



EMPLOYMENT TRIBUNALS (ENGLAND & WALES)
LONDON CENTRAL

BETWEEN

Mr H Chavda

Claimant

-AND-

DKLM LLP

Respondent

Employment Judge:

Mr J S Burns

Representation:

Claimant

in person

Respondent:

Mr J Kleinfeld (Managing Partner)

Judgment

1. To the extent necessary the Claimant is granted leave to amend his claim as described below
2. The claims are dismissed.

Reasons

1. The claims in the ET1 are for (i) £2500 being a 40% deduction which the Claimant claimed had been applied to his final month's pay (for June 2020) (ii) an unquantified sum for any discount applied against his holiday pay and (iii) any amount deducted from his pay in respect of the costs of the Claimant's practising certificate.
2. In an amendment document the Claimant subsequently confirmed that he had been paid 80% of his full salary for the period 1/6 – 1/7/2020 – (his reduced claim being for the 20% balance - £1250 plus £57.70), that no deduction had been made for his practising certificate, but that he claimed £634.59 for holiday pay being an unauthorised discount applied to his day rate for 12 days. He was unable to provide these details earlier as he did not have his final payslip when he issued his ET1. There was no forensic prejudice to the Respondent in this amendment being permitted.
3. I heard evidence on oath from the Claimant and from Mr Kleinfeld and I have read the ET1, ET3, and various email exchanges between the parties, and a skeleton argument produced by Mr Kleinfeld.

Facts

4. The Claimant was employed from 8/10/2019 as a senior associate in the Respondent solicitors firm at the rate of £75000 gross – ie £6250 gross per month. He worked full time 5 days a week.
5. On 19/3/2020 Mr Kleinfeld emailed all staff to tell them that their pay was cut by 80% with effect from 1/4/2020, to be reviewed after three months (ie at the end of June 2020)
6. On 1/4/2020 the Claimant agreed to his salary being reduced by 40%.
7. On 3/4/2020 the Respondent emailed the Claimant "*I note you have agreed to accept a 40% reduction in salary ...this is to take effect from 1/4/2020 until further notice and I would be obliged if you would acknowledge receipt of this email and confirm the same may be treated as a variation...*"
8. The Claimant email in reply on 6/4/2020 made it clear that he was agreeing to a reduction for April only.

9. On Mr Kleinfeld stated in an email on 1/5/2020 that *"the existing arrangement will continue for the time being and will be constantly reviewed"*. The Claimant responded on 6/5/2020 *"I noted that my salary for the month of May will be reduced by 40% and the reduction is to be reviewed by the end of the month for June"*.
10. On 2/6/2020 the Claimant emailed resigning with effect from 1/7/2020. This was accepted by Mr Kleinfeld's email of 5/6/2020. The Claimant responded later that day *"please confirm that I will be paid my full salary for this month and my notice period as it was agreed that there would be a 40% reduction in my salary for May and then for the arrangement to be reviewed"*
11. On 8/6/20 Mr A Robinson the Respondent's practice manager replied *"In regard to your salary level, having spoken to Jeremy he has confirmed that the 40% reduction was for the period of April and May after which it would be reviewed. That review was due to take place last week, however, your resignation was given before the review discussions took place. I can confirm however, that the income figures for last month do not unfortunately support a return to the 100% salary and therefore your salary will have to remain at the 40% level for the remainder of your employment."*
12. The Claimant replied later on 8/6/2020 *"I was told that I had a choice in April to accept a 40% reduction in salary or lose my job. I agreed to a 40% reduction in salary for April with a reduction in salary from my normal salary to be reviewed on a monthly basis. I subsequently agreed to a reduction in salary for the month of May. I was not advised of any review of my salary away from my full salary for the month of June."*
13. On 16/6/2020 Mr Robinson replied *"In regard to your final salary as you point out the reduction was to be reviewed. Everybody in the firm has taken a reduction in salary due to the current effects of Covid(19). I would refer you to the email from Jeremy of 1st May (attached). There was no time limit on the reduction and it clearly stated "will be constantly reviewed". As mentioned previously notice was given before it could be reviewed such that it continues to apply. In any event your billings in May would not have justified departing from the 40% reduction."*
14. On 19/6/2020 the Claimant wrote *"With regards to the salary that is to apply for the month of June and my notice period, it is my contractual salary that is to apply and not a reduced salary that the firm unilaterally decides to pay me. I had agreed a reduction in my salary, away from the default salary as stated in my employment contract, for April only. I refer to my email to Jeremy on 6 May at 9:57am. It is clear that a subsequent reduction was agreed for the month of May. Further it is clear that this was to be reviewed before the end of May so that any subsequent proposal for a reduction on in salary (away from that stated in my contract) would be notified to me before the 1 June for me to agree to. No proposal was notified to and agreed by me for any period beyond the month of May. Therefore my normal salary is to apply for June and my notice period."*
15. On 24/6/2020 Mr Robinson replied *"In regard to your salary payment I again state that the salary reduction agreed previously is ongoing and was subject to future reviews. Notwithstanding your resignation the income generated from your work has remained at a level that did not support a return to the previous salary level, as such your salary remains at 60%."*
16. On 26/6/2020 Mr Robinson wrote *"Having discussed the matter with the Members and notwithstanding the firm's position as previous advised, I can confirm that purely as a gesture of goodwill you will receive an ex-gratia payment equal to 20% of your standard salary for the month of June and the 1st of July. This means for the month of June and the 1 day in July you will receive 80% of your normal salary in line with the reduction applied to everyone else."*
17. The Claimant refused to accept this but the Respondent nevertheless applied only a 20% rather than a 40% deduction to the Claimant's final pay.
18. In making its final payments to the Claimant the Respondent paid him for his agreed 12 days untaken holidays for the holiday year starting 1/1/2020 by paying him at a 100% rate for those days which were apportioned to January to March 2020, 60% for the days apportioned to April and May and 80% for June.

Assessment and Conclusion

19. The main issue is what the contractual position was regarding the salary from 1/6/2020. Mr Kleinfeld had stated in his email of 1/5/2020 "*the existing arrangement will continue for the time being and will be constantly reviewed*". The existing arrangement referred to was a 40% reduction in the Claimant's salary. According to the Respondent's email, the reduction was to continue for the time being – ie indefinitely – until further reviewed.
20. The Claimant's email of 6/5/2020 was not on all fours with this because it reads "*I noted that my salary for the month of May will be reduced by 40% and the reduction is to be reviewed by the end of the month for June*".
21. The parties are in agreement that the pay for May was to be reduced and the material difference between the two emails is whether the review of the pay for June had to take place before the end of May. However that is an insignificant difference, because whether the review was to take place before the end of May or not, both emails have it in common that the reduction to 60% of pay would remain in force unless and until the reduction was reviewed upwards. This did not happen because there was no review before the Claimant's resignation.
22. Having regard to the previous practice of the parties and to give business efficacy to the arrangement, the Claimant did not have a contractual or other right to a review of the June pay before the end of May. It is clear that any review of pay going forward would wish to consider the whole month's results. Furthermore, the previous reduction of the April and May pay had been agreed/reviewed during the first weeks of those months and not by the end of the previous months.
23. I find it was not open to the Claimant to secure one month's full ie unreduced pay for June by giving notice before a review which was the only way in which (in theory) the pay for June could have been restored to 100% but which in fact, had it occurred in the first few days of June as per the previous precedent, would have left the pay at the 60% level at best.
24. I therefore find that the Claimant's contractual pay from 1/6/2020 onwards remained 60% because it had been reduced to that level previously and not reviewed upwards before he resigned.
25. In fact he has been paid at the rate of 80% from 1/6/2020 onwards so his claims in this regard must fail.
26. The Claimant has been paid for holidays as per paragraph 18 above. Under regulation 16 of the Working Time Regulations 1998 read with section 221 Employment Rights Act 1996 the applicable rate of pay for holidays must be the rate applicable in the last 12 weeks prior to the calculation date. In this case the calculation date for a payment in lieu was the effective date of termination. During the whole of the last 12 weeks of the Claimant's employment his salary was subject to a 40% reduction. He has therefore already been paid for holidays in excess of his legal entitlement so this aspect of his claims fails also.

NOTE: The hearing took place over CVP. From a technical perspective, there were severe difficulties because Mr Kleinfeld was unable to join the CVP platform effectively. As a result I had to disconnect the judge's CVP microphone and speak to the parties over the telephone in a joint conference call hosted by BTmeetMe. As a consequence of this, members of the public who wanted and listen to the hearing as well as observe were unable to do so. I asked the parties whether they wished to continue or not and each confirmed that they did and agreed not to take any subsequent point or objection to the hearing format. I apologised to the members of the public who I was able to converse with after the hearing and agreed to email them a copy of this document.

J S Burns Employment Judge
London Central
9/10/2020
For Secretary of the Tribunals

date sent to the Parties – 09/10/2020