

B E T W E E N :-

MISS. C. COCKAYNE

Claimant

And

MEDASIL SURGICAL LIMITED

Respondent

Heard by CVP on 26 January 2021

Before Employment Judge Wedderspoon

Claimant : In Person

Respondent : Mr. Bennison, Solicitor

## RESERVED JUDGMENT

1. The breach of contract claim is not well founded and is dismissed.
2. The claim for one week's statutory notice is dismissed upon withdrawal.

## REASONS

1. The claimant brings a breach of contract claim to recover the monetary shortfall between the furlough pay received, during two months of her notice period, and her actual full contractual salary. The respondent disputes the claim on the basis full contractual pay was not properly payable following a furlough agreement between the parties which varied the claimant's remuneration to 80% of her full contractual pay. Alternatively, it argues, pursuant to the provisions of section 87 (4) of the Employment Rights Act 1996, due to the fact that the claimant's contractual notice was more than one week than her statutory entitlement, she is only entitled to £2,500 per month.
2. At the commencement of the hearing the claimant clarified she no longer sought an additional one week of notice pay as set out in her claim form. This claim was dismissed upon withdrawal. Further, she stated she had been paid one month (within the three months' notice period) full contractual pay for holidays.
3. The Employment Tribunal was provided with an agreed bundle of 47 pages. The claimant and Mrs. Hassall, Chief Executive Officer of the respondent gave evidence.

### FACTS

4. There is a slight dispute as to the employment start date between the parties but nothing turns on this. The claimant alleges she commenced her

employment as a commercial manager with the respondent from 1 August 2019 (the respondent contends from 15 July 2019). The respondent is a specialist manufacturer of silicone tubing and surgical devices mainly used in operating theatres.

5. The claimant's contract of employment (page 26 of the bundle) provided that after one month's service, an employee must serve three months written notice to the employer. The contract further provided payment for holidays would be at the normal basic rate under the terms and conditions of employment for the employee's normal hours of work. On termination of employment holidays are calculated in proportion to the full entitlement. The respondent retained a right under the contract (page 24) to require an employee to be placed on garden leave and require an employee to remain away from the place of employment for all or part of an employee's notice period with or without work whether the employee or the respondent gave notice. During the period of garden leave the employee could not work for any other company, firm, person or business.
6. On 31 March 2020, following the start of the pandemic, Ms. Hassall spoke to the claimant by telephone and discussed with her the downturn in sales as a result of the cancellation of non-essential operations. In the light of this loss of trade, the respondent did not have sufficient alternative work within the business to sustain current staffing levels. The respondent hoped that in the coming months that previous sales figures would recover and therefore agreed with the claimant a period of furlough in accordance with the Government's Job Retention Scheme.
7. By letter dated 31 March 2020 (page 37) Ms. Hassall set out the discussion between herself and the claimant and the claimant signed the same agreeing to be a "furloughed worker" from 1 April 2020. It stated that this was an alternative to lay off or being made redundant and that the respondent agreed to pay the claimant 80% of her wages. During the period of furlough, the claimant had to be available to work for the respondent and any work would then bring to an end the furlough period. The agreement stated that the process did not affect the claimant's continuity of service with the company nor did it break the claimant's employment in any way. The claimant signed the agreement, agreeing in particular to being designated a furloughed worker until the company lifted the restriction.
8. By letter dated 24 July 2020 Ms. Hassall informed the claimant that holiday entitlement continues to accrue.
9. On 30 July 2020, the claimant gave three months' notice to the respondent in accordance with her contract. The claimant was paid 80% furlough pay for two months of this notice period and paid in full for the third month to take account of holiday pay. The claimant brings a breach of contract claim seeking to recover the shortfall between her usual contractual salary and the 80% of furlough pay she actually received for the two month

period. Her case is that she should have been paid 100% for all three months (not just one month).

### Submissions

10. The respondent submitted that pursuant to section 13 (3) of the Employment Rights Act 1996 the sum sought by the claimant was not "*properly payable*" because the claimant's contract had been varied. As a result of furlough, which continued throughout the notice period, there was an agreement to pay the claimant £2,500. The sum of £2,500 only was "properly payable".
11. Further, the respondent submitted that the Employment Rights Act 1996 (Coronavirus, Calculation of a Week's Pay) Regulations 2020 in particular Regulation 3 (1) (b) sets out how a week's pay is to be calculated for an employee on furlough in respect of a notice period. It expressly includes sections 88 and 89 of the Employment Rights Act 1996.
12. In the circumstances of this case, the respondent submitted section 88 applied; the claimant had normal working hours. By virtue of section 87 (2) of the ERA the claimant gave notice to terminate her contract so that the liability of the employer for the period of notice is set out in sections 88 to 91 of the ERA. The period of notice required is in accordance with section 86 (2) of the ERA 1996. Section 87 (4) of the ERA disapplies section 87 where notice to be given to terminate the contract of employment is at least one week more than the notice required by section 86 (1) of the ERA. He submitted that the contractual notice period here is more than one week than that required pursuant to section 86 (1) of the ERA; the claimant was required to give 3 months' notice. Therefore, section 87 (4) applies so to disapply the remainder of section 87. The correct payment for the notice period is whatever the claimant was paid at the material time. The claimant was being paid 80% of normal pay namely £2,500. As the contractual period to terminate is more than one week than that required pursuant to section 86 then pursuant to section 87 (4) of the ERA at the material time the claimant is paid notice pay at the rate she was being paid (not the usual full contractual pay).
13. The Respondent relied upon the case of **Scotts Company v Budd (2003) IRLR 145** (paragraphs 11 and 12). He submitted at the material time normal pay of £2,500 was paid and there was no unlawful deductions.
14. Further, considering this case as a breach of contract claim under the Employment Tribunal Jurisdiction order 1994 the starting point is look at section 86 the minimum statutory notice period overtaken by the contractual provision. Although the claimant is saying she believed she had certain rights and believes she is entitled to 100% pay for the whole of the contractual period; she has given more notice than the statutory minimum and therefore, her rate of pay is not the full contractual rate for the notice period.

15. The claimant submitted that her contract stated her notice would be paid at her regular pay at that time. She also argues that the furlough agreement says that it does not affect her contractual agreement. The respondent continued to pay her at a furlough rate (80% of her contractual pay) during the notice period. She argues she should have been paid at the full usual contractual rate. She submitted that similarities should be drawn upon the circumstances of garden leave that is an employee does not have to work and an employee gets full pay. This situation was not very different. The furlough scheme was to preserve jobs and not for employers to pay less to employees than the contract. Otherwise, she submitted her contract of employment was useless.
16. The respondent submitted that garden leave is governed by different legislation. The provisions of section 86 to 88 of the ERA apply to notice.
17. The claimant responded that her contractual agreement still stood. Furlough does not overrule her contractual term; either party can decide to revert back to the contract.

### **The Law**

18. Pursuant to section 86 of the ERA the minimum notice required to be given by an employer to an employee is as follows :-
  - (a) who has been continuously employed between 1 month and 2 years is one week;
  - (b) who has been continuously employed between 2 years and 12 years is at least one week's notice for each year of service; and
  - (c) for employees with over 12 years continuous service it is not less than 12 weeks' notice.
19. Section 87 of the ERA sets out the rights of employees in the period of notice. At section 87 (2) of the ERA it states "If an employee who has been continuously employed for one month or more gives notice to terminate his contract of employment, the provisions of sections 88 to 91 have effect as respects the liability of the employer for the period of notice required by section 86 (2). It then states at section 87 (4) that the section does not apply in relation to a notice given by the employer or the employee if the notice to be given by the employer to terminate the contract must be at least one week more than the notice required by section 86 (1).
20. Section 88 of the ERA sets out provisions for employees with normal working hours. If during the notice period the employee is :
  - (a) ready and willing to work but no work is provided by the employer;
  - (b) is incapable of work through injury or illness;
  - (c) is absent from work because of pregnancy or childbirth;
  - (d) is off work on holiday, the employer is liable to pay the employee for that part of the normal working hours covered by this absence a sum not less than the remuneration for that part of the normal working hours calculated at the average hourly rate of remuneration produced by dividing

a week's pay by the number of normal working hours. An employee who is off work for one of the reasons during the notice period is entitled to normal pay for that period.

21. The case of **Scotts Company v Budd** establishes that where a contractual notice period is at least one week more than the statutory notice period then section 87 (4) has the effect of disapplying section 87 (1) and section 88.

### **Conclusions**

22. The employment relationship between employer and employee is determined by the contract of employment and the relevant statutory provisions. The relevant contract in this case is the employment contract and the agreement signed by the claimant on 31 March 2020. The relevant statutory provisions are those set out in section 86 to 88 of the Employment Rights Act 1996 and the Employment Rights Act 1996 (Coronavirus, Calculation of a Week's Pay) Regulations 2020.
23. The contractual notice entitlement in this case is as set out in the employment contract, namely the employee is entitled to terminate the contract of employment on giving three months' notice. The signed furlough agreement between the parties varies the employment contract in that it requests the employee to stay at home whilst being paid £2,500 per month.
24. There is no dispute that the claimant worked normal contractual hours. The statutory minimum to terminate the claimant's contract of employment with less than one year's service, pursuant to section 86 of the Employment Rights Act 1996, is one week. Pursuant to her contract of employment, to terminate, the claimant had to give more than at least one week's notice (three months) than the statutory minimum (one week).
25. In the case of **Scotts Company v Budd**, the claimant, Mr. Budd was on sick leave from work. His employer terminated his contract of employment giving him 13 weeks' notice in accordance with his contract. By this stage Mr. Budd had been absent for a period whereby he exhausted his sick pay. His employer did not pay him any notice pay. HHJ Burke at the Employment Appeal Tribunal found that the employer was entitled not to pay Mr. Budd any money during the notice period. The contractual notice period was at least one week more than the statutory notice period then section 87 (4) of the ERA so that it had the effect of disapplying section 87 (1) and section 88 of the ERA.
26. In my Judgment as the claimant employee was required to terminate her employment contract by at least one week's more notice than the statutory minimum, the claimant has no right to the "full usual contractual" pay for the two month period. The claimant's situation is caught by section 87 (4) of the Employment Rights Act 1996; section 87 (2) of the ERA is disappplied. As a result, section 88 which normally would have rendered the employer liable to pay normal contractual pay during the whole notice

period does not apply. The claimant was not entitled to more than £2,500 per month for the two months' notice period; there is no shortfall.

27. Further I do not find that the furlough agreement says otherwise. In so far as the claimant submits the furlough agreement states that the contract of employment is "unaffected", the terms of the furlough agreement states *"this process does not affect your continuity of service with the company nor does it break your employment in any way."* In my judgment this cannot be reasonably interpreted as meaning the employer must pay the employee three months full contractual pay. The relevant statutory provisions remain applicable. In my judgment this argument does not assist the claimant to recover more than the sums she has been paid.
28. Further I am not persuaded the government scheme introduced during the pandemic is the same to an employee being on garden leave. The scheme was introduced to deal with a unique situation, to preserve jobs and is governed by the relevant statutory scheme. Payments of notice pay remain the same pursuant to the statutory framework of the Employment Rights Act 1996.
29. Insofar as it is necessary to consider this claim as an unlawful deductions claim (it is brought as a breach of contract claim), in my judgment for the reasons I have provided for the breach of contract claim, the amount properly payable to the claimant was the sum of £2,500 per month following her agreeing to the furlough agreement which varied her employment contract. She provided greater than one weeks' notice to terminate her contract so that the sum properly payable was not full contractual pay by reason of the disapplication of section 87(2) of the ERA 1996 but £2,500 per month.
30. For these reasons I dismiss the claimant's claim.

Employment Judge Wedderspoon

15 February 2021