EMPLOYMENT TRIBUNALS

Claimant **Respondent**

MR PAUL THORPE **v** **BURRANA LIMITED**

Heard at: Reading Employment Tribunal (by CVP) **On**: 16 & 17 August 2021
(written submissions by 3 September 2021)

Before: Employment Judge Cowen

Appearances

For the Claimant: Ms Rokad counsel
For the Respondent: Mr Francis counsel

JUDGMENT

1. The claimant's claim for unlawful deduction for wages between 17 April 2020 and 30 October 2020 succeeds.

2. The claimant's claim for unfair dismissal succeeds.

3. A Polkey deduction is made to the compensatory award which limits the award to four weeks of earnings.

REASONS

Introduction

1. By an ET1 dated 9 September 2020, the claimant brought claims for Unfair Dismissal, Breach of Contract, Unlawful deduction from wages and Holiday pay. By the time of the hearing these issues had been narrowed to Unfair dismissal and unlawful deduction of wages.

2. At a Preliminary Hearing the final merits hearing was listed for two days on 16 &17 August 2021. The final merits hearing was heard by CVP. The claimant was represented by Ms Rokad of counsel and Mr Francis of counsel, represented the respondent. We were unable to hear closing submissions in the time available and so both parties agreed that they would prefer to make written submissions, rather than return at a later date. Unfortunately, these submissions did not reach me and therefore there was a delay. The parties

provided the submissions once again, before the judgment could be written.

3. In accordance with the directions made at the Preliminary Hearing, the parties provided a bundle of documents and the claimant provided a witness statement for himself. The respondent provided witness statements from Mr Neal Nordstrom, Mr Todd Pickering and Mrs Sally O'Connor. All of them provided oral evidence at the hearing. Mr Pickering and Ms O'Conner were resident in Brisbane, Australia and attended by CVP and provided their evidence. Mr Nordstrom was resident in California, USA and also gave his evidence by CVP. Permission for the respondent's witnesses to give evidence from overseas was granted at a Preliminary Hearing on 26 May 2021.

4. A list of issues was placed in the bundle by the respondent, but was not agreed by the claimant prior to the hearing. The parties agreed that the hearing should be limited to issues relating to liability and the issue of Polkey reduction if there was an unfair dismissal.

5. The issues before me were therefore;
   5.1 <u>Unfair Dismissal</u>
      5.1.1 Was the Claimant dismissed for a potentially 'fair' reason? Was redundancy the reason for the Claimant's dismissal?
      5.1.2 2. Did the Respondent follow a 'fair' procedure in dismissing the Claimant?
   5.2 <u>Unlawful Deduction from Wages</u>
      5.2.1 Did the Claimant suffer unauthorised deductions from his wages between April 2020 and October 2020, by way of a reduction in his monthly salary?
      5.2.2 Did the Claimant agree to a reduction in his monthly salary?

The Facts

6. The claimant was employed as the President EMEA on 15 May 2014, by the respondent, an international company which supplies inflight entertainment systems to the airline industry. The claimant reported to the CEO, Mr Withers. The company had initially been formed in Australia, but from January 2019 it had been funded by US equity sources.

7. At the start of the Covid-19 pandemic in March 2020 the respondent recognised that the suspension of international air travel would lead to significant financial problems for the whole company, which was already facing difficulty due to the grounding of the Boeing 737 Max fleet worldwide. Discussions were entered into immediately amongst the ExCo, a committee of Vice -Presidents which included David Withers, the CEO and Neal Nordstrom. They considered how the company should respond to the collapse of the airline industry and the effect this would have on their business. Ultimately, they considered redundancy and furlough options in the UK and elsewhere.

8. The respondent's HR Business Partner Mr Pickering was located in Australia and was attempting to advise various managers in a number of different countries, all of which had different rules and requirements relating to government backed support for employees. Mr Pickering was not aware of the

specific requirements of the UK Coronavirus Job Retention Scheme (aka furlough scheme), as he did not research or read the scheme himself. He was unaware that there was a requirement that staff give written agreement to being placed on furlough. Instead, he placed reliance on the claimant as the local manager to inform him of the terms.

9. On 16 March 2020 the ExCo agreed that a number of staff across the whole company would be 'stood down'. This was a company scheme to try to save costs. There were four different types of stand down – some involved working reduced hours, some which stopped work altogether, others continued their normal hours; all of them involved a reduction in pay.

10. On 17 March 2020 the claimant was sent a letter to say he would be 'stood down' from 23 March 2020. He was told that he would not be paid full pay, but would receive 50% pay for two weeks, followed by no pay for two weeks. He would be allowed to take his annual leave for some time. The claimant was asked to provide the same letter to his employee group at the same time. His input was requested in compiling a strategy for the business to respond to the pandemic. He was not asked for his consent to this action. The claimant agreed to a period of unpaid leave and assisted in advising other employees of the same.

11. The claimant continued to be involved in discussion of how the respondent would deal with its staff in the UK and recommended that the respondent use the UK furlough scheme which provided up to £2,500 per month per employee. In mid April the respondent was successful in its application to join the scheme, together with the requirement that those on the scheme should not continue to work. The claimant was informed on 17 April that he was on 'total standdown so we can access the HMRC's funding model'. The letter indicated that he should return to duties on 1 June 2020. The letter did not seek the claimant's agreement to furlough, nor to any deduction from his salary payments.

12. The claimant was paid his full salary in April 2020. This was an error, as the respondent was able to reduce this to the £2,500 maximum of the furlough scheme. The claimant and one other employee were overpaid. On 20 April Mr Pickering said that he would talk to the claimant about the error and ask if he would agree that instead of taking money back from him, they would use his annual leave balance to reverse it instead. There was email correspondence between the claimant and Ms Kruger about the amounts and the deductions. On 23 April 2020 the claimant sent Ms Kruger an email agreeing to deductions being taken from his pay (furlough amount) to recover the overpayment which had been made to him.

13. The claimant was placed on the furlough scheme in April, but continued to be included in email conversations and online meetings about the continued structure of the EMEA team. Mr Pickering did not challenge the claimant over his continued involvement in the management of EMEA, whilst on furlough.

Ms O' Connor's view was that it was a commonly accepted practice to work whilst on 'standdown'.

14. In May 2020 the claimant exchanged emails with Mr Pickering about further meetings with all staff to discuss headcount reductions. He was therefore aware that this was being considered at this time. It also showed that the claimant continued to undertake some work tasks, despite being on furlough. On 11 May the claimant wrote to Mr Withers to say that if those in the UK on furlough continued to work, they and the company would be breaching the law.

15. Mr Withers stood down as CEO in May 2020 and Mr Nordstrom took over. Mr Nordstrom reconsidered the future direction of the company and its' survival. The claimant emailed Mr Nordstrom in May 2020 to indicate his views on the continued situation for the EMEA staff. Whilst the claimant was not a member of ExCo, he now reported to Mr Nordstrom and they met weekly online to discuss issues privately.

16. The claimant spoke with Mr Nordstrom on 15 May via mobile phone and then by Teams on 24 May to discuss the operational needs of the EMEA team. During these conversations they discussed other members of the team and a 50% reduction in costs. There was no conversation with regard to the claimant's position being potentially redundant. Mr Nordstrom did not take any advice from Mr Pickering or Ms O'Connor with regard to the process of redundancy in the UK.

17. Mr Pickering wrote to the claimant on 2 June indicating that his furlough was to continue to the end of June 2020 and would then be reviewed.

18. On 9 June Mr Nordstrom and the Board took the decision to make the claimant redundant. This was based on Mr Nordstrom's recommendation. It was considered that there was insufficient work for the claimant to do, as the company focused on delivering the products which were currently on order, rather than on further sales.

19. On 9 June Mr Nordstrom contacted the claimant and asked to speak to him. A meeting took place on 10 June 2020 between them. There are no respondent notes of this meeting.

20. On 11 June Mr Nordstrom asked Ms O'Connor to draft a letter to the claimant outlining his redundancy entitlement and the terms of his departure. He informed Ms O'Conner that the claimant was "in agreement in principal with our proposal". The email also highlights that the claimant has told Mr Nordstrom that whilst he remains on furlough he should not be working. Mr Nordstrom asks Ms O'Connor to " limit his time to the mandatory turnover of equipment and information. …. asked that he be available to consult with us regarding the handling of the rest of the team".

21. There was no list of vacancies within the business at this time, so any possible alternative vacancies were unknown to the claimant. However, any

recruitment process was run by either Mr Pickering or Ms O'Connor and therefore they would have details of any existing vacancies, if asked. At the time of the claimant's redundancy there had been a global freeze on hiring.

22. Mr Nordstrom's view was that no-one was safe from redundancy and that Gene Connolly was the better person to continue to cover the sales role on a global basis than the claimant. The claimant considered there to be an 'America first' policy.

23. On 12 June the claimant told Mr Nordstrom that he had discovered that there had been a confidential email to staff within EMEA indicating that another member of staff was taking over EMEA. This was prior to any announcement or agreement about the claimant leaving the business. Mr Nordstrom apologised to the claimant for this. The claimant's name was not included in an email sent to members of ExCo in relation to those being made redundant.

24. It was not until later in the day that Ms O'Connor emailed the claimant to tell him how much he would be paid on termination and to indicate he would remain on furlough during his notice period. The claimant replied to Ms O'Connor to ask for his total redundancy entitlement calculation and pension and benefits entitlement. She sent the claimant the answers to his questions by email on 19 June 2020. There was a dispute between the claimant and respondent over his entitlement to accrued holiday pay and other remuneration.

25. On 22 June the claimant appealed against the decision to terminate. He indicated that he considered the selection grounds for redundancy to be unfair and not to have followed a fair process. He also asserted that the retention of contractors was unfair and ignored his suggestion on how to avoid redundancy at all. Up until receipt of this Mr Nordstrom and Ms O'Connor had believed that the claimant was in agreement with the decision to terminate his employment.

26. Ms O'Connor spoke to the claimant on 29 and 30 June with regard to his appeal. She took no notes of the conversation at all. The claimant's notes indicate that he raised the fact that there had been no consultation with him at all and no attempt to avoid or reduce the number of redundancies. There was no discussion about the number of individuals considered for redundancy, nor the selection criteria used.

27. She erroneously believed that the claimant had accepted his redundancy by his statement on 1 July that he was going to announce to his staff that he was being made redundant. She did not send an outcome letter for this hearing, as she was hospitalised for a short time after this.

28. The respondent announced on 27 July 2020 that the claimant would remain on furlough during his notice period.

29. The claimant's employment terminated on 30 October 2020.

30. **The Law**

Redundancy

Redundancy is defined by s. 139(1) Employment Rights Act 1996 ('ERA') as
"(a) the fact that his employer has ceased or intends to cease –

(i) to carry on the business for the purposes of which the employee was employed by him, or

(ii) to carry on that business in the place where the employee was so employed, or

(b) the fact that the requirements of that business-

(i) for employees to carry out work of a particular kind, or

(ii) for employees to carry out work of a particular kind in the place where the employee was employed by the employer, have ceased or diminished or are expected to cease or diminish".

31. For a dismissal to be fair under s.98 ERA, the respondent must establish that the reason for the dismissal was one of the potentially fair reasons under s.98(1). These include redundancy.

32. If the reason for the dismissal is a potentially fair one, then the Tribunal must consider whether, in all the circumstances of the case, the respondent acted reasonably in treating redundancy as a sufficient reason to dismiss the claimant: Williams v Compare Maxam Ltd [1982] IRLR 83, EAT

33. The Tribunal is also obliged to consider under s.98(4) whether a reasonable procedure was applied to the dismissal. This was considered in Polkey v A E Dayton Services Ltd [1987] IRLR 503; where the process was set as;

33.1 Warn and consult employees about the proposed redundancy and

33.2 Adopt a fair basis on which to select for redundancy, including from an appropriate pool and using selection criteria, and

33.3 Consider any available offer of suitable alternative employment within the organisation.

34. The Tribunal must also consider, where there has been a failure to follow a proper procedure, whether a proper procedure would have led to the claimant being dismissed in any event. If so, a reduction can be made to the any compensatory award to reflect such a chance.

35. In doing so, the Tribunal will consider what was actually known by the employer at the time and the views taken by them at the time.

36. Unlawful Deduction from Wages

The claimant claims that the respondent has breached s.13 ERA by failure to pay him an amount owed to him, which was not an authorised deduction either by a statutory provision or by his contract, or by him signifying in writing his consent to the making of the deduction.

37. The Tribunal will first consider what amount is 'properly payable' by way of reference to the contract and statutory provisions.

38. A contractual variation can be made orally or in writing. However, the respondent may also rely on the claimant continuing to work under the varied contract, to show that the employee has agreed to the contractual variation. See Abrahall v Nottingham City Council [2018] IRLR 628.

39. A number of cases have been heard on the impact of the Coronavirus Job Retention Scheme (‘furlough’) on the law of variation of contractual terms. These include the ET case of Docherty v CCRS Brokers Ltd and Re Carluccio’s Ltd [2020] IRLR 510, EAT.

40. In order for a variation to be implied, the Tribunal must be satisfied that the inference is unequivocal and therefore must take into account the circumstances of the case.

Decision

Unlawful Deduction and Furlough

41. The claimant was not expressly asked by the respondent to agree to being placed on ‘standdown’, nor to be placed on the furlough scheme. The documentary evidence sent to employees does not highlight that they have the choice not to agree with these proposals.

42. In relation to the standdown notification in March/April 2020– the claimant was told that he would not be paid as per his contract entitlement. Whilst he was part of the management of the respondent who were formulating and enacting the standdown terms, he was also an employee who was entitled to the same requirements to legally vary his contract. However, the claimant clearly understood and acknowledged the notification of standdown, in his email of 19 March, saying he was “OK without changes” after which he continued to work. This amounts to acceptance of the changes which were proposed by the respondent.

43. The claimant was paid his full pay in March 2020, but by April 2020 when the furlough scheme started, the company sought to recover what they considered to be an overpayment. They did discuss this with the claimant and there is evidence of an agreement as to how the money would be recouped.

44. The claimant indicated that he would be willing to have reduced payments for the following two months in order to balance the overpayment. This was an agreement made between the claimant and the respondent. There was therefore no unlawful deduction from wages, as the claimant agreed to this variation by consenting to the overpayment being recouped. Had the claimant not been in agreement with the variation he would have shown opposition at that point, but did not do so. The deductions made up to 17 April 2020 were not unlawful.

45. In relation to the furlough scheme - Mr Pickering did not research or become familiar with the terms of the UK furlough scheme. The Tribunal recognised that there was a lot of emergency work going on at that time and that Ms

O'Connor was stood down from her employment for a period of 4 weeks and then returned on very limited hours, so was not readily available to him for management or support.

46. However, given that Mr Pickering was engaging with a statutory scheme and was applying for the respondent to receive funding from the UK government, he ought to have taken the time to ensure that the terms of the UK furlough scheme were followed by the respondent. He could have taken legal advice, but did not do so. He ought to have been aware that the respondent was required to ask individuals for their agreement to be placed on furlough and their acquiescence to a reduction in salary payments.

47. The limit in relation to furlough pay represented a significant reduction in income for the claimant and was to be for longer than the 4 week standdown proposal by the respondent. The respondent ought to have taken time to ensure that the claimant understood that this would amount to a substantial variation to his contract. There is no evidence to suggest that the respondent sought to clarify the claimant's personal agreement to this scheme.

48. The fact that the claimant had outlined the scheme to Mr Pickering is not of itself evidence of his agreement to be placed on the scheme himself. I recognise that the claimant's actions as a manager are not necessarily the same as his actions on his own behalf.

49. Furthermore, the claimant indicated to the respondent on more than one occasion that if he were placed on furlough then he ought not to be undertaking any work. This aspect of the furlough scheme was disregarded by the respondent who expected him to continue to engage with emails and calls. This alert by the claimant amounts to an indication that he does not agree with the actions of the respondent.

50. Whilst the claimant continued to work on behalf of the respondent, he had made it clear that he did not agree with the respondent's actions under the furlough scheme. This did not amount to acquiescence to the variation. The lack of request by the respondent for the claimant to agree to being placed on furlough and the continued expectation that he work, indicate that the terms of the furlough scheme were not adhered to. There was not therefore an intention by both parties to vary the contract to align with the terms of the furlough scheme. A variation in line with the furlough scheme, including a deduction from the claimant's contractual pay cannot be inferred from his actions.

51. The payment of the claimant between 17 April 2020 and his dismissal amount to a series of payments which were an unlawful deduction of his salary.

52. <u>Unfair Dismissal</u>
The respondent had faced a downturn in work prior to the Covid pandemic as a result of the grounding of the Boeing fleet. This made a significant impact on the finances of the respondent. They were already looking to make cutbacks and costs savings as a result of this, when the Covid pandemic hit in March

2020. The pandemic meant that most worldwide airlines stopped flying/reduced their flights and therefore reduced the need for new equipment and maintenance of inflight entertainment systems.

53. The respondent therefore faced a significant decline in its business and as the pandemic developed the length of the impact became more uncertain.

54. The company sought to make significant cutbacks, asking the claimant and other regional Presidents to consider 50% reductions in costs.

55. The definition of redundancy in the Employment Rights Act includes a reduction in the requirement for employees to carry out work of a particular kind. In this case, the requirement to have three regional Presidents ceased and the company decided to reduce that requirement in order to save costs.

56. It is not for the Tribunal to go behind the business decisions of the company. The Tribunal can only consider whether those in the company who made the decision to reduce the number of employees required, did so on genuine grounds. Given the situation being faced by the respondent at this time and the industry uncertainty, their decision to reduce costs was a genuine decision. The reason for dismissal as redundancy was therefore potentially a fair reason.

57. The claimant was informed that he had been selected for redundancy on 9 June 2020 by Mr Nordstrom. This was the first time he had been informed of the respondent considering making his dismissal. There had been no consultation at all as to possible redundancy. This amounts to a complete failure to abide by the procedure set out by ACAS and by the case authorities.

58. In a call on 10 June Mr Nordstrom and the claimant discussed his departure. No notes of this call were made, other than by the claimant. No justification or reasoning as to the selection of the claimant was given on that day, or after. No selection criteria, or scoring was referred to. Once again, this is a breach of a fair procedure.

59. The respondent's pleaded case that the claimant was in a pool of one is not supported by the respondent's own evidence which lacks any consideration of a pool or selection criteria. There were three geographical areas each with a Presidential role. It is arguable therefore that the Presidents of the other two areas ought to have been placed in the pool with the claimant and a skills based selection criteria applied to each of them to select a Global Head of Sales.

60. There is no evidence that alternative employment was considered or offered to the claimant to avoid dismissal.

61. I have also considered the appeal hearing which gave the claimant an opportunity to seek clarification and raise the points on which he objected to his dismissal. No outcome to this appeal was sent to the claimant in writing.

62. The respondent entirely failed to provide the claimant with a fair procedure. He had no opportunity prior to the decision making to influence the outcome and whilst he was given an appeal, the chance of him persuading the company to recant its decision was not realistic. The dismissal of the claimant was therefore unfair.

63. Polkey
I am obliged to consider whether there ought to be a reduction to the claimant's compensatory award due to the principals applied in Polkey. Had a fair procedure been applied to this redundancy process, would it have made a difference to the outcome and if so, by how much.

64. I have accepted the respondent's submission that this was a genuine redundancy situation. The respondent was in a very difficult financial position in June 2020 with uncertainty over the length of time it would take to return to normal business conditions.

65. Had the claimant been consulted over the redundancy I do not believe that it would have ultimately made a difference as Mr Nordstrom would have chosen to retain Mr Connolly over the claimant in any event. There were no alternative vacancies suitable for the claimant and nothing he raised would have changed the financial position of the company at that time.

66. I do find that had the claimant been given the courtesy of a full period of consultation, he would have remained in the employment of the respondent for a further 4 weeks.

67. Conclusion
Having made the decisions above, the parties are asked to consider whether they might be able to agree the level of compensation to be paid to the claimant.

68. If the parties are unable to agree then they should notify the Tribunal by 28 February 2022 and the case will be listed for a remedy hearing with a time estimate of 1 day.

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Employment Judge Cowen

Date: …7 February 2022………………..

Sent to the parties on:

8 February 2022

For the Tribunal Office

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