Case no. 2303733/2022

EMPLOYMENT TRIBUNALS

Claimant: **Lander Velazquez**

Respondents: **Purezza Limited**

Heard at: **London South (by CVP)** **On:** **10 March 2023**

Before: **Employment Judge Cheetham KC**

Representation

Claimant: David Ware (HR Business Partner)
Respondent: Tim Barclay (Chief Executive)

JUDGMENT

1. The Respondent will pay the Claimant the sum of £2,538.48.

REASONS

1. This is a claim that was received by the Employment Tribunal on 23 October 2022. The Claimant's employment commenced on 13 July 2021 and ended on 16 July 2022. He was employed as a Project Development Executive.

2. The claim is for breach of contract in the sum of £2,538.48, which is what the Claimant says he is owed as a result of an under-payment of his salary between 9 February 2022 and the end of his employment.

3. I heard evidence from the Claimant and from Mr Barclay for the Respondent, both of whom gave their evidence clearly and helpfully.

Findings of fact

4. The Claimant was employed under a contract that was signed in October 2021, but was agreed to take effect from 9 August 2021. The relevant part of the key clause (4.1) reads as follows:

   "Your rate of pay shall be £19,500 per annum, paid in fortnightly instalments in arrears every second Friday. From 9th Feb 2022 your salary will increase to £25,000 per annum."

5. No conditions were attached to the clause, so that, as things stood at the time the contract was entered into, the Claimant had a contractual right to receive an increased salary of £25,000 per annum from 9 February 2022. That is not disputed by the Respondent.

6. On 3 February 2022, the Claimant had a performance review meeting with Mr Barclay. The Claimant's evidence was that, during a 5 minute conversation before the review meeting, Mr Barclay told him there would be a delay in making that increased payment. He said there was a company-wide pay freeze and that the company was looking for investment, which was due to arrive at the end of April or start of May. The Claimant said that he accepted there would be a delay, but that he never agreed to forfeit that pay rise. What he understood was that at a future point (probably April/May), his salary would increase and that he would also receive back pay to reflect the difference in pay from 9 February. Nothing was put in writing.

7. Mr Barclay's evidence to the tribunal was that this conversation did take place, but he did not remember mentioning any dates. He told me that that he understood that the Claimant was agreeing to waive his pay increase, although in his written witness statement, Mr Barclay said that he had explained that, "*(the Claimant's) salary would not be increasing until the investment arrived*". He said in oral evidence that, after the investment arrived, there would be further negotiations over pay.

8. My finding is that Mr Barclay told the Claimant that the increased payment would not be made until there had been an investment in the company. That is what the Claimant says and that is what Mr Barclay said in his statement. I do not find that the Claimant waived the pay increase, in the sense that he agreed that he was no longer entitled to it. Rather, as the evidence suggests, he simply accepted that there would be a delay in payment until the investment arrived. It also seems likely that he was given a probable date, because - as a matter of common sense - that was information he would have requested.

9. I also prefer the Claimant's evidence that he understood that he would receive "back pay", in other words, that the increased payment would be back-dated to 9 February.

I cannot see any reason why the Claimant would simply surrender that valuable entitlement and I do not find that Mr Barclay explicitly told him that would occur.

10. I should also mention that the Respondent's ET3, which I am told was drafted by a solicitor, is misleading over this meeting. It states, "*January 2022 – the Respondent wrote to the Claimant to say that the previously agreed terms were no longer valid. If he chose to commence work on 9 February 2022 it would be on the new terms and the pay rate would be different*". None of that is correct.

11. The Claimant said that on 6 May, he was told by Mr Barclay that the investment had been confirmed, but that it would take 6 to 8 weeks, when the payments (including the back payments) would be made to him. This conversation is evidenced in the Claimant's grievance, which was written on 31 July, by which time the Claimant had resigned. In the event, he never received any of the payments claimed. There was correspondence between the parties, which I have read, but which does not take the issue further.

The law

12. The legal issue is whether there was an effective variation of the Claimant's contract, as a result of the conversation that took place between the Claimant and Mr Barclay on 3 February 2022. Absent an effective variation, then the Claimant's contractual entitlement was to receive increased pay from 9 February.

13. A contract of employment is a legally binding agreement. Both parties are bound by its terms and neither can alter those terms without the agreement of the other. Therefore, the issue in this case is whether there was an agreed variation. Although there is reference in the ET3 and some of the documents to the Claimant entering a new contract, there is no evidence to suggest that occurred.

14. It is trite law that an employee must be aware of what he is agreeing to. It is always preferable that the agreement should be committed to writing, precisely to avoid the confusion that has arisen in this case. Indeed, where an employee's terms and conditions change, the employer is obliged to issue the employee with a written statement of the change within one month of its taking place, which did not happen here (Employment Rights Act 1996 s.4).

15. In his summarising submission, Mr Ware helpfully referred to the case of ***Abrahall & Others v Nottingham City Council*** [2018] ICR 1425, CA. That case concerned an employee continuing to work following a contractual pay cut and whether that constituted acceptance of the variation to their contract. The Court held that it depended on the circumstances of the case and it identified some specific points about the proper approach to the question.

16. Relevant to this case, the Court noted that continuing to work would not always be treated as acceptance. What inferences could be drawn depended on the

circumstances. If the employee's conduct in continuing to work was reasonably capable of a different explanation, it could not be treated as constituting acceptance.

17. It is also relevant if the proposed variation is wholly disadvantageous to the employee, because the employee may simply be putting up with a breach of contract, because they are not willing to take positive steps to remedy it, such as by bringing proceedings. In addition, it may be the case that the matter has not been put to the employee as something requiring their agreement.

Conclusions

18. In my judgment, there was no effective variation of the employment contract, for the following reasons. First, the Claimant did not agree to that variation. What he accepted was a delay in payment, which he understood would be made within a relatively short time. He also did not agree to waive his entitlement.

19. Secondly, although he continued working, that did not mean in the circumstances of this case that he was accepting the variation. He continued working in the expectation that he would be paid the full amount. He was putting up with the situation, which had not been presented to him as something that required his agreement. Thirdly, it was incumbent on the Respondent to record in writing the variation, if that is what they thought had been agreed. There was no written confirmation of the variation and, in fact, there were mixed messages about bonuses, negotiations and new contracts.

20. In all the circumstances, I conclude that the failure to pay the Claimant his increased salary from 9 February until his employment ended on 16 July 2022 was in breach of his contract. He is therefore entitled to the sum of £2,538.48, which was not disputed as being the sum owing.

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Employment Judge Cheetham KC
Date 13 March 2023