



## EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4106558/2020

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Held via Cloud Video Platform (CVP) on 15 January 2021

Employment Judge B. Beyzade (sitting alone)

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Mr. Ian Docherty

Claimant

CCRS Brokers Ltd

Respondent

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### JUDGMENT OF THE EMPLOYMENT TRIBUNAL

#### 1. The judgment of the Tribunal is that:

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1.1. The complaint of unauthorised deduction from wages in respect of arrears of pay between 17<sup>th</sup> July 2020 and 30<sup>th</sup> September 2020 is well founded and the Respondent is ordered to pay the Claimant the sum of **NINE THOUSAND ONE HUNDRED AND FIFTEEN POUNDS AND EIGHTY PENCE (£9,115.80)** from which tax and national insurance requires to be deducted, provided that the Respondent intimates any such deductions in writing to the Claimant and remits the sum deducted to Her Majesty's Revenue and Customs (and that sum is payable immediately).

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1.2. The complaint of unauthorised deduction from wages in respect of arrears of pay between 1<sup>st</sup> July 2020 and 16<sup>th</sup> July 2020 does not succeed and is dismissed.

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1.3. The Claimant's claim in respect of non-payment of an additional 4 weeks' notice pay by the Respondent to the Claimant does not succeed and is dismissed.

**REASONS****Introduction**

2. By an ET1 Claim Form dated 22<sup>nd</sup> October 2020 the Claimant presented a complaint of unlawful deduction from wages (arrears of pay and notice pay) which the Respondent denied.
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3. A final hearing was held on 15<sup>th</sup> January 2021. This was a hearing held by CVP video hearing pursuant to Rule 46. The Tribunal was satisfied that the parties were content to proceed with a CVP hearing, that it was just and equitable in all the circumstances, and that the participants in the hearing were able to see and hear the proceedings.
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4. The parties prepared and filed a Joint Inventory and Joint Bundle of Productions in advance of the hearing consisting of 146 pages, to some of which reference was made in evidence and submissions. References to page numbers in this judgment and reasons are references to page numbers in the Joint Bundle.
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5. On the morning of the hearing the Claimant's solicitor sent by email to the Tribunal a copy of a document titled "*Further and Better Particulars*" relating to the Claimant's notice pay claim. There were no directions or permission granted previously in relation to the same. Having invited submissions from both parties' representatives, the Tribunal granted permission for the Claimant to rely on the Further and Better Particulars of his claim. The Respondent's solicitor did not object and Respondent requested further particulars in their ET3 Response Form. The Tribunal dispensed with the requirement for an Amended ET3 Response to be provided by the Respondent. It was suggested by Mr. White that he could deal with any matters arising therefrom in evidence and submissions and the Tribunal was satisfied that this would be fair and just and in accordance with the overriding objective.
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6. At the outset of the hearing the parties were advised that the Tribunal proposed to investigate and record the following issues as falling to be determined, and both parties agreed the following list of issues:

5 (i) In relation to the Claimant's arrears of pay claim, should the Claimant have been paid at his full salary or furlough rate (i.e., 80% of his salary; up to £2,500 maximum per month) between 1<sup>st</sup> July 2020 and 30<sup>th</sup> September 2020? It is accepted by both parties that the Claimant was paid between the period of 1<sup>st</sup> March 2020 and 30<sup>th</sup> June 2020 at the furlough rate and that this was the correct rate of pay.

10 (ii) Whilst it was agreed by the parties that Claimant has been paid one months' notice pay in respect of the month of October 2020, the Tribunal was required to determine whether he should be paid an additional 4 weeks' pay in respect of his notice pay?

15 7. The Claimant gave evidence at the hearing on his own behalf and Ms. Catriona Campbell, Accounts and HR Manager gave evidence on behalf of the Respondent.

8. Both parties were represented by solicitors and made closing submissions.

#### Findings of Fact

20 9. On the documents and oral evidence presented the Tribunal makes the following essential findings of fact restricted to those necessary to determine the list of issues -

The Claimant was employed by the Respondent from 29<sup>th</sup> February 2016 until 31<sup>st</sup> October 2020. The Claimant was employed by the Respondent as an Associate Director.

25 10. In terms of his contract the Claimant agreed to work from 09.00am until 05.00pm Monday to Friday. He was entitled to a one-hour lunch break. His total hours each week were 35 hours. His rate of pay was £6170.35 gross per month.

11. The Claimant was paid monthly in arrears on the last working day of the month.
12. In terms of his contract the Respondent is entitled to make a deduction in respect of an overpayment of wages and other matters listed at pages 5 and 6 of the Claimant's contract dated 10<sup>th</sup> April 2017.
13. The Claimant's contract [pages 32-33] states that in the event an employee with 4 years or more service was required to give the Respondent "*1 month plus 1 week for each complete year of service (to a maximum of twelve weeks after twelve years)*" notice to terminate his employment.
14. The Claimant's contract also states [page 32] "*During your probationary period, employment may be terminated without notice. Thereafter, until the satisfactory completion of your probationary period, including extensions to it, employment may be terminated by either side giving notice of one week.*"
15. The Claimant was entitled to receive his normal contractual pay up to and including 31<sup>st</sup> March 2020.
16. At this point it is necessary to recall what was happening around that time. On 23<sup>rd</sup> March 2020, the UK Government put the country into 'lockdown' because of the COVID-19 pandemic. On that day, the government said that people were going to be required to stay at home and work at home. All but essential workers were required, by law, to stay at home. There were only limited exceptions, such as for exercise and the purchase of essential items. It was a criminal offence to be outside if an exception did not apply. Social distancing of 2m had to be observed, apart from in respect of people living in the same household.
17. The coronavirus pandemic is generally recognised to be the greatest peacetime emergency that this country (and indeed, the world) has ever faced. It has already caused the biggest shrinkage in the UK's economy on record, and its effects are likely to be felt for generations to come. Accordingly, the world shifted on its axis on 23<sup>rd</sup> March 2020 and the government introduced the Coronavirus Job Retention Scheme to assist employers with

payment of employees' pay and to retain employees who may otherwise have not retained their employment.

18. The Respondent is an insurance broker providing insurance broking services, claims management, risk management and advice and support. The Respondent stated it had experienced a significant reduction in business that resulted from the Government's advice to members of the public to work from home and to socially isolate because of Coronavirus. The Respondent temporarily closed its offices at that time.
19. In acknowledgment that the situation had changed the Respondent consulted its employees in relation to the Coronavirus Job Retention Scheme and the proposal of being placed on furlough. The Claimant had a discussion with Annie Watson on 31<sup>st</sup> March 2020 in relation to this matter. Several staff including the Claimant were placed on furlough leave and the Respondent utilised the Government's Coronavirus Job Retention Scheme.
20. The Respondent sent two correspondences to the Claimant dated 31<sup>st</sup> March 2020 proposing to pay the Claimant pursuant to the Coronavirus Job Retention Scheme. The first letter dated 31<sup>st</sup> March 2020 summarised the Respondent's position, the fact that from 1<sup>st</sup> April 2020 the Claimant will no longer be required to come to work or to work from home. The letter stated:
- "After consulting with you on this matter, you agreed to be temporary laid-off, also known as 'furloughed'."*
21. Additionally, the same letter indicated as follows:
- "The Government intends for the Coronavirus Job Retention Scheme to be run for at least three months from 1<sup>st</sup> March 2020, but will extend if necessary, and hopefully allow you to remain part of the CCRS Brokers Ltd team."*
22. The second letter sent to the Claimant of the same date indicated that following the discussion with the Claimant on 31<sup>st</sup> March 2020, it had been necessary to put the Claimant on furlough leave for a temporary period. The letter stated that the Claimant would receive 80% of his salary capped at a maximum amount of £2500.00 and that he would not be required to work

during this period. In relation to the timescale during which the Claimant will be placed on furlough the letter stated:

5 *“Due to extreme circumstances, we cannot currently state how long this will last for. You are not permitted to work elsewhere during this time and will not be required to come in to work to carry out work until further notice.”*

The letter further stated:

10 *“Initially the Government Coronavirus Job Retention Scheme has been set up to run until the end of May 2020. However, this (sic) under review by the Government. We will notify you as soon as we become aware of any extension in time to the scheme.”*

23. The Claimant was advised at the end of the letter:

*“Finally, to accept this change to your contract of employment please sign both copies of this document and return one to the HR Manager Catriona Campbell by 06/04/2020.”*

15 24. The Claimant duly signed the second letter dated 31<sup>st</sup> March 2020 on 03<sup>rd</sup> April 2020 and returned the same to the Respondent. The statement signed by the Claimant stated:

20 *“I have read and understood the proposed changes in working hours and pay. I agree to these changes being incorporated into my contract of employment.”*

25. Accordingly, the Claimant was placed on furlough by agreement with effect from 1<sup>st</sup> April 2020. From this date the Respondent would pay the Claimant at the furlough rate of 80% of his salary up to a maximum of £2500.00 per month in accordance with the government’s Coronavirus Job Retention Scheme.

25 26. On 9<sup>th</sup> April 2020 the Claimant sent an email to Catriona Campbell stating that when he signed the letter, he did not truly appreciate what he was signing and he thought that being placed on furlough was compulsory, he stated that he was now aware that he did not have to agree and that he was concerned as his job duties still needed to be carried out. Catriona Campbell replied by

email dated 16<sup>th</sup> April 2020 stating that the letter the Claimant received and signed clearly indicated that there was the opportunity to decline being furloughed, the potential alternatives and that all furloughed staff members positions will be reviewed upon receipt of further information from the Government in relation to its scheme. In fact, the letter dated 31<sup>st</sup> March 2020 which the Claimant signed and returned to the Respondent stated:

*“Please be assured that the decision as to whether or not you agree to being assigned as a ‘furloughed worker’ on the terms above is entirely yours. However, the alternative may be compulsory redundancy or unpaid leave.”*

10 27. Having received no further correspondence from the Claimant in relation to the concerns he raised, the Respondent sent a letter dated 30<sup>th</sup> April 2020 to the Claimant stating as follows:

15 *“As you are aware, you are currently furloughed under the Coronavirus Job Retention Scheme (JRS). The JRS has been extended until the end of June 2020 and I am writing to let you know that it is our intention to furlough you until this time.”*

28. The letter dated 30<sup>th</sup> April 2020 did not require the Claimant to acknowledge or to agree, sign and return the same to the Respondent. However, the Claimant did not object to being kept employed and on furlough up to and including the end of June 2020. The Respondent continued to pay the Claimant his salary at the furlough rate of pay.

29. At page 114 there is a document titled *“Chancellor extends furlough scheme until October.”* The document is printed from the [www.gov.uk](http://www.gov.uk) website, it states it was published on 12<sup>th</sup> May 2020 and it confirms that the Coronavirus Job Retention Scheme was being extended until the end of October 2020.

30. On 15<sup>th</sup> May 2020, the Claimant sent a letter to Catriona Campbell stating he wished to raise a formal grievance in relation to the methodology adopted by the Respondent in respect of him being placed on furlough leave. He stated that all his duties were still required and were being carried out by other members of staff. In an email dated 22<sup>nd</sup> May 2020 Catriona Campbell offered

to arrange a grievance meeting during the next week if the Claimant were available.

5 31. Following the grievance meeting held on 9<sup>th</sup> June 2020, Annie Watson, Managing Director advised the Claimant that his grievance was not upheld, that the methodology used to place individuals on furlough was to help safeguard the business, there was no new business team or market, and that the Claimant's residual activities and other non-new business duties were allocated to other members of staff. The Claimant lodged an appeal against this decision by way of a letter dated 19<sup>th</sup> June 2020 and a grievance appeal meeting took place on 26<sup>th</sup> June 2020. The Claimant's appeal was rejected and the reasons for this were confirmed in a letter dated 30<sup>th</sup> June 2020 [page 10 129].

15 32. There was no further correspondence between the parties thereafter until 15<sup>th</sup> July 2020. On 15<sup>th</sup> July 2020, the Claimant was sent a text message from Annie Watson indicating that she wanted to have a business call with him. As this could not be arranged, the Respondent advised the Claimant that he will receive a written communication instead.

20 33. On 16<sup>th</sup> July 2020, the Claimant was sent a letter from Neil Campbell, Managing Director advising that he was at risk of redundancy and that a consultation process would begin. The letter did not refer to any extension to the furlough scheme.

34. The Claimant sent an email to Annie Watson on 17<sup>th</sup> July 2020 in which he stated:

25 *"Following my period of furlough coming to a conclusion on 30<sup>th</sup> June I trust that the "business call" is to discuss my return to work as I am keen to do so."*

30 35. Catriona Campbell sent emails to the Claimant on 21<sup>st</sup> and 22<sup>nd</sup> July 2020 advising that Annie Watson tried to contact him without success, that he was supposed to be available to work during furlough if required and that he is now in receipt of the letter and a meeting was scheduled on 28<sup>th</sup> July 2020. On 22<sup>nd</sup> July 2020, the Claimant replied stating that he had been away for a



few days and he asked for the scheduled meeting to be put back until the end of next week.

36. The Claimant sent an email dated 24<sup>th</sup> July 2020 at 11.50am stating:

5 *"I acknowledge receipt of £1,973.93 (net) paid into my bank account yesterday however this is not my contracted salary.*

*Can you ensure the difference is paid, within 14 days, to avoid further action."*

37. Annie Watson sent a letter dated 23<sup>rd</sup> April 2020 to the Claimant stating:

10 *"As you are aware, you are currently furloughed under the Coronavirus Job Retention Scheme (JRS). The JRS has been extended until the end of August 2020 and I am writing to let you know that it is our intention to furlough you until this time."*

38. The letter dated 23<sup>rd</sup> April 2020 was attached to an email dated 24<sup>th</sup> July 2020 sent at 4.20pm and the cover email stated that at no point was the Claimant asked to work while he was on furlough nor was he informed that he was to resume his duties and the Claimant was continuously paid at 80% of his salary at the capped rate. The letter did not require the Claimant to acknowledge or to agree, sign and return the same to the Respondent. The Respondent continued to pay the Claimant his salary at the furlough rate of pay.

39. The Claimant replied by email dated 27<sup>th</sup> July 2020 referring to previous correspondences and pointing out that he made himself available for work following the furlough extension to end of June 2020 coming to an end. He stated:

25 *"Therefore I do not agree to any further temporary variation to my contract of employment. I therefore look forward to receiving my full contracted salary by the 7<sup>th</sup> August as requested previously."*

40. The next correspondence I was referred to an email from Catriona Campbell dated 8<sup>th</sup> September 2020 attaching a copy of the final redundancy confirmation letter and minutes, confirming that the Claimant had completed 4 full years of service and that if he had five years' service, he would have

received 5 weeks' notice pay. The letter of 8<sup>th</sup> September 2020 providing notice of the Claimant's redundancy stated that the Claimant was entitled to a 4 weeks' notice period which will commence on 1<sup>st</sup> October 2020, he was paid 7 days annual leave in August 2020 (which was the accrual of leave up to end of October 2020), and that he will be paid at the furlough rate of pay in September 2020 (along with his full salary in October 2020 and would receive 6 weeks' salary in relation to his redundancy pay). The Claimant did not lodge an appeal.

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41. On 9<sup>th</sup> September 2020 the Claimant sent an email to Catriona Campbell stating that his contract of employment (on page 2) stated that the notice period for an employee with over 4 years' service was 1 month plus 1 week for each complete year of service. The email did not contain the full text of the relevant notice clause.
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42. The Claimant received a pay slip dated 31<sup>st</sup> October 2020 detailing his payments (gross) for leave of absence £1875.00; top up £4295.00; and redundancy payment £1423.00. There were deductions of £1063.75 PAYE tax; £445.06 National Insurance; and £246.61 pension contribution, thereby net pay amounted to £12,958.29.
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### Observations

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43. On the documents and oral evidence presented the Tribunal makes the following essential observations on the evidence restricted to those necessary to determine the list of issues –
44. The Claimant suggested that in his email of 9<sup>th</sup> April 2020 he told the Respondent he disagreed with being placed on furlough leave. There was no suggestion that the employment contract had been reduced and thereby he set it aside (in any event the Tribunal would have no jurisdiction to hear a reduction claim and this would normally be brought in the Sheriff Courts as a plea exception and such a claim is not properly set out in the pleadings). At the outset of the hearing the parties' representatives agreed that the correct payment was made to the Claimant up to and including 30<sup>th</sup> June 2020.
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45. The Claimant asserted that he had made himself available for work following the furlough extension to 30<sup>th</sup> June 2020 coming to an end. Following 30<sup>th</sup> June 2020, the Claimant only indicated that he treated the furlough period as ended and his willingness to work to the Respondent on 17<sup>th</sup> July 2020. The Tribunal was not referred to any correspondence from the Claimant sent between 30<sup>th</sup> June 2020 and 16<sup>th</sup> July 2020.
46. Catriona Campbell confirmed that there was no letter sent from the Respondent to the Claimant in relation to the extension of the furlough scheme until 23<sup>rd</sup> July 2020. This was despite confirmation on the UK Government's website from 12<sup>th</sup> May 2020 that the Coronavirus Job Retention Scheme was extended to end of October 2020. Accordingly, there was no agreement recorded in writing in respect of any period of furlough leave after 30<sup>th</sup> June 2020.
47. The totality of the evidence and the parties' conduct suggests that the furlough rate of pay was due up to be paid to the Claimant up to 16<sup>th</sup> July 2020. However, after this date and from 17<sup>th</sup> July 2020 the Claimant made his position clear that he was not willing to be on furlough and accordingly there can be no agreement to furlough leave after this date. The Claimant's salary reverted to his contractual pay of £6170.35 per month from 17<sup>th</sup> July 2020.
48. The contractual provision relied on in the Claimant's email of 09<sup>th</sup> September 2020 related to notice required to be given by the employee on termination and is therefore not relevant to the Claimant's claim. The only express provision in the contract of employment in relation to notice required to be given by the employer stated that the relevant period of notice was one week (this was clearly erroneous). The Claimant sought to rely on his interpretation of the contract and an implied term, however, this was not made out in the pleadings or in the evidence before the Tribunal. The evidence provided by the Respondent indicated that the Claimant was paid 4 weeks' pay in respect of his notice period in his October 2020 salary at his full rate of pay. Therefore, the Claimant received his statutory notice entitlement of 4 weeks' pay.

#### Relevant law

49. To those facts, the Tribunal applied the law –

50. Section 13 of the Employment Rights Act 1996 ('ERA 1996') provides that an employer shall not make a deduction from wages of a worker employed by him unless the deduction is required or authorised by statute, or by a provision  
5 in the workers contract advised in writing, or by the worker's prior written consent. Certain deductions are excluded from protection by virtue of s14 or s23(5) of the ERA 1996.

51. A worker means an individual who has entered into or works under a contract of employment, or any other contract whereby the individual undertakes to personally perform any work for another party who is not a client or customer  
10 of any profession or business undertaking carried on by the individual (s230 15 ERA 1996).

52. Under Section 13(3) there is a deduction from wages where the total amount of any wages paid on any occasion by an employer is less than the total  
15 amount of the wages properly payable by him to the worker on that occasion.

53. Under Section 27(1) of the ERA 1996 "wages" means any sums payable to the worker in connection with their employment.

54. A complaint for unlawful deduction from wages must be made within 3 months beginning with the due date for payment (Section 23 ERA 1996). If it is not  
20 reasonably practicable to do so, a complaint may be brought within such further reasonable period.

55. Section 86 of the ERA 1996 provides:

*"The notice required to be given by an employer to terminate the contract of employment of a person who has been continuously employed for one month  
25 or more—*

*(a) is not less than one week's notice if his period of continuous employment is less than two years,*

(b) *is not less than one week's notice for each year of continuous employment if his period of continuous employment is two years or more but less than twelve years, and*

(c) *is not less than twelve weeks' notice if his period of continuous employment is twelve years or more."*

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56. Emergency legislation (Coronavirus Act 2020) was passed by the House of Commons without a vote on 23<sup>rd</sup> March 2020 and became law on 25<sup>th</sup> March 2020. There followed a raft of secondary legislation including legislation which required all but essential businesses to close and severely restricted the ability of people to go to work and to travel.

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57. The starting point is that contracts of employment which give rise to the entitlement to pay are a matter of contract: based upon an agreement between the parties, employer, and employee, although it is recognised that those two parties rarely have the same bargaining power. Many forms of employment protection have been established by Parliament over the years to ensure that employers deal properly and in accordance with minimum contractual entitlements with their employees. In short, employers will not be acting lawfully if they act on a unilateral basis. The statutory provisions dealing with the relevant employment protection rights are set out in the Employment Tribunals Act 1996, at Section 3 read with the Employment Tribunals Extension of Jurisdiction (Scotland) Order 1994/1624 for the notice pay claim, Part II of the Employment Rights Act 1996, particularly at Sections 13, 14, 23 and 24, for the unlawful deduction from wages claims. The Tribunal had regard to its overriding objective at Rule 2 of the Employment Tribunals Rules of Procedure 2013 to deal with cases fairly and justly.

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58. The Covid-19 pandemic has caused 2020 to be an exceptional year in terms of employment with the Chancellor of the Exchequer announcing his Coronavirus Job Retention Scheme in March. However, that scheme is not a statutory arrangement but gives direction and guidance from the Government making arrangements for employers to receive reimbursement or advanced payment from the Treasury covering 80% of the normal wages of eligible

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employees and workers put on furlough with their agreement given the exceptional circumstances of the virus and national lockdown. The original scheme announced on about 19 March 2020 was to cover the months of March, April and May and was soon extended to cover June 2020 with a further scheme and greater flexibility introduced from July 2020 onwards. The original scheme involved employees not working or attending for work but still receiving the reduced 80% payment (unless the employer topped that up to full wages). There was no entitlement for an employee to be placed on furlough; it needed to be specifically agreed between the employer and employee and the provisions of the scheme were such that only the employer had direct dealings with HMRC.

59. Strictly, the effect on the individual contract of employment between employer and employee was an agreed variation of the contract whereby the employee received just the 80% wages (up to a limit of £2,500.00 per month, unless the employer paid in full) and the employee was required not to do work. All other existing employment protection rights continued unchanged.

60. In the course of submissions, the parties' representatives drew the Tribunal's attention to the following authorities all of which the Tribunal found informative:

(a) In *Re Carluccio's Ltd 2020 IRLR 510* the administrators of a restaurant chain offered to place many employees on furlough. It sent them a variation letter, which stipulated that they would only be paid at Coronavirus Job Retention Scheme rates and made clear that a failure to respond might result in redundancy. The High Court found that the variation letter had validly amended the contracts of those employees who had expressly agreed to it. They were therefore employed on varied contracts that gave them an entitlement to wages in the sum of the grants to be paid to the company under the Coronavirus Job Retention Scheme. However, the Court rejected the argument that the contracts of those who had not yet responded had also been amended. It recognised that implied acceptance by way of conduct is possible but found that it was not established in the circumstances, given that only a matter of days had

passed since the letter was sent, the letter required a positive response, and some employees had rejected the offer.

(b) In *Abrahall v Nottingham City Council* [2018] EWCA Civ 796; [2018] 4 WLUK 296 the lead case employees (behind whom stood several hundred other employees) argued that incremental pay increases were contractual and the Court of Appeal agreed. The Court of Appeal then had to decide whether the union-represented employees had impliedly accepted the lack of incremental increases by continuing to work (largely) without protest for approximately two years; it held they had not, and the council was in breach of contract. Paragraphs 85-89 sets out the way a contractual offer can be accepted by conduct including the requirement for any inference to be unequivocal; collective protest or objection may negative any inference relating to continuing to work: and the use and effect of the phrase “*after a period of time*” by Elias J in *Solectron Scotland v Roper* [2004] IRLR 4 (EAT) was considered.

#### Discussion and decision

61. On the basis of the findings made the Tribunal disposes of the issues identified at the outset of the hearing as follows –

62. Whilst the Claimant (like many others) may not have felt he had much alternative, the Tribunal concluded that the proper interpretation of the facts was that he had agreed a variation of his contract of employment: to be put on furlough backdated to 1<sup>st</sup> April 2020 when this was offered to him by his employer, the Respondent, on 31<sup>st</sup> March 2020. He did not challenge the Respondent's letter of 31<sup>st</sup> March 2020 (he signed and returned this to the Respondent on 3<sup>rd</sup> April 2020 indicating his acceptance of the varied terms) and the variation is further evidenced by the payments to the Claimant eventually of 80% furlough wages for April, May, and June 2020. The Respondent was clearly not entitled unilaterally to put the claimant on paid or unpaid furlough.

63. The parties agreed at the outset of the hearing that the Claimant's furlough payments made by the Respondent up to and including 30<sup>th</sup> June 2020 were

the proper payments due to the Claimant and no claim was made in respect of these. It is ascertainable from the terms agreed by the Claimant on 3<sup>rd</sup> April 2020 that he agreed to be on furlough until the end of May 2020. The Claimant accepted by concession that he agreed to be on furlough leave until 30<sup>th</sup> June 2020 and he acted in reliance on the Respondent's letter of 30<sup>th</sup> April 2020. He did not repudiate, he accepted payments following receipt of the said letter, he did not work, so there was clearly ample evidence from which to infer the Claimant accepted he was on furlough leave until 30<sup>th</sup> June 2020 in any event. There is a dispute as to any extension after 30<sup>th</sup> June 2020.

64. The Tribunal was grateful to both parties' representatives for their clear and helpful submissions. Mr. White submitted that the Claimant did not make any contact to express his position until 17<sup>th</sup> and 24<sup>th</sup> July 2020 (his inaction indicated that he accepted to continue on furlough leave), whereas the Respondent's position was clear in its correspondences dated 31<sup>st</sup> March 2020 and thereafter that they wished the Claimant to remain on furlough leave until such time as he was required to attend work, he referred to Re Carluccio's and he invited the Tribunal to find that the Claimant continued on furlough leave from April to October 2020. Mr White also submitted that the contract of employment was silent as to notice pay and that the Claimant was paid his full 4 weeks' statutory notice entitlement. Ms. Doyle stated in her submissions that the variation agreed from 1<sup>st</sup> April 2020 was temporary for 3 months with any updates to be provided by the Respondent, that the Claimant's consent to be placed on furlough leave was limited to 30<sup>th</sup> June 2020 (referred to Re Carluccio's and Abrahall), and in relation to notice that the Claimant's interpretation of his contract of employment was that he was entitled to an additional four weeks' notice pay and she suggested that there was an implied term entitling the Claimant to the said additional 4 weeks' notice pay.

65. Given the circumstances and on the evidence, it is reasonable and proper to infer that the Claimant was on furlough and thereby entitled to receive pay at the furlough rate up to and including 16<sup>th</sup> July 2020. The Claimant did not



contact the Respondent between 30<sup>th</sup> June – 16<sup>th</sup> July 2020 to indicate that he did not want to be on furlough leave, that he was willing to work or that he was not happy to receive the furlough rate of pay. The Respondent continued to pay the Claimant the furlough rate of pay. This indicated that the Respondent was happy to continue to offer the Claimant the opportunity to be placed on furlough leave (as indicated in Ms. Campbell's evidence and in the letter of 23<sup>rd</sup> July 2020) and the Claimant's conduct 30<sup>th</sup> June – 16<sup>th</sup> July 2020 implied that he was content to accept the furlough arrangement up until 16<sup>th</sup> July 2020. There was therefore an implied agreement to keep the Claimant on furlough leave up to and including 16<sup>th</sup> July 2020.

66. Based on the evidence before the Tribunal, following 30<sup>th</sup> June 2020, the Claimant contacted the Respondent on 17<sup>th</sup> July 2020 to clearly indicate that he was ready and willing to return to work and did not want his period of furlough to be extended. The position was thus made clear by the Claimant and the Tribunal firmly concluded that the Respondent, which remained the Claimant's employer, was not entitled to pay the 80% furlough payments made to the Claimant from 17<sup>th</sup> July 2020 onwards as the Claimant clearly did not consent to being placed on furlough leave from that date and he was therefore entitled to receive his full contractual salary from 17<sup>th</sup> July 2020 – 30<sup>th</sup> September 2020. The Claimant's gross payments received under the furlough scheme amounted to £2500.00 per month between July and September 2020 and the Claimant was paid his full contractual pay (notice pay) in October 2020.

67. The total amount of any wages payable was less than the total amount of the wages properly payable by the Respondent to the Claimant in the following occasions: -

Date	Amount Payable	Amount Paid	Deduction
17.07.2020- 31.07.2020	[(£6170/31) x 15 days between 17-	(£2500/31) x 15 days between	£1775.80

	31.07.2020 £2985.48	=	17-31.07.2020 = £1209.68	
01.08.2020- 31.08.2020	£6170.00		£2500	£3670.00
01.09.2020- 30.09.2020	£6170.00		£2500	£3670.00

68. The above amounts were evidenced by the payslip provided to the Claimant by the Respondent in October 2020 and the Claimant's evidence (including but not limited to his Schedule of Loss). The Tribunal concluded without hesitation that the claimant, proved these outstanding amounts. The Respondent has therefore made an unlawful deduction from wages in the sum of £9,115.80 in total (£1775.80+£3670.00+£3670.00) [less any statutory deductions due including tax and national insurance in relation to which the Respondent is required to account to HMRC and to confirm the amounts to the Claimant in writing].
69. The Claimant did not pursue a claim for compensation under Section 24(2) of the ERA 1996.
70. The contract of employment provided to the Claimant states that notice given by the Respondent to the Claimant in the event of termination is one week. Clearly, this does not represent the statutory minimum period of notice which was due to the Claimant pursuant to section 86 of the ERA 1996 i.e., 4 weeks' notice because the Claimant had 4 continuous years of service. The Respondent recognised that it had to pay 4 weeks' statutory notice to the Claimant, and this was paid in October 2020. The Claimant contended that he interpreted the provisions in his contract of employment as providing him with one months' notice plus 4 weeks' notice, however, this was clearly an erroneous view as the contract provision he referred to related to the period of notice that an employee was required to give to the employer in the event of termination. In closing submissions Ms. Doyle suggested that there was an

implied term to the effect that the Claimant was to be given one months' plus  
4 weeks' notice, but not only is this not set out in the Claimant's pleadings  
(ET1 dated 22<sup>nd</sup> October 2020 or in the Further and Better Particulars) but  
also the Tribunal was not satisfied that it was appropriate or necessary to  
5 imply any such term based on the evidence it heard. Accordingly, there are  
no damages awarded for breach of contract in respect of the Claimant's notice  
or breach of the Respondent's statutory duties under section 86 of the ERA.

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Beyzade Beyzade**Employment Judge**

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25 January 2021**Date of Judgment****Date sent to parties****30 January 2021**