Case Numbers: 3200588/2017
2403169/2017

THE EMPLOYMENT TRIBUNALS

Claimants: **(1) Mr Philip Gower**
(2) Ms Julie Donnelly

Respondent: **Post Office Limited**

Heard at: **East London Hearing Centre**

On: **6 October 2017**

Before: **Employment Judge Tobin**

Representation

Claimant: **Ms L Seymour (counsel)**

Respondents: **Ms A Carse (counsel)**

JUDGMENT

The Employment Tribunal determines as follows:

1. **Pursuant to sections 11 and 12 of the Employment Rights Act 1996, the first claimant and second claimant are entitled to receive their wages on a weekly basis. Accordingly, the tribunal confirms that the correct particulars for the first claimant and second claimant is as follows:**
the interval at which your remuneration will be paid shall be weekly.

2. **By not paying the first claimant and second claimant their weekly wages, the respondent has subjected them to a series of unlawful deduction of wages, pursuant to section 13 of the Employment Rights Act. At the date of this hearing the first claimant and the second claimant were owed one week's wages.**

3. **The first claimant and second claimant are awarded two-weeks' pay under section 38 of the Employment Act 2002.**

REASONS

The case

1. The claims were presented at the Employment Tribunal on 23 June 2017. The claims were presented as multiple cases and were formally joined. The first and second claimants brought claims for:

a. Unlawful deduction from wages, pursuant to section 13 of the Employment Rights Act 1996 ("ERA");

b. A determination of the validity of a statement purporting to change their conceptual terms from an entitlement to an entitlement to monthly pay, under ss11 and 12 ERA; and

c. An award under s38 Employment Act 2002 ("EA").

2. This case is about whether the respondent was contractually entitled to change the claimants' pay-date so as to pay them on a monthly rather than a weekly basis. The respondent contended that it varied the claimant's contract of employment lawfully. The claimants have refused to accept this contractual variation.

3. The respondent chose not to terminate the claimants' contract of employment and offer new terms. Following the respondent's switch to monthly pay, with effect from 3 February 2017, the claimants did not elect to treat themselves as constructively dismissed. As the employment relationship is continuing in both cases, this tribunal does not have the jurisdiction to hear a breach of contract claim. This accounts for the rather circuitous route of Part II (Protection of Wages) ERA to determine what is, in essence, a breach of contract matter. This was dealt with as a preliminary point; and following the authorities of *Southern Cross Healthcare Co Limited v Perkins & Others [2010] ICR 285* and *Whetherilt v Cathay Pacific Airways Limited UK E8T/0333/16,* I (i.e. the tribunal) am satisfied that I have jurisdiction to effectively determine the substance of what would be the focus of a breach of contract complaint within the confines of the ERA and EA claims presented by the claimant.

This hearing

4. The claimants were represented by Ms Seymour. She presented signed and dated witness statements for both claimants and Mr Andy Furey, National Secretary of the claimants' trade union, the Communication Workers Union ("CWU").

5. The respondent was represented by Ms Carse. She presented signed statements from Mr Mark Dyer, a consultant employed by the respondent, and Mr John Whitefoot, the respondent's Employee Relations and Policy Director.

6. Both parties provided me with skeleton arguments, copies of various cases and extracts from Harvey on Industrial Relations and Employment Law. I was also provided with an agreed bundle of documents which ran to 338 pages.

7. Witnesses were in attendance, except the second claimant. I was informed that following the transfer of her case to the East London Employment Tribunal, Ms Donnelly felt the journey was too far to attend the hearing. Following discussions, the representatives agreed that the witness statements could stand as the parties' evidence. I do not deem the absence of cross-examination as an indication of the acceptance by either party of the opposition's case.

8. I am grateful for the constructive manner in which the parties and their representatives have approached this case. The issues were narrowed where suitable. The skeleton arguments were detailed. Each side was clearly committed to their case. Nevertheless, it is a credit to all concerned that the focus of this dispute remained fixed upon the issues which required determining.

The law

9. Section 1(1) ERA provides:

> Where an employee begins employment with an employer, the employer shall give to the employee a written statement of particulars of employment.

10. S1(4) ERA provides that this statement shall contain particulars of

> …
> (b) The intervals at which remuneration is paid (that is, weekly, monthly or other specified intervals),
> …

11. S4 ERA provides for a statement of changes of any of the particulars required to be given by ss1-3 ERA, at the earliest opportunity and, in any event, not later than one month after the change in question.

12. S11(2) ERA states:

> Where—
> (a) a statement purporting to be a statement under section 1 or 4, or a pay statement or a standing statement of fixed deductions purporting to comply with section 8 or 9, has been given to an employee, and
> (b) a question arises as to the particulars which ought to have been included or referred to in the statement so as to comply with the requirements of this Part,
> either the employer or the employee may require the question to be referred to and determined by an employment tribunal.

13. S12 ERA deals with the determination of the employment tribunal:

> (1) Where, on a reference under section 11(1), an employment tribunal determines particulars as being those which ought to have been included or referred to in a statement given under section 1 or 4, the employer shall be deemed to have given to the employee a statement in which those particulars were included, or referred to, as specified in the decision of the tribunal.
>
> (2) On determining a reference under section 11(2) relating to a statement purporting to be a statement under section 1 or 4, an employment tribunal may—
> (a) confirm the particulars as included or referred to in the statement given by the employer,
> (b) amend those particulars, or
> (c) substitute other particulars for them,
> as the tribunal may determine to be appropriate; and the statement shall be deemed to have

been given by the employer to the employee in accordance with the decision of the tribunal.

…

14. Section 13(1) provides:

> An employer shall not make a deduction from the wages of a worker employed by him…

15. This prohibition does not cover deductions authorised by statute or the contract or where the worker has previously agreed in writing to the making of the deduction: see ss13(1)(a) and (b) ERA.

16. Section 13(3) ERA explains what is meant by a deduction:

> Where the total amount of wages paid on any occasion by an employer to a worker employed by him is less than the total amount of the wages properly payable by him to the worker on that occasion (after deductions), the amount of the deficiency shall be treated… as a deduction made by the employer from the worker's wages on that occasion.

17. To determine what is *properly payable* on any given occasion will involve the tribunal resolving the dispute over what the claimants were contractually entitled to receive by way of wages from the respondent *on any occasion* and what they did, in fact, receive *on that occasion*.

18. S38 Employment Act 2002 deals with the failure to give a statement of employment particulars pursuant to ss1 and 4 ERA.

> (1) This section applies to proceedings before an employment tribunal relating to a claim by an employee under any of the jurisdictions listed in Schedule 5.
>
> (2) If in the case of proceedings to which this section applies—
> (a) the employment tribunal finds in favour of the employee, but makes no award to him in respect of the claim to which the proceedings relate, and
> (b) when the proceedings were begun the employer was in breach of his duty to the employee under section 1(1) or 4(1) of the Employment Rights Act 1996 (c. 18) (duty to give a written statement of initial employment particulars or of particulars of change or under section 41B or 41C of that Act (duty to give a written statement in relation to rights not to work on Sunday),
> the tribunal must, subject to subsection (5), make an award of the minimum amount to be paid by the employer to the employee and may, if it considers it just and equitable in all the circumstances, award the higher amount instead.
>
> (3) If in the case of proceedings to which this section applies—
> (a) the employment tribunal makes an award to the employee in respect of the claim to which the proceedings relate, and
> (b) when the proceedings were begun the employer was in breach of his duty to the employee under section 1(1) or 4(1) of the Employment Rights Act 1996 or under section 41B or 41C of that Act,
> the tribunal must, subject to subsection (5), increase the award by the minimum amount and may, if it considers it just and equitable in all the circumstances, increase the award by the higher amount instead.
>
> (4) In subsections (2) and (3)—
> (a) references to the minimum amount are to an amount equal to two weeks' pay, and
> (b) references to the higher amount are to an amount equal to four weeks' pay.
>
> (5) The duty under subsection (2) or (3) does not apply if there are exceptional circumstances which would make an award or increase under that subsection unjust or inequitable.
>
> (6) The amount of a week's pay of an employee shall—

(a) be calculated for the purposes of this section in accordance with Chapter 2 of Part 14 of the Employment Rights Act 1996 (c. 18), and
(b) not exceed the amount for the time being specified in section 227 of that Act (maximum amount of week's pay).

(7) For the purposes of Chapter 2 of Part 14 of the Employment Rights Act 1996 as applied by subsection (6), the calculation date shall be taken to be—
(a) if the employee was employed by the employer on the date the proceedings were begun, that date…

My finding of facts

19. The parties presented an agreed chronology, which was extremely helpful and I am obliged to their efforts in this regard. The facts which I set out below is not an exhaustive chronology: it is merely the facts, which I judge necessary to determine the issues before me.

20. The first claimant began working for the respondent as a temporary employee in 2004. He was "promoted" to a substantive appointment as a "CHD PA" (a Cash Handling and Delivery Postal Assistant) with effect from 1 August 2005. He was appointed by Royal Mail Group plc to the Network Support Services (NSS) business of its subsidiary, the respondent company.

21. The first claimant's letter of appointment dated 28 July 2005 stated he was being offered employment:

> the terms and conditions will vary as contained in the attach a statement of terms and conditions.

22. The letter also stated that:

> Variations of the conditions of employment referred to in this letter and in the enclosed statement will be subject to discussion or negotiation between Royal Mail Group (NSS) [the respondent] and the appropriate trade unions.

23. A statement of Terms and Conditions of Employment was attached, which said:

> Your starting pay will be at the rate of £322.31 payable weekly … your pay may be increased in accordance with your pay scale or range.

24. The second claimant commenced employment with the respondent in 1988 as a part-time Postal Officer and she is still employed in that role, although the position is now called a Customer Services Consultant.

25. The second claimant's signed letter of appointment, dated 3 February 1988 (in her pre-marriage name), said that she was being offered employment

> on the terms and conditions shown in this letter and in the enclosed formal statement and contract documents.

26. The appointment letter also continued:

> *Variations in the rules relating to conditions of service referred to in this letter and in the enclosed statement will be subject to discussion or negotiation between the Post Office and the appropriate staff associations, or, were applicable, arbitration*.

27. The statement of Terms and Conditions of Employment was attached and said

> Your starting pay will be at the rate of £2.078 per hour payable weekly in arrear and, … your pay will be increased by annual increments in accordance with your pay scale.

28. The claimant worked full-time and then reverted to a role as a part time Postal Officer in July 1993. She received a new letter of appointment, which in respect of the terms under our scrutiny, used identical language to that of the first claimant. This letter attached a further statement of Terms and Conditions of Employment which contained identical provisions as to her payment intervals as that identified above.

29. The first and second claimants worked on the basis that they were paid weekly, notwithstanding that they received pay increases from time to time negotiated by their trade union.

30. Sometime around May 2016, the respondent reviewed its payroll and human resources systems in respect of its obligations for automatic enrolment of eligible job holders under the requirements of the Pensions Act 2008. The respondent considered that it would need to introduce a new payroll system and decided against undertaking the additional work required in relation to a weekly pay cycle. The respondent proposed that all weekly-paid staff should be moved to a monthly payment cycle.

31. On 8 August 2016 the respondent's Head of Industrial Relations wrote to the Assistant Secretary of the CWU, a letter entitled "Simplifying our Payroll – Proposal to Move to Monthly Pay". The respondent's Head of Industrial Relations said that he was commencing a formal 90-day consultation period which would start on 8 September 2016 and conclude on 8 December 2016. The respondent said

> This proposal constitutes a change in the contractual terms and conditions of employment for 1,230 employees who are currently paid weekly. We propose this change will become effective from 1 February 2017.

32. The respondent went on to state:

> We are proposing to pay all of our employees on a monthly basis and so move weekly paid staff to monthly pay by February 2017. This would mean that employees would be paid on the last working day of each month.
>
> This change will not reduce the amount that employees are paid, only the frequency of their payments.

33. There followed further correspondence and discussions between the respondent and the CWU in relation to the proposed change to the contractual terms of the claimants, and their colleagues, in respect of their pay frequency. No agreement was reached. The CWU requested a reference to ACAS, which was declined by the respondent.

34. On 3 January 2017 the respondent wrote direct to the first and second claimants seeking their agreement to change their contractual terms from weekly payment to monthly payment. The letter said:

> [The] Post Office decided to proceed with the proposal on 13 December 2016 and this means that you will be paid on a month basis from 3 February 2017.
>
> This is a change to the terms of your contract of employment and some new wording will now be added in relation to this change [which was set out underneath].

35. This letter equated a lack of objection from affected employees to an agreement to the proposed change of pay date. Staff were given 10 days from the date of the letter, which in the case of both claimants was significantly less than the contractual and statutory notice period of either. Recipients were told that in the absence of a response within the arbitrary time limit the respondent had set, then the new terms would be implemented from 3 February 2017,

> and will be agreed between you and Post Office.

36. In any event, both claimants objected promptly, by separate letters, to the proposed change to their contracts. The first claimant objected by CWU pro forma letter dated 11 January 2017 and the second respondent also objected in writing on 6 January 2017, which was recorded in her "Line Manager Feedback. The substance of the objection of both claimants was as follows:

> I do not agree to my contract of employment being changed unilaterally and wish to retain weekly pay. If you impose it I shall regard the Post Office as being in breach of my contract of employment, and I reserve my right to commence legal proceedings to remedy the breach and to seek damages for breach of contract.

37. The respondent ignored the claimants' objection and wrote to the first and second claimants on 23 January 2017, saying

> …the variation to your contractual terms, as set out in our letter to you of 3 January 2017, will take effect from 3 February 2017.

38. If there was any possible doubt that both claimants had objected to a unilateral variation of their contracts of employment, then this was eliminated by the first claimant and second claimant on 24 January 2017, when they wrote to the respondent, separately, although again in identical terms:

> For the avoidance of doubt, I am adamant I want to retain weekly pay and I continue to oppose any unilateral change to my contract of employment that introduces monthly pay".

39. On 24 January 2017, the first and second claimants also applied for a "bridging loan" of 4 weeks advance payment of salary, which the claimants elected to repay at the point that they leave the respondents employment.
'

40. Since 10 February 2017 the first claimant and the second claimant have not received the weekly pay to which they are contractually entitled to. Instead, the respondent has paid both claimants at monthly intervals.

My determination

41. There is a fiction in contract law that assumes the parties have equal bargaining strength. The tolerated myth in employment law is that each contract is negotiated on an individual basis with each employee. The reality is that most employees are simply given no option as to the terms of the contract. They are presented with a contract of employment and invited to sign the document – if

they want the job. We, in the employment tribunal, maintain that fiction to provide for legal certainty. A contract of employment is usually the most important document in regulating and determining the relationship between employers and employees. Other than where the contract explicitly states so and save as to exceptional or unusual circumstances, we do not import concepts of *reasonableness* to determining whether a term of a contract is enforceable or even how it should be construed. We regularly hear arguments from claimants that say they should not be held to their contracts because they had limited bargaining strength and the term requiring adherence was "unreasonable". That argument usually has little force because agreement of an express contractual term overrides the reasonableness of whether or not it should be complied with.

42. The contract of employment between the respondent and the two claimants provided weekly rather than monthly pay. The respondent contended that it had varied the contract to the extent that it was entitled to pay the claimants on a weekly basis.

43. There is no breach of contract claim and I do not have jurisdiction to hear a breach of contract because firstly, the respondent has not terminated the claimant's contract to affect the change. Secondly, the claimants have not treated themselves as constructively dismissed because of the respondents purported ongoing breach of contract.

44. The respondent appears to have a strong argument in respect of the reasonableness of its proposal to change the salary payment frequency. No doubt that argument carried weight in persuading many employees to sign up for the proposed variation. Indeed, it is an argument that might have had some persuasive force in respect of the reasonableness of terminating (on notice) the contracts of dissenting employees and then offering new contracts of employment with varied terms. However, that is not the path that the respondent chose, and the reasonableness of the respondent's objective has only limited application to this review.

45. In her submission, Ms Carse accepted that the claimants' contracts of employment with the respondent did not contain any express power of variation. The first claimant's and second claimant's contracts of employment were clear and both contracts stated that their wages were payable on a weekly basis.

46. Reference was made to the National Collective Engagement and Industrial Relations Framework 2015 and the respondent accused the claimant's trade union of not engaging in meaningful consultation, negotiations or discussions with the respondent. From my reading of the correspondence it appears that the respondent was fully committed to the reasonableness of its own case and would only accept that the consultation or negotiations would be "meaningful" if they got what they wanted.

47. The case put forward by the respondent in the first instance is that the respondent was entitled to vary the contract if there was some discussion or negotiation between the respondent and the CWU. The respondent contends that as the change was subject to some discussion or negotiation with the relevant trade union, it was entitled to vary the claimants' contracts (presumably

despite the clear objections of the claimants themselves). The respondent is not consistent on this point, because when it failed to achieve agreement with the CWU, it sought to appeal direct to its employees to agree the variations separately and individually.

48. A contract is a legally enforceable agreement between two or more parties. It is a prerequisite that that agreement must have legal certainty and any power to change some or all of the agreement must be clearly set out. The power to unilaterally change the employment terms must be clear and unambiguous: see *Norman v National Audit Office [2015] IRLR 634*. The claimants' contracts refer to variations in the same sentence as discussions or negotiations with the relevant trade union. However, whilst the contract says that variations will be subject to such discussions or negotiations, it does not state that the respondent, having so engaged, is then at liberty to proceed to vary conditions of employment without agreement. I accept the claimant's submission that the terms relied upon by the respondent do not even come close to establish in a unilateral right to change such a core term. The language used in the contracts has not clearly and an ambiguously reserved a right, by the respondent, to amend the pay frequency unilaterally.

49. The respondent says that it cannot be correct that the CWU can deliberately fail to engage in the consultation process and thereby stop the respondent from varying its employees' contract of employment. The response to this predicament is simple – yes it can. This is an obvious point for anyone drafting a contract on one side and a party considering signing the contract on the other. If the respondent feared deadlock in consultation and/or negotiation, then if it wanted to reserve the power to break the impasse then the respondent should have drafted a clear term that provided for an ultimate right of variation. I note that the respondent reserved this right of unilateral variation in respect of the second respondent's contractual hours in July 1993. Neither a right to change the interval for paying wages nor a general right to vary the contract without agreement was reserved by the respondent in the contract of employment for the first and second claimants.

50. As an alternative, the respondent argued that it is necessary to imply a term into the claimants' contract of employment which allowed it to vary the frequency of pay from weekly to monthly. The respondents say that this was necessary for contracts to work properly and construed on the basis of what a reasonable person would take to be the consensus. I state above that the reasonableness of the respondent's objectives does not mean it is necessary to imply the right to change a previously agreed core term of the contract.

51. I do not accept that an implied term could establish a right to unilaterally vary the pay frequency in these circumstances. A contractual term may be implied only if it is necessary to make the contract work. If there is an express contractual term for the matter in question, then this argument just does not work: see *Liverpool v Irwin [1977] AC 239* and more recently *Ali v Petroleum Company of Trinidad and Tobago [2017] ICR 531*. I have not been quoted any authority nor am I aware of any authority where an implied term can override an express contractual term which has been agreed (or at least accepted) between the

parties.

52. Nevertheless, the claimants made their position very clear to the respondents in respect of the proposal to move to monthly pay. This was emphatically rejected by both on 11 January 2017 and 13 January 2017. The first and second claimants made it clear that they did not agree to the changes being foisted upon them by their employers (see *Arthur H Wilton Limited v Peebles & Others EAT/835/1993)*. The consequences of proceeding with the proposal was made clear to the respondent. The respondent was in no doubt that the claimant would legally challenge the proposal, which is what they have done. Nevertheless, the respondent proceeded to disregard the claimants' objections and their warnings of the consequences. The claimants' witness statements do not refer to any ongoing communication following the imposition of the new terms, which took effect from the 3 February 2017. However, the claimants did not need to engage in further dialogue because their position was unambiguous. There are references to ACAS early conciliation certificates in the bundle, although I suspect that this was a mere formality as a prelude to proceeding with claims in the employment tribunal. Proceedings were issued on 23 June 2017. Both claimants issued proceedings promptly, so as to avoid any realistic contention that their failure to proceed could somehow be taken as assent. The respondent's argument of affirmation does not accord with the facts of this case.

53. Notwithstanding the claimants' emphatic rejection of the respondent's proposed contractual variations prior to them coming into effect, the respondent argues that because the claimants have continued to attend work, and received their pay, then they should be deemed to have accepted the change. The respondent says that because the claimants have not made it known that they are "working under protest" following the change and because they have accepted loans from the respondent, then they should be taken to have impliedly agreed to the changes – i.e. assented by acquiescence – following the dicta of Browne-Wilkinson J in *Jones v Associated Tunneling Co Ltd [1981] IRLR 447*. I regard a more suitable analysis is *Khatri v Cooperatieve Centrale Raiffeisen-Boerenleenbank BA [2010] EWCA Civ 397* where the Court of Appeal held that the employee's silence did not amount to acceptance of a variation in the contract. Indeed, Elias J in *Jones v Associated Tunnelling* said that a lack of protest may not be damning in similar circumstances as a more relevant test could be: *is the employee's conduct, in continuing to work, "only referable" to them having accepted the new terms?* In the circumstances of this case, it would be manifestly incorrect to construe an absence of explicitly saying "we are working under protest" as acceptance by the claimants of the new terms.

54. Having determined the contractual position, I conclude that the claimants were entitled to be paid their weekly wages on 10 February 2017 and they have continued to be entitled to payment every Friday since that date. On each Friday that the respondent has not paid the claimant's their wages, the claimants have suffered an unlawful deduction from their wages.

55. At the date of this hearing, the claimants were owed one-week wages as particularised in the schedule of loss. The respondent has mitigated against the effects of this breach by providing both claimants with a bridging loan. Therefore, I do not accept that the claimants have lost out financially. However, I emphasise

that the respondent has merely mitigated the effects of their non-payment of wages and this does not diminish my judgement and findings under s11 & 12 ERA.

56. S38 EA provides for an award of compensation where the tribunal finds that the respondent was in breach of its duty to provide claimants with written employment particulars or particulars of change.

57. The claimant submits that the respondent was in breach of its obligations under s38 EA, because, by letter dated 23 January 2017, it provided both claimants with a purported statement of variation of the terms which were not accurate. The primary focus of ss1 and 4 ERA is to oblige an employer to provide some specified initial terms of employment and then provide notice of any subsequent changes. The claimants allege that the statement of changes was provided when it should not have been, as there was no valid change to the terms and conditions of employment for the first and second claimant. Clearly, there were changes because, as a matter of fact, the respondent altered the frequency of the claimants' pay. Written particulars, pursuant to s4 ERA (and s1) are not in themselves contracts of employment, they are merely evidence of what the employer regarded as the core contractual terms. That said, the respondent provided a s4 statement and altered core contractual terms when it should not have done so as I accept that the respondent had no contractual right to vary the claimant's contract of employment. I have made an award under s13 ERA so therefore I must increase this award by the minimum amount, at least, if there are no exceptional circumstances which would make such an award/increase unjust or inequitable. There are no such exceptional circumstances which would make an award under s38 EA unjust or inequitable

58. The claimants brought this claim under the ERA so there is no remedy available to me for the breach of contract, which is the substantive dispute. The remedy under the EA is primarily aimed at circumstances where the employer reneges upon its obligation to provide confirmation of essential employment terms and fails to keep these updated. I am minded that the claimants have not financially lost out because of the respondent's changes. I regarded it as appropriate to award a minimum amount, equivalent to two-weeks' pay for each claimant.

59. The schedule of loss does not set out the calculation for an award under s38 EA. I see that the claimants' remuneration is complicated by the number of allowances payable and variable hours worked. Indeed, the calculation of a week's pay under Chapter 2 of Part 14 of the ERA is complicated in itself. I have no doubt that the representatives for the claimant and the respondent will be able to agree the calculations for each of the claimants' award under s38 EA. If they do not, then I will review my determination to provide for appropriate quantification upon the application of either party. I suspect it will not be necessary to order a further schedule of loss and a counter-schedule of loss.

60. I have not stipulated the amount awarded under s13 ERA because this figure is variable. The figure contained in the claimants' schedule of loss will have changed by the time that this decision is promulgated to the parties. Accordingly, I expect the parties to agree the appropriate figures, in default of which, again, I

will review this determination.

Employment Judge Tobin

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