EMPLOYMENT TRIBUNALS

Claimant: Ghada Al-Naimi

Respondent: Buildmaster Construction Services Limited

UPON APPLICATION made by letter dated 3 August 2023 to reconsider the judgment sent to the parties on 20 July 2023 under rule 71 of the Employment Tribunals Rules of Procedure 2013, and without a hearing,

JUDGMENT

The Judgment sent to the parties on 20 July 2023 is confirmed. However, the reasons are varied as set out below.

REASONS

1. Following a hearing on 21 June 2023, the Tribunal sent a reserved judgment with reasons on 20 July 2023 upholding the claimant's claim that the respondent had unlawfully deducted £12000 from her wages.

2. By a letter dated 3 August 2023, the respondent made an application for reconsideration on the basis that the tribunal failed to consider the respondent's argument that it was a unilateral decision made by the respondent to reduce the claimant's pay and that the effect was the claimant being dismissed in October 2021 and reemployed on new terms, namely on a reduced wage of £1400 per month.

3. The respondent further alleges that the Tribunal erred in law by stating "whether or not the claimant agreed to vary her contract, which she in any event denies, a verbal agreement would mean that the statutory conditions laid out in section 13 ERA would not be met and she would still be entitled to recover the difference in pay."

4. The application to reconsider refers to a number of cases including: **Marriott v Oxford and District Cooperative Society** (No 2) [1970] 1 QB 186; **Hogg v Dover College** [1990] ICR 39; **Alcan Extrusions v Yates others** [1996] IRLR 327, and **Smith v Trafford Housing Trust**

[2013] IRLR 86 (HC). The respondent further sent to the Tribunal the authority of **Miss Clare Jackson v The University Hospitals of North Midlands NHS Trust** [2023] EAT 102. None of these authorities were drawn to the Tribunal's attention during the hearing.

5. The claimant objected to the respondent's reconsideration application by letter dated 6 August 2023.

6. The Tribunal considered that there was no need for a hearing.

The respondent's case before the Tribunal

7. The response states that it was agreed that the claimant's salary would "be subject to workload and the profit made by" the respondent and that pay was reduced in line with that agreement. The respondent further asserts that it had to dismiss all of its employees post the pandemic as there was no work and reduced revenue and that the claimant's position was "part-redundant".

8. The evidence before the Tribunal at the hearing included a witness statement from Mr Ahmad Kamil Kadom Al Naimi, the sole witness for the respondent. In that witness statement, Mr Al-Naimi stated that it was agreed between the claimant and the respondent that her monthly payment would depend on the respondent's income so it could rise and fall subject to workload and profit; the respondent had to reduce all wages to keep afloat; and that the claimant's role was made "part-redundant" due to a loss of customers and so no further wages are owed to her.

9. Neither the response nor the witness statement suggested that there was a unilateral decision to reduce the claimant's pay and that the effect was the claimant being dismissed in October 2021 and reemployed on new terms.

10. However, at the outset of the hearing, the respondent did put forward an argument that the change in payment from £2400 to £1400 per month marked the end of the previous relationship and started a new relationship on new terms. It was suggested that there had been a unilateral change to terms and conditions which amounted to a dismissal.

11. It was put to the claimant in cross examination that she was redundant in October 2021: she said she was not made redundant. The respondent appeared to argue that the claimant was made redundant from part of her job. The respondent confirmed that the alleged redundancy was not confirmed in writing.

12. When asked why the claimant had been suspended if she had been made redundant, Mr Al Naimi answered that she was redundant until the business picked up, otherwise the respondent would have to fully dismiss her. He went on to say that the redundancy had happened automatically hence there had been no notice pay or statutory redundancy payment.

13. In submissions, the respondent argued that there was a genuine redundancy situation and that the claimant was legally dismissed and re-engaged on new terms, without any reference to case law.

The law

14. Under Rule 70 of the ET Rules 2013, a tribunal has the power to reconsider a judgment where it is necessary in the interests of justice to do so. A central aspect of the interests of justice is that there should be finality in litigation. It is therefore unusual for a litigant to be allowed a 'second bite of the cherry' and the jurisdiction to reconsider should be exercised with caution.

15. **Jackson** states as follows**: "**The case of **Hogg v. Dover College** and its usual companion, **Alcan Extrusions v. Yates** [1996] IRLR 327, are familiar fare to employment lawyers when giving advice about the consequences of an employer's decision to restructure its workforce. When an employer has neither sought nor achieved agreement with the affected employees, and when it does not wish to take the so-called "fire and re-hire" option, it may consider the risky option of unilaterally imposing a change to terms and conditions of employment. The options available to an employee in response are widely understood to comprise: (1) to resign and claim constructive unfair dismissal, subject to qualifying service and showing that the breach was repudiatory; (2) to waive any repudiatory breach/affirm the contract and agree to work under the new terms; (3) depending on the nature of the change, to refuse to work under the new terms and (in terms) dare the employer to dismiss; (4) to "stand and sue" by working under protest but bringing proceedings for breach of contract and/or any shortfall in wages (the classic case being **Rigby v. Ferodo Ltd** 1988 ICR 29 HL); and (5) to work under the new contract but assert dismissal from the old contract, which – subject again to qualifying service – can form the basis for a complaint of unfair dismissal. The fifth option is the Hogg dismissal."

16. **Alcan** states as follows: **"**… it is only where, on an objective construction of the relevant letters or other conduct on the part of an employer, it is plain that an employer must be taken to be saying, 'Your former contract has, from this moment, gone' or 'Your former contract is being wholly withdrawn from you' that there can be a dismissal … other than, of course, in simple cases of direct termination of the contract of employment by such words as 'You are sacked' … However, in our judgment, it does not follow from that that very substantial departures by an employer from the terms of an existing contract can only qualify as a potential dismissal … In our judgment, the departure may, in a given case, be so substantial as to amount to the withdrawal of the whole contract…..whether a letter or letters or other conduct of an employer has such an effect is a matter of degree and a question of fact for the tribunal to decide. In many cases to construe letters or other conduct on the part of an employer which puts forward no more than variations in a contract of employment as amounting to a termination or withdrawal of such a contract would be quite inappropriate and wrong. Whether or not the action of an employer in imposing radically different terms has the effect of

withdrawing and thus terminating the original contract is ultimately a matter of fact and degree for the tribunal to decide."

17. In applying **Hogg**, the Tribunal must consider whether the claimant's contract of employment had been terminated and replaced by another . The question is not whether employment in the broader sense had ended, but whether the old contract has been brought to an end.

18. Whether or not there is an intention by the respondent to dismiss the claimant is irrelevant. In a **Hogg** scenario, there will be no such intention almost by definition; an employer who purports to vary a contract is most unlikely to desire dismissal. In any case, intention is irrelevant. What matters is the consequence of the variation unilaterally imposed by the employer.

19. Of course, all of these cases turn on situations in which it is the employee who is seeking to argue that the contract has come to an end. In **Jackson** it was argued in order for the claimant to be entitled to a contractual redundancy payment. Can the same principle apply when it is the employer seeking to assert that there has been a dismissal?

20. That it can is demonstrated by **Smith v Trafford Housing Trust** [2013] IRLR 86. In that case, the High Court had to consider whether, despite remaining at work, Mr Smith was wrongfully dismissed from his former role. Mr Smith argued that he had not been dismissed, while the employer argued he had been. The High Court held that Mr Smith had been dismissed, despite remaining at work.

Conclusions

<u>Unilateral variation of contract</u>

21. First, the argument that the claimant was dismissed by the unilateral variation of her contract was not raised either in the witness statement or in the response. It was put to her in cross examination that her role was "partly" redundant, which she denied on the basis that her work had remained the same throughout.

22. The respondent's argument before the Tribunal was confused. It was argued that the claimant was "partly redundant" and that the remainder of her job continued. When asked about notice pay and redundancy pay, Mr Al Naimi said redundancy was "automatic" and suggested that the redundancy had taken place in September/October 2022.

23. The respondent says that the unilateral variation took place in October 2021 when the respondent first reduced the claimant's salary (which deductions were the subject of a previous case brought by the claimant 2301785/2022). This case was only in relation to deductions from June 2022 to May 2023.

24. The respondent's submission was that this was a genuine redundancy situation; that the claimant was not entitled to wages as she did not work and then added that its main submission was that the claimant

was legally dismissed following the change in terms and conditions of employment.

25. Accordingly, the respondent did not put forward any clear argument about the unilateral variation and this reconsideration should not be an opportunity to have a second bite of the cherry and put the case more clearly. As stated above, none of the case law now referred to was referred to the Tribunal during the hearing.

26. Nonetheless, applying the case law, the Tribunal is satisfied that the claimant was not dismissed and reengaged on new terms when the respondent reduced the claimant's wage in October 2021, post furlough. In contrast to **Smith**, although there was a reduction in salary, the claimant's work did not change at all. Similarly in **Hogg,** the claimant had been a full time teacher and was told he would need to work part time on a substantially reduced salary, and that another teacher had been appointed to his role in his place.

27. In **Smith**, it was held that Mr Smith accepted that his original contract was at an end by agreeing to work in a different capacity and for a greatly reduced salary, thereby entering into a new contract. The High Court concluded that Mr Smith's demotion amounted to a wrongful dismissal.

28. In this case, there was no demotion, just a fluctuating reduction in salary which followed on from furlough. It appears from the payslips that between October 2021 and February 2022 the claimant was paid £1050 gross, which figure increased in March 2022 to £1400. There are no relevant letters or communications with the claimant around that time as far as the Tribunal is aware. There was nothing to indicate to the claimant that this would be a continuing course of action or that it would not be resolved. In any event, given that salary fluctuated, there was no "new" contract capable of being accepted.

29. There is no conduct of which the Tribunal has been made aware which must be taken as saying to the claimant that her former contract had gone or was being withdrawn from her. In fact, the claimant received no communication from the respondent. It is relevant that the claimant's wage was reduced at the same time as divorce proceedings resumed against Mr Al-Naimi. It is also relevant that the respondent appears to have believed that there was an agreement in place with the claimant that her salary would fluctuate (see below), that argument having been put forward in the response and Mr Al Naimi's witness statement. On that basis, the respondent could not also believe that the reduction in salary would bring the old contract to an end, albeit that the respondent has indicated that this is a "legal" argument.

30. The question is whether the old contract was brought to an end by the respondent's actions. The only action to be considered is the reduction in the claimant's salary, which fluctuated over the following months, and which the claimant believed was because she had recommenced divorce proceedings. Everything else stayed the same.

31. Although it is not determinative, the claimant did not treat the reduction

in pay as a dismissal. She chose to "stand and sue" and has brought these and other proceedings for the shortfall in her wages.

32. There is no evidence from which to consider that the reduction in pay amounted to a withdrawal of the claimant's former contract. This case is different to the other cases referred to in which there were clear communications about the changing nature of the role, and salary, going forward. In those cases there was certainty of what the new contract looked like. Here, there was just a fluctuating reduction in pay.

33. Nonetheless, the reasons are amended as follows: paragraph 26 of the Judgment which currently reads: "*The respondent also sought to argue that the claimant was legally dismissed and she was re-employed on new terms and conditions which entitled her to lower pay. Again, none of this was evidenced by any documentation and the respondent sought to argue that it was a technical argument only. The argument lacked credibility and the claimant denied that there had been any conversations around such a change to her terms and conditions. In any event, there was nothing in writing to support this position."* is amended to read: "*The respondent also sought to argue that the claimant was legally dismissed and she was re-employed on new terms and conditions which entitled her to lower pay. Again, none of this was evidenced by any documentation and the respondent sought to argue that it was a* ***legal*** *argument onl**y. Applying Hogg v Dover and the other authorities referred to, the Tribunal is satisfied that, on an objective view of the circumstances, the variation in the claimant's pay back in October 2021 did not amount to the withdrawal of her original contract and create a Hogg dismissal: the only change was a fluctuating reduction in salary without more. The Tribunal could not objectively conclude that the claimant's original contract of employment was at an end**."*

<u>Agreement by the claimant that her pay should vary</u>

34. The respondent's position, for this reconsideration, is that it was agreed with the claimant that her wages varied according to the respondent's income.

35. However, whilst the response and Mr Al Naimi's witness statement asserted that it was agreed between the claimant and the respondent that her monthly payment would depend on the respondent's income so it could rise and fall subject to workload and profit, it was not at any point suggested when this agreement was reached; and the argument was not raised in submissions, the respondent confirming that its main argument was that the claimant was legally dismissed when her wages were reduced, but also arguing that the claimant was redundant and that she was not entitled to any pay as she did not do any work.

36. If the respondent had such an agreement with the claimant then any reduction in pay could not be a unilateral variation which would result in dismissal, as the claimant would have agreed to fluctuating pay. The argument advanced by the respondent at the hearing was that there had been a unilateral variation to the contract, not that there had been any agreement that the claimant's pay would fluctuate.

37. The reconsideration is not an opportunity to put new arguments to the Tribunal or to have a new opportunity to argue the case.

38. In any event, for the majority of time, the claimant's salary remained static, being reduced around October 2021, since when it was £1050 for a few months and has then remained static again at £1400. The claimant asserted that her basic salary at the material time was £2,400 and the respondent did not dispute this. The claimant has claimed that the respondent has made unauthorized deductions from her salary in respect of each month in which her wage has fallen below £2400.

39. The Tribunal is satisfied that there was no agreement with the claimant that her pay would vary. No evidence was adduced to show that such an agreement had been made with the claimant, or when.

40. Nonetheless, the Tribunal accepts that there does not need to be an agreement in writing for the parties to agree that the claimant's pay would vary and for that to be a valid term of the oral contract of employment (there was no written contract).

41. Accordingly, the Tribunal does consider that paragraphs 28 and 29 of the reasons should be amended.

42. Paragraph 28 currently reads: "*The Tribunal is satisfied that nothing about any alleged variation, or dismissal, or redundancy, was confirmed in writing. Therefore, the deduction was not authorised in terms of section 13 and the amount of the deduction is recoverable by the claimant*." It should be amended to read as follows: *"The Tribunal is satisfied that there was no agreement that the claimant's pay would fluctuate and also that the claimant was not dismissed in October 2021 (or indeed at any other time as variously alleged by the respondent). Therefore, in the absence of any agreement to deductions being confirmed in writing, the deductions were not authorised in terms of section 13 and the amount of the deduction is recoverable by the claimant."*

43. Paragraph 29 currently reads: "*Whether or not the claimant agreed to vary her contract, which she in any event denies, a verbal agreement would mean that the statutory conditions laid out in section 13 ERA would not be met and she would still be entitled to recover the difference in pay*." to " *As stated above, the Tribunal is satisfied that there was no agreement between the claimant and the respondent that the claimant's contract was varied such that the claimant agreed to fluctuating pay depending on the respondent's income or due to COVID. The Tribunal accepts that such a verbal agreement could mean that the claimant would not be due sums under the contract which could result in her claim for an unlawful deduction being unfounded. However, in this case, the Tribunal being satisfied that there was no such agreement, the claimant remains entitled to recover the difference in pay*."

Employment Judge Rice-Birchall
03 January 2024