EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4107186/2020

Held remotely by Cloud Video Platform (CVP) on 22 June 2021

Employment Judge W A Meiklejohn

Mr J Perrins	**Claimant** **Represented by:** **Mr R Clarke** **Solicitor**
Prestwick Aircraft Maintenance Ltd	**Respondent** **Represented by:** **Ms D Dickson** **Solicitor**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The Judgment of the Employment Tribunal is as follows –

(a) The claimant suffered an unlawful deduction of wages by the respondent.

(b) In the event that the parties are unable to agree the amount to be paid by the respondent to the claimant in respect of that unlawful deduction, a remedy hearing will be fixed.

REASONS

1. This case came before me for a final hearing, conducted remotely by means of the Cloud Video Platform. Mr Clarke appeared for the claimant and Ms Dickson appeared for the respondent.

2. This is one of eight cases which, subject to one matter described below, raise identical issues. The other seven claimants are –

Name	Case number
Mr L Aitken	4107166/2020
Mr B Geddie	4107170/2020
Mr A Harding	4017173/2020
Mr H Masterman	4107178/2020
Mr R McGregor	4107179/2020
Mr A Scott	4107189/2020
Mr H Sussams	4107191/2020

3. No Order had been made under Rule 36 of the Employment Tribunal Rules of Procedure 2013 for a lead case. However, the parties had agreed that (a) Mr Perrins should be the lead claimant to avoid the need for all of the claimants to give much the same evidence and (b) my determination on liability should allow the parties to resolve the other seven cases.

4. The "*one matter"* referred to above related to the terms of the contracts of employment of the eight claimants. Two of them (Mr Perrins and Mr Masterman) had an older form of contract than the other six. I will refer to these two forms of contract as the *"old contract"* and the "*new contract*".

Issues

5. These were as follows –

(i) What sum of wages was properly payable by the respondent to the claimant on each particular occasion (meaning 28 April 2020 and 28 May 2020)?

(ii) What sum in wages was actually paid by the respondent on each such occasion?

(iii) If the sum actually paid on each occasion was less than that which was properly payable, there has been a deduction from wages. If there has been such a deduction was the respondent nevertheless authorised to make it because it was required or authorised to be made by virtue of relevant provision of the claimant's contract?

(iv) Did the provisions in the claimants' contracts of employment entitle the respondent to pay the claimants (a) a salary for hours worked and (b) no salary for hours they did not work?

(v) If it is decided that the terms in the claimants' contracts of employment did not entitle them to pay the claimants in the way that they did, the respondent has made an unauthorised deduction from wages. If this is the case what amount should the Tribunal order the respondent to pay to the claimant representing the amount of the deduction? Should this amount take into account and give credit for any amounts such as slip days and additional paid time given to the claimants by the respondent during the annual summer shutdown?

6. I should say that I have distilled this list of issues from the parties' written submissions where the list was expressed in slightly different terms by each side. I believe that the list as I have expressed it is not controversial.

Applicable law

7. Section 13 (**Right not to suffer unauthorised deductions**) of the Employment Rights Act 1996 ("ERA") provides, so far as relevant, as follows –

"*(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 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…."

8. Section 14 ERA provides, so far as relevant, as follows –

"(1) Section 13 does not apply to a deduction from a worker's wages made by his employer where the purpose of the deduction is the reimbursement of the employer in respect of –

(a) an overpayment of wages…."

Evidence

9. I heard evidence from the claimant and, for the respondent, Mr S Davies, General Manager (formerly Base Maintenance Technical Manager). I had a bundle of documents extending to 229 pages to which I will refer by page number.

Findings in fact

10. The claimant is employed by the respondent as an Aircraft Engineer. His employment commenced on 17 September 2007. His contract of employment comprised a letter of offer and acceptance both dated 10 September 2007 (71-80). This was the *"old contract"* mentioned above.

11. The respondent is an aircraft maintenance company based at Prestwick Airport. It carries out aircraft maintenance for Ryanair. At the relevant time for the purposes of this case Mr E Cunningham was the respondent's Managing Director.

Impact of pandemic

12. On 18 March 2020 Mr Cunningham sent an email (83) to all of the respondent's staff reporting on a conference call with senior staff at Ryanair. He said that all staff across the Ryanair Group had been "*requested to work the months of April and May on a reduced salary rate of 50%".* Mr Cunningham described the situation facing all airlines as "*dire"* and continued "*and at this stage is the best option available to our Group going forward".* Although not expressed in clear terms I understood this to be Mr Cunningham telling staff that the respondent was intending to do the same as Ryanair.

13. This was at the time when the coronavirus pandemic was taking hold and Covid-19 cases were increasing. Air travel was very significantly impacted by this.

14. The respondent produced a document headed *"Covid-19 PAM Fall-out Q&A – 190320"* (85-86) following a meeting with senior staff. This included the following –

> "*50% pay v 100% Work – A new shift pattern will be introduced which will reduce hours in line with Minimum wage not being breached"*
>
> *"**We are currently looking at a revised shift pattern 5on5off to absorb some RYR line staff which would also allow a reduced working pattern that closer matches 50/50 and should be much better received if it goes ahead"*
>
> *"**1. Will staff be paid back the 50% when the company returns to be profitable.***
> *No, this is being done to save the company and jobs."*

*"**3. Pension – what are the personal and company contributions being made?***

The company will keep paying its % but staff can opt out. Letter to follow"

*"**4. Is the 50% cut – half of take home salary, or basic only?***

50% of basic and 50% of shift pay if applicable"

*"**8. Can/Will slip days already worked be paid out early?***

No, Slip days worked will be paid out during the shut down as is the norm."

*"**9. Is unpaid leave an option and how would this be applied for?***

Yes, unpaid leave is an option, application via H.R."

Slip days

15. The references to "*slip days*" and "*shut down*" were explained within the respondent's *"Rough Guide to PAM"* (104-134). This was the equivalent of a company handbook. It was first introduced in or around 2010 and was referred to in the new contract, which stated in a paragraph to be signed by the employee at the end of the contract (69) –

> *I.have read and understand "Rough Guide to PAM" in full and understand how it affects my terms and conditions of employment. I understand that amendments to this booklet are made periodically and I should ensure that I am familiar with the most up to date version and the relevant sections, which apply, to my employment. I also accept that the "Rough Guide to PAM" does not form part of my contact and is not intended to become incorporated by reference."*

16. Appendix 3 of the Rough Guide (124-125) dealt with *"PAM Annualised Hours Policy"* ("AHP"). The background to this was that from around 2010 Ryanair required maintenance to be carried out between the start of September and

the end of May so that aircraft were available to meet seasonal demand in June/July/August. The AHP contained the following definitions –

"*Working year"*	*The 40 weeks per year between end of August/start of September and end of May/start of June, when PAM is fully operational.*
"Summer shut down"	*The 12 weeks leave between end of May/start of June to the end of* *August/start of September.*
"Slip days/hours"	*Additional rostered hours that employees are required to work over the course of the "working year", which are banked for "summer shut down".*

17. The AHP explained that employees would be on leave for the 12 weeks of summer shut down, of which 10 weeks would be in lieu of annualised hours worked and 2 weeks would be assigned annual leave. Slip days/hours were accrued by employees working additional days/hours (i.e. over and above their normal shift pattern) without additional pay at the time the additional hours were worked. Typically this would be achieved by employees working a 5on/3off shift pattern instead of 4on/4off.

18. The "Terms & Conditions" within the policy included –

> "*You will receive your normal salary payments during "summer shut down", provided you have worked all the slip days/hours assigned to you during the "working year". If you have failed to work all your assigned slip days/hours, then your salary payment will be pro rata during the summer shut down or you may be rostered for duties over this period at the company's discretion."*

"Your rostered duties can fall at any time during this 12-week shut down period and will be assigned to you by management. If it is not operationally possible to roster you during this period, then you will be unpaid for your negative balance."

19. Notwithstanding the status of the Rough Guide, it was not in dispute that the AHP was part of the claimant's terms and conditions of employment.

Communications with staff

20. On 24 March 2020 Mr Cunningham emailed staff (87) stating –

"*We are working on a shift pattern to hopefully start Monday,*
To include a 5 on 5 off shift with a possible early and late starts,
To thin staff to the max."

21. Also, on 24 March 2020 Mr Davies issued a *"Special Base Instruction Covid-19 March 2020"* (89-90). This set out measures to mitigate risk and employ best practice. Mr Perrins spoke of the difficulty in maintaining social distancing due to the nature of the work.

22. On 25 March 2020 the respondent's HR Department issued a letter to staff (91-92) headed "*Temporary Reduction in Salary – Coronavirus".* The letter was in these terms –

"*We are in unprecedented times following the outbreak of Coronavirus which is now a pandemic. This has seen drastic measures being taken by the Government in order to preserve the health and safety of the general public. Businesses have not been immune and substantial changes are required to be undertaken from businesses to try and survive the drastic economic effects. We as a company are no different. The simple reality is that due to a reduction in work, the income for the Company has decreased significantly. Ensuring the long-term future of the Company is our number*

one goal. But to achieve this, we do require the help and support of staff during these troubled times.

The Board have had the incredibly difficult task to trying to find solutions in order to work through these challenging times. Unfortunately, there is no strategy that does not require assistance from staff. The Company is committed to ensure the long-term employment of staff. Redundancies are unfortunately a potential consequence should immediate steps not be taken. We are reluctant to place staff on temporary layoff without pay as the Board appreciate the devastating consequences that this may have on staff and their families.

To reduce the possibility of short-term layoffs or even redundancies, a decision has been taken to (with agreement of staff) reduce wages by 50% from the 1st April until 31st May, it is hoped that salaries will return to normal levels thereafter, we will of course keep you updated. We fully appreciate that this will not be welcome news but considering the alternatives, we feel there is little option. The long-term future of the Company requires drastic and urgent action to be taken. You will be aware of the Government scheme that will mean the Government will pay 80% of wages for a period of up to 3 months. Unfortunately, the Company cannot consider using the scheme. To do so would mean that those employees would not be able to attend work during the period that the Government were subsidizing the wages. This would result in insufficient staff levels that would mean contracts would not be completed. Without these contracts, salary payments after May 2020 may not be met.

Reducing wages by such a level while maintaining working hours will require your written consent. We have therefore attached a short form that we require you to sign. This decision has not been taken lightly but we cannot underestimate the current financial position. If there is no agreement with you to reduce your wages, then you will be placed on short term layoff as per company policy. This will be in line with the Company policy of no pay

during this time. The reason for this is that it would not be fair those who have helped the Company by reducing their wages to attend work while another employee may be paid at 80% of normal levels and not have to attend work.

These unprecedented times also effect the Company Sick Pay Benefit, therefore if you are off sick during the period from 1st April until 31st May you will receive Statutory Sick Pay only as per Government guidelines…."

23. Attached to this letter was an acceptance docket to be signed by the employee confirming his/her agreement to reduce salary by 50% (93).

24. Mr A Marshall sent an email to staff on 26 March 2020 (95-96) detailing the new 5 on 5 off shift pattern. This included early and late shifts. The new shift pattern involved a reduction in working hours.

25. Mr Cunningham sent a memo to staff dated 1 April 2020 (101). This included the following paragraphs –

"*The UK Government introduced a payroll support scheme for those Companies sadly effected by the Covid-19 crisis. Regrettably this does not include payment for those who continue to work and provide essential services. As PAML must continue to provide essential services to maintain aircraft this government payment does not apply to any PAML staff at this stage. While all PAML staff have been paid in full for March, we are responding to this crisis by reducing everybody's pay for April and May. All staff will receive 50% of salary in the April and May payrolls, in accordance with the excess capacity provision within our contracts of employment. This decision has not been taken lightly. Given the queries I have received, some of you thought that there was a choice between this pay cut and layoff. There is no such choice. The stark reality for PAML is to cut our costs for the short term (a pay cut of 50% for at least Apr & May) in the hope that we can survive the Covid-19 crisis and prosper when this business eventually*

returns to some normality. We will also have to review fixed term contracts, third party contractors and those currently on probation.

These are unprecedented crisis times and will be the most challenging in both our history and that of Ryanair, our sole customer whose entire fleet has been grounded. Ryanair is not a legacy airline able to rely on Government bailouts and must rely on its own resources to survive in business. They have also imposed 50% pay cuts for everyone at the airline in April and May and they expect no different from one of their largest suppliers. Equally, PAML, to ensure future employment, and the long-term survival of our Company during this crisis must react and adapt accordingly. How soon Ryanair will return to full service remains uncertain and we may well have a position after May where we will have to reduce capacity, impose unpaid leave or job cuts.

Ryanair like all other UK Airlines has grounded its fleet but continues to maintain a tiny skeleton operation to support EU Govt's, by maintaining some connectivity, and to operate urgent rescue and medical flights. It is critical that PAML maintain aircraft to support these essential service flights and continue with our heavy maintenance so that all aircraft are ready and serviceable when these Government restrictions are lifted, which is in all our interests."

Claimant objects

26. The claimant wrote to Mr Cunningham on 30 March 2020 (135). His letter included the following paragraphs –

"*You wrote to me on 26/03/2020 unilaterally changing my contract of employment in respect of my contractual pay.*

Furthermore, you have informed staff that you are seeking to change our established sickness pay provisions, which I consider to be so long-established and notorious as to represent a contractual term.

I am therefore writing to tell you that I do not accept your unilateral changes to my contractual terms and that my continued attendance at work should not be taken as my acceptance of those changes, which I consider to be a breach of contract….

I am therefore working under protest."

27. The claimant responded to Mr Cunningham's letter of 1 April 2020 by his own letter (undated – 136) which contained the following paragraphs –

"*Following your letter I am reasserting in writing that I do not accept your unilateral changes to my contractual terms and that my continued attendance at work should not be taken as my acceptance of those changes, which I still consider to be a breach of contract.*

I do not accept that the excess hours capacity clause gives you the ability or authority to amend my pay while still requiring my attendance in the workplace. The clause allows, in the absence of work, for you to place me on unpaid leave only….

I remain working under protest."

Respondent cuts pay

28. The respondent implemented the 50% pay cut for the claimant (and the other staff) when paying wages on 28 April 2020 and 28 May 2020. The claimant's normal gross monthly pay at that time was £2968.33. The claimant's payslip for April 2020 (210) disclosed a gross salary payment of £1484.00. His payslip for May 2020 (210) disclosed three elements of gross payment –

(a) £1484.00 of Salary (50% of normal)

(b) £645.16 of "Furloughed worker pay"

(c) £120.96 of "Top up"

29. I understood that items (b) and (c) reflected the fact that the respondent started to participate in the Coronavirus Job Retention Scheme as from 24 May 2020. That did not square with the claimant's evidence, which I found no reason to disbelieve, that he had worked until 31 May 2020. It did however square with the evidence of Mr Davies that the respondent began to participate in the Coronavirus Job Retention Scheme ("CJRS") on or around 24 May 2020.

Claimant raises grievance

30. The claimant submitted a grievance about deductions from his April 2020 pay in terms of his letter to Mr Cunningham of 5 April 2020 (137). His grievance was rejected as was his appeal. I did not believe it was necessary to record the details of these processes for the purpose of the issues I had to decide.

Old contract terms

31. The terms of the claimant's contract (71-80), which was in the form of the old contract, included the following –

"***5. SALARY***

Your salary will be as follows:

Basic salary	*£11,000*
Shift allowance	*£ 4,000*
**Bonus*	*£ 500*
*Total PA (incl *Bonus)*	*15,500.00*"

The clause then set out conditions relating to bonus entitlement and continued –

"And will be paid annually.

Shift allowance is based on the position offered on a Shift pattern to be decided…."

*"**6. WORKING HOURS***

Our normal hours of work are from 08.30 to 17.30 Monday through to Friday with a 30 minute lunch break. However, due to the nature of the business which we are supporting, you must be prepared to work shift duties and additional hours when requested by the Company, in order to meet the requirements of the business and to ensure the proper performance of your duties. You may be required to use a swipe card system to record your hours of work."

*"**15. LAY OFF***

Where circumstances outside the control of the Company prevent it conducting its normal business, such as might occur due to industrial disputes, the Company reserves the right to lay you off (in accordance with the Employment Rights Act 1996 or any statutory modification thereof), without pay, if this is considered necessary. The Company will endeavour to give a weeks notice in such circumstances."

*"**21. DEDUCTIONS***

You hereby authorize the Company to deduct from your pay (including holiday pay, bonus and pay in lieu of notice) any amounts which are owed by you to the Company, which for the avoidance of doubt would include but is not limited to any overpayments, monies for staff car parking, the provision of your uniform and the provision of replacement ID cards."

New contract terms

32. The example of the new contract provided in the bundle (61-70) was that of Mr Sussams. It included the following –

*"**5. BASIC PAY***

*You will be paid a basic gross annual salary of £**16,100** (sixteen thousand, one hundred pounds) per annum. Salary will accrue from day to day and is payable by equal monthly instalments on the 28th day of each month into your bank account.*

Your salary will be subject to annual review each April, at the Company's absolute discretion. Salary reviews will be based on your performance and that of the Company. No automatic increments or salary increases apply to your employment."

*"**6. SHIFT ALLOWANCE***

*You will receive shift allowance of four thousand pounds (**£4000**) gross per annum while working the current Mechanic shift pattern, which will accrue from day to day and is payable in equal monthly instalments. You do not have any contractual right to any particular roster pattern or corresponding shift allowance which are at the Company's discretion and will be allocated to you to meet the needs of the business. In the event of this shift pattern changing*

you will no longer be entitled to this specific allowance, but will be paid a new allowance based on your new shift pattern at the company's discretion. No shift allowance is payable if you are assigned standard business hours."

*"**9. <u>WORKING HOURS</u>***

Our normal hours of work are from 08.30 to 17.30 Monday through Friday (40 hours per week), with a 60 minute lunch break. However, due to the nature of the business which we are supporting, you must be prepared to work shift duties and additional hours when requested by the Company, without additional remuneration, in order to meet the requirements of the business and to ensure the proper performance of your duties. For the avoidance of doubt this may include Saturdays, Sundays and public holidays. You may be required to use a swipe card system to record your hours of work.

The company operates an annualised hours program and you may be required to work hours as part of this program."

*"**23. <u>EXCESS CAPACITY</u>***

Due to the inherent uncertainty of circumstances within the industry, situations can arise where the Company has excess capacity (for example, reduced business activity). If the Company is required to reduce activity levels for any reason, it is a condition of this job offer that you agree and accept the right of the Company, at its sole discretion, to give you compulsory unpaid leave for the duration of the period the Company considers as excess capacity. The Company will give you as much notice of this eventuality as is reasonably practicable. In accordance with the Employment Rights Act 1996 you will be

given the statutory minimum payment applicable (known as the "guarantee payment"). For the avoidance of doubt no claim for further payment can be made.

During any period of compulsory unpaid leave as set out under clause 23, all other terms in your contract of employment (save for payment of wages) will remain in force.

It is a condition of this contract that the Company reserves the right at its sole discretion to terminate your employment, giving you the statutory period of notice."

*"**24. <u>LAY OFF</u>***

The Company reserves the right to lay you off (in accordance with the Employment Rights Act 1996 or any statutory modification thereof), without pay, if this is considered necessary.

If it is necessary to lay you off because the Company's workload or market conditions mean that it is not possible to provide you with work, the Company will give you three days' notice of any such lay off or as much notice as is practicable in the circumstances, whichever is shorter. The decision as to which employees to lay off will be at the Company's sole discretion; however, it will have regard to the geographical location of the work, the current skill requirements, the equitable distribution of lay offs amongst the workforce and the economic, technical and organisational considerations of the business at the time.

The Company reserves the right to lay you off without notice due to weather conditions or other circumstances beyond the Company's control for such time as these conditions or circumstances apply.

In circumstances where the Company is required to lay you off you will receive a Guaranteed Payment in accordance with the Employment Rights Act 1996 (or any statutory modification thereof)."

*"**31. <u>DEDUCTIONS</u>***

You hereby authorize the Company to deduct from your pay (including holiday pay, bonus and pay in lieu of notice) any amounts which are owed by you to the Company, which for the avoidance of doubt would include but is not limited to any overpayments, monies for staff car parking (following the issue of a parking permit), the provision of your uniform, outstanding training bond and the provision of new or replacement ID cards."

*"**37. <u>GENERAL TERMS AND CONDITIONS</u>***

This contract constitutes the only agreement between you and the Company ….and replaces/supersedes any previous agreement, written, verbal or implied. In the event of any conflict between verbal agreements and this contract then the provisions of this contract will prevail. Any amendments or additions to the terms of this contract shall be confirmed in writing by the Company and unless so confirmed and agreed shall not be binding on the parties."

Negative balance – slip days

33. Covid-19 affected the whole of the respondent's operation. One consequence was that a significant number of staff were in negative balance in respect of slip days. The respondent's participation in the CJRS from May 2020 meant that staff could not be rostered for duty to work back that negative balance. Payments made to staff from June 2020 onwards were not reduced to reflect being in negative balance. The effect of that in the case of the claimant was that he had a negative balance of 8 days, but the *"unpaid for your negative*

balance" provision in the Terms and Conditions of the AHP had not been applied to him.

Summer shut down – 13th week

34. Mr Davies said that the summer shut down was nominally for 12 weeks but it was *"a floating period"* and *"a 13th week exists".* It depended on when the August bank holiday fell. Mr Davies continued "*We don't penalise staff. We give more time off than staff actually accrue".* He said that the respondent had *"not pressed the issue"* and that "*no-one would expect to pay back the pay for the 13th week".*

35. My view of this was that the dates of the summer shut down were dictated by (a) Ryanair's summer flights schedule and (b) how the calendar functioned from year to year, including when the August bank holiday fell. Notwithstanding the reference in the AHP to "*12 weeks"* the respondent's practice was to allow staff a 13th week and to pay them for this. I considered that this was done at the respondent's discretion, in other words it had not become a contractual entitlement. I also considered that, where that discretion was exercised in favour of allowing a 13th week, it applied to all staff.

Negotiation

36. It was apparent from the notes of the claimant's grievance appeal (147-149) that there had been some negotiation. In the course of the grievance appeal, the claimant's trade union representative was recorded as saying "*I can accept the 8 days but not the 6 days".* "*8 days"* was a reference to the claimant's negative balance of slip days and "*6 days"* was a reference to his having been paid for the 13th week of summer shut down.

Submissions

37. At the conclusion of the evidence on 22 June 2021 it was agreed that, although the case had been set down for two days, both Mr Clarke and Ms Dickson were content to proceed by way of written submissions. Both duly provided those submissions and I am grateful to them for the evident care taken in their preparation. The submissions are available in the case file and I do not propose to rehearse them here. I will however set out the parties' respective positions.

Claimant's position

38. The claimant had suffered an unauthorised deduction from his pay when the respondent imposed the 50% pay cut in April and May 2020. He did not accept the respondent's contention that they were contractually entitled to make the deduction.

39. The construction of his contract of employment was a matter of law. I should construe the claimant's contract in accordance with the guidance in ***Patersons of Greenoakhill Ltd v Biffa Waste Services Ltd [2013] CSOH 18*** (to which I refer below).

40. The lay off clause in the claimant's contract did not give the respondent authority to reduce his pay without his consent. It gave the respondent the right to place the claimant on unpaid leave but not to reduce his pay.

41. Per ***Wandsworth London Borough Council v D'Silva and another 1998 IRLR 193***, clear language is required to give one party the right to vary a contract unilaterally. The lay-off clause in the claimant's contract did not give the respondent the right unilaterally to reduce the claimant's pay. It was fanciful of the respondent to suggest that the lay-off clause was capable of enabling the respondent to act as it did, as evidenced by the fact that the respondent sought to consult with staff before imposing the contract variation.

42. If the respondent was not contractually entitled to reduce the claimant's wages, it had to follow that the claimant had suffered an unlawful deduction of wages.

43. The claimant's position on offsetting the slip days was that this was not permissible in this type of claim. All the Tribunal could do was make a declaration that unauthorised deductions had been made and order the respondent to pay the claimant an amount in respect of the deductions. The contract made no provision for such an offset.

44. If the Tribunal found that it could offset the value of the slip days, such an offset could only be made during the period of the summer shut down. The AHP provided for *"salary payment pro rata during the summer shut down".* It did not allow for an offset in the months of April and May and had no bearing on the amount "*properly payable"* in those months.

45. I deal with Mr Clarke's position in respect of the excess capacity clause below.

Respondent's position

46. The respondent had excess capacity during April and May 2020. The excess capacity clause permitted the respondent to place the claimants (ie those working under the new contract) on a period of unpaid leave during a period when they did not work during a period when the respondent had excess capacity. The clause was silent on the ways in which the respondent could do this.

47. The respondent's business was maintaining aircraft. Excess capacity clauses were commonplace in that industry. Their effect was to reduce pay to zero only for those periods when the respondent did not have work for the claimant to do. To take the view that the clause allowed only two options – being at

work or at home on unpaid leave - failed to take into consideration the numerous work arrangements in use at the respondent's site and the manner in which the AHP operated.

48. A sensible interpretation of the excess capacity clause was that it permitted the respondent to utilise the clause only as far as required to meet any period of real excess capacity. This should not prevent the respondent from using a combination of paid time at work alongside periods of unpaid leave or increased time away from work. The clause meant that the respondent was entitled to place employees on periods of unpaid leave during a period of excess capacity. It did not state how the respondent must structure this nor limit their flexibility. The respondent did not ask its employees to work 100% of their hours for 50% of their pay. It tried to put in place a working pattern where employees worked close to 50% of their hours for 50% of their pay.

49. The old contract contained a lay off clause. A period of lay off need be no more than one day. However, the respondent did not want to lay off the claimant, i.e. sending him home and his receiving no pay. They wanted to do better than that. They tried to match work with pay. The figures produced by the respondent showed that the claimant had an average of 40.95% unworked hours in April/May 2020. The excess capacity and lay off clauses permitted employees to be on unpaid leave for part of their working hours.

50. The effect of changing the claimant's shift pattern from 5 on/3 off to 5 on/5 off was to add two days of unpaid leave into each shift cycle he worked. If the Tribunal found that the claimant had suffered unauthorised deduction of wages, that should be limited to the amount by which the claimant worked in excess of 50% of his normal hours. In the claimant's case that was 17.92%.

51. The payments to the claimant in respect of (a) slip days during June/July/ August 2020 and (b) in respect of the 13th week of summer shut down were overpayments. As such the respondent was entitled to recover them. The AHP did not restrict application of the pro rata provision (relating to non

payment of a negative balance) to the summer shut down period. Having a negative balance put an employee on notice that the "*missing"* slip days would have to be worked or repaid.

Discussion and disposal

52. Both Mr Clarke and Ms Dickson reminded me of the approach to be taken to interpretation of the claimant's contract of employment. Mr Clarke did so by reference to ***Biffa*** where Lord Hodge said –

"*The court, when construing a contract, considers the language that the parties have used. It uses the concept of a reasonable person, who has all 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. It ascertains what that reasonable person would have understood the parties to have meant by their use of language. In doing so, the court has regard to the relevant surrounding circumstances, being the circumstances which were reasonably within the knowledge of both parties, or all of the parties in a multilateral contract."*

53. Ms Dickson set out the main principles of contract interpretation as follows –

- *Loyalty to the text.*
- *Whole contract approach. Consider the remainder of the contract or instrument in which the provision appears.*
- *Context. Consider the factual, legal and regulatory background to the contract or instrument.*
- *Business common sense. A court must give appropriate weight to business common sense, or the commercial purpose of the contract or provision.*

- *Reasonableness. Avoid giving literal effect to the words of the contract where that would lead to very unreasonable results.*

- *In each case of contractual interpretation it is necessary to balance these potentially competing principles. It has been stressed that this is nevertheless a single exercise, which considers the practical consequence of possible readings (per* ***Wood v Capita Insurance Services Ltd [2017] UKSC 24****).*

54. Before addressing the agreed issues, I considered the relevant provisions of the old contract and the new contract (see paragraphs 31 and 32 above). While the new contract was not applicable in the claimant's case, it was a matter of agreement that I should set out my views on the correct interpretation of the relevant clauses of the new contract to assist the parties' representatives to resolve the claims brought by the other claimants.

The old contract

55. I found that the combined effect of the Salary and Working Hours clauses was that the claimant was entitled to a basic salary which did not vary with hours worked. He was required to work "*shift duties and additional hours when requested*" by the respondent. There were normal working hours in the sense that the number of hours to be worked each week could be calculated ("*08.30 to 17.30 Monday through to Friday with a lunch break of 30 minutes"*). When these hours were to be worked could vary according to the shift arrangements in place from time to time. There was nothing said about the hours of work being variable or capable of being changed by the respondent other than the reference to *"shift duties".*

56. The claimant's remuneration was expressed as a salary and not by reference to an hourly rate. There was no mention of the salary or shift allowance changing if the hours of work or shift pattern changed. Provided the claimant

made himself available to work his contracted hours, he was entitled to his contracted salary.

57. I found that the Lay Off clause was clear and unambiguous. The respondent had the right to lay the claimant off where circumstances outside its control prevented it conducting its normal business. The coronavirus pandemic, its effect on the airline industry (and Ryanair in particular) and the Government's reaction to it were all such circumstances.

58. "*Lay-off"* is defined in section 147(1) ERA –

"For the purposes of this Part an employee shall be taken to be laid off for a week if –

(a) he is employed under a contract on terms and conditions such that his remuneration under the contract depends on his being provided by the employer with work of the kind which he is employed to do, but

(b) he is not entitled to any remuneration under the contract in respect of the week because the employer does not provide such work for him."

59. This was not helpful because (a) the terms and conditions of the claimant's contract were not such that his remuneration depended on his being provided with work and (b) the definition applies only *"for the purposes of this Part",* ie Part XI Redundancy Payments etc ERA.

60. Referring to www.gov.uk, I noted this explanation of lay off –

"*Your employer can ask you to stay at home or take unpaid leave if there's not enough work for you.*

A lay-off is if you're off work for at least 1 working day…."

61. I considered that the Lay Off clause in the old contract gave the respondent the right to tell the claimant to stay at home (or at least not attend work) without pay. That is what a reasonable person would understand the clause to mean.

62. I also found that the Deductions clause was clear and unambiguous. It authorised the respondent to deduct from the claimant's pay any amount owed to the respondent including overpayments of salary.

The new contract

63. Looking at the combined effect of the Basic Pay, Shift Allowance and Working Hours clauses, I came to a similar conclusion as for the old contract. Those of the other claimants who worked under the new contract were entitled to a salary which did not vary with hours worked. This point was reinforced in the new contract by the addition of the words "*without additional remuneration"* in the Working Hours clause. Had it been necessary to decide the point, I might have been persuaded that this implied a term into the new contract that if hours were reduced, remuneration would not be reduced (except with the employee's agreement), which would be the other side of the same coin.

64. The normal hours of work were stated to be 40 per week. There was a requirement to work "*shift duties and additional hours when requested by the Company".* As with the old contract there was no mention of (basic) salary changing if the hours of work or shift pastern changed. However, unlike the old contract, there was provision for the shift allowance changing if the shift pattern changed – *"In the event of this shift pattern changing you will no longer be entitled to this specific allowance, but will be paid a new allowance based on your new shift pattern at the company's discretion".* I pause to observe that the respondent might have invoked this provision to reduce the shift allowance for those on the new contract when changing the shift pattern from 5 on/3 off

to 5 on/5 off but (a) this would not have been possible for employees working under the old contract and (b) arguably the exercise of the company's discretion might not be unfettered.

65. That brought me to the excess capacity clause. Mr Clarke referenced a passage from Mr Davies' evidence – he had accepted in cross examination that the clause *"does not say we can touch their money".* His submission (based on ***Biffa*** and ***D'Silva***) was that *"no reasonable person with all of the relevant background knowledge which would reasonably have been available to the parties in the situation in which they were [in] at the time of the contract would have understood the parties to have agreed that the [excess capacity clause] gave the Respondent the authority to reduce the Claimants' wages".*

66. Clear language was required to reserve to the respondent the unusual power to reduce the claimants' wages. On any plain reading, the excess capacity clause only gave the respondent the contractual authority to place employees on unpaid leave during periods of excess capacity. There was no mention of reducing pay. Mr Clarke argued that time off between shift cycles (ie the extra two days off when the pattern changed from 5 on/3 off to 5 on/5 off) was different from compulsory unpaid leave.

67. Ms Dickson's arguments in respect of the excess capacity clause are set out at paragraphs 46-48 above. She was in effect arguing that I should apply business common sense and interpret the clause as entitling the respondent to place employees on unpaid leave during the period the respondent considered as excess capacity. She referred to ***Rainy Sky SA and others v Kookmin Bank [2011] UKSC 50***. At paragraph 21 of his judgment in that case Lord Clarke said –

"*if there are two possible constructions, the court is entitled to prefer the construction which is consistent with business common sense and to reject the other."*

68. I could see some force in this argument, as least to the extent of treating the two extra days off (arising from the change in shift pattern) as unpaid leave. However, I noted that Lord Clarke also said at paragraph 23 of his judgment –

"*Where the parties have used unambiguous language, the court must apply it."*

69. Lord Hodge in ***Biffa*** refers to the parties' situation at the time of the contract. I had no evidence about this beyond the fact that the respondent had offered the claimant employment on the terms set out in the old contract and he had accepted that offer. However, business common sense indicated that (a) the old contract was the form of contract used by the respondent at the time they employed the claimant in September 2007, (b) the new contract was the form of contract used by the respondent at the time they employed Mr Sussams in August 2013 and (c) it was highly unlikely that the formation of these contracts had involved any element of negotiation of the terms. I considered that this pointed towards construing the contracts contra proferentem, so that if the excess capacity clause (or any other clause) was ambiguous, it should be construed against the respondent.

70. My view of this was that, despite Ms Dickson's valiant efforts to persuade me otherwise, the excess capacity clause was not ambiguous and was capable of only one interpretation. If the respondent had excess capacity and required to reduce capacity, it could place the employee on unpaid leave for the duration of the period considered by the respondent to be excess capacity.

71. The only sensible interpretation of Mr Cunningham's memo of 1 April 2020 (see paragraph 25 above) was that the respondent considered April/May 2020 to be a period of excess capacity. The change in the shift pattern from 5 on/3 off to 5 on/5 off did not signify that only the extra two days off were periods of excess capacity. I do not say that the respondent could not have invoked the clause by designating the two extra days off as a period (or rather periods) of excess capacity, but that was not what they actually did.

72. It was not tenable to argue that, since the clause was silent on how the respondent might structure the unpaid leave, the arrangements they made came within the clause. Patently they did not. It was clear from the terms of the respondent's letter to staff on 25 March 2020 (see paragraph 22 above) that they recognised the need for employee consent to reduce pay – "*a decision has been taken to (with agreement of staff) reduce wages by 50%".* The excess capacity clause did not authorise a reduction in pay. It only authorised unpaid leave. If the respondent genuinely believed that the clause authorised a 50% pay cut, there would have been no reason to seek employee consent to the pay cut (at least for those on the new contract).

73. In respect of the Lay Off and Deductions clauses in the new contract, I came to the same view as for the equivalent clauses in the old contract (see paragraphs 61 and 62 above). The Lay Off clause in the new contract was simply an expanded version of the one in the old contract.

The issues

74. Having come to the views set out above, I addressed the issues.

What sum of wages was properly payable by the respondent to the claimant on each particular occasion (meaning 28 April 2020 and 28 May 2020)?

75. As the 50% pay cut imposed on the claimant was not authorised by a relevant provision of his contract and he had not previously signified in writing his agreement or consent to the making of the deduction (in terms of section 13(1) ERA) the deduction was unlawful and the amount properly payable to the claimant (in terms of section 13(3) ERA) was his normal pay without deduction.

What sum in wages was actually paid by the respondent on each such occasion?

76. The sums actually paid were those disclosed on the claimant's payslips for April/May 2020 (210).

If the sum actually paid on each occasion was less than that which was properly payable, there has been a deduction from wages. If there has been such a deduction was the respondent nevertheless authorised to make it because it was required or authorised to be made by virtue of relevant provision of the claimant's contract?

77. No, there was no provision in the claimant's contract (the old contract) which authorised the deduction.

Did the provisions in the claimants' contracts of employment entitle the respondent to pay the claimants (a) a salary for hours worked and (b) no salary for hours they did not work?

78. No, see paragraphs 55-56 and 63-64 above.

If it is decided that the terms in the claimants' contracts of employment did not entitle them to pay the claimants in the way that they did, the respondent has made an unauthorised deduction from wages. If that is the case what amount should the Tribunal order the respondent to pay to the claimant representing the amount of the deduction? Should this amount take into account and give credit for any amounts such as slip days and additional paid time given to the claimants by the respondent during the annual summer shutdown?

79. If I were making an order for payment of the amount of the unauthorised deduction from the claimant's wages, the starting point would be the difference between normal monthly pay for April/May 2020 and the amounts actually paid. This is evident from his payslips.

80. So far as the amounts in respect of slip days and the 13th week are concerned, I came to the view that these were not matters which I could properly decide. If the respondent believes these were overpayments it could, at any time since the payments were made, have deducted the alleged overpayments from wages otherwise due to the claimant. It had not done this, but arguably it could still do so. Until that happens, the question of whether these amounts can lawfully be deducted is hypothetical, and the Tribunal cannot determine this as a hypothetical question. It can only determine whether the deductions are unauthorised after they have actually been made.

81. I appreciate the parties will regard this as unhelpful as they had hoped that my decision would allow them to resolve all outstanding issues. I am sorry for that but my view is that the parties have asked the Tribunal to decide a matter which lies outside its jurisdiction. Section 13 ERA does not allow me to determine whether a deduction would be unauthorised, were it to be made.

82. As I said at the hearing, I appreciate that the respondent was facing unprecedented circumstances in March 2020 and that it acted in good faith to try and find a way forward which best addressed those circumstances. I also appreciate the perception of inequity that those who opposed the 50% pay cut and chose to litigate against the respondent will end up better off than those who accepted it.

83. The respondent could have invoked the lay off clause in the claimant's contract on the basis that there were circumstances outwith the respondent's control which prevented it conducting its normal business. However, in terms of his memo of 1 April 2020, Mr Cunningham chose to rule out layoffs, no doubt for commercially sound reasons. Unfortunately for the respondent the law is not on their side in the circumstances of this case and, although that produces an outcome which may seem unjust, it is the outcome which the law requires.

Employment Judge: W Meiklejohn
Date of Judgment: 6 July 2021
Entered in register: 19 July 2021
and copied to parties