual who has entered into or works under a contract of employment, or any other contract whereby the individual undertakes to personally perform any work for another party who is not a client or customer of any profession or business undertaking carried on by the individual (s230 ERA 1996).
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33. Under Section 13(3) there is a deduction from wages where the total amount of any wages paid on any occasion by an employer is less than the total amount of the wages properly payable by him to the worker on that occasion.
34. Under Section 27(1) of the ERA 1996 “wages” means any sums payable to the worker in connection with their employment.
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35. A complaint for unlawful deduction from wages must be made within 3 months beginning with the due date for payment (Section 23 ERA 1996). If it is not reasonably practicable to do so, a complaint may be brought within such further reasonable period.
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36. In terms of the claimant’s contract, the starting point is that contracts of employment which give rise to the entitlement to pay are a matter of contract: based upon an agreement between the parties, employer, and employee, although it is recognised that those two parties rarely have the same bargaining power. Many forms of employment protection have been established by Parliament over the years to ensure that employers deal properly and in accordance with minimum contractual entitlements with their employees. In short, employers will not be acting lawfully if they act on a unilateral basis. The statutory provisions dealing with the relevant employment protection rights are set out in the *Employment Tribunals Act 1996*, at Section 3 read with the *Employment Tribunals Extension of Jurisdiction (Scotland) Order 1994/1624* for the pay arrears/notice pay claim, Part II of the Employment Rights Act 1996, particularly at Sections 13, 14, 23 and 24, for the unlawful deduction from wages claim. The Tribunal had regard
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to its overriding objective at Rule 2 of the Employment Tribunals Rules of Procedure 2013 to deal with cases fairly and justly.

5 37. There was no entitlement for a pay increase in the claimant's contract of employment; it needed to be specifically agreed between the employer and employee and confirmed in writing.

10 38. Strictly, the effect on the individual contract of employment between employer and employee was an agreed variation of the contract whereby the claimant would receive £250.00 additional gross salary per month (as per the respondent's letter sent on 16 March 2021) and the employee would continue to be employed on that basis. All other existing employment protection rights and provisions of the claimant's contract continued unchanged.

39. Any variation to the rate of pay thereafter would require amendment to the claimant's contract.

15 40. In the course of submissions, the respondent's representatives drew the Tribunal's attention to the following authorities all of which the Tribunal found informative:

20 (a) In *GAP Personnel Franchises Ltd v Robinson UKEAT/0342/07* the employee was employed on a contract which stated that travelling expenses would be paid at 25 pence per mile. Shortly after he commenced employment, the employer unilaterally varied the contract to the effect that mileage would be paid at 15 pence per mile (the employer stated that the rate on the original contract was incorrect). The claimant in that case sent expenses forms for 5 months in which he claimed his expenses at 15p per mile. The Employment Appeal Tribunal pointed out that the question arose as to whether the employee continued to work under protest, and if not whether he had affirmed the contract by acquiescence; the finding of the Tribunal was unclear. Aside from the first month, which constituted an unlawful deduction from wages, the case was referred to the Tribunal.

Discussion and decision

41. On the basis of the findings made the Tribunal disposes of the issues identified at the outset of the hearing as follows –

42. Whilst the Claimant (like many others) may not have felt she had much alternative, the Tribunal concluded that the proper interpretation of the facts was that she had agreed a variation of her contract of employment: to receive a salary increase of £250.00 gross per month backdated to 1 November 2020 when this was offered to her by her employer, the respondent, on 16 March 2021. She did not challenge the respondent's letter received on 16 March 2021 (her employment continued, and her conduct indicated her acceptance of the varied terms) and the claimant's clearly expressed expectation that she would be paid the new salary rate (including backdated salary) in the 31 March 2021 payroll. The respondent was clearly not entitled unilaterally to reduce the claimant's pay thereafter.

43. There was no dispute that the claimant's payments made by the respondent up to and including 31 October 2020 were the proper payments due to the claimant and no claim was made in respect of these. There is a dispute as to the effect of the conversation that the claimant had with Raymond Clarke on 22 March 2021, the email correspondences on 31 March 2021 and the claimant's conduct thereafter.

44. The Tribunal was grateful to both parties for their clear and helpful submissions. Mrs Barnett submitted on behalf of the respondent that there was no unlawful deduction because they were entitled to withdraw the salary increase awarded (albeit it was disputed as to whether any backdated salary could amount to an unlawful deduction of wages). It was accepted by the respondent that there was no contractual clause in place expressly permitting the retraction of a salary award. The respondent's representative also submitted that in relation to the claimant's breach of contract claim "...*the claimant acquiesced the breach on the basis the variation applied related to a matter which had immediate practical application on the Claimant (the rate*

of pay) and the Claimant continued to work without objection after effect had been given to the variation via her salary and exhaustion of the grievance process” and referred to the *Robinson* case (above) in support. I differentiate the *Robinson* case as the EAT’s decision showed that the matter is one of fact and degree, and that case was based on an employee benefit, a mistake by the employer and the claimant had applied for the benefit at the reduced rate for five months. The evidence that I heard and the documents that I considered did not show that the claimant affirmed the respondent’s proposed variation of her pay (following the increased pay award on 16 March 2021) by acquiescence or by her conduct (or otherwise).

45. The claimant submitted that she was told she would be receiving a pay rise, that this would be backdated to 1 November 2020 by telephone, this was confirmed to her writing, and that there was no clause in her contract to state that a pay rise could be withdrawn after it has been offered to her. The claimant further submitted that she did not agree to the deduction, she raised a grievance and grievance appeal, and she did everything she could to express her protest to the respondent’s position, including requesting ACAS early conciliation after the grievance appeal outcome.

46. Given the circumstances and on the evidence, it is reasonable and proper to infer that the claimant was entitled to a pay increase from 16 March 2021 (and backdated to 1 November 2020) and thereby entitled to receive pay at the increased rate of pay up to and including 22 June 2021. The salary increase was agreed and communicated to the claimant in writing on 16 March 2021. The respondent did not notify the claimant in writing of the proposal to change her pay to her old pay rate until 31 March 2021. It is surprising that there was no mention of the respondent’s intention in its letter dated 22 March 2021. Whilst Raymond Clarke felt that the pay award was rewarding loyalty and the claimant did not display her loyalty after this was granted, there were no conditions of the pay award contained in the letter of 16 March 2021.

47. The respondent suggested that in the telephone conversation on 22 March 2021 and email dated 31 March 2021 the claimant was told that the

agreement to the increased pay award had been rescinded. The extent to which an aggrieved party may annul a contract for misrepresentation or induced error, without seeking a decree of reduction, is uncertain under Scots law (see for example *MacLeod v Kerr 1965 SC 253*). There was no evidence to suggest that the contractual variation that led to the increased pay award in March 2021 had been reduced and thereby the respondent set it aside (in any event the Tribunal would have no jurisdiction to hear a reduction claim, and this would normally be brought in the Sheriff Courts as a plea exception and such a claim is not properly set out in the pleadings).

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10 48. The respondent therefore has to establish that the claimant's pay had been changed following their letter sent on 16 March 2021. The claimant protested to the respondent's proposal to vary her pay (to £2833.33). The protest was made by way of a number of emails dated 31 March 2021, a grievance dated 15 7 April 2021, grievance appeal dated 22 April 2021, and the appeal outcome was received on 09 May 2021. The claimant contacted ACAS on 10 May 2021 with a view to resolving the matter and this process continued until the day before the claimant's employment was due to come to an end. While the claimant did not contact the respondent directly between 10 May 2021 – 22 June 2021 to indicate that she was not happy with the respondent's refusal to pay her increased rate of pay, the claimant was seeking to progress her claim through the ACAS early conciliation process. Additionally the claimant had previously agreed to serve her notice period until 22 June 2021 (albeit she would be on holiday from 11 June 2021). Considering all the circumstances, there was therefore an agreement to pay the claimant an additional £250.00 gross pay per month from 1 November 2020 up to and including the last day of the claimant's employment and the claimant continued to be employed throughout this time and she did so having made the fact that she were protesting to the respondent's attempt to vary her pay to the original rate clear.

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30 49. The position was thus made clear by the claimant and the Tribunal firmly concluded that the respondent, who remained the claimant's employer, was not entitled to pay the claimant at the previous salary rate of £2833.33 from 1 November 2020 onwards as the claimant clearly did not consent to reducing

her pay and she was therefore entitled to receive her full contractual salary communicated to her on 16 March 2021 from 1 November 2020 – 22 June 2020. The claimant’s pay was not varied. The claimant’s gross payments received amounted to £2833.33 per month between 1 November 2020 and 31 May 2021 and the claimant was paid her pro rata pay up to 22 June 2021.

50. The total amount of any wages payable was less than the total amount of the wages properly payable by the respondent to the claimant in the following occasions: -

Date	Amount Payable	Amount Paid	Deduction
1 November 2020 – 31 May 2021	[£2833.33 +£250.00 £3,083.33] x 7 months =£21,583.31	(£2833.33) x 7 months between 1.11.2020 and 31.05.2021 = £19,833.31	£1750.00
01.06.2021- 21.06.2021	£1983.33 +£183 [£250 x 0.733 (i.e.22/30)] = £2166.33	£1983.33	£183.00

51. The above amounts were evidenced by the payslips provided to the claimant by the respondent and the claimant’s evidence (including but not limited to her Details of Financial Loss document). The Tribunal concluded without hesitation that the claimant, proved these outstanding amounts. The respondent has therefore made an unlawful deduction from wages in the sum of £1,933.00 in total (£1750.00+£183.00) [less any statutory deductions due including tax and national insurance in relation to which the Respondent is required to account to HMRC and to confirm the amounts to the claimant in writing]. The claimant did not pursue a claim for compensation under section 24(2) of the ERA 1996.

52. There is nothing in section 13 of ERA 1996 to suggest that the claimant could not bring her claim in respect of the salary increase payable to her between 1 November 2020 and 22 June 2021 as an unlawful deduction of wages claim. However, if the Tribunal is wrong on that, the Tribunal in the alternative was

5 satisfied that the failure to pay the claimant the pay increase of £250.00 per month gross between 1 November 2020 and 22 June 2021 was in breach of the claimant's contract of employment. The contract was varied on 16 March 2021 with immediate effect and this variation applied to the claimant's pay from 1 November 2020. For the reasons stated above, the Tribunal was not satisfied that the respondent's purported variation or rescission thereafter was effective. The claimant is therefore entitled to the sum of £1933.00 gross in respect of her loss arising from the respondent's breach of contract.

10 *I confirm that this is my judgment in the case of 4110124/2021 Miss O Reilly v Consilium Accountancy Group Limited and that I have signed the order by electronic signature.*

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20 Employment Judge: Beyzade Beyzade
Date of Judgment: 27 September 2021
Entered in register: 04 October 2021
and copied to parties