RM

EMPLOYMENT TRIBUNALS

First Claimant: **Mr Colin Carman**

Second Claimant: **Mr Husan Sahota**

Respondent: **British Airways PLC**

Heard at: **Watford, by Cloud Video Platform ("CVP") (Virtual Region)**

On: **20th, 21st and 22nd February 2023**

Before: **Employment Judge M Yale**

Representation:

For the Claimants: **Mrs Carman, the First Claimant's wife**

For the Respondent: **Mr Cainer (Counsel)**

JUDGMENT

1. The First Claimant's claim for unauthorised deductions from wages is dismissed.

2. The Second Claimant's claim for unauthorised deductions from wages is dismissed.

3. The Respondent is ordered to pay the Second Claimant a redundancy payment of £254.47.

4. The Second Claimant is entitled to 4 weeks' notice pay, less any appropriate deductions under the terms of his contract of employment.

5. The Second Claimant's claim for holiday pay is dismissed.

REASONS

Claims and Preliminary Matters:

1. The two Claimants brought three claims against the Respondent. The first two claims, 3312852/2020 and 3312853/2020, are both claims of Unauthorised Deductions from Wages, one each for each Claimant. The third claim, 3300548/2021, is a claim of Unfair Dismissal and a Notice Pay claim brought against the Respondent by the Second Claimant in relation to his subsequent redundancy. Liability in that claim was determined by Employment Judge Gumbiti-Zimto on 14th January 2022 but issues in relation to quantum overlapped with the issues in the Unauthorised Deductions claims and therefore the issue of damages was left to be determined at the conclusion of the Final Hearing in relation to those matters.

2. At the start of the hearing I was asked by the Respondent to determine whether the Claimants should be allowed to rely on Economic Duress in relation to the signing of the COT3 agreements. Employment Judge Hyams, in a Case Management Hearing on 28th March 2022, directed that if the Claimants wished to advance duress, they must state precisely the circumstances in which they say they are entitled to rely on the defence of duress.

3. It was common ground nothing further had been forthcoming. The Claimants submitted that they thought they had complied with the order, as the statements of the Claimants set out the circumstances in which the COT3 agreements were signed. I note, however, that Employment Judge Hyams had those statements when making Order. Nonetheless, I was concerned that, as both Claimants were not legally represented, they should not be prevented from advancing their case. I took into account that they believed they had set out what was needed and there was nothing in writing setting out to them, in terms, the issues they needed to address with reference to duress. In the circumstances, I decided that whether or not duress was made out was a matter of evidence and a determination could be made, after hearing evidence, whether or not that evidence fully met the legal test for duress.

4. It became apparent during the course of the hearing that there were significant issues with the way in which some of the calculations in relation to overpayment and deductions in respect of those overpayments had been undertaken by the Respondent, particularly in relation to whether they should have been gross or net. Further, some anomalies on the payslips were identified by the Claimants, such as Mr Carman's pensionable pay being nearly three quarters of a million pounds, according to one payslip. It was therefore agreed that I would deal with liability only in relation to the heads of claim affected by those issues and liability and quantum (if appropriate) where no such issues arose.

5. In have therefore determined the following issues:

    a. The claims by both Claimants for unauthorised deductions from wages.

    b. The amount of the redundancy payment owned to the Second Claimant.

c. The entitlement of the Second Claimant to Notice Pay (and the duration of the unpaid notice) and whether terms of the Second Claimant's contract operated to allow the Respondent to deduct outstanding salary overpayments from that sum.

6. I have not been able to determine the quantum of Notice Pay, if any, still owing to the Second Claimant. By virtue of the other findings of fact I have made, the quantum of Notice Pay is the only issue left to resolve.

Findings of Fact:

7. During the course of this Final Hearing I heard evidence from the First Claimant and the Second Claimant. I also heard from two witnesses on behalf of the Respondent, Sharon Walsh and Monica Bhambri, who spoke about the efforts to recover alleged overpayments and how the alleged overpayments and other sums were calculated, respectively. I was further provided with a Core Bundle, containing nearly 1,000 pages of documents, and a Supplementary Bundle, which included the ET1 forms, the ET3 forms, the judgment in relation to the Second Claimant's Unfair Dismissal Claim and a Case Management Order from Employment Judge Hyams, dated 28th March 2022.

8. The First Claimant began working for them on 24th September 2007 as a Ramp Agent. The Second Claimant began working for them on 20th April 1998 as a Ramp Agent. Each was provided with a Contract of Employment, setting out their terms and conditions. It is not disputed that the Claimants were both employees from those respective dates. Thereafter, both Claimants worked their way up the pay scales. By 2017 both the Claimants worked in the Paint Bay, the second Claimant having moved there in August 2009 (having received a letter varying his contract, rather than a new contract). Both Claimants were, by this time, earning £29,556.

9. In 2017 the Respondent decided to outsource the Claimant's roles to another company, International Aerospace Coatings Limited. The implications of that outsourcing was that the Claimants would have been transferred to International Aerospace Coatings Limited in accordance with the TUPE provisions. However, International Aerospace Coatings Limited planned to move the work overseas and the Claimants would therefore have been made immediately redundant.

10. The Respondent's position is that they wanted the Claimants to have some options and, as an alternative, they were each given the opportunity to remain employed with the Respondent in a Ground Operations role. Each of the Claimants was offered that alternative role in an identical document (save for the person to whom it was addressed), setting out a salary of £18,235.00, a reduction of £11,321 to their current annual salary. Each of the documents sent to the Claimants was dated 16th March 2017. On 23rd March 2017 the Second Claimant signed that document. The First Claimant signed the following day, 24th March 2017. There is no dispute that those documents were provided and signed, or what was contained in those documents. The claims in relation to Unauthorised Deductions and unpaid Notice Pay arise from the true effect of those documents.

11. Each Claimant says they made clear, verbally, at the time of signing, that they were signing the document to keep the position open but were not agreeing to the revised salary. They both say that they were told that, if they did not sign the document, the position would

go to someone else and they would lose the opportunity to take it. Each of the Claimants says that the salary was subject to further negotiation. The Claimant's case is that they were to continue receiving their original salary whilst the negotiations were ongoing. They say there were various conversations with managers and Union representatives and, so far as they were concerned, their salaries were never reduced. Each of the Claimants says that the document they signed was no more than a letter and did not amount to a formal contract such as to change their contract terms.

12. The Respondent's position is that, in signing the documents, containing the offer of the new job, the Claimants accepted that new job and accepted the terms and conditions that came with that new job as set out in the document. The Respondent concedes the Claimants continued to be paid their old salary for over three years but say this was due to an administrative error and should not have happened. The Respondent says the Claimants were overpaid for that entire period of time and any deductions that were made were made to reimburse the Respondent for the inadvertent overpayment of wages.

13. The documents sent to, and signed by, the Claimants were contained within the Core Bundle and I was referred to them during the course of the hearing. Each document is in the form of a letter but, under the date, it is headed "Variation of Contract…". The body of the document offers a "permanent full time position as a Ground Operations Agent based at London Heathrow with effect from 4th April 2017". The document sets out the grade as "Level 1", a basic salary of £18,235 per annum, plus any shift allowance. The document continues: "In addition to this letter, the terms and conditions applicable to your employment are set out in the GSS NSP collective agreement, which is incorporated into your contract of employment and the Employment Guide, which contains a number of contractual policies, which are also incorporated into your contract of employment."

14. At the bottom of the document, under the signature of the Head of Heathrow Resource Planning, is a section in which the Claimants were to sign, and did sign, to accept the job offer. That section reads: "I have read, understand and confirm my acceptance of the offer outlined above, including the incorporation into my Contract of Employment of the collective agreement and the parts of the Employment Guide described."

15. In my judgment it is clear, when this document was drafted, it was intended to vary the existing contract of employment of the Claimants, whilst retaining the unaffected clauses of their original employment contract. As the heading sets out, it was intended to be a variation of the original contract. That is not accepted by the Claimants but it is worthy of note that the Second Claimant's employment contract was varied in such a way when he became an Aircraft Painter in August 2009.

16. The Claimants also say there were other terms of their original contracts that prevented a reduction in salary. That is true but, in my judgment, the Variation of Contract documents were drafted in such a way that any such clause of the original contract was varied by acceptance of the Variation of Contract document.

17. Determining the purpose of the document, which the Claimants had the opportunity to take away and read (there were several days between them being sent that document and them signing it), does not resolve that issue. The Claimant's case is that, irrespective of what the document itself actually says, they verbally agreed with the Respondent that they were only signing so the position would be earmarked for them but their salary would remain the same until negotiations over their salaries was complete.

18. I heard evidence on this issue. It is right to observe, as pointed out by the Respondent, that the terms of the document are clear and there is no qualification endorsed on the document to indicate the true nature of the agreement made at the time was different from what the document says on its face. Of course, contractual terms can be made orally or in writing, so the absence of such an endorsement is not conclusive but an aspect of the evidence I bear in mind. The Variation of Contract was in such clear and unambiguous terms in relation to salary that, had there been an agreement the Claimants salary would remain at the higher level whilst discussions were ongoing, I would have expected one side or the other to endorse that on the document and both to sign it.

19. Both parties took me through e-mail correspondence immediately before and following the signing of the Variation of Contract documents. The First Claimant was the author or recipient of a number of these e-mails but it was common ground between the two Claimants that, as they were in the same position, they were discussing matters amongst themselves and the First Claimant often spoke for both of them.

20. In an e-mail of 23rd March 2017 to the Human Resources Recruitment Officer at the Respondent company, Geraldine McDonagh, the day before the First Claimant signed his document, the first Claimant said he would like to take the position providing the information they were waiting for was "OK" and he was waiting for additional information on his complete package from the Respondent. He said he was not aware if he was supposed to sign before he had all this information and asked for advice. He said that if it was not what he was expecting, he could retract and take the redundancy package. He spoke of a conversation with "Carl".

21. In evidence the First Respondent said he had been told he could revert to the redundancy package if he was not happy and he spoke about conversations with Geraldine McDonagh but these were not documented. I have not been provided with any reply by Geraldine McDonagh to that e-mail.

22. In my judgment the contents of that e-mail do provide some support for there being uncertainty about the full terms of that job offer and that the Claimants were seeking clarity. However, the e-mail made no specific reference to salary, which I would have expected if that is the issue in dispute, particularly given the clear terms of the Variation of Contract letter. The First Claimant then signed the Variation of Contract document the following day without anything further in writing. The Second Claimant signed the document on the day of this correspondence and it is not clear whether this particular e-mail was one that was intended to be sent on behalf of both Claimants.

23. In an e-mail of 30th March 2017 from the First Claimant to Bill Kelly, General Manager, the First Claimant referred to having "had to accept a logistics role as I did not want to leave British Airways" and later saying: "The logistics offered have put us on new contract conditions, with no increments and we have also been put on a new starter's salary which means I will be losing £12,000 a year, which is not a great feeling." He goes on to talk about how he feels like "we" are being treated like new starters in the company again. He later says: "and I feel that even though I am losing a considerable amount of money every month…". In that e-mail he asked about going to work in Baggage, where he had worked previously, and said that would mean that "even though I am losing a considerable amount of money every month, I will be working back with people I know and have worked alongside." In evidence the First Claimant confirmed why there were reasons other than

money that he would want to work in Baggage instead of in the role he had been offered and that a starting salary in Baggage would be the same as in the role he had been offered. In that e-mail, the First Claimant speaks about the Second Claimant and the position they are jointly in. I therefore infer that, whilst there is some switching between "I" and "we" this is one of the e-mails that was written by the First Claimant on behalf of both Claimants and they had discussed, at least in general terms, its contents. Indeed, that was confirmed in evidence by the Second Claimant.

24. Bill Kelly responded to that e-mail on 3rd April 2017 explaining that, if a move could be facilitated (and he could not promise anything) it would be on the current terms and conditions.

25. On 3rd April 2017 the First Claimant (again it is accepted this was also sent on behalf of the Second Claimant) sent an e-mail to Jason Mahoney, Managing Director of Engineering, in very similar terms, referring to "now that we have a £12,000 reduction in salary a year, when we move to this logistics job with no incremental scale," a job the Claimants were due to start the following day.

26. Having considered the documents each of the Claimants signed on 24th March 2017 and 23rd March 2017, respectively, on the balance of probabilities, I find that both Claimants accepted a new role on the terms contained within those documents. In my judgment the documents were headed "Variation of Contract" and that is exactly what they were. There is no documentary evidence to support the Claimants' contentions that these documents were varied by any oral agreement and the e-mails sent by the Claimants during that time period, support the contention by the Respondent that they knew they were to me moving to a new role on a lesser salary as of 4th April 2017. The Claimants place heavy reliance on the word "will" in some of the e-mails but I find the future looking aspect of the e-mails was with reference to the affect it would have on them. Whenever the e-mails refer to the loss of money, the present or past tense was used.

27. There is e-mail correspondence on 5th April 2017 correcting an issue with holiday entitlement, as the Claimants were not new starters and were entitled to retain their holiday pay entitlement. The Claimants rely on this to show they were not on new terms. It is common ground that they were not new starters but the Respondent says that, due to the restructuring within the company, they were being redeployed to new roles at the salary appropriate for that role. In my judgment this e-mail does nothing to assist on the issue of rate of pay.

28. On 6th April 2017 the Claimants were invited to meeting for the purposes of signing a so-called COT3 agreement. Present at that meeting were both Claimants, a representative of the Respondent, a representative of International Aerospace Coatings Limited, two Union representatives and two ACAS representatives.

29. The Claimants both said that they did not realise what the meeting was about until they arrived. They thought that the consultation process was still ongoing and did not appreciate they would be asked to sign any such agreement until they arrived in the meeting. The First Claimant says he was told he could not take the agreement out of the room to speak to his wife or a solicitor. He said he was told that he had to stay in the room until he signed the agreement. He was advised that, if he wanted a solicitor, he would need to contact them whilst still in the room. He said it as difficult for him to read the agreement because of his dyslexia. He said he felt under a considerable amount of pressure and

duress and was suffering from anxiety. He said he was being made to sign an agreement he did not understand. He said one of the ACAS representatives made an inappropriate comment and was reprimanded by the other ACAS representative. He said he and the second Claimant were unable to ask for advice. He said there came a point were one of the Respondent's representatives said it was getting late and they had to sign on the day or they would be expected to move to Ireland and work there and the new job they were being offered would not be available. He said he was then advised by Alan Clark, a Union Representative, that he should sign the agreement or he would not have a job to go to. He says he therefore signed under duress.

30. In cross-examination, the First Claimant said his understanding at the meeting was that he could switch to the new role or that he could refuse, be transferred to International Aerospace Coatings Limited (and be made redundant) or take an enhanced redundancy package from the Respondent. It was also suggested to him he had the option of taking the Respondent to the Tribunal but he said he was not advised of that option. His evidence, therefore, is that he was aware, at the time, of three options from which he could choose.

31. The Second Claimant said that he understood being given the COT3 agreement to sign meant that he was finishing his role in the Paint Bay and moving to the new role in Baggage. He said he was not happy to sign without some external legal advice. He also said that he was not allowed to take the document away. He was told that ACAS were there and they could ask them. He said that the ACAS representative then said that they could not offer legal advice and could only help with anything they did not understand. He agreed Alan Clark, the Union Convenor, was still present and he, too, says a representative of the Respondent said they had to sign or go and work in Ireland. He, too, says he signed under duress.

32. In cross-examination, the Second Claimant said he understood he could move to the new role foe which he has signed a few days earlier and stay with the Respondent, he could be transferred to International Aerospace Limited and be made redundant or he could accept a one-off payment. Unlike the First Claimant, he denied this was a redundancy package but he was offered a money payment as an alternative. He said he could not have gone to the Tribunal because he could not have taken the document with him. He then said his only option was to sign the document or be transferred to the new company and made redundant.

33. The answers both Claimants gave in cross-examination were different from their witness statements in that in their witness statements they both said they thought their only options were to sign the agreement or prepare to work in Ireland.

34. In my judgment, this meeting has to be placed in the context of what was already going on. Both Claimants say that they were first aware of the Paint Bay work being outsourced in 2016 and that the options were being considered. Both Claimants had been offered an alternative role in the company and had received, and signed and returned, the "Variation of Contract" document. Both Claimants understood the alternative was to either accept an enhanced redundancy package (or a one off payment) or be transferred to the new company, either to work in Ireland or be made redundant. In my judgment, this meeting cannot have been a complete surprise to them.

35. Union Representatives were at the meeting. The purpose of Union Representatives is to assist Union members in situations such as this or other situations where there is a

dispute or potential dispute with their employers. Both Claimants gave evidence of a talk being given at the start of the meeting by Union Representative Joe McGowan, although he left straight after that talk. Other Union representatives were still present. ACAS were there to facilitate an agreement and explain anything they did not understand. The Claimants were also both in the room together and, whilst I accept each was in a stressful situation, each had the opportunity to speak to the other. I take account of the evidence the First Complainant gave in relation to his dyslexia. The point was made on his behalf that the e-mails he wrote had errors in spelling, grammar and were not always well-structured. That being so, the e-mails were often of some length and detailed. Even if he did have issues reading the document due to his dyslexia, he was aware of the issues facing the Paint Bay employees, he could have asked the Second Claimant to assist him, although he says the Second Complainant was in no fit state, and both Claimants could have asked the Union Representatives or ACAS for assistance. Those representatives may not have been able to provide legal advice or read the document from start to finish but, even on the Claimant's evidence, the representatives said they were there to assist with anything Claimants did not understand. Therefore, in my judgment the Claimants could have sought assistance, if they felt the need, from others in the room.

36. In my judgment, however, there was an understanding of the COT3 agreements by the Claimants. Both Claimants understood, in accordance with the agreements, they were to receive a one-off payment of £11,331, this representing "the difference in salary" between their previous role in the Paint Bay and their new role in Baggage. The Claimants' evidence is that they said they did not want to take that money because they were still negotiating their salary and the First Claimant said he kept it to one side to pay back if agreement was reached. Further, it is clear from their evidence they understood the options open to them in relation to signing, or not signing, the COT3 agreements.

37. In my judgment, the very fact the Respondent paid money to the Claimants to "cushion the blow" of the reduced salary clearly demonstrates that the Respondent had not agreed to keep them on their Paint Bay salaries whilst negotiations took place. In my judgment, had that been the position, the Respondent company would have kept that money until the issue was resolved and then paid that money if and when the Claimants did go on to the lower salary in Baggage.

38. As the Claimants averred in one of the e-mails, there was a 12 week trial period where the Claimants could change their mind about the COT3 agreement and alternative (lesser paid) roles and take voluntary redundancy instead. There is no evidence that either of the Claimants took their copy of the COT3 agreement, once signed, to obtain advice or seek clarification and there is no evidence either sought to revert to voluntary redundancy instead. In my judgment, that provides further evidence that the Claimants were voluntarily entering into the agreements with an understanding of the nature of them.

39. The COT3 agreements set out further terms, including that the new role that had been accepted would be on the terms applicable to that role and that other contract terms in relation to Redeployment would not apply. It was made clear that there would be a one off payment of £11,331 to compensate for the difference in salaries. It made clear that no sums other than those in the COT3 agreement would be due. It contained a clause saying the COT3 agreement was full and final settlement in relation to the agreement. Further, it contained a "claw back" clause, which read as follows:

> *3.3 The Employee agrees that:*

[…]

(d) should the Employee be eligible for a redundancy or severance payment of any kind within 5 years of receiving the one-off payment referred to [above], the full amount of this payment will be deducted from that redundancy or severance payment (or any other payment owed to the Employee).

40. On 7th April 2017 the COT3 agreement signed by the First Claimant was sent to him. Although there is no direct evidence in the bundle, I infer the Second Claimant would also have been sent a copy of his COT3 agreement. Once received, the Claimants would have been able to take those documents to a lawyer for advice, discuss them with whoever they wished and challenge the validity of them if the so chose. No such challenge was made, the Claimants accepting in cross-examination that they did not raise any issues about the circumstances in which they signed the COT3 agreements until proceedings were instituted over 3 years later.

41. Having concluded that the Claimants did accept a new role at a lower salary, and their Contracts of Employment were varied accordingly, I have gone on to consider whether there was any subsequent agreement to restore them to their original, higher, salary. It is common ground that there is no formal contractual documentation to this effect. Following this meeting there was further relevant correspondence.

42. On 11th April 2017 the First Claimant wrote an e-mail to Alan Clark, a Union Representative, asking if there had been any updates from Steve Bond, Director of Engineering at the Respondent company, as the Claimants evidence is that they were having discussions with him as well. In that e-mail the First Claimant referred to him and the Second Claimant "finding this hard to work out" how their "money has been taken off" them. The First Claimant referred back to his and the Second Claimants original contracts when they first joined the Respondent company and complained their "incremental scales" had been taken away, adding that not everyone had lost money and he could not see how this was being allowed to happen.

43. There is nothing in the e-mail chain that followed to indicate Mr Bond or Mr Kelly had any intention to keep the Claimants on, or return them to, their higher Paint Bay salary. In fact, a reference by the First Claimant to their being treated as "new starters" confirms my finding that there was no such intention.

44. In a further e-mail in May 2017 to Alan Clark, the First Claimant complained that he and the Second Claimant were the only ones who were losing money, that they were being "punished" and were losing £12,000 because of the move. He, again, referred to their being treated as "new starters".

45. The Claimants' evidence is that on 25th May 2017 they had a meeting with Mr Bond and their Union Representative, Mr Panesar, where Mr Bond agreed at that meeting to move the Claimants "back to baggage on the top increment". He says this was agreed by a shake of the hand and there is no written record of what was discussed at the meeting. They also gave evidence of another meeting between them, Mr Panesar and Ragbir Patter, the director of Heathrow at the Respondent company on 20th June 2017.

46. There is an e-mail from Mr Panesar, dated 26th June 2017, referring to the meeting of 25th May 2017 and how Mr Bond had said he could help by moving the Claimants to Baggage and I accept that meeting took place. However, there is nothing in the e-mail to indicate a higher salary was discussed or that the "top increment" was discussed. In evidence Mr Carman accepted there were reasons, other than money, that they would want to move to Baggage. The e-mail does refer to the Claimants being under "an immense amount of pressure financially and emotionally" and that they had been relieved when they thought the move was agreed. However, given there were other reasons they may want to move to Baggage, those sentiments would apply whether their salary was being restored or not. Further, it is not clear from the e-mail whether Mr Panesar was saying the handshake was to agree on the Claimants' move to Baggage or whether it was simply a handshake at the end of the meeting. It is common ground, however, that no further contractual documentation followed.

47. There is an e-mail from Mr Pattar to Mr Panesar on 9th July 2017 saying that "there is nothing I can do to change their respective salary levels". Mr Pattar says going against commitments in good faith at the time of the consultation and legal underwritings given at the time of the change is "not within my remit, nor would I want to reverse formal decisions of this nature taken at the time." He suggested the Claimants look at career progression. The e-mail chain was forwarded to the two Claimants by Mr Panesar.

48. There is an e-mail chain in August 2017 where the Respondent made clear to the Claimants that, whilst it was hoped their move to Baggage would take place in due course, it would need to be at the right time to coincide with people leaving "as well as different processes being introduced over the coming months.". None of the e-mails contain an promise of any move, any timescale over which any such move should happen, any terms and conditions of any such move, where on the salary scale the Claimants would be placed if they did move or how much they would be paid.

49. In my judgment these e-mails demonstrate the Claimants had been moved to a different role, at a lower salary, their salaries had not been "ring-fenced" and there was no sufficiently detailed agreement in relation to a return to Baggage to amount to a contract, verbal or otherwise, that they would be moved to Baggage maintaining or regaining their previous salary. I therefore find that from 4th April 2017 the Claimants were both inadvertently paid at their higher Paint Bay salary than the salary appropriate to the new role they had been offered after that work was outsourced. The Claimants continued to be paid at that salary until June 2020.

50. The Respondent asserts this is an overpayment of their salaries, caused by the Respondent's own administrative error. For the reasons set out above, and the absence of any records of any new contract or variation of contract, as was seen when the Claimants were moved to the lower salary, I accept the payment of these sums was due to an administrative error, rather than because there was any intention to "ring-fence" the Claimants' Paint Bay Salaries or restore that salary on promise of a move to Baggage.

51. The Respondent originally asserted that no deductions were made from the salary of the First Claimant because he later went on Sick Leave and exhausted his Sick Pay entitlement. The Respondent asserted that he not being paid was therefore not a "deduction". During cross-examination by Mrs Carman on behalf of the Claimants, it became apparent that sums that were due to be refunded to him in relation to both Pension Contributions (as a consequence of being paid at a higher rate than he should have been,

his contributions had been too high) and Sick Pay had, in fact, been set off against the total alleged overpayment. The Respondent conceded there had been deductions from the First Claimant's wages.

52. The Second Claimant was later made redundant from the Respondent company. In addition to the issue to be resolved in relation to the "claw back" clause in the COT3 agreement, the Second Claimant claims for Notice Pay. The Second Claimant disagreed when cross-examined that the date on which he was given notice was 11th August 2020.

53. On 11th August 2020 the Second Claimant was sent an e-mail by Mel Birch, the now Director of Heathrow at the Respondent company, setting out the Second Claimants options in relation to the redundancy situation, which included accepting a different role within the company. The Second Claimant failed to comply with the deadlines set by the company to take up that role and was therefore mare redundant. In a section headed "What you need to do" the e-mail explained what the Second Claimant should do to accept the alternative role being offered to him. Part of that section read: "This letter also constitutes notice of the termination of your existing role. Your notice period will commence as of the date of this email and your current role and existing terms and conditions of employment will terminate on 31st October 2020."

54. In the absence of any evidence to the contrary, any alternative notice of termination date being provided and any evidence to indicate a different notice of termination date, I accept the Respondent's evidence that notice was given on 11th August 2020.

55. By 6th October 2020 the Second Claimant had still not responded to the offer of an alternative position and was then sent a further e-mail by Ms Birch, bringing the date for termination of his employment forward to 6th October 2020.

56. It is agreed that the Second Claimant was entitled to 12 weeks' notice. The period between 11th August 2020 and 6th October 2020 is 8 weeks. The Respondent concedes, and I accept, the Second Claimant is therefore entitled to 4 weeks' Notice Pay, subject to any appropriate deductions.

57. The Respondent asserts they are able to set off or "claw back" any Notice Pay against any overpayments found to have been made to the Second Claimant. They rely on the second Claimant's Contract of Employment, a document headed "FS11 – Payroll" (which they say was incorporated into the Contract of Employment) and also under the terms of the COT3 agreement.

58. The Second Claimant's original Contract of Employment contained a clause at paragraph 5. That clause read "The Company is entitled to deduct from your salary other monies payable and reimbursable to you by the Company all and any sums which you may owe to the Company or any of its Associated Companies at any time. The Second Claimant was cross-examined about this. He did not contend this was not a term of his contract, just that he had not been overpaid. This contract was made in 1998 but, in my judgment, the acceptance of the new roles thereafter amounted to variation of that original contract and that original contract was never superseded. Therefore, that contract remained in place and would cover any salary overpayments.

59. The "FS11 – Payroll" document contained a clause, in the context of overpayments, which read as follows:

> *18. Should an employee/BA terminate employment the line manager must inform Pay Services immediately so that the balance can be recovered from any outstanding salary, expenses or severance payments. Should these not cover the debt owed, the employee would be required to settle any balance in full.*

60. The Second Claimant said, in relation to the FS11 – Payroll document, that the document was online, that no-one had informed him about that document, that he was not computer literate and he had no reason to go to that document. However, the document dated 16th March 2017 made specific reference to other documents and contractual policies that were incorporated into the contract. As set out above, the Second Claimant signed that variation document on 23rd March 2017. In my judgment, it was incumbent on him, if he was not fully aware of the other documents and policies to which the document referred, to have made those enquiries and established the contents of those documents before signing the variation document. He had ample opportunity to do so, as the document was dated 16th March 2017 and he did not return it until 23rd March 2017. In my judgment, clause 18 in the FS11 – Payroll document would cover salary overpayments.

61. In my judgment the "claw back" clause in the COT3 agreement did not cover any overpayment of salary, only recovery of the one-off payment set out in the earlier clauses in the COT3 agreement and, therefore, the Respondent cannot rely on this particular term to recover any overpayments of salary.

The Law:

62. Section 13 of the Employment Rights Act 1996 ("the 1996 Act") reads:

> (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.

63. Section 14 of the 1996 Act reads:

> (1) Section 13 does not apply to a deduction from a worker's wages made by his employer where the purpose of that deduction is the reimbursement of the employer in respect of –
>
> (a) an overpayment of wages, or
>
> (b) an overpayment in respect of expenses incurred by the worker in carrying out his employment
>
> made (for any reason) by the employer to the worker.

64. Section 135 of the 1996 Act reads:

(1) An employer shall pay a redundancy payment to any employee of his if the employee –

(a) is dismissed by the employer by reason of redundancy, or

(b) Is eligible for a redundancy payment by reason of being laid off or kept on short-time.

65. Section 203 of the 1996 Act reads:

(1) Any provision in an agreement (whether a contract of employment or not) is void in so far as it purports –

(a) to exclude or limit the operation of any provision of this Act, or

(b) to preclude a person from bringing any proceedings under this Act before an [employment tribunal].

(2) Subsection (1) –

(a) […]

(b) […]

(c) […]

(d) […]

(e) does not apply to any agreement to refrain from instituting or continuing proceedings where a conciliation officer has taken action under [any of sections 18A to 18C] of the [Employment Tribunals Act 1996]

(f) […]

if the conditions regulating [settlement] agreements under this Act are satisfied in relation to the agreement.

66. Section 18B of the Employment Tribunals Act 1996 reads:

(1) This section applies where –

(a) a person contacts ACAS requiring the services of a conciliation officer in relation to a matter that (if not settled)) is. Likely to give rise to relevant proceedings against that person, and

(b) ACAS has not received information from the prospective claimant under section 18A(1).

(2) This section applies where –

(a) a person contacts ACAS requesting the services of a conciliation officer in relation to a matter that (if not settled) is likely to give rise to relevant proceedings by that person, and

(b) the requirement under section 18A(1) would apply to that person but for section 18A(7).

(3) Where this section applies a conciliation officer shall endeavour to promote a settlement between the persons who would be parties to the proceedings.

67. It is clear from the caselaw that "taken action" has a very wide meaning.

68. Economic Duress requires the following elements:

a. A threat or pressure exerted that is illegitimate,

b. That illegitimate threat or pressure caused the other party to enter the contract, and

c. There was no reasonable alternative to giving in to the threat or pressure.

Conclusions:

69. The Claimants each entered into an agreement to vary their Contract of Employment such that each of their salaries was reduced to £18,235.00, as an alternative to being made redundant. The First Claimant entered into that agreement on 24th March 2017. The Second Claimant entered into an identical agreement a day earlier, on 23rd March 2017.

70. For each of the Claimants, that represented a reduction in their salary of £11,331. According to each of the letters varying the Claimants contracts, that change was to take effect from 4th April 2017. The Claimants' case is that negotiations were ongoing and the reduction in pay was not to take effect until those negotiations had concluded. Whilst it is clear the Claimants were in discussions with senior management, and had the assistance of their Trade Union, there is no documentary evidence to support the contention that the Claimants' pay was to remain at the higher rate during the currency of those discussions. In fact, as set out in the Findings of Fact section, in my judgment the evidence points the other way and supports the Respondent's contention that all were aware that the pay reduction was to take place from 4th April 2017.

71. From 4th April 2017, therefore, each of the Claimants was being overpaid. It is regrettable that situation persisted for so long but, given the size of the Respondent company and the turmoil that was ongoing at the time, I do accept that the overpayments were an inadvertent oversight by the Respondent, the Claimants should have, at the very least, been suspicious they were being overpaid and should have queried it.

72. The Respondent initially claimed no reductions at all had been made from the First Claimant's wages but Mrs Carman, in cross-examination of the Respondent's witnesses, obtained a concession that deductions had been made from the First Claimant's wages, as sums he was due by way of refund for overpayment of pension contributions and sick pay had been set off against the sums outstanding. Whilst I have my doubts that the pension

contributions come within the definition of "wages", sick pay does. Therefore, there were deductions from the First Claimant's wages.

73. However, in my judgment those deductions and all those deductions taken from the monthly pay after the overpayment was discovered were for the purpose of reimbursing the Respondent for the salary overpayments to the Claimants. Having made that finding, I have no jurisdiction to determine whether the deductions were lawful or the amount of the deductions were correct. I can consider those claims no further and they are dismissed. Any further action in respect of these sums would have to be brought in the County Court.

74. Both Claimants entered into COT3 agreements. In my judgment, those agreements came within section 18B of the Employment Tribunals Act 1996 and section 203(1)(e) of the Employment Rights Act 1996. The Respondent made this assertion from the outset and the Claimants did not challenge that aspect of the case. It is clear that there was a restructuring within the Respondent's company, that the Claimants were at risk of redundancy and that the agreements were signed at a meeting on 6th April 2017 in the presence of the Claimants, the Respondent, Union Representatives and ACAS representatives.

75. Both Claimants assert they entered into those agreements under duress. However, in my judgment, the test for economic duress is not met. There was no improper pressure. The Claimants said they were made to sign there and then, they could not take the agreements away to seek advice and they did not understand the terms of the agreements. Whilst there may have been pressure to sign there and then, I do not consider any such pressure there was to be illegitimate. I infer from the evidence that there was a pressure of time in relation to the restructuring and sorting out what was to happen to the affected staff was something that needed to be addressed quickly.

76. Despite claiming that there was pressure to sign the agreements, there is no evidence that either party then sought legal advice after the agreements were sent to them. If they had felt genuinely compelled to sign an agreement they did not understand, I take the view they would then have retrospectively sought advice as to whether such an agreement was binding on them. Further, there were Union representatives and ACAS representatives at the meeting. The Claimants gave evidence of one ACAS representative telling another off for making an inappropriate comment. This suggests the representatives present felt free to challenge any inappropriate behaviour, yet there was no apparent challenge to the allegation that the Claimants were forced to enter the agreements under duress.

77. Further, both Claimants accept there were alternatives to entering into the agreement. They could have been transferred to the new company and made redundant. They could have taken an enhanced redundancy package (on the First Claimant's evidence) or a one-off payment (on the Second Claimant's evidence). Each of those were reasonable alternatives. In my judgment, the offer of a role at lesser pay was an effort to try an accommodate the two Claimants so that they were not made redundant if they wanted to remain at the Respondent company.

78. In my judgment the COT3 agreements were not entered into by the Claimants under duress and, therefore, they were not void or voidable.

79. In my judgment the "claw back" clause in the Second Claimant's COT3 agreement entitled the Respondent to reduce any redundancy payment to the Second Claimant by the value of the one-off payment made pursuant to the COT3 agreement. The purpose of this clause was clearly to avoid the Second Claimant effectively claiming two redundancy payments if, having accepted a role at a lesser salary and taking the payment as a result, he was then made redundant within 5 years, as, indeed, he was, having failed to take the offer of another different role in a further redundancy situation, which arose because of the COVID pandemic.

80. The Respondent helpfully set out the figures for the Second Claimant's redundancy payment, providing a breakdown for the payments if the Second Claimant was successful and if the Respondent was successful. I have checked those figures and am content they are accurate. Having made the findings of fact set out above, but for the COT3 agreement, the Second Claimant would have been entitled to a statutory payment of £11,565.47.

81. However, having found the COT3 agreement was valid and the "claw back" clause applied to that payment, the sum to which the Second Claimant is entitled as a redundancy payment is £254.47.

82. Turning to the claim for unpaid Notice Pay, the Second Claimant was entitled to 12 weeks' Notice Pay. The Second Claimant worked (paid) for 8 weeks after he was given notice of termination of his employment. Therefore, the period of Notice Pay outstanding, but for any "claw back", is 4 weeks.

83. There were, however, provisions of the Second Claimant's contract that allowed the Respondent to offset Notice Pay against outstanding sums. As some anomalies were exposed during Mrs Carman's cross-examination of the calculations that were made in relation to the overpayments, I am not in a position to decide, at this stage, whether there should be any reductions to the Second Claimant's Notice Pay, if so, how much and whether he is therefore owed any payments in respect of his Notice Pay.

84. It was agreed in evidence that there was no differentiation in the payslips between monies paid whilst the Second Claimant was working and the Second Claimant's Holiday Pay. Therefore, any claims to Holiday Pay are dealt with by the claims in relation to wages.

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Employment Judge M Yale
Dated: 28th February 2023

SENT TO THE PARTIES ON

11th March 2023

GDJ
FOR THE TRIBUNAL OFFICE