EMPLOYMENT TRIBUNALS

Claimant: Mr C Wightman

Respondent: Fan Data Pools Limited

Heard at: Watford (remotely by CVP)
On: 8 September 2021

Before: Employment Judge Heath

Representation
Claimant: Mr S Proffitt (counsel)
Respondent: Ms K Taunton (counsel)

RESERVED JUDGMENT

1. The claimant's claim of unauthorised deductions from wages and breach of contract in respect of the salary claim is not well founded and is dismissed.

2. The claimant's claim of unauthorised deductions from wages and breach of contract in respect of the car allowance claim is not well founded and is dismissed.

3. The claimant's claim of breach of contract in respect of the pension claim is well-founded. The respondent is to pay the claimant £8333.40 in respect of this claim.

REASONS

Introduction

1. The claimant, the former CEO of the respondent company, claims by ET1 presented on 14 December 2020 three sets of sums from the respondent:-

a. A top-up of furlough pay to full salary from March to September 2020, ("the salary claim")

b. Car allowance from March 2020 to September 2020, ("the car allowance claim") and

c. Pension contributions from October 2018 until June 2020 ("the pension claim").

He claims sums under a) and b) both as unauthorised deductions from wages and as contract claims, and c) as a contract claim.

Issues

2. I discussed the issues with the parties at the start of the hearing, and they were as agreed as follows:

<u>The salary claim</u>

Deduction from wages

a. What sums were properly payable to the claimant between 1 March 2022 and 17 September 2020? In particular: -

i. What were the terms of the furlough letter in respect of top-up of salary?

ii. Were the conditions triggering top-up met? The claimant says that sufficient funds were received by the respondent to pay the claimant's arrears of pay. The respondent says that sufficient funds were not received from CBILS and from shareholders.

b. Did the respondent pay the claimant less than the total amount of wages properly payable on the occasions for payment?

c. If there was a deduction, was it authorised by a relevant provision of the workers contract or had the claimant signified his consent to make deductions by signing the furlough letter?

Breach of contract

d. What were the contractual terms in relation to payment of salary top-up?

e. Did the claimant breach such terms by failing to pay the claimant his salary top-up?

<u>The car claim</u>

Deduction from wages

f. What sums were properly payable to the claimant in respect of car allowance under the provisions of the claimant's contract of employment during his furlough? In particular, was his car

allowance part of his remuneration package subject to the furlough agreement?

g. Did the respondent pay the claimant less than the total amount properly payable on the occasions for payment?

Breach of contract

h. What were the terms relating to payment of car allowance during furlough?

i. In breach of contract did the respondent failed to pay the claimant the amounts due to him?

The pension claim

j. What were the contractual terms in relation to payment of employer's pension contributions?

k. In breach of contract did the respondent fail to pay 5% salary into the pension scheme of the claimant's designation within 14 days of the details of the scheme being advised the respondent?

l. Did the claimant advise the respondent of the details of the scheme before May 2020, and if so when?

Procedure

3. I was provided with an agreed bundle of 268 pages (including index). The claimant provided a witness statement and gave evidence on his own behalf, and Mr Bruce Ellis provided a witness statement and gave evidence on the claimant's behalf. For the respondent Mr Steven Meeks and Mrs Shazia Choudhury provided witness statements and gave oral evidence.

4. I took some reading time at the start of the hearing, heard from the claimant and Mr Ellis on the first morning of the hearing, and then heard from the respondent's witnesses in the afternoon. Both counsel provided written submissions which they expanded on orally. I reserved my decision. I raised with counsel my belief that I had all the information I needed to make a decision on both liability and remedy, and that I did not consider this to be a case where there would be a need for a separate remedy hearing if I upheld any of the claimant's complaints. Both counsel agreed.

Facts

5. The respondent is a company that works with professional sports clubs to offer fans discounts and offers. Mr Meeks is a director, Chairman and founder of the company and is responsible for the day-to-day running of the business.

6. On 1 October 2018 the claimant was in employed by the respondent as Chief Executive Officer ("CEO") at a salary of £100,000 per annum under a service agreement which the claimant signed on 20 December 2018.

The service agreement contained the following clauses under the heading of clause 6 as "**SALARY**":-

> "*6.5 The company will pay 5% of salary into a pension scheme of the employee's designation within 14 days of the details of such scheme being advised to the company.*
>
> *6.6 The Employee will be entitled to a car allowance of £600 per month net of tax.*"

7. Shortly after the claimant signed the contract, he was paid his remuneration backdated to 1 October 2018. The claimant, at his request, was paid his car allowance each month before he was furloughed. This was payable regardless of his mileage.

8. The claimant was one of two employees employed by the respondent, the other being Ms Belo who was employed as a Data Compliance Director at a similar level of salary as the claimant.

9. The pension arrangements for the respondent were that employees were automatically enrolled onto a pension scheme. The claimant, on the other hand, wished so to set up his own private pension arrangements. In early December 2018 he corresponded by email with his financial adviser about the arrangements he should make. On 6 December 2018 his financial adviser emailed him some forms that needed to be completed so that pension contributions could be paid into his private scheme.

10. The claimant was automatically enrolled onto the respondent's own pension scheme on 1 January 2019. On 14 January 2019 the claimant forwarded to Mrs Choudhury, the respondent's Senior Accounts Administrator, the forms his financial adviser had emailed him. Mrs Choudhury responded to the claimant on 21 January 2019 indicating that the respondent had its own pension scheme, but the claimant could opt out of that if he wished. She enquired what the forms he had sent were.

11. On 5 February 2019 the claimant sent the respondent a notice indicating his instruction to opt out of the respondent's pension scheme, which was acknowledged by the respondent that day. On or around 28 February 2019 Mrs Choudhury spoke to the claimant's proposed pension provider who told her that he had to set up his pension through a financial adviser and get a SIPP. She emailed the claimant this information on 28th of February 2019 and told him that she could contact the pension provider if he had already set up if he sends her membership number. The claimant responded to Mrs Choudhury the same day "Yes, will do".

12. The claimant in his witness statement said that he realised that Mrs Choudhury should have sent forms to his financial adviser and not to the pension company and that he spoke to her on the phone when he realised her error. Mrs Choudhury denies that this phone call took place. It has been difficult to resolve this dispute, but on balance it is more likely that the claimant would have sought to have progressed his pension arrangements and made that call and that Mrs Choudhury simply did not remember it, than for the claimant to have misremembered or made up the fact that he made the call.

13. On 15 March 2019 Mr Ellis filled in forms necessary for the processing of payments into the claimant's private pension. He put crosses and names against boxes that needed a signature from Mr Meeks, a financial adviser, and the claimant. He also said that a "*single accumulated £ contribution to end of March 2019 for [the claimant] needs to be calculated, inserted in the Employer single contribution (gross) box and a cheque for that amount raised in favour of [the claimants pension provider] and signed by Steve [Meeks]*". Mr Meeks signed the relevant section of the form on 22nd of March 2019. Mrs Choudhury posted these documents to the claimant's home address. The claimant's evidence is that he never received them. On 27 June 2019 Mr Ellis emailed to enquire whether the forms had been sent. Mrs Choudhury responded the same day that she had sent the form to the claimant's home address. I accept Mrs Choudhury's evidence that she sent the forms as it is something she was specifically asked about at the time and she confirmed she had sent them. Equally, the claimant appeared to be focused on receiving his pension contributions and there was nothing to suggest that the claimant was not being honest when he said he did not receive the forms. The most likely explanation, although not entirely satisfactory, is that they were lost in the post. The respondent did not set up a direct debit for the payment of pension contributions.

14. Stepping out of the chronology and going forward almost a year, on 3 June 2020 Mrs Choudhury asked the claimant for information that would allow her to set up the pension scheme. The claimant provided answers to all the questions the following day by email. Pension contributions were made to the claimant up to the date of termination of his employment, albeit they were not allocated to his pension scheme, even though the forms were still outstanding (which I understand they were at the date of the hearing).

15. The respondent's business depended on professional sport, which stopped overnight when the country was put into lockdown in March 2020 as a result of the coronavirus pandemic.

16. 26 March 2020 the claimant and Ms Belo were placed on furlough. The Coronavirus Job Retention Scheme ("CJRS") requires furloughed employees to signify their agreement to furlough in writing. The effect of this is not in itself to amend the contracts of employment, but it is open to employers and employees to agree variations

17. The claimants furlough letter of 26 March 2020, which he signed, includes the following:-

> *"If you agree to this change, which we would like to implement with effect from 1 March 2020 as permitted under the emergency legislation, we understand that we will be able to apply for a grant from HMRC which will enable us to reimburse 80% of furloughed workers wage costs, up to a cap of £2500 per month.*
>
> *During furlough leave, you will remain employed by the company and will continue to accrue continuous service and your contractual benefits, other than in respect of remuneration, will continue to apply….*

At the time of writing, we do not know whether the contribution to wage costs will extend to benefits such as pension contributions, however rest assured that we will continue to monitor the situation.

Given the application process may take some time, you must be aware that there may be a delay in you receiving your wages over the coming weeks but we will do our best to pay you as quickly as we can and backdate it when necessary. For clarity, we are not currently in a position to be able to top up your wages to your normal rate of pay but will undertake to do so as soon as sufficient funding has been received by the Company either from its shareholders or from the Coronavirus Business Interruption Loan Scheme ["CBILS"] *which we will be applying for as soon as your furloughed status is agreed by you*".

18. On 10 April 2020 Mr Meeks, following a telephone call with the claimant, emailed him proposing a change in his service agreement whereby his hours would be reduced to a three-day week, his salary reduced to £60,000 per annum, his car allowance would be removed and the restriction on working for someone else (other than a competitor) would be removed. Mr Meeks proposed giving an undertaking to revert to the claimant's existing contractual terms "*on the earliest of the following events happening: 1. The Job Retention Scheme is ended, 2. We have succeeded in raising over £400,000 of new equity. Your agreement to these changes will give us the best chance of securing the funding we need to allow the business to continue during these very difficult times".* In a further email Mr Meeks proposed setting up a loyalty share bonus arrangement to make up for the 40% reduction in salary during which the claimant would be working three days per week.

19. The claimant did not take up the offer. On 17 April 2020 Mr Meeks emailed the claimant on behalf of the Board giving the claimant six months notice to terminate his service agreement, giving a termination date of 17 October 2020. The claimant responded acknowledging the email and asserting that the respondent was in breach of contract and that he was taking legal advice.

20. On 30 April 2020 the claimant emailed Mr Meeks and a Mr Reid referring to clause 6.5 of his contract and suggesting that having provided relevant details to the respondent and no employer contributions having been made the respondent was in breach of contract.

21. On 19 May 2020 the claimant emailed Mr Meeks saying that he hoped he was about to receive "the R&D credits and investment". Under the heading "Pension" he gave his bank details and pointed out how his service agreement was negotiated and backdated and said that there had been communications regarding paying his pension into his private pension scheme rather than the company's one. He suggested pension arrangements should have been properly backdated to October and asked for the payments to be made.

22. On 22 May 2020 Mr Meeks replied saying that he was waiting on both funding sources. He said "*I have asked Shazia to set up the payments but she will need contact details at Suffolk Life as the last contact she had with them was when they refused payment because you had not been suitably*

advised. It was left that you would speak to an IFA and I assume this has now happened. At this point we are not accepting responsibility for any back payments as you haven't only now provided us with necessary details to set up your pension with Suffolk Life".

23. The claimant responded on 27 May 2020. He said that he had informed Mrs Choudhury and Mr Meeks on 4 January 2019 that he wanted his pension paid into his SIPP, that he had opted out of the company scheme as he had been told to and was given forms. He said that Mrs Choudhury had been given the SIPP details many times and that Mr Ellis, who had been the respondent's Acting Chief Financial Officer at the relevant time, could verify this. He said he had complied with the contract and that payments must be backdated to October 2018.

24. On 28 May 2020 claimant emailed Mr Meeks (cc'd to Ms Belo) that he had heard R&D tax credits had been received and that a company creditor had been paid £20,000. He looked forward to receiving the amounts owed to him under the furlough agreement by close of business the next day. Mr Meeks replied later that day that there were no amounts owed under the terms of the furlough agreement "*as we have received no shareholder funding or CBIL proceeds*". £68,679.68 had been received by way of R&D tax credits in May 2020.

25. On 31 July 2020 £180,496 was raised by allotment of shares valued at £1 each. It had been hoped to raise over £400,000 with shares valued at £5 each. This shareholder fundraising was not brought to the claimant's attention.

26. At some point, the date of which is not entirely clear, the application for a £250,000 CBILS loan was declined as the respondent was deemed to have been an "Undertaking in Difficulty" as at 31 December 2019.

27. On 3 September 2020 the claimant was informed by email from Mr Meeks that he was no longer required to be available for work beyond 17 September 2020 and that he would be paid in lieu for the final month of his notice period.

28. By way of backdrop, the respondent was a "pre-revenue" business and was entirely dependent on investment. It had creditors who were threatening legal proceedings. Mr Meeks' evidence was that when attempting to find a way to keep the business afloat investors were prepared to invest on the basis of money going into the business to allow it to continue trading and not in order to top-up furlough payments of furloughed staff. This evidence was not undermined in cross examination, was referred to in contemporaneous documentation (see below email Mr Meeks to Ms Belo 28 May 2020) and I accept it.

29. On 25 September 2020 solicitors instructed by the claimant wrote to the respondent indicating that furlough top-up had not been paid along with car allowance and pension contributions. Solicitors instructed by the respondent replied on 2 October 2020. They indicated that sufficient funding had not been received from shareholders or the CBILS but did not indicate in terms that shareholder funding had been received in July 2020.

30. After the termination of the claimant's employment around £120,000 was raised in 4 tranches of share allotments.

Ms Belo's position

31. As set out above, Ms Belo was furloughed at the same time as the claimant. On 26 March 2020 she emailed Mr Meeks referring to a telephone call in which he agreed to add to a draft letter and to send the final version to the claimant and her. She set out the following "*1. FanLogic to backdate outstanding/under paid salaries as soon as the funds are available 2) Any funds secured from a business interruption loan or any other kind of loan or investment will be applied to pay and catch up with outstanding/under paid salaries first*". Mr Meeks replied the same day "*I have amended the wording as requested and would be grateful if you would sign and scan and email back to me confirming your agreement to being placed in the [CJRS]*". Mr Meeks said that there was a subsequent telephone call with Ms Belo following her email.

32. Ms Belo was cc'd into the claimant's email to Mr Meeks of 28 May 2020. That same day Ms Belo replied to Mr Meeks' reply to that email. She indicated that she was expecting to use the tax credit rebates towards topping up her salary. She indicated she had sought legal advice prior to signing the furlough letter as she was concerned that the wording of the furlough letter differed from what she and the respondent had agreed. She set out an earlier email she had sent Mr Meeks which suggested that, essentially, any funds secured from any kind of loan or investment would be applied to top-up under paid salaries first.

33. Mr Meeks and Ms Belo corresponded by email over the course of the next couple of weeks. On 28 May 2020 Mr Meeks said that the respondent would not be in a position to start to top-up any furloughed salaries until sufficient new funding was raised by investors or received by way of CBILS loans. The next day he observed "*Nobody will fund the business if their investment will go straight out of the bank account and into yours and [the claimant's] to make up 100% of your salaries for the period you have been furloughed. We are in the middle of a pandemic and this is impacting everybody. What investors will agree to fund is a re-engagement strategy that would allow us to bring you back into the business part-time at the start of July*". He then made a proposal to Ms Belo in similar terms to the one made to the claimant on 10 April 2024, that included her coming back to work three days per week at 60% of her current salary.

34. There were a number of further emails between the two, and on 11 June 2020 Mr Meeks emailed Ms Belo to indicate that the respondent had not received any further shareholder funding and was not in a position to top-up her wages but would do so as soon as sufficient funding had been received as agreed. He said that this arrangement would apply from "*that point onwards and not retrospectively. However, if we can compromise at the 70% level of pay for any furloughed top up, then as an exceptional matter, I am willing to commit to pay this top up for the full period of your furlough by the end of June and we can proceed with your employment and look to bring you back part-time in July*".

35. Ms Belo was paid £11,000 backdated furlough pay and returned to work for the respondent and was paid £4,500 per month.

The law

36. Section 13 Employment Rights Act 1996 ("ERA") provides: –

> *(1)An employer shall not make a deduction from wages of a worker employed by him unless—*
>
> > *(a)the deduction is required or authorised to be made by virtue of a statutory provision or a relevant provision of the worker's contract, or*
> >
> > *(b) the worker has previously signified in writing his agreement or consent to the making of the deduction.*
>
> *(2) In this section "relevant provision", in relation to a worker's contract, means a provision of the contract comprised—*
>
> > *(a) in one or more written terms of the contract of which the employer has given the worker a copy on an occasion prior to the employer making the deduction in question, or*
> >
> > *(b) in one or more terms of the contract (whether express or implied and, if express, whether oral or in writing) the existence and effect, or combined effect, of which in relation to the worker the employer has notified to the worker in writing on such an occasion.*
>
> *(3) Where the total amount of wages paid on any occasion by an employer to a worker employed by him is less than the total amount of the wages properly payable by him to the worker on that occasion (after deductions), the amount of the deficiency shall be treated for the purposes of this Part as a deduction made by the employer from the worker's wages on that occasion.*

37. In making the determination of what sums are properly payable the tribunal has jurisdiction to determine issues of contractual interpretation (*Agarwal v Cardiff University* [2019] ICR 433).

38. It is common ground between the parties that pension contributions are not "wages" for the purposes of Part II ERA (s. 27(2)(c) ERA).

39. A tribunal may not interfere with an employer's exercise of discretion regarding remuneration unless it was done irrationally or perversely (*Clark v Nomura International Plc* [2000] 9 WLUK 43), nor substitute its own view of reasonableness for the views of the parties (*Keen v Commerzbank AG* [2006] EWCA Civ 1536). The burden is on the claimant to show unreasonableness, but once grounds of unreasonableness are shown shown the burden shifts to the respondent to show that its decision was reasonable (*Hill v Niksun Inc* [2016] EWCA Civ 115.)

40. Where a contract gives a party a power to exercise a discretion there is an implied term requiring the party to exercise it in a way that satisfies the

two limbs of the Wednesbury unreasonableness test, that is the right matters were taken into account, and that the result was not such that no reasonable decision-maker could have reached it (*Braganza v BP Shipping Limited* [2015] UKSC 17)

41. Under the Employment Tribunal's Extension of Jurisdiction (England and Wales) Order 1994 "*proceedings may be brought before an employment tribunal in respect of the claim of an employee for the recovery of damages or any other sum… if… The claim arises or is outstanding on the termination of the employee's employment*". The financial limit on payment in respect of the contract claim, or in respect of a number of contract claims relating to the same contract, is £25,000.

Conclusions

The salary claim

42. A central plank of the claimant's claim is that the furlough letter of 26 March 2020, signed by him, does not accurately reflect the agreement between him and the respondent. Ms Taunton submits that the actual agreement between him and the respondent should be construed by reading correspondence between Ms Belo and Mr Meeks relating to Ms Belo's identical agreement with the respondent. She submits that the agreement was that the difference between the £2500 furlough pay and full salary, including any backdated shortfall from the beginning of the furlough period, would be payable o the claimant as soon as funds from any source became available, and that such funds would be applied to pay the claimant before being used for any other purposes.

43. To spare the reader from flicking back and forth in this decision the relevant provision of the furlough letter will be set out again: -

> *For clarity, we are not currently in a position to be able to top up your wages to your normal rate of pay but will undertake to do so as soon as sufficient funding has been received by the Company either from its shareholders or from the Coronavirus Business Interruption Loan Scheme which we will be applying for as soon as your furloughed status is agreed by you*".

44. This is at odds with the agreement that Ms Taunton urges me to find. Essentially she is urging me to find that the true nature of the agreement should be ascertained by reading the correspondence between Ms Belo and Mr Meeks. A complication is that communication between Ms Belo and Mr Meeks was obviously not confined to email but also included telephone calls (see [87]) and that they were additionally negotiating terms for her return to part-time working with the respondent at reduced pay. Where the claimant and the respondent have reduced to writing their agreement as to how the claimant's contract of employment was to be varied on the question of remuneration during furlough I consider the route the claimant invites me to follow is inappropriate. I find that the agreement between the claimant and the respondent is as set out in the furlough letter, and I will be construing the provisions of that letter without recourse to correspondence (against a background of oral communications) by third party.

45. The letter itself sets out an ambition to top-up the claimant's pay in prescribed circumstances. Those circumstances are when 1) sufficient funding 2) has been received from identified sources.

46. I have not had to deal with the situation where no funds have come from those identified sources, but am faced with a situation where some has come from shareholders and some from sources outside of those referred to in the furlough letter (the R&D tax credits). I have heard nothing to persuade me that receipt of funds from outside the identified sources should be one of the triggers for top-up. It may have been that there may have been persuasive arguments advanced if these had been the only sources of funds, but that was not the case.

47. However, funds received from other sources, or indeed the respondent's financial situation in general, are not entirely irrelevant. If, for example, the respondent received a very substantial cash injection from other sources, it might be difficult for it subsequently to argue, if it were also to receive modest sums from CBIL or shareholders, that those modest sums were insufficient to top-up the claimant's salary. The R&D tax credits are not something I therefore dismiss from my mind. They are in the background when I turn the next trigger, that of sufficiency.

48. Turning to "sufficient funding". Ms Taunton makes the point in her closing submissions that the respondent interprets the meaning of "sufficient funds" in such a way that an obligation to pay the claimant would never arise as there would always be creditors and business expenses towards which funding could be directed. She says this renders the agreement between the parties meaningless.

49. I do not consider that the respondent's interpretation renders the agreement meaningless. Mr Proffitt in his skeleton argument sets out that the agreement envisages a necessarily subjective assessment by the respondent of whether the amount received from prescribed sources is sufficient to be able to top-up monthly payments the previous salary. In other words, the respondent can pay when it considers that it can afford to pay. On this argument the parties have not agreed to something meaningless, but rather that the respondent has retained a discretion to top-up which it must exercise in a manner that is not perverse or irrational (*Clark, Keen*) or *Wednesbury* unreasonable (*Braganza*)..

50. I accept Mr Proffitt's argument, and accept the submission that I can only interfere in the respondent's decision not to top-up the furlough pay to the full salary if such decision is perverse or irrational or *Wednesbury* unreasonable.

51. The evidence before me was that the application for CBILS funding was turned down, and this was not challenged. This leaves the only funding from the specified sources received during the claimant's employment as being the £180,496 raised in July 2020.

52. While the respondent did receive £68,679.68 in R&D credits, the overwhelming impression of the respondent's financial position was that it was dire. Indeed, the reason it did not qualify for CBILS was that it was considered to be an undertaking in difficulty in December 2019. That was

before the Coronavirus pandemic stopped the professional sport that its business depended on. The claimant was candid in cross-examination that he was not really in a position to challenge the respondent's assertions about how bad its financial state was as he had not read its accounts.

53. As to whether there was "sufficient funding" Ms Taunton points to Mr Meeks's evidence at paragraph 10 of his witness statement that it was envisaged that the respondent would be in a position to top-up the claimant's and Ms Belo's salary if CBILS of £250,000 were received. She points out that in actual fact the £68,679.68 plus the £180,000 shareholder fundraising in July 2020 is more or less that figure.

54. As indicated earlier, the R&D credits figure is there in the background as I consider whether there were sufficient sums to trigger the obligation to top-up. Mr Meeks' further evidence orally and in his witness statement (paragraphs 13 and 14) were that the R&D credits were merely sufficient to satisfy creditors who were threatening legal action. I also had regard to the evidence that when the claimant was offered reduced hours and reduced pay on 10 April 2020 the commitment was made to revert to full contractual pay when £400,000 of equity was raised. I note also that this was a commitment to revert to full pay and not backdate any pay. £400,000 was the amount that the respondent was hoping to raise by way of share issues in July 2020, when it actually raised £180,000. Mr Meeks indicated when making the offer on 10 April 2020 that the claimant's agreement to these terms would give the respondent the best chance of securing the funding that was needed to allow the business to continue in difficult times.

55. I accept Mr Meeks' evidence, as alluded to in the offer to the claimant on 10 April 2020, that investors were not prepared to invest on the basis of money going "out of the door" pay for salaries. This is relevant when I consider whether the respondent acted irrationally or perversely or did not take into account relevant matters or acted in a manner no reasonable employer would in making the decision not to top-up.

56. In all the circumstances I accept that the respondent was in what Mr Proffitt describes as an "existential crisis". I do not consider that the respondent acted irrationally, perversely or otherwise unreasonably in considering that it did not have sufficient funds to trigger the obligation to top-up the claimant's pay under the agreement set out in the furlough letter.

57. This means that there were no deductions from sums properly payable under contract or otherwise. There were therefore no deductions from wages and no breach of contract. The claimant's claims for unauthorised deductions from wages and for breach of contract fail on this point.

<u>The car allowance claim</u>

58. A key issue here is whether the car allowance constitutes remuneration or a contractual benefit. Neither counsel referred me to any authority as to how car allowance is to be understood.

59. On balance I find that it was remuneration. His entitlement to it appears in the part of his service agreement headed "Salary". This is not

determinative, as his entitlement to participate in the company health care and dental insurance plan also appears here. Nonetheless, it was a fixed sum of £600 net monthly. I note that the purpose of the CJRS, as expressed in the furlough letter, was to allow the respondent to reduce its "wage costs". Car allowance was not paid to the claimant during furlough, and he did not ask for it at the time. Taking into account the context of the CJRS and the purpose of the furlough agreement a hypothetical reasonable person in possession of all the relevant facts would in all probability conclude that the parties considered the car allowance to be remuneration rather than a contractual benefit and therefore covered by the furlough agreement.

60. In the circumstances, car allowance was not properly payable to the claimant under his contract of employment or otherwise. The claimant's claims for unauthorised deduction from wages and for breach of contract are accordingly not upheld.

Pension claim

61. The terms of the claimant service agreement were that the respondent "*will pay 5% of salary into a pension scheme of the employee's designation within 14 days of the details of such scheme being advised to the company*".

62. What in fact happened was the claimant was auto-enrolled in the respondent's scheme on 1 January 2019. He took prompt steps to notify the respondents of his pension provider by 14 January 2019 and providing forms which needed to be completed. He promptly opted out of the respondent's scheme. On my findings he contacted Ms Choudhury to tell her that she needed to liaise with his financial adviser. On 15 March 2019, Mr Ellis, the respondents then acting Chief Financial Officer emailed forms to Ms Choudhury setting out where they needed to be filled in and by whom. Importantly, in his email he instructed the preparation of a cheque for backdated single contribution from the respondent to the claimant's pension provider. I find that at this point sufficient details had been provided to trigger the duty to pay pension contributions. He suggested the contribution to run to the end of March 2019, no doubt in the anticipation that matters would be resolved at that point. I find that Ms Choudhury posted the forms to the claimant, but he did not receive them.

63. The fact that the acting Chief Financial Officer sanctioned backdating payments indicates that backdating payments would not be an issue either. Furthermore, the unchallenged evidence from the respondent is that pension contribution payments were made from June 2020 in the absence of forms which were not returned after, on my finding, the claimant did not receive them. This would indicate that not having the "details" contained in the forms did not form a barrier to payment. I therefore find that the claimant did provide, to the satisfaction of Mr Ellis, sufficient details of his pension to trigger the obligation to make payment.

64. It follows that the claimant has failed to pay the claimant his pension contributions from the start of his employment to the end of May 2020.

65. In his skeleton argument Mr Proffitt submits that no sums in respect of pension contributions payable as they form part of remuneration which was expressly temporarily varied by the furlough letter. However, the fact that the respondent actually did make pension contributions at the full contractual payment rate from June 2020 onwards suggests that this was not the understanding of the parties at the time. It also suggests that the full contractual rate is the correct rate and not 5% of furlough pay. Pension contributions are payable as damages for breach of contract in respect of the whole period of their non-payment, including during the furlough.

66. In the circumstances the claimant's claim for breach of contract in respect of pension contributions succeeds. The respondent is to pay the claimant the sum of £8333.40, being 20 months at £416.67 per month.

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Employment Judge **Heath**

Date: 18 October 2021

RESERVED JUDGMENT & REASONS SENT TO THE PARTIES ON

5/11/2021

N Gotecha

FOR EMPLOYMENT TRIBUNALS