

# EMPLOYMENT TRIBUNALS

**Claimant:** Ms B. Garcia Ulloa      **Respondents:** Pridegreen Limited

**London Central Remote Hearing (CVP)**      **On: 18 February 2021**

**Before:** Employment Judge Goodman

## Representation

**Claimant:** Ms S. Glanville, trade union representative

**Respondents:** Mr. P. Fizia, respondent's operations director

## JUDGMENT

**The respondent made unauthorised deductions from the claimant's pay and is ordered to pay the claimant the total sum of £4,767.65.**

Details of the Employment Tribunal Fast Track process for enforcement are contained at the following link:

<https://www.gov.uk/government/publications/form-ex727-i-have-an-employment-or-an-employmentappeal-tribunal-award-but-the-respondent-has-not-paid-how-do-i-enforce-it>

A non-paying respondent may be named and fined by the government through the following process:

<https://www.gov.uk/government/publications/employment-tribunal-penalty-enforcement> “

## REASONS

1. This is a claim for underpayment of wages and unpaid holiday pay while the claimant was on furlough during 2020.

### Evidence

2. Tribunal heard evidence from:

**Betty Garcia Ulloa**, the claimant, who was assisted throughout by a Spanish interpreter, Ms Botero.

**Paul Fizia**, a director of Paul Fizia associates Ltd. who contracts with the respondent company to provide services as operations director.

**Peter Taylor**, a chartered accountant and member of PA Taylor Associates LLP, which provided payroll services to the respondent through an associated company, Elite Payroll.

3. There was a 162 page of bundle of documents which included emails about wage queries, payslips and the employment contract.

### **Findings of Fact**

4. The claimant was employed by the respondent as a chambermaid at the London Elizabeth Hotel in Lancaster Terrace, by Hyde Park. Her working hours were 8 a.m. to 3 p.m., with an unpaid one hour break, so she was paid for six hours per day. By the beginning of 2020 the annual salary was £13,728 per annum.
5. The contract provided for four weeks holiday pay a year, rising after five years to 5 weeks, plus bank holidays. If an employee was rostered to work a bank holiday, she would be given time off in lieu rather than additional payments She had been employed since 6 April 2011, so by 2020 was entitled to 5 weeks..
6. The holiday year ran from January to December. Staff are allowed to carry over some holiday from one year to the next.
7. The claimant carried over one week's holiday from 2019 into 2020. She worked throughout January and February 2020. In March she worked up to 7 March, and then took booked holiday for the period 8 to 24 March 2020; the holiday booking form is signed 6 March 2020.
8. Information about working hours each month was supplied to the payroll company on an Excel spreadsheet completed by the hotel manager, Kamesh Sridharan. Mr Sridharan did not give evidence to the tribunal and none of the spreadsheets were in the hearing bundle. Money was paid on 25<sup>th</sup> of each month, but it was for the calendar month, as the payslips give the last day of the month.
9. On 13 April 2020 she was issued with a letter by the respondent stating that she was being placed on the government's furlough scheme with effect from 1 March 2020 and would therefore receive 80% of her gross wage while on furlough. The letter also states that she was forbidden to work for anyone else during this period.
10. In January and February 2020 she received £1,144 gross per month, 1/12 of the annual salary.
11. In March 2020 she was paid only £490.28, and she went on being paid that amount each month, up to and including 31 January 2021, the last pay before this hearing.

12. On 13 November 2020 she received a further letter stating that from 1 November 2020 she was on flexible furlough, which meant that she could be required to work, when she would receive full pay, but otherwise would continue to receive 80% of normal pay. In fact she has not been required to work during the flexible furlough period.

**The Issues in this Claim**

13. The claimant first raised the issue of short payment, at the beginning of June 2020, but without success, and on 21 August 2020 she presented a claim to the employment tribunal. The respondent filed a response on 29 October 2020 asserting that she had been correctly paid. There was a hearing before Employment Judge Smailes on 10 December 2020 which could not go ahead because one side had not received the bundle, and the time was used to clarify the issues. These are:

(1) how furlough pay should be calculated. The respondent believed it was to be based on her earnings during March 2020.

(2) what was her entitlement to holiday pay, or generally, in March 2020. The respondent asserted she had not worked from the 1- 7 March, and that this was unpaid absence, and that she received four days holiday pay for the rest, as no more than that had accrued in 2020.

14. Witness statements were supplied for the claimant and Mr Fizia. In the course of today's hearing Mr Fizia asked permission to call Peter Taylor to give evidence; permission was granted, although there was no witness statement, as Mr Fizia himself had little direct knowledge of the disputed circumstances.

15. The tribunal was then told that there had been a conversation about this claim yesterday with HMRC, who reimburse employers for furlough payments. The respondent now accepted that furlough payments had been calculated incorrectly, and that the claimant should have been paid 80% of her normal gross pay, rather than 80% of her March pay. Accordingly, the respondent no longer disputes the claimant's entitlement to furlough. The tribunal was told that the respondent would have difficulty making payment for periods from March to October 2020 as that scheme is now closed, and it can no longer be reimbursed by the government. It was explained that the tribunal's function is to adjudicate on what the claimant is owed by the respondent, without regard to the respondent's ability to pay, or liability as between the respondent and HMRC and Elite Payroll.

16. Accordingly, the only matter that remained in dispute was holiday pay.

**Relevant Law**

17. The environment protection act 1996 provides that section 13 a Right not to have unauthorised deductions made from wages. The tribunal must assess what money was properly payable under contract or otherwise by reference to the employment, and then subtract money actually paid, to assess the amount of the deduction. A claim is brought under section 23.
18. The effect of an agreement to accept furlough under the Coronavirus job retention scheme is to vary the terms of the contract between employer and employee as to hours and payment. The scheme itself operates as between the employer and HMRC.
19. Section 76 of the Coronavirus Act 2020 provides that HMRC should have such functions as the Treasury may direct with regard to the disease. On 15 April 2020 a Treasury Direction was issued to HMRC setting out the operation of the CJRS scheme. It was revised twice later that year. It provides that HMRC will reimburse employers 80% of the wages of furloughed employees, and where wages vary from time to time, the figure is either average wages in the previous year, or the corresponding week in the previous year. A furloughed employee could not work for the employer in furlough (until the flexible furlough scheme); nothing however in fact prevents a furloughed employee from working for someone else during furlough.
20. Holiday pay is governed by the Working Time Regulations 1996, which provide for 5.6 weeks paid leave per annum as a statutory minimum. Whether the holiday entitlement is from the regulations or the contract of employment, an employee taking annual leave is not on furlough, and is entitled to the full payment, not 80% of it.
21. In normal times, workers may not carry forward into the next leave any untaken statutory annual leave – although if the contract permits a limited number of days to be carried forward, it may be. By virtue of The Working Time (Coronavirus) (Amendment) Regulations 2020, in effect from 27<sup>th</sup> of March 2020, workers may carry holiday forward where the impact of coronavirus means that it has not been reasonably practicable to take it in the leave year to which it relates. This applies to the four weeks of statutory leave that derives from the European directive, but not, except by agreement with the employer to the additional 1.6 weeks to which an employee is entitled under UK law.
22. It was not made clear whether the claimant had booked any further periods of holiday during 2020. If she had not, her leave in 2020 was the 2.6 weeks she took in March 2020.

### **Discussion**

23. Mr Fizia could not say whether the claimant had or had not worked from 18 March and in the absence of contrary evidence the claimant's evidence is accepted.

24. She was then on annual leave until 24th of March, 2.6 weeks. She had carried over 1 week from 2019. She had accrued 5.5 days by 8 March, allowing 33 days per annum and two months worked, but in any event in the absence of any contractual restriction (none is asserted) was only limited to accrued leave in the first year of employment. The result is that she is entitled to normal pay from 1-24 March. From 25 –31 March she is entitled to 80% normal pay. That is  $24/31$  of £1,144 +  $80/100(7/31$  of 1,144) =£1,092.33. She was only paid £573.88 in March, so the shortfall is £518.45.
25. In the remaining months, from April 2020 to January 2021 inclusive, 10 months in all, she was entitled to 80% of £1,144 per month, £915.20, but only received £490.28. Multiplying the shortfall of £424.92 by 10, that makes £4,249.20.

### **Conclusion**

26. The total award of unlawful deductions therefore is £4,767.65.
27. The untaken holiday entitlement for 2020 is 33 days, less 8 days taken in March: 25 days roll over to 2021 to be paid as booked and taken or paid on termination.
28. It is a pity that it has taken two Tribunal hearings to reach a conclusion when in the event there was very little difference between the parties. The claimant has been fortunate in having tenacious trade union representatives to assist her, as otherwise a low paid worker with little competence in English might not have reached this result. It is unfortunate for the respondent that the advice they received means that they may not recover all the money from HMRC as they would have done had it been paid correctly at the time. With the benefit of hindsight the respondent might wish that the conversation yesterday with HMRC had taken place in June, when the claimant first raised the problem, or in September when they received her tribunal claim.

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Employment Judge Goodman

Date: 18<sup>th</sup> February 2021

JUDGMENT and REASONS SENT to the PARTIES  
ON 19 February 2021

FOR THE TRIBUNAL OFFICE