EMPLOYMENT TRIBUNALS

Claimant: **Miss P Wildman**

Respondent: **Shine Childcare Limited**

On: **2 December 2020**
10 December 2020 (in Chambers)

Before: **Employment Judge McAvoy Newns**

Appearances:

For the Claimant: **Mr Morgan, Counsel**

For the Respondent: **Mr G Abbott, Lay Representative**

RESERVED JUDGMENT

1. The Claimant's claim for unauthorised deductions from wages is upheld in respect of the payment for accrued but untaken annual leave which the Claimant ought to have received on 26 June 2020.

2. The Claimant's claim for unauthorised deductions from wages is not upheld in respect of the Claimant's pay between 16 March 2020 until 12 June 2020.

WRITTEN REASONS

Issues

1. On 22 September 2020 the Claimant commenced proceedings against the Respondent for unauthorised deductions from wages. It was confirmed at the outset of this hearing that this claim concerned:

1.1. The salary that the Claimant received whilst on furlough leave, from 16 March 2020 until 12 June 2020 when her employment terminated. Although the Claimant contends that she did not specifically agree to be placed on furlough, she confirmed during the hearing that she had no complaint about her salary being reduced to 80%. However, she contends that the 80% should have been calculated with reference to her wages for February 2020, as opposed to the wages from the preceding 12 months. In this regard, it was alleged that deductions were made from her wages without authorisation on 27 March 2020, 24 April 2020, 29 May 2020 and 26 June 2020; and

1.2. Holiday pay which the Claimant did not receive following the termination of her employment. In this regard, it was alleged that a deduction was made from her wages without authorisation on 26 June 2020.

2. The Claimant confirmed that she was no longer pursuing her claim for unauthorised deductions from wages to the extent that it concerned the pay that the Claimant received when undertaking training.

Evidence and findings of fact

3. I heard evidence from Miss Wildman on behalf of herself and Ms Laycock (Nursery Manager) and Mr Whittingham (Payroll Manager) on behalf of the Respondent. I was also provided with an agreed bundle of documents totalling 116 pages.

4. Having considered the evidence I made the following findings of fact:

4.1. The Claimant commenced employment with the Respondent on 23 April 2019. At the time of her dismissal, the Claimant worked as a Nursery Practitioner at the Respondent's Tiny Tree Day Nursery. The Respondent owns two other children's day nurseries;

4.2. The Respondent's holiday year is from 1 January to 31 December. Its Annual Leave Policy states: 'If upon termination of employment, you take more or less leave than you are entitled to, then an adjustment to your final pay will be made' [37];

4.3. Prior to commencing employment with the Respondent, the Claimant informed the Respondent that she had an immune disease/disorder;

4.4. Initially and up to 17 February 2020 (considered below) the Claimant was employed pursuant to a zero hour contract. On 17 February 2020, the Claimant's contract with the Respondent changed. Different descriptions for this new contract were provided by the parties. They were referred to as a full time contract, a permanent contract and/or a guaranteed hours contract. The Claimant agreed that she was an hourly paid employee;

4.5. The Claimant's signed contract of employment [54] stated: 'Your hours of work are between 7.15am and 6.15pm, Monday to Friday inclusive. Actual hours and days to be worked are to be agreed by your Manager in advance, dependent

upon the needs of the Nursery' [49]. This did not provide guaranteed hours of work however the parties accepted that this was the intention of the new contract;

4.6. The contract also stated: 'If upon termination of employment, you take more or less leave than you are entitled to, then an adjustment to your final pay will be made' [50]. Whilst this contract entitled the Respondent to place the Claimant on annual leave during Christmas/New Year, it did not provide such an entitlement during other times of the year;

4.7. The Claimant's contract of employment also contained a provision which stated: 'In the event there is insufficient work to warrant your normal working hours, then you will either be laid off without pay or your working hours will be significantly reduced. Your entitlement to pay on workless days in the period of lay off or short time working will cease…' [51]. Although this contract of employment was relied upon by both parties in their evidence, the Respondent did not specifically bring this provision to my attention during the hearing. However, I have decided to consider it because I have a partly inquisitorial role, the Respondent was not legally represented during the hearing and this provision is significant to the Respondent's defence to the Claimant's claim in respect of the pay that the Claimant received during her furlough leave. Furthermore, this contract was signed by both parties and the Claimant did not adduce any evidence in opposition to this provision;

4.8. On 16 March 2020 the Claimant left work with COVID-19 symptoms. There is a dispute on the facts as to whether the Claimant was sent home by Kim Harrison, the Deputy Manager of the Respondent's Tiny Tree Day Nursery or whether she requested that she go home. Ms Harrison did not give evidence at the hearing. As there is no evidence corroborating the Respondent's version of events in this regard, I find that the Claimant was sent home;

4.9. On 20 March 2020, the Government announced the introduction of the Coronavirus Job Retention Scheme (the "CJRS"). On 23 March 2020, the national lockdown was imposed. This resulted in the closure of Tiny Tree Day Nursery;

4.10. A conversation took place between the Claimant and either Ms Laycock or Ms Harrison between 20 and 27 March 2020 during which it was confirmed that the Claimant would be placed on furlough leave. This could have been the conversation that the Claimant refers to when saying that the Respondent agreed to pay her 80% of her February 2020 wages during her furlough leave. However the Claimant was adamant during her re-examination that this conversation took place on 30 March 2020. She said: 'that conversation was on 30 March. See paragraph 4 of my witness statement'. The evidence from both parties regarding this was unsatisfactory. Ms Laycock said she was on annual leave at around this time. Ms Harrison remains employed by the Respondent and could have attended the hearing to give evidence regarding this however did not do so. I have summarised my findings in relation to this point in the conclusions section of this Judgment;

4.11. On 27 March 2020, Ms Harrison wrote to the Claimant and stated: 'as agreed, your current position at Tiny Tree Day Nursery Leeds is being 'furloughed' effective from 16/03/2020 and until further notice', 'We will be applying to HMRC to claim funding to pay your furlough pay via the [CJRS]. In accordance with the [CJRS], you will receive 80% of your pay for the period of furlough up to a maximum of £2,500 per month. Specific details of this Scheme have not yet been revealed in terms of how to calculate your pay in this situation but we expect clarity from the Government to be received in due course and we will keep you updated' [55]. Ms Laycock's evidence was that Ms Harrison signed this letter, rather than her, because Ms Laycock had just returned from annual leave and had other matters to attend to upon her return;

4.12. The Claimant's evidence is that, on 30 March 2020, Ms Laycock contacted her to discuss her immune disorder. Her evidence is that Ms Laycock advised her to ring her GP and 111 to ascertain whether she needed to isolate for 12 weeks due to being at risk. Ms Laycock accepts that this was discussed with the Claimant but cannot be certain when;

4.13. In respect of this conversation, the Claimant's evidence was 'I was told that I would get 80% of my February wages even though the furlough scheme was rolled out in March'. It was put to the Claimant that, considering the above mentioned letter dated 27 March 2020, the Claimant may have her mistaken her dates, if this conversation took place at all. The Claimant was adamant that this conversation took place on 30 March 2020. Ms Laycock denies that this conversation took place at all because her role was not to discuss pay with the employees. Ms Laycock was emphatic when challenged about this during cross examination that she did not have a discussion with the Claimant about her rate of pay during furlough leave. She said that this 'definitely did not happen'. I have summarised my findings in relation to this point in the conclusions section of this Judgment;

4.14. On 31 March 2020, Mr Abbott wrote to the Respondent's employees and stated: 'You should already be aware that payroll was processed and paid last Friday, however this did not include any furlough payments… Now that the government have clarified the rules these payments will be made during the course of the next couple of days… The amount of pay you will receive is based on your average gross pay per month worked between April 19 and Feb 20' [56];

4.15. On 31 March 2020, the Claimant emailed Mr Abbott and asked: 'I'm just enquiring about a concern that arises from the constant new changes of law etc. If you have been employed at tiny tree for less than a year how will it differ? I know that in the early months I worked less hours on a 0 hour contract but obviously was given a pay rise and a permanent contract. It's just the hours I worked 6 months ago are vastly different to the hours I've been working in the last six months. Do contracts and usual hours even come into consideration or is it just 12 months' pay checks with an overall percentage. I'm sure there's no correct answers and you're probably very busy, it's just a concern I have' [57];

4.16. It is acknowledged by both parties that the Respondent did not ask the Claimant to sign any documentation confirming that the Claimant agreed to be placed on furlough leave, that the Claimant consented to a reduction in her salary or specifically the method of calculating such reduction. However, the Claimant did not raise any formal concerns about her furlough pay being calculated in this way;

4.17. Ms Laycock's evidence was that, in April 2020, the Respondent's Directors were concerned that there was no sign of the lockdown lifting. They spoke to Ms Laycock and expressed concern about not being able to accommodate all employees' holidays once lockdown had been lifted. Ms Laycock's evidence is that she agreed to speak to all members of staff at her nursery, including the Claimant, and did so on 20 April 2020. Her evidence in her witness statement was that Ms Harrison attended the discussion with the Claimant as well and '[the Claimant] readily agreed to take the annual leave she had accrued up until the end of May 2020 and said that she understood and accepted the challenges Tiny Tree was facing. I remember her clearly saying she "trusted our judgement"'. Ms Laycock accepted that there was no clear written record of this conversation taking place or the Claimant agreeing to take her annual leave in May 2020. In cross examination, Ms Laycock could not say whether she specifically remembered calling the Claimant. She said that she had a list of employees and she went through the list, one by one, highlighting their name once their call had finished. Ms Laycock said that everyone agreed to take their holiday and she had 'no issues'. She said had someone 'quizzed' her, she would have spoken to Mr Whittingham. However, later, in response to the question 'Did you agree or tell people when they would be on holiday', Ms Laycock replied 'Some staff said no e.g. they were getting married'. Considering all of this evidence, I find that Ms Laycock's evidence in regard to the discussions she had with the Claimant about annual leave is unreliable;

4.18. Mr Whittingham gave evidence that he overheard these calls however during cross examination he accepted that he did not hear 'the specifics'. He also said that, prior to the calls taking place, he advised Ms Laycock that it was important to give all employees statutory notice before requesting that they took their annual leave;

4.19. At page 61 is an undated operational update signed by Ms Laycock and Ms Harrison. It states: 'Spoke to all staff regarding holidays no issues'. This document does not refer to the Claimant specifically. The Claimant said this document meant nothing to her, she did not see it at the time and notes that it was never signed by Ms Laycock, Ms Harrison or any employees;

4.20. The Claimant denies that this conversation took place. Ms Harrison did not attend the hearing to give evidence. This is largely a case of the Claimant's word against Ms Laycock's. As stated above, Ms Laycock's version of events regarding this is unreliable. I therefore accept the evidence of the Claimant;

4.21. Mr Whittingham gave evidence during cross examination that the Claimant took annual leave between 11 and 20 May 2020. However, this was not contained in Mr Whittingham's witness statement or in any of the documents. Mr Whittingham accepted that this was not documented. It was also denied by the Claimant;

4.22. The Claimant's evidence is that on 11 May 2020 she was contacted by Ms Laycock and told to undertake COVID online courses. Ms Laycock's evidence is that this request was made on 13 May 2020. It appears from page 64 that the correct date was 13 May 2020. Ms Laycock's evidence that that this course contained only a handful of questions and it took her no more than a few minutes to complete it;

4.23. On 13 May 2020, the Claimant was placed at risk of redundancy and a consultation process commenced and took place between then and 15 May 2020;

4.24. On 15 May 2020, the Claimant's redundancy was confirmed. She was told her employment would terminate on 12 June 2020 [73-74];

4.25. On 22 May 2020 the Claimant received a payslip showing her furlough pay for that month as £373.82. Additionally, this payslip showed that the Claimant had been paid the sum of £543.66 for holiday pay;

4.26. Soon following receipt of this payslip (on the day she received it), the Claimant telephoned Mr Whittingham and questioned how her pay had been calculated;

4.27. On 22 May 2020, Mr Whittingham emailed the Claimant and stated: 'You have been paid £543.66 for 7.8 days holiday; 80% of this is paid from furlough (£434.93) and 20% from the company (£108.73)' [75];

4.28. On 26 May 2020, the Claimant emailed Ms Laycock to complain that her wages for May 2020 had been calculated incorrectly. She stated: 'I believe you have paid me incorrectly. As you have deducted my accrued holidays from my furlough payment… Additionally, my last date of employment is the 12th of June, until this date I will still be accumulating annual leave as normal. Therefore, my holiday should have been paid on my final pay day' [76]. Ms Laycock's evidence is that she forwarded this email to Mr Whittingham, for him to investigate;

4.29. On 26 May 2020, Mr Whittingham replied to the above mentioned email from the Claimant. He stated: 'With regards your holiday pay you agreed to be paid for holidays you had accrued up to 31/05/2020 which would be take[n] in May and paid in your May wage, we are entitled to pay this out of furlough pay as long as we as a company pay at least 20% of your holiday pay which we have… You will however as you say have accrued additional holiday between 1st June and 12th June… this will therefore be paid to you in your June wage' [77];

4.30. On 28 May 2020, the Claimant requested an appeal against her redundancy. In this letter she stated: 'I require a more detailed explanation as to why my holiday pay was deducted from my furlough payment' [78];

4.31. On 1 June 2020, the Respondent replied to the Claimant's appeal in writing. In respect of the holiday pay point, the Respondent stated: 'Holiday pay has not been deducted from furlough pay as this is clearly illegal… the basic calculation used to work out your holiday pay was to take the relevant amount of furlough pay at 80% and then a second calculation took place to gross holiday pay up to 100% of the full daily rate using the current year's national minimum wage rate relevant to you' [81]; and

4.32. The Claimant's employment terminated on 12 June 2020 and the Claimant received her last payment on 26 June 2020.

Law

5. Pursuant to section 13(1) of the Employment Rights Act 1996 (ERA):

> *"An employer shall not make a deduction from wages of a worker employed by him unless—*
>
> *(a) the deduction is required or authorised to be made by virtue of a statutory provision or a relevant provision of the worker's contract, or*
>
> *(b) the worker has previously signified in writing his agreement or consent to the making of the deduction."*

6. Section 13(2) of the ERA defines "Relevant provision" as a provision of the contract comprised—

> *"(a) in one or more written terms of the contract of which the employer has given the worker a copy on an occasion prior to the employer making the deduction in question, or*
>
> *(b) in one or more terms of the contract (whether express or implied and, if express, whether oral or in writing) the existence and effect, or combined effect, of which in relation to the worker the employer has notified to the worker in writing on such an occasion."*

7. Regulation 13(9)(b) of the Working Time Regulations 1998 (the "WTR") states:

> *"Leave to which a worker is entitled under this regulation may be taken in instalments, but— it may not be replaced by a payment in lieu except where the worker's employment is terminated".*

8. Regulation 15(2) of the WTR states:

> *"A worker's employer may require the worker—*

(a) to take leave to which the worker is entitled under regulation 13 or regulation 13A, on particular days, by giving notice to the worker in accordance with paragraph (3).

9. Regulation 15(2) of the WTR states:

"A notice under paragraph (1) or (2)—

(b) shall specify the days on which leave is or (as the case may be) is not to be taken and, where the leave on a particular day is to be in respect of only part of the day, its duration; and

(c) shall be given to the employer or, as the case may be, the worker before the relevant date".

10. In the Employment Appeal Tribunal decision of Craig & Ors v Transocean International Resources Ltd [2008] UKEAT 0029_08_1612 it was noted that *"Notices under regulation 15 need not be in any particular form and need not be in writing".*

Submissions

11. The Respondent submitted that they acted properly and professionally throughout, following the government's guidance. It said there was clear evidence that the Claimant worked variable hours. It said that, had it agreed to pay the Claimant her furlough pay based on her February 2020 wages, the Claimant would have been the only employee in this position. It said their evidence had been consistent whereas the Claimant's had not. It criticised the Claimant's calculations and submitted there was no evidence to support the Claimant's claims.

12. The Claimant submitted that the Respondent had relied upon the government guidance and noted that this does not provide legislation. It was noted that whilst there was a lot of changes to the relationship between the Respondent and HMRC throughout March and April 2020, there were no relevant changes to employment law. I was reminded that I am required to deal with established legal principles rather than the government guidance.

13. The Claimant submitted that, in order to place her on furlough, and reduce her pay, the Respondent needed to agree that with her. The Claimant said that what was agreed was for her to be paid 80% of her February 2020 salary throughout the furlough period. In the alternative, the Claimant submitted that, if it was correct that the Claimant's furlough pay should be based on an average of 12 months' pay, that average should only take into account the Claimant's pay for February 2020, when she was working pursuant to her new, full time and permanent contract of employment.

14. The Claimant also submitted that, in order for the Claimant to have used some of her holiday in May 2020, she must have taken that holiday in May 2020, which the Claimant submitted the evidence did not support.

Conclusions

Furlough pay

15. The Respondent had a clear and unambiguous contractual right to either lay the Claimant off without pay or significantly reduce her working hours (and pay), should there be insufficient work to warrant her normal working hours. This contract was signed by the Claimant soon before the commencement of the furlough leave.

16. As a result of the Government imposed lockdown, there was insufficient work to warrant the Respondent giving her normal working hours. However, rather than reduce the Claimant's pay to nil, as it was contractually entitled to do, the Respondent used the CJRS and paid the Claimant 80% of her wages. The Respondent explained its method of calculation to the Claimant before any furlough pay was paid to her. Consequently, if there has been a deduction from the Claimant's wages in regard to the pay that the Claimant received during furlough, such deduction was authorised by her contract of employment.

17. Additionally, even if this was not the case, the Claimant accepts that she has no complaint regarding the Respondent's decision to reduce her salary by 80%, even though this was not agreed with her in writing at the time. Her complaint is that it was agreed between her and the Respondent that her salary during furlough should be based on 80% of her February 2020 salary, as opposed to her salary over the preceding 12 months, and the Respondent reneged on that agreement. I have therefore considered whether there was such an agreement in place and I have found that there was not. The only evidence of such an agreement is the Claimant's evidence of a discussion which allegedly took place on 30 March 2020. The Respondent denies that such a conversation took place. The Respondent's method of calculating the furlough pay, namely, to base the calculation on the average of 12 months' wages, was confirmed in an email which was sent before 30 March 2020, on 27 March 2020. Prior to this date, the Respondent did not know how it should undertake this calculation and was awaiting guidance from the government in this regard. There was no evidence of a reasonable justification for the Respondent to apply one calculation for the Claimant and the other for the rest of the workforce. Furthermore, had this been agreed, I expect the Claimant would have referred to such an agreement in her email to Mr Abbott of 31 March 2020. However, she did not. In that email she 'enquired about a concern' and acknowledged there may be 'no correct answers'. The Claimant did not raise this concern formally after sending this email, which I find would have been done had such an agreement been entered into. The Claimant's unauthorised deductions from wages claim in respect of the pay that the Claimant received during her furlough leave is not upheld.

Annual leave

18. In order for the Respondent to legitimately pay the Claimant for annual leave in May 2020, the Claimant needed to have taken annual leave in May 2020. She did not do so. The only reference to the Claimant having allegedly done so is the evidence which Mr Whittingham gave during cross examination that the Claimant took annual leave between 11 and 20 May 2020. However, this was not contained in Mr

Whittingham's witness statement or in any of the documents. Nor was this evidence given by Ms Laycock, the witness who had spoken to the employees about taking annual leave in May 2020. Furthermore, during this period of time, the Claimant was required to engage in a redundancy consultation process and was asked to undertake a short COVID related training session both of which are inconsistent with the purpose of taking annual leave.

19. A written notice from the Respondent to the Claimant to take annual leave between 11 and 20 May 2020 is not necessary. However, no verbal notice of such was provided. There was no discussion between the Claimant and Ms Laycock about a need for the employees in general to take annual leave in May 2020. Ms Laycock's evidence regarding this was vague and contradictory. Ms Harrison was not called to give evidence. The Claimant was adamant that no such discussion took place.

20. Even if there was such a general discussion that annual leave should be taken in May 2020 this is insufficient to comply with Regulation 15 of the WTR. The Respondent did not specify the days on which leave was to be taken.

21. The Claimant did not agree to take annual leave in May 2020. She strongly denied doing so, there is no clear written evidence of her doing so and, on 22 May 2020, promptly after receiving her wage slip, raised concerns about the references to holiday pay contained therein. The Claimant communicated her lack of satisfaction with Mr Whittingham's decision and later included this complaint in her grounds of appeal. The evidence in support of the Claimant not agreeing to take annual leave in May 2020 outweighs the evidence in support of there being such an agreement.

22. On 26 June 2020 the Claimant ought to have received a payment in lieu of all accrued but untaken holiday. She could not be paid in lieu of holidays untaken in May because her employment had not terminated and this is prohibited by the WTR. As she did not take the holiday between 11 and 20 May 2020 she ought to have been paid in lieu of these days on termination. As she did not, the Respondent made a deduction from her wages on 26 June 2020. That was not authorised to be made by virtue of a statutory provision or a relevant provision of the employee's contract. There was no evidence of the Claimant having signified in writing her agreement or consent to the making of this deduction. The Claimant's unauthorised deduction from wages claim in this regard is upheld.

Case management orders relevant to remedy

23. The Claimant accepted that there were inaccuracies in her schedule of loss which she was unable to explain because this had been prepared by her solicitor. The Respondent said it was unable to understand the Claimant's figures during the hearing.

24. In these circumstances, rather than seek to deal with remedy within this Judgment I therefore direct as follows:

    a. A Remedy Hearing will be listed, to take place via CVP, before me for 2 hours;

b. Within 14 days of this Judgment being sent to the parties, the Claimant will provide the Respondent and the Tribunal with an updated and accurate Schedule of Loss addressing only the relevant heads of claim bearing in mind the contents of this Judgment; and

c. Within 14 days of receiving the Claimant's Schedule of Loss, the Respondent is ordered to either confirm that it agrees with the Claimant's figures or provide to the Claimant and the Tribunal a Counter Schedule of Loss.

Employment Judge McAvoy Newns

8 January 2021