EMPLOYMENT TRIBUNALS

Claimant Mr M Atkinson **and** **Respondent** ITC Compliance Ltd

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

HELD AT: BRISTOL **ON:** 1ST JULY 2021
EMPLOYMENT JUDGE MR P CADNEY
APPEARANCES:-
FOR THE CLAIMANT:- IN PERSON
FOR THE RESPONDENT:- MR M DYER

JUDGMENT

The judgment of the tribunal is that:-

i) The claimant's claim for unpaid notice pay is not well founded and is dismissed.

Reasons

1. By this claim the claimant brings a claim for unpaid notice pay. There are three points in dispute:-

i) The length of his period of notice – whether it is four or twelve weeks;
ii) The amount of notice pay to which he was entitled during the relevant notice period – full pay or his furlough pay;
iii) If full pay which elements of his overall pay package should be included in the calculation of the correct amount of notice pay.

2. The tribunal has heard evidence from the claimant; and on behalf of the respondent from Mr Dyer and Mr Jason Lewis.

Facts

3. In this section I will deal with the broad factual background. Any dispute of fact will be dealt with where it is relevant in relation to the individual points in dispute.

4. The claimant was employed by the respondent from 25th November 2019 as Sales Director (North). His contractual pay was £80,000 paid in equal monthly instalments, £6,666; together with an annual car allowance of £4,800 and Employer's Annual Pension contribution of £2,400.

5. On 31st March 2020 the respond notified its employees including the claimant that in response to the coronavirus outbreak that the government had enforced the closure of motor dealerships and travel firms. In consequence they were unable to offer employees work of the type that they were employed to perform. However in order to avoid the consequential redundancies the government had established the Coronavirus Job Retention Scheme (the furlough scheme).The respondent indicated that it was applying to join the scheme which would entitle it to a grant to cover wages of up to 80% of salary with a £2,500 cap for furloughed employees. The claimant had been identified as an employee to be placed on furlough and his status would change to that of a "furloughed worker". Attached to the letter was a form allowing the employee to signify in writing whether they agreed or did not agree to being designated a furloughed worker. On the same day, 31st March 2020 the claimant signed to agree, giving his reason for agreement as "no viable alternative." The evidence of Mr Dyer, which I accept, is that all designated furlough workers agreed, but that it had been decided that if any did not they would be dismissed on the basis that the respondent could not provide them with any work and they would, on the face of it be redundant. From that date the claimant became a furloughed worker and received £2,500 gross per month.

6. On 11th June 2020 the claimant was notified that he had been selected for redundancy. The letter informed him that the respondent had concluded that it was likely to see a reduction in business as the economy recovered from the pandemic and that it would no longer need two sales directors. He had been selected for redundancy on the basis of length of service. He was given four weeks' notice until 10th July 2020 but informed that with his agreement the respondent was happy to delay the formal giving of notice until 3rd August giving a termination date of 31st August 2020.

7. The claimant replied asserting that he was entitled to twelve weeks' notice, not four, as he believed he had passed the probationary period. By a letter of 22nd June 2020 from Deborah Smith, the respondent, although not agreeing with the claimant's analysis that the probationary period had ended, agreed to extend the notice period to twelve weeks giving a termination date of 3rd September 2020. During the notice period the claimant was paid his furlough pay, £2,500 per month gross.

8. The claimant subsequently unsuccessfully appealed the decision to dismiss him.

Conclusions

Notice Period

9. The dispute as to the length of the notice period arises from the question of whether the claimant had or had not completed his probationary period. If he had the notice period was twelve weeks and if he had not it was four. However, as is set out above, in this case the issue of whether the claimant was contractually entitled to four or twelve weeks' notice is purely academic as the claimant was in fact given twelve weeks' notice. If therefore he was entitled to

full contractual pay during the notice period that will apply for the full twelve weeks after notice had been given. It follows that in my view in the circumstances of this case it is not necessary to determine whether the claimant was or was not contractually entitled to twelve weeks' notice as he received it in any event.

Notice Pay

10. In consequence the central issue in the case is whether the claimant was entitled full pay or furlough pay during that twelve week period. If this involved the question of the calculation of statutory notice then the question would involve the application of the notice pay provisions of the Employment Rights Act 1996 and it is possible that the claimant would be entitled to full pay not furlough pay, as the claimant points out in his submissions. However his statutory notice was one week, he was contractually entitled to either four or twelve weeks' notice and he actually received twelve weeks' notice. On any analysis his contractual notice was more than one week greater than his statutory notice. As a consequence he is not entitled to statutory notice pay (S87(4) ERA 1996).

11. The question for the tribunal is therefore what contractual pay the claimant is entitled to during the notice period.

12. The claimant contends that he should receive full not furlough pay as:-
    - *i) The purpose of the government's furlough scheme was the preservation of employment, and that once it had been decided to dismiss him that purpose fell away;*
    - *ii) His agreement to receiving furlough pay, i.e. the amount that the government would pay to the respondent resulting in his continued employment being cost free or least with minimal cost, was specifically in order to be able to maintain his employment;*
    - *iii) Once he was notified that his employment was to be terminated that consent no longer applied, or at least could no longer be assumed to apply and in the absence of his specific consent to agree to receive a reduced salary he is entitled to full pay during his notice period.*

13. The respondent contends:-
    - *i) That the claimant's contract of employment was varied with there being an accepted offer to continue to employ him at a reduced salary whilst requiring him to do no work and his status had changed to that of "furloughed worker";*
    - *ii) That variation subsisted during the notice period. He continued to be employed and was not paid in lieu of notice, and during the whole of his notice period the provisions of the furlough scheme continued to apply;*
    - *iii) He was therefore paid exactly in accordance with the agreed variation to the contract;*
    - *iv) In addition and/or alternatively if the contract was not varied the claimant had signified his agreement in writing in advance and that any deduction was lawful in any event.*

14. The respondent contends that it took advice from ACAS, reviewed the CAB guidance and took legal advice (which I necessarily have not seen) all of which supports the view that where the notice period takes the case outside the payment of statutory notice (as in this case) furlough pay is the appropriate pay during the notice period.

15. The contract of employment sets out the relevant notice periods but unsurprisingly is silent as to the effect of any variation on pay during that period (clause 9); and salary is set out at clause 10. Similarly the written agreement as to the receipt of furlough pay is silent as to its effect if notice is given.

16. In effect the claimant's submission is that the express variation of the contract does not reflect any agreement as to the correct pay during the notice period. Accordingly in order to determine this issue the tribunal will need to consider two questions; firstly can a term be implied that despite the claimant's express agreement to receiving furlough pay and the alteration of his status to a "furloughed worker", that full pay would be payable during the notice period; or secondly can the express agreement be construed or interpreted to provide for two different rates of pay pre and post notice being given.

17. In my judgement the resolution of these issues is not easy. I will deal with implied terms first. The law in relation to the implication of terms is:.

> *The courts will not imply a term simply because it is a reasonable one. Nor will they imply a term because the agreement would be unreasonable or unfair without it. A term can only be implied if the court can presume that it would have been the intention of the parties to include it in the agreement at the time the contract was made.*
>
> *In order to make such a presumption, the court must be satisfied that:*
> *i) The term is necessary in order to give the contract business efficacy;*
> *ii) It is the normal custom and practice to include such a term in contracts of that particular kind:*
> iii) *An intention to include the term is demonstrated by the way in which the contract has been performed, or*
> iv) *The term is so obvious that the parties must have intended it*.

18. The first test, the business efficacy test, requires a court/tribunal only to imply a term if it is necessary, in the sense that without it it would lack commercial or practical coherence (*Marks and Spencer plc v BNP Paribas Securities Services Trust Co (Jersey) Ltd and anor 2016 AC 742, SC*.). In *Ali v Petroleum Co of Trinidad and Tobago 2017 ICR 531, PC*, Lord Hughes referred to the *Marks and Spencer* case and explained that: '*A term is to be implied only if it is necessary to make the contract work, and this it may be if (i) it is so obvious that it goes without saying (and the parties, although they did not, ex hypothesi, apply their minds to the point, would have rounded on the notional officious bystander to say, and with one voice, "Oh, of course") and/or (ii) it is necessary to give the contract business efficacy. Usually the outcome of either approach will be the same. The concept of necessity must not be watered*

down. Necessity is not established by showing that the contract would be improved by the addition. The fairness or equity of a suggested implied term is an essential but not a sufficient precondition for inclusion. And if there is an express term in the contract which is inconsistent with the proposed implied term, the latter cannot, by definition, meet these tests, since the parties have demonstrated that it is not their agreement.'

19. In my judgement it is not possible to conclude that business efficacy requires the implication of a term as to the payment of full pay during the notice period. Put simply the contract is equally coherent whether it is implied or not. Similarly in my judgement neither the second or third tests shed any light on the question in this case as the parties faced a unique situation.

20. That leaves the officious bystander test. This requires the tribunal, somewhat artificially to attempt to discern what the parties would have agreed at the time had they considered the question. Answering it is not easy as by definition by the time the dispute reaches the tribunal the parties are inviting the tribunal to reach different conclusions. In my judgement had the issue been raised at the time the parties are highly likely to have adopted the positions that they now adopt and this test equally does not allow the implication of a term disapplying the consent of the claimant to the contractual variation during the notice period.

21. The alternative question is that of the interpretation or construction of the contract. Can the express agreement to vary the amount of contractual pay be construed or interpreted to limit that agreement to the period prior to giving notice, with the result that full pay would be payable during the notice period. Even if it were permissible to do so there is nothing in the pre-agreement negotiations between the parties that would shed any light on that issue. The test is that the contract should be interpreted not according to the subjective view of either party but in accordance with the meaning which would be attributed to it by "*a reasonable person having 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*" (Spectrum Agencies v Benjamin EAT 0220/09 quoting Lord Hoffman in Investor's Compensation Scheme Ltd v West Bromwich Building Society (No1) 1998 1 WLR 896 HL)

22. The question thus becomes what background knowledge would be attributed to this reasonable person. In my judgement that knowledge would include:-
    i) The fact that the furlough scheme had been introduced to preserve employment;
    ii) The fact that during any period of statutory notice the respondent would be likely to be obliged to pay full pay and not furlough pay;
    iii) The fact, as in this case, that if the respondent was effectively not permitted to trade (or at least only very minimally) during the furlough period that it would be likely have little or no income;
    iv) The fact that the furlough scheme continued to apply during any notice period;
    v) The fact that the original employment contract had been expressly varied to change the claimant's status to "furloughed worker";

vi) The fact that any deduction would on the face of it be lawful (in the context of a claim for unlawful deduction from wages) during the period of the signed consent.

23. Factors i) and ii) point in the claimant's favour; factors iii) - vi) in the respondent's. In my view the most decisive factors are iv) and vi). Given that the furlough scheme continued to apply during the notice period, save for any statutory requirement to calculate notice pay in accordance with ERA 1996, and the underlying purpose still subsisted on the face of it the contractual variation would still apply; and the fact the signed consent would permit the deduction points to the same conclusion.

24. It follow that in my view neither by the route of implication or interpretation is there any basis for avoiding the conclusion that the contract had been expressly varied and that the variation continued to apply during the notice period; and that as a result the correct contractual pay during the notice period was furlough pay.

25. Given my conclusions as to the applicability of furlough pay as the correct pay during the notice period it is not necessary to determine the issue of whether full pay consisted simply of basic pay or whether it included the car allowance and/or pension contribution.

Employment Judge Cadney
Date: 21 July 2021

Sent to the Parties: 26 July 2021

FOR THE TRIBUNAL OFFICE