



## EMPLOYMENT TRIBUNALS

Claimant

Respondent

**Mr C Howson**

v

**Marshall (Building Contractors) Ltd**

Note: A summary of the written reasons provided below were provided orally in an extempore Judgment delivered on 19 November 2021, the written record of which was sent to the parties shortly thereafter. A written request for written reasons was received from the claimant and referred to the Employment Judge on. The reasons below are now provided in accordance with Rule 62 and in particular Rule 62(5) which provides: In the case of a judgment the reasons shall: identify the issues which the Tribunal has determined, state the findings of fact made in relation to those issues, concisely identify the relevant law, and state how the law has been applied to those findings in order to decide the issues. For convenience the terms of the Judgment given on 19 November 2021 are repeated below:

## JUDGMENT

1. The claimant's complaint of unlawful deduction from wages succeeds in relation to an alleged deduction in respect of February 2021 and the respondent shall pay him the gross sum of £176.21.
2. In other respects, the claim is dismissed.

## REASONS

### Introduction

1. The claimant worked as an estimator for the respondent firm since 2005. His employment ended on 19 March 2021. He brought an unlawful deduction from wages claim only, arising out of, in essence, a four day week implemented from June 2020. He alleged a series of unlawful deductions from July 2020 to February 2021.
2. I heard oral evidence from the claimant and Mr Marshall, the respondent's general manager. Much of the general chronology was not in dispute. I had a helpful and compact file of documents.

### Findings of Fact

3. On 2 June all employees were contacted by email to request agreement to one of a number of options to address the circumstances faced by the firm as a result of the pandemic. It employed around 43 employees but is part of a group which employs 200 or so.
4. The cover email from Mr Marshall said this: "*change to working week:*

*“Following my email Saturday 30/5/20, re the potential of phase three of our company furlough strategy, please can in confirm that a number of employees have taken time to pop and see me, rang or emailed the writer, advising they would like to help the company in these uncertain times, and wish to be furloughed.*

*Clearly these offers are greatly appreciated and have brought back my faith in human kindness. Those who have taken time to do so, albeit I may have been a little sheltered/reserved, your offers to help are very much appreciated.*

*Thank you very much, honestly, I’m flattered to be working alongside gentlemen and ladies, who care about the company and indeed others.*

*The offers have ranged to take the full furlough, reduced holidays, reduced working week, reduce salary, etc*

*I therefore have taken on board everyone’s comments, and though I still wish to furlough a number of staff, as the Government policy, to reduce staff numbers due to the shortfall in work, and sites coming to a close, I believe that the company needs to act further to monitor/reduce its overhead, as clearly there is little sign of an economic recovery in the immediate future. We have to face reality, and I’m aware it’s frustrating to everyone concerned.*

*Therefore, I’m proposing that we **reduce** the standard working week.*

*Days off/worked, can be at the employee’s discretion, as that seems a fair compromise, but must fixed [sic] for a four week period.*

*Let’s go to base 1 first.*

*Clearly this isn’t what we wish to hear, but we have to face reality.*

*Work is going to be very hard for the foreseeable, and all companies are actively streamlining. This reduce working week, will be **for all employees**, initially staff, and once started we can then sort the operatives.*

*Sites etc can be covered, as we all must pull together and pool resources.*

*I would like you to liaise with your families and respond asap, so we can move forward collectively, try and conclude matters asap, and hopefully stop the spread of uncertainty and negativity.*

*I’m therefore proposing that we have three options, these options will commence from **Monday/08/06/20** and be reviewed on a **four weekly** cycle, until signs of recovery dictate that we can restore us all back to a full working week.*

*Therefore, you can see, I’m keen to move matters forward and await your earliest attentions please.*

*1 Full Furlough/Max payment plan, no car allowance, as the email Saturday.*

*2 Reduction to four days a week, including reduction in car allowance to marry the four days worked.*

*3 Reduction to three days a week, including reduction in car allowance to marry the three days worked.*

*4 We shall have to advise pension details as some on Final Salary Scheme and some not. I’m no expert, but Catherine Dinsmore is on the case and we shall update, if not today/tomorrow am.*

*Clearly this is a lot to take in and a lot to consider with your families, but please complete the attached and hopefully we can all move forward collectively and in unison. Please review the email in its entirety, ahead of forging a decision or quoting "don't understand the contents".*

*I'm trying to be fair to everyone and also trying to ensure the company continues to function/operate albeit with reduced numbers and a more fluid monthly approach, and reduced overhead per department/company.*

*Please tick one box only, add name, and email back asap, so we can try and close out and move forward.*

*Again this procedure will be repeated every four weeks, so someone may offer to furlough initially, then wish to work part week, say a month later, we all have to adopt a fluid and rational approach.*

*Thank you this clearly is a very difficult situation/request, and we pray that signs of recovery dictate we can all be back to normal asap.*

*Each employee has the responsibility of what they consider is the most suitably [sic] option to them, and then simply advise.*

*Awaiting your attentions please. "*

5. The form attached simply recorded the three group company names, and then below that a space to complete the employee's name, and space to tick either, "furlough", "3 day week" or "4 day week".
6. There was no option to tick "5 day week" or "no change".
7. On 3 June Mr Marshall forwarded pensions advice to all staff faced with the choices above, which included the following: *"It is my understanding that the pension issues would not be too great should the short time working continue through to the end on 2020 [sic]. If it were to continue beyond this time the advice would need to change..."*
8. Those emails also included an independent adviser's advice that other employee benefits (life cover and so on) would not be affected provided any changes to contract terms were not still in place by January 2021, mentioning that the Furlough Scheme was set to end on 31 October 2020.
9. The cover email sent at 12.14 to all users from Mr Marshall said this:

*"Please can I remind everyone to fill in the various options, so we have one consolidated sheet and try and plan our way through this situation.*

*I'm aware one glove doesn't fit all, alas the three permutations are the options available, please send forms back with one box ticked.*

*We simply need choices in the **first instance, for the next four weeks**, to enable us to move forward and appraise resources, teams/project completions etc.*

*We are endeavouring to be fair to all employees, so that they can have their say/vote. We would like a nucleus here, some furloughed and some part time, hence we thought a simple process.*

*We believe we have the right to not let people furlough if we need them, alas lets get to base 1, so we know what peoples preference is.”*

10. On 3 June the claimant went to see Mr Marshall. He was not happy; some colleagues had been furloughed from March and he had been working throughout. Mr Marshall said *“not to worry, the company has plenty of money and it was only for a short period”* – that is the four day week was only for a short period. The claimant then emailed his form, attached to the email at paragraph 4 above, indicating he chose a four day week with a Monday off, and he also emailed his line manager directly on 4 June to confirm his preferred day off would be Monday.
11. Subsequently on 5 June a “day off” summary was sent saying - *“this will come into effect week commencing 8<sup>th</sup> June 2020 and last for an initial period of 4 weeks. Due to the timescales involved, and to assist with the smooth running of sites, I have spoken to and agreed with a few individuals that the day off next week only will not be as the schedule. Apart from these few agreements we must insist the day off is set in stone and cannot be altered for the 4 weeks period.”*
12. On 29 June Mr Marshall sent a further email to all employees about “FURLOUGH 4”, communicating that the four day week was to continue for those working and he also explained that furlough was not an option for those who had not yet been furloughed, and asked for further furlough suggestions amongst those furloughed.
13. On 30 June he also went to see the claimant in the office and told him again the four day week was to continue – that was before the expiry of the initial period. The claimant said he was not happy, or words to that effect. I accept that conversation happened because it was likely given the long and trusting relationship between them at that point and I find that the claimant accepted the position, albeit he was, understandably, not happy.
14. On 3 July, having been told that some individuals (not the claimant) had been subjecting the payroll member of staff to unpleasantness, or putting her in a difficult position (not the claimant), in relation to these arrangements, Mr Marshall wrote a further email seeking to stop that, and explain again the history of the four day week arising because of cancelled projects and so on. He said “we decided to request everyone to work a four day week rather than choosing to adopt what other companies have chosen and that is redundancies or simply leave everyone on furlough. It is clear from that email that some people were complaining about having not been permitted to remain at work full time from March to the end of May, as the claimant was.
15. Before the end of that initial four week period then, knowing it was to continue and the reasons why, the claimant did not withdraw his agreement or put in writing that he was working under protest or words to that effect or communicate in writing any objections. He continued to work the four day week and have a day off each week, for the next four weeks, and accepted his salary at the end of July, reflecting that reduction. Payment was made around the last working day of the month for the previous month.

16. The claimant's case was that he regularly protested the four day week after that initial four week period, but I do not consider that reflects reality.
17. On 29 July the claimant sent an email about some holiday he wished to cancel to his manager, in which he said, please can I cancel it and take as my day off, I have Shipley Tender to finish by close of play now on Tuesday, unless we are back working 5 days". That was copied to Mr Marshall to address that query, who responded, copying the claimant in, for confirmation, that "whilst we have people on furlough, working five days is off the radar for everyone indefinitely". Again, having received that and prior to the end of the second four week period, the claimant did not document he was withdrawing his agreement to work that shorter week, nor seek to give notice, despite being told that a return to five days was "off the radar".
18. In the middle of August there were further communications from Mr Marshall about encouraging a return to office working and quarantine issues and confirmation of a four day week continuing.
19. Similarly, at the beginning of October, he confirmed following review, it was to continue. The claimant wrote, not straight away, but on 23 October, indicating that as he was on holiday at the end of that month, please could intentions going forward be confirmed; and he said this: "when I came to see you on 3 June with regards to your shorter working week options you explained it was for a short term period and not to worry, now with five months on short time it is starting to be a concern... he went on "as you have emailed previously the short time is indefinitely I would hopefully as a key member of staff like to see some light at the end of the tunnel".
20. There was then a further memo to all staff confirming the four day week was indefinite (as well as dealing with various other Covid related matters); in the middle of November the claimant asked to change his day off to a Wednesday, which was agreed.
21. At the beginning of December there was confirmation of a wage freeze and continuation of the four day week. On 16 December the claimant wrote to Mr Marshall a longer email indicating concerns with his employment situation – including in relation to the car policy and the disadvantages of having only car allowance, rather than a company vehicle; he also said he had never agreed to an indefinite four day working week – the response was robust that the four day week was until workload picked up. The claimant was at this point expressing clear unhappiness, describing feeling as if he was being punished for winning work.
22. Just before Christmas Mr Marshall updated matters, explaining to staff that if there was enough work for five days a week, it served no purpose to have people on four days and thanking people for their patience. On 6 January 2021 the claimant wrote again saying the four day week was causing him strain, that he had heard some colleagues were back five days, and that he had only agreed to four days for a four week initial period; and that he would happily do other work on site, on his fifth day, if Mr Marshall considered there was still only four days' estimating to do; he also asked if he could be "flexi furloughed" or words to that effect to recover monies for the fifth day; this then took place for January 2021.

23. The claimant gave 12 weeks' notice to bring his employment to an end on 8 February 2021. He presented a claim alleging the imposed reduction in pay from 6 July 2020 to 31 December 2020 was an unlawful deduction. His pleaded case was that he had only agreed a four week reduction in pay, and he had "raised concerns on a regular basis about the continued reduction in his hours and pay". A table set out the unlawful deductions alleged, which included small alleged deductions in January and February as a result of errors. These were agreed at £176.21 and the respondent said it had paid these sums; the claimant said he had not received payment; I accept the latter assertion (it was not challenged Mr Pochron).

#### The Law, argument, discussion and conclusion

24. The relevant law is within part II of the Employment Rights Act 1996; Section 13(1)(a) relevantly provides that an employer shall not make a deduction unless the deduction is required or authorised by ....a relevant provision of the worker's contract. Section 13(3) provides that "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, the amount of the deficiency shall be treated ....as a deduction.....".

25. The parties argued this case on contractual principles. The claimant said he had not agreed to an indefinite change in his working weekly hours/pay, but only to the initial four week change; the respondent said he had agreed to the July to December changes, by both initial agreement on a signed declaration; and subsequently by his conduct.

26. The respondent had argued that the early June documents, properly construed at the time, were an agreement for a four day week, subject to regular review, but without limitation in time. Mr Marshall, however, conceded, when it was put to him, that the documents read objectively, would give the reader the impression they were agreeing only to reduce hours and pay for four weeks and that matters would be reviewed – he honestly agreed with that proposition.

27. There was no limitation issue – this was a series of deductions case. The question posed by Section 13 in these circumstances is, what wages were properly payable to the claimant on each occasion where he alleged underpayment?

28. "Properly payable" in these circumstances means payable pursuant to contractual terms. It follows that the question for the Tribunal was whether the claimant had agreed to vary his terms of employment. I find, in accordance with the concession made, that he initially agreed in writing to reduce hours and pay to four days per week with a particular day off; he then subsequently, and regularly, agreed to continue with that arrangement by his conduct, on occasions varying the day off.

29. The context in which his conduct comes to be construed is well known; these were unprecedented times and many people faced uncertainty. It was those unprecedented times rather than any malevolence or manipulation which resulted in the employer asking for variation. The claimant's conduct is instructive; although towards the end of his employment, he reflected, and presented a grievance alleging a raft of "bullying" conduct by Mr Marshall. On the other hand, at the time, amidst the daily changing circumstances, there communications were constructive, with much good work achieved and tenders won, and he made a pragmatic choice to remain in his employment, not to give notice, and to agree to work a shorter working week. Each week he took his day off; each month he received his reduced salary. He did

not seek to withdraw earlier agreement. He only asserted his agreement was only for the first four weeks, in his communication of mid December, in which he offered to work a fifth day in other duties. Earlier than that he simply expressed a wish for the monthly review to result in a return to five days, as no doubt many others did.

30. Finding agreement of such a variation by conduct is straightforward, when the term or proposal to change is so easily understood and is “lived” every week. It is not a term which in practice only requires conduct consistent with it at the end of the contract – for example the notice provision – or at certain intervals, such as holiday arrangements. It was a simple proposition. The more complex the proposal, the harder it is to find agreement by conduct, as opposed to in writing. In this context, however, where the alternative to agreeing by conduct was withdrawing agreement, or resigning, in a sector deeply affected by the pandemic, no doubt for the claimant, as for others, withdrawing agreement and/or resigning was entirely unthinkable.
31. For these reasons the claimant’s July to December 2020 case fails. It being accepted that there were unlawful deductions through error in January and February of 2021, I make that declaration; and order that sum payable because I accept the unchallenged evidence of the claimant that it has not been paid to him.

Employment Judge JM Wade

Date 1 December 2021