



## **EMPLOYMENT TRIBUNALS (SCOTLAND)**

**Case Number: 4106732/2020 (V)**

**Held on 18 January 2021 by Cloud Based Video Platform**

**Employment Judge Neilson**

**Mr D Smith**

**Claimant  
In person**

**Carmeleon Preperation Centre Limited**

**Respondent  
Represented by:  
Mr S Creamer,  
Director of the  
Respondent**

### **JUDGMENT OF THE EMPLOYMENT TRIBUNAL**

The Judgment of the Employment Tribunal is that the claim under Section 23(1) of the Employment Rights Act 1996 is well founded and that the Respondent shall pay to the Claimant the gross sum of Five Thousand and Ninety Three Pounds and Fifty Five Pence (£5,093.55) less appropriate tax and National Insurance.

### **REASONS**

1. At the Hearing on 18 January by CVP the Claimant appeared in person and represented himself. The Respondent was represented by Mr Simon Creamer a Director of the Respondent. Mr Creamer was unable to join the CVP by video but was able to phone in. Mr Creamer confirmed that

he was happy to proceed despite the fact that he only had a telephone connection.

2. Prior to the Hearing proceeding Mr Creamer confirmed that he wished to make an application to have the Hearing adjourned on the grounds that there was an ongoing police investigation. Mr Creamer had notified the Employment Tribunal office on 14 and 15 January of his intention to seek such an adjournment. The Tribunal heard from both Mr Creamer and the Claimant on that application. Mr Creamer explained that the Claimant had been furloughed and had been asked to return to work in July 2020. He had refused to do so and thereafter had sent threatening text messages to Mr Creamer threatening both Mr Creamer and his family. Mr Creamer had involved the police. A letter was issued to the Claimant terminating his employment as a consequence of these threats. There were two separate police reports as referenced in Mr Creamer's e mail to the Employment Tribunal on 14 January 2021, one on 24 July 2020 and one on 10 August 2020. Mr Creamer had provided the police with copies of the texts and a copy of the letter. Mr Creamer still had these documents. Mr Smith explained that he opposed the application for adjournment. He had had no contact with the police and he had not received any letter from the Respondent terminating his employment. He had not received any furlough money and that is why he has brought this claim.
3. Having considered the submissions from both parties the Tribunal rejected the application to adjourn the Hearing. It was clear to the Tribunal that there were two separate issues. Firstly a claim regarding arrears of pay and secondly a possible police investigation into conduct by the Claimant. The Employment Tribunal could determine the former without prejudice to the latter. The evidence to allow the Tribunal to come to a view on the arrears of pay was available. In the opinion of the Tribunal it was not in the interests of justice to adjourn the Hearing and there would be no prejudice to either party in proceeding.

4. Having determined that the Hearing should proceed there was then discussion regarding documents. The Claimant had not copied to the Respondent the documents that he had lodged and wished to rely upon. The Respondent had not lodged any documents with the Employment Tribunal but it was clear that the text messages and the dismissal letter would be potentially important documents. It was agreed that the Respondent would e mail the text messages and the dismissal letter to both the Claimant and the Employment Tribunal. Although there was some difficulty in the Claimant receiving copies of these documents by e mail from the Respondent eventually they were received. They were also received by the Tribunal. The Claimant copied his documents by e mail to Mr Creamer who acknowledged receipt.
5. The Claimant gave evidence on his own behalf and evidence was provided on behalf of the Respondent by Mr Creamer and the Respondent's workshop manager Mr Andrew Nicoll.
6. The issue to be determined in the case is whether the Claimant is owed any arrears of pay (including any holiday pay) in respect of the period from 1 May through to the end of August 2020.

### **Findings in Fact**

7. The Claimant was employed by the Respondent to carry out preparation and polishing work at the Respondent's workshop. The Claimant's employment commenced on 1 February 2020. The Claimant was entitled to an annual salary of £27,664 per annum payable monthly in arrears.
8. The Claimant worked for the Respondent throughout February and March 2020. Towards the end of March the Respondent closed its premises as a consequence of the Covid-19 pandemic and in response to the Government regulations and guidance in respect of the national lockdown arising out of the Covid-19 pandemic.
9. The Respondent took advice at that time on the availability of the Government's Coronavirus Job Retention Scheme ("the Furlough

Scheme"). In broad terms the Furlough Scheme allows employers to be reimbursed for up to 80% of their employees' wages – subject to a cap of £2,500 per month. The Claimant was notified by the Respondent that he would be placed on furlough in accordance with the Furlough Scheme with effect from the beginning of April 2020. The Claimant accepted that position.

10. The Respondent applied to HMRC for support under the Furlough Scheme. The Respondent received a payment from HMRC under the Furlough Scheme in April 2020. The Claimant received a payment of 80% of his salary at the end of April 2020.
11. The Claimant did not receive payment of any further salary from the Respondent in May, June, July or August 2020.
12. The Respondent's accountant, Monika, sent an e mail to the Claimant dated 28 May 2020. In that e mail Monika explained that there is a delay in receiving payment from HMRC. In that e mail Monika also confirmed that the Claimant would be placed on holiday for the two weeks commencing 15 June and 22 June 2020. Monika confirmed the Claimant would receive 80% of pay for the periods 1 to 14 June and 29 to 30 June and 100% for the dates 15 to 28 June 2020. The Claimant confirmed to Monika that that was acceptable.
13. The Respondent did not receive any further funds from HMRC under the Furlough Scheme in May, June or July 2020. It was not until October 2020 that they received the funds they should have received for May and June 2020. HMRC had rejected their claims in May and June 2020 and the Respondent had been in correspondence with HMRC seeking payment and had sought support from their local MP, Stewart Hosie.
14. On 22 June 2020 Mr Creamer wrote to the Claimant and other employees updating them on the position regarding furlough leave. The letter explained that there was a problem with HMRC but that the Respondent was working on this with the support of Mr Hosie. The letter stated *"Unfortunately, our hands are tied until HMRC transfer the funds*

*for the furlough payment but when this happens it will be transferred to you immediately."* The letter went on to explain that the Claimant had two options:-

*"1. You stay in employment although we cannot give you a time scale when the payment will be made by HMRC.*

*2. Formally end your employment where you will be entitled to a Universal Credit claim. If you choose this option, we will welcome you back once we are back up and running."*

The Claimant did not respond to that letter.

15. Mr Creamer sent a further letter to the Claimant and other employees on 6 July 2020 where he explained that the Respondent was still not in receipt of funds from HMRC and he re-iterated the two options for employees. He also mentioned that *"work is gradually increasing....and I am hopeful that we will have work available soon."*
16. In July 2020 the Respondent was starting to bring employees back to work on a gradual basis. The Respondent asked the Claimant to return to work on or about 20 July 2020.
17. The Claimant did attend at the Respondent's premises on or shortly after 20 July 2020 and met with the Workshop Manager Mr Andrew Nicoll. However he told Mr Nicoll that he was refusing to work as he had not received any pay.
18. On 23 July 2020 at 23.05 the Claimant sent a text message to Mr Creamer in the following terms:-

*"You're a Dead Man. X. Believe me. Your going down. Marlee"*

Mr Creamer responded *"What you on about"*

The Claimant replied:-

*"You owe me money. I am chapping doors tomorrow. Not my style Simon. Where's my holiday pay. You've fucked me n my daughter last few months. We're totally broke. I am going to break you and family. Why Simon. You able open new premises in Wales. I'm severely in debt. Away get evicted. Please answer me."*

Mr Creamer responded:-

*"Its nothing to do with me. HMRC are due the buisness money and Stewart Hosie is dealing with it you where asked back to work but refused to work we have sent out letters and updated everyone regarding the situation its out of our hands until they resolve it"*

19. Mr Creamer was alarmed by these text messages and reported the matter to the Police on 24 July. Mr Creamer took advice from an HR professional and with their support prepared a letter of dismissal dated 24 July 2020. That letter stated

*"Further to your unacceptable behaviour you have left the business no option but to terminate your employment. Your threatening behaviour has undermined the entire working relationship and you are summarily dismissed, without notice, for gross misconduct."*

The letter went on to state that the Respondent would not be pursuing the furlough claim for the Claimant and that his employment would be considered to have terminated on 30 April 2020.

20. The letter was signed by Mr Creamer and was posted out to the Claimant.
21. The letter was received by the Claimant on or about 27 July 2020.
22. The Claimant signed on for Universal Credit at the beginning of August.
23. On 10 August 2020 the Claimant attended at the premises of the Respondent. There was a heated exchange of words between the Claimant and Mr Creamer. That discussion took place in Mr Creamer's

office and then in the workshop area. The gist of the conversation was that the Claimant was accusing Mr Creamer of keeping the furlough money for himself. Mr Creamer reported this incident to the Police on 10 August 2020.

### **Submissions**

24. The Claimant is seeking payment of arrears of pay for the months of May, June, July and August 2020 to include holiday pay for the two weeks in June. He received no pay in these months. The position of the Respondent is that they were unable to make payment to the Claimant during May, June and July as they did not receive any funds from HMRC; that the Claimant was asked back to work in July 2020; he refused to work and subsequently sent threatening text messages to Mr Creamer which entitled them to dismiss the Claimant and treat that dismissal as effective at the end of April 2020. On that basis no money was due to the Claimant.

### **The Law**

25. Section 23(1)(a) of the Employment Rights Act 1996 ("ERA") provides a "worker" with the right to make a complaint to an Employment Tribunal that an employer *"has made a deduction from his wages in contravention of section 13"*. Section 13 ERA provides a worker with a right not to suffer unauthorised deductions. Specifically Section 13(3) states *"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 for the purposes of this Part as a deduction made by the employer from the worker's wages on that occasion."*
26. An "employee" under Section 230(1) ERA means *"an individual who has entered into or works under (or, where the employment has ceased, worked under) a contract of employment"*.

27. Section 24(1)(a) ERA provides "*Where a tribunal finds a complaint under section 23 well-founded, it shall make a declaration to that effect and shall order the employer—*

*(a) in the case of a complaint under section 23(1)(a), to pay to the worker the amount of any deduction made in contravention of section 13,.."*

28. Section 24(2) ERA provides "*Where a tribunal makes a declaration under subsection (1), it may order the employer to pay to the worker (in addition to any amount ordered to be paid under that subsection) such amount as the tribunal considers appropriate in all the circumstances to compensate the worker for any financial loss sustained by him which is attributable to the matter complained of."*

29. In an action by a worker to recover his pay under a contract of employment, the worker has the initial burden of proving that he worked or was ready and willing to render the services required by the contract. In a contract of employment wages and work go together. Wages are remuneration which must be earned. If the worker declines to work, the employer need not pay - *Miles -v- Wakefield Metropolitan District Council 1987 IRLR 193.*

### **Discussion & Decision**

30. The Claimant and other employees of the Respondent were placed on furlough leave at the beginning of April 2020. The Claimant did receive payment in respect of the month of April. In evidence the Claimant thought that he had received his normal monthly pay however the evidence of Mr Creamer was that all employees were paid in accordance with the Furlough Scheme and that the payment was 80% of pay. The Tribunal preferred Mr Creamer's evidence on this point as it is consistent with the documentation that the Claimant lodged (the e mail from Monika of 28 May and the letters from Mr Creamer of 22 June and 6th July).



31. The evidence from the Claimant and Mr Creamer regarding the terms upon which the Claimant and others were placed on furlough leave was consistent with them being placed on furlough leave on the basis their pay would be reduced to 80% or a maximum of £2,500 in accordance with the Furlough Scheme. Mr Creamer was not directly involved in these discussions. His accountant, Monika, dealt with the process. Neither party produced any written documents. Mr Creamer did not specifically state in evidence that there was any agreement that payment of the reduced salary was conditional upon funds being received from HMRC. There was no evidence of any right to "lay off" employees under the contract of employment. Based upon the evidence available the Tribunal concludes that there was an agreement that employees, including the Claimant, be placed on furlough leave at a rate of 80% of their normal pay subject to a maximum of £2,500. This was not conditional on funds being received from HMRC. Had the Respondent wanted to make it clear that payment was going to be conditional upon the receipt of funds from HMRC the Tribunal would have expected there to be clear evidence to that effect.
32. Whilst it is understandable that the Respondent may have had some difficulty in paying wages when funds were not received from HMRC they did nevertheless remain under a legal obligation to pay wages to the employees, including the Claimant, at the end of each month in accordance with their contracts of employment. Any right the Respondents might have had to be reimbursed by HMRC was a separate matter. The Claimant was accordingly entitled to receive 80% of his monthly salary at the end of each month that he remained on furlough. The Respondent's failure to make payment as at the end of these months does represent an unlawful deduction from pay in accordance with Section 13(3) of the ERA. The amount due on a monthly basis was £1,844.27 (being 80% of monthly pay).
33. The Respondent required the Claimant to take holidays in June. The Respondent is entitled to make such a request under Regulation 15 of the Working Time Regulations 1998. In any event the Claimant was

happy to agree to that request. It was agreed that he would receive 100% of pay for those two weeks.

34. The pay due to the Claimant for May 2020 was £1,844.27. For June it was £2059.43.
35. With regard to July the Tribunal finds that the Claimant was asked to return to work in the middle of July. Although the Claimant denied this we prefer the evidence of Mr Creamer and Mr Nicoll on this point. Whilst the Tribunal understands the Claimant's reluctance to return in circumstances where he had not been paid nevertheless from the point in time where the Claimant was asked to return to work, but refused, the Respondent was under no obligation to pay further wages.
36. The Claimant admits that he sent the text messages to Mr Creamer on 23 July however he denies receiving the dismissal letter of 24 July. The Tribunal concludes that it is more likely than not that the Claimant did receive the dismissal letter of 24 July. The Tribunal accepts that the text messages were alarming for Mr Creamer to receive. That in light of that he immediately took steps to obtain HR advice and have the letter of 24 July prepared and issued. The evidence of Mr Creamer and Mr Nicoll has been consistent as regards the events in July whereas the evidence of the Claimant has been less so. The subsequent actions of the Claimant in signing on for Universal Credit at the beginning of August (particularly in light of the letters of 22 June and 6 July from the Respondent) are consistent with the Claimant being aware his employment had been terminated. In any event the refusal of the Claimant to return to work means that the Respondent is not obliged to pay wages beyond that point.
37. The Tribunal accepts that the text messages sent by the Claimant did amount to an act of gross misconduct entitling the Respondent to terminate the employment with immediate effect. Whilst the Claimant no doubt felt aggrieved at not receiving his pay the text messages are

threatening and could be reasonably interpreted as a threat to Mr Creamer and his family.

38. The Tribunal takes the date of termination of employment to be the date that the claimant is likely to have received the letter – Monday 27 July 2020. The Respondent cannot lawfully back date that dismissal to 30 April 2020. Whilst none of the witnesses were specific as to the date that the Claimant attended the Respondent's premises and refused to work the Tribunal finds that it was more likely than not to have been in the week beginning Monday 20 July. It was for the Claimant to establish that he was ready and willing to work from 20 July to the end of August 2020. Under the contract of employment the Claimant is only entitled to wages if he is ready and willing to work (*Miles -v- Wakefield Metropolitan District Council 1987 IRLR 193*). The Claimant was not ready and willing to work after 20th July 2020. The Tribunal accordingly finds the Claimant entitled to his wages for July at 80% up to that date (20 July 2020) as he remained on furlough - £1,189.85.
39. The total due to the Claimant in respect of the months of May, June and July is £5,093.55. This is a gross figure and will be subject to the deduction of appropriate tax and National Insurance. It is for the Respondent to ascertain and make the appropriate deductions (*Walters T/A Rosewood v Barik UKEAT/0053/16/BA*).
40. The Claimant did not seek any additional compensation under Section 24(2) ERA.

<b>Employment Judge:</b>	<b>Stuart Neilson</b>
<b>Date of Judgment:</b>	<b>02 February 2021</b>
<b>Date sent to Parties</b>	<b>02 February 2021</b>