Case Nos. 2414136/2020
Code V

EMPLOYMENT TRIBUNALS

Claimants: Mrs Stefania La Croce

Respondent: Il Vecchio Ltd

Heard at: Manchester (by CVP) **On:** 4th February 2021
11 February 2021
(In Chambers)

Before: Employment Judge Newstead Taylor
(sitting alone)

REPRESENTATION:

Claimants: Mrs Stefania La Croce (In person)

Respondent: Mr Eldi Brahimi (Director)

RESERVED JUDGMENT

The Judgment of the Tribunal is that:

1. The respondent has made unlawful deductions from the claimant's wages and is ordered to pay to the claimant the gross sum of £1,559.62 in respect of the amount unlawfully deducted.

REASONS

Introduction:

1. The respondent operates an Italian restaurant called Il Vecchio at 141 Manchester Street, Heywood, Greater Manchester. Mr Eldi Brahimi is the director of the respondent. The manager at Il Vecchio is called Dani.

In 2017, the claimant started working as a waitress, kitchen porter and starter sous chef at the respondent. The claimant was placed on furlough. The claimant's employment with the respondent terminated in June or July 2020. This claim is concerned with the furlough wages the claimant received during the period of her employment from March to June/July 2020.

The Tribunal Hearing:

2. The hearing took place on 4 February 2021.

3. The claimant represented herself. She did not connect to the hearing at 10am. The clerk contacted her. The claimant explained that she was having difficulties accessing the hearing. The claimant got help from her neighbour to access the hearing. At the start of the hearing, it became clear that there was another person in the room with the claimant. This was the claimant's husband who, due to the claimant's limited English, deals with her business affairs and had been involved in the matters under consideration in the case. I explained to the claimant that her husband could, if she wanted, remain in the room, but I asked that he sat next to her so I could see him. I also explained that she had an Italian interpreter, Ms. Monica Sobrero, and, accordingly, that her husband should not interpret for her and should not communicate with the claimant when she was giving her evidence. The claimant gave her evidence via the Italian interpreter who translated the entirety of the proceedings.

4. The respondent was represented by Mr. Eldi Brahimi, the Director. He gave evidence on behalf of the respondent. Mr. Brahimi did not connect into the hearing at 10am. The clerk contacted Mr. Brahimi at around 10.30am. He said that he would join the hearing. At the start of the hearing, it became apparent that there was another person in the room with Mr. Brahimi. On questioning, Mr. Brahimi told me that this was his friend who had arrived to take him out as they had planned to go somewhere. I explained to Mr. Brahimi that the hearing was listed for the full day. He confirmed that he could attend all day. He also explained that his friend was nothing to do with the case. I explained that the hearing was a public hearing. However, I expressed some concern about Mr. Brahimi's friend being present in the same room as Mr. Brahimi, but unseen during the duration of the hearing. Mr. Brahimi confirmed that his friend would leave. Further, at various stages during the hearing Mr. Brahimi's wife passed through the room, being the living room, in which Mr. Brahimi was situated for the hearing. I reminded Mr. Brahimi of the requirement to be in a quiet location with no family members or colleagues to disturb him.

5. The Notice of Claim, dated 28 September 2020, ordered the parties to exchange documents by 23 November 2020, to agree the documents to be used at the hearing and then the respondent to prepare the bundle by 7 December 2020 and to exchange witness statements by 21 December 2020. The claimant complied with these directions, including preparing the bundle herself. The respondent did not. In particular, there were no documents or witness statements from the respondent. I asked Mr Brahimi why the respondent had failed to comply with these orders. Mr Brahimi told me that there was no reason for the non-compliance. He had been very busy. He did not want to waste his time. I explained to him that complying with orders of the Employment Tribunal was not wasting his time.

6. The claimant provided a bundle of 57 pages, a witness statement of 2 pages called 'Tribunal Letter' and 4 pages from her TSB Bank Statements. The ET3 had been omitted from the bundle. I obtained the ET3 from the Employment Tribunal file. I read the bundle and associated documents. I informed the parties that they should refer me to the documents on which they relied regardless of my reading, and the cross references in the claimant's witness statement. During the hearing, it became clear that documents thought to be in the bundle were not and that some documents in the bundle were poorly copied. I asked the claimant, during the lunch break, to provide these documents. The claimant did so. She provided better copies of the TSB Bank Statements, Government Gateway documents and text messages from her husband to Mr Brahimi. References in square brackets in this Judgment are to the claimant's referencing and the pages of the bundle.

7. The claimant had a hard copy of all of these documents. However, the claimant had not provided the respondent with the final bundle and associated documents. Nonetheless, she had previously disclosed all the documents to the respondent. Additionally, the interpreter did not have a copy of the bundle and associated documents. In the circumstances, at 11.50 am, I stood the case down for 40 minutes for the bundle and associated documents to be provided to both the respondent and the Interpreter. During the break, I suggested that the respondent read the bundle and consider whether or not he was in a position to proceed with the case that day.

8. At 12:30, the hearing re-started. Both Mr Brahimi and the Interpreter confirmed that they had received the bundle and associated documents. Mr Brahimi confirmed that he had read all of the bundle and that he had no objection to continuing that day. At this stage, Mr Brahimi did not

identify any further documents that he wished to provide. However, during the course of the day Mr Brahimi referred, more than once, to checking matters with his accountant later and to documents that his accountant had produced, but that were not in the bundle. I enquired whether or not those documents could be provided during the course of the day. Mr Brahimi said they could not. Mr Brahimi did not apply to adjourn the hearing in order to obtain further evidence. Nonetheless, I considered whether or not the case should go part heard for the respondent to provide evidence. I reminded myself that the respondent had no good reason for failing to comply with the orders in the Notice of Claim. In fact, the respondent had elected not to comply considering it a waste of time. The claimant, who wished the case to proceed, had provided the bundle and associated documents. Mr Brahimi had been afforded time to consider the bundle and associated documents. He had confirmed that he was content to proceed. He had not, at the outset, identified any further documentation that he wished to rely on. Also, I considered that if the case were to go part heard this would not be proportionate to the relatively straightforward nature of the issues, that it would cause delay and potentially increase costs. Therefore, I concluded that the case should proceed and that a decision would be made on the evidence before me.

The Claims & Issues:

9. I raised with the claimant whether or not she was bringing a claim for unfair dismissal. I noted that she had ticked the box at paragraph 8.1 of the ET1 stating "*I was unfairly dismissed."* [16] However, I also noted that she claimed to have been employed until 7 July 2020, being after the alleged date of dismissal on 3 June 2020. The claimant confirmed that she was not claiming unfair dismissal. She accepted that her claim was solely for unpaid furlough wages in the period March – July 2020.

10. At the outset of the hearing, it was agreed that the issue for consideration was whether or not the respondent made unauthorised deductions from the claimant's wages in the period March – July 2020 and, if so, how much was deducted? Further, it was agreed that this involved consideration of the following sub-issues:

    10.1. When did the claimant agree to furlough?
    10.2. How was the furlough agreement made?
    10.3. What were the terms of the furlough agreement?
    10.4. Did the claimant's employment end on 3 June 2020 or 7 July 2020?

10.5. What should the claimant have been paid in the period March 2020 to the end of her employment?

10.6. What was the claimant paid in the period March to the end of her employment?

10.7. If the claimant was paid less, was any deduction authorised?

Findings of Fact:

11. I make the following findings in this case.

11.1. The claimant was employed by the respondent in September or October 2017. She worked as a waitress, kitchen porter and starter sous chef. She did not have a written employment contract. She worked 5 days a week, being Wednesday – Thursday 4pm – 11pm, Friday – Saturday 3pm till close, and Sunday 3pm – 9pm. She was not prohibited from taking work with third parties during her employment with the respondent. She was not required to give a set period of notice. She did not authorise or agree to any deductions being made from her wages. Prior to furlough, she was paid £246.30 gross [24]. The net equivalent was paid into the claimant's bank account in arrears weekly on a Friday. She never received a payslip.

11.2. The respondent had contact details for the claimant namely her address and her husband ("Masimo's") mobile phone number.

11.3. After 22 March 2020, the claimant orally agreed to be placed on furlough. The claimant did not agree the percentage of her wages she would receive. In short, she said she *"just received what she received."* Initially, Mr Brahimi contended that this was at 80% of the claimant's pre-furlough wage. However, he ultimately accepted that in fact the respondent was paying the claimant 85% of her pre-furlough wage. I have concluded that the claimant was not actually put on furlough until on or around the beginning of April 2020 and then at 85% of her wage. I have come to this conclusion from considering the Government Gateway documents at [46, 48, 50 – 51.] These documents record the claimant's taxable

income. The claimants' taxable income on 27 March 2020 and 3 April 2020 was £246.30 per week gross, being her pre-furloughed wages. The claimant's taxable income from 10 April 2020 – 03 July 2020, was £209.28 per week gross, being 85% of the claimant's previous wage.

11.4. During furlough, the claimant, in order to pass the time, visited Masimo at the takeaway he managed. Whilst she was there, she learnt to make pizza. However, the claimant confirmed that she did not work for the takeaway and was not paid. I note that Mr Brahimi believed that the claimant was paid by the takeaway. The respondent had no evidence that she was paid. In the circumstances, I find that she was not.

11.5. On 24 April 2020, Masimo text messaged Mr Brahimi as follows *"hi eldi, how are you? Stefi ask to me if you did something about the wages from government. Let you me know. Thank you."* Mr Brahimi replied *"Nothing yet masimo."* The claimant's husband asked *"ok. Let you me know. Thank you mate."*

11.6. On 30 April 2020, Mr Brahimi called Masimo and told him to go to the restaurant to collect the claimant's furlough wages from the manager. Further, Mr Brahimi said that if the restaurant reopened as a takeaway the claimant would not be needed.

11.7. On 2 May 2020, Masimo text messaged Dani saying *"good morning Dani, how are you mate? Eldi told me him leave to you something."* On 4 May 2020, Masimo text messaged Dani again stating *"hi Dani how are you mate? Are you in restaurant?"* On 4 May 2020*, Dani replied stating "Hi Massimo I'm alright. Home When you can I'm here."* [3.2/33] Masimo collected an envelope containing £960 in cash. This was in accordance with what the respondent's accountant had said to pay to the claimant.

11.8. On 8 June 2020, Dani text messaged Masimo stating *"Hey Masimo. I'm good mate! In 15 minutes I gone be in the restaurant. Eldi have to bring something."* [4.1/34] Masimo

went to the restaurant and collected an envelope containing £760 in cash, being the claimant's May 2020 wages. Again, this was in accordance with what the respondent's accountant had said to pay to the claimant.

11.9. On 4 July 2020, Dani text messaged Masimo asking if the claimant could work that night [4.1-4.2/34-35.] The claimant did not work that night.

11.10. On 7 July 2020, the claimant went to the restaurant and spoke to Eldi. She told him that she had decided to leave her job at the restaurant. Mr Brahimi stated that the claimant was always welcome back. He agreed to give the claimant her P45 and her furlough wages for June 2020 in the next few days. At no point did he state that the claimant had been dismissed on 3 June 2020 for working at a takeaway. At no time between 3 June 2020 and 7 July 2020 did Mr Brahimi contact the claimant to discuss her allegedly working at the takeaway. Specifically, Mr Brahimi did not write to the claimant and did not send any text messages to Masimo's mobile phone.

11.11. On 10 July 2020, the claimant went to the restaurant for a drink. Mr Brahimi had already left. She asked Dani when she would receive her P45 and her furlough wages. Dani said to give Mr Brahimi time as he was very busy and had not had time to prepare the P45 or the furlough wages.

11.12. On 14 July 2020, Dani called the claimant asking her to return to work as a kitchen porter. The claimant declined. Then the claimant checked the Government Gateway and saw that she was still registered as employed and on furlough.

11.13. On 15 July 2020, the claimant text messaged Dani requesting the P45 and referring to the continued furlough. Dani responded that he would mention the P45 to Mr Brahimi [5.1/38.]

11.14. On 17 July 2020, Dani sent a picture of the claimant's alleged P45 [6.1/39.] This was the first time that the claimant was aware that the respondent considered her leaving date to be 3 June 2020. The P45 also recorded her surname and address incorrectly. The claimant was very upset. She went to the restaurant that evening. Dani was surprised to see her. She asked Dani to correct the leaving date. Dani said he would speak to Mr Brahimi.

11.15. On 20 July 2020, the claimant text messaged Mr Brahimi stating that she would collect her P45 that afternoon. After initially agreeing, Mr Brahimi asked the claimant to come the next day as he had been unable to meet with his accountant. The claimant agreed [7.1-7.2/43.]

11.16. On 21 July 2020, the claimant met with Mr Brahimi at the restaurant. He gave her a new P45 [7.3/44.] However, this still recorded her leaving date as 3 June 2020 and recorded her surname and address wrongly. Mr Brahimi justified the leaving date on the basis that someone told him the claimant did not come back after that date.

11.17. The claimant's gross taxable income for the period 27 March 2020 to 03 July 2020 is £3,213.24. The claimant's income net of tax and National Insurance for the period 27 March 2020 to 03 July 2020 is £3,150.81. These figures have been taken from the Government Gateway records [46, 48, 50,51.] The claimant's net income has been calculated by deducting the income tax and National Insurance paid from the gross pay.

Date	**Gross Pay**	**Net Pay**	**Money Received**
27.03.20	£246.30	£235.46	
03.04.20	£246.30	£235.66	
10.04.20	£209.28	£206.13	
17.04.20	£209.28	£206.13	
24.04.20	£209.28	£206.13	£960
01.05.20	£209.28	£206.13	
08.05.20	£209.28	£206.13	
15.05.20	£209.28	£206.13	
22.05.20	£209.28	£206.13	

29.05.20	£209.28	£206.13	£760
05.06.20	£209.28	£206.13	
12.06.20	£209.28	£206.13	
19.06.20	£209.28	£206.13	
26.06.20	£209.28	£206.13	
03.07.20	£209.28	£206.13	
	£3,213.24	**£3,150.81**	**£1,720**

The Law:

12. The right not to suffer an unauthorised deduction from wages is contained in section 13 (1) of the Employment Rights Act 1996 ("ERA") as follows:

"(1)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.

(2)In this section "relevant provision", in relation to a worker's contract, means 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..."

13. Section 23 ERA gives a worker the right to complain to an Employment Tribunal about an unlawful deduction from wages. A claim can be brought by a worker, which includes an employee, as defined in S.230 (3) ERA.

14. The term wages is defined in s.27 (1) ERA as *"any sums payable to the worker in connection with his employment."* Salary comes within the definition of wages.

15. An employer has made a deduction *"Where the total amount of wages paid on any occasion by the 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" (S.13 (3) ERA.)*

Submissions:

16. The claimant and the respondent both made submissions.

17. The claimant concluded by saying that she did not expect furlough to end up in the respondent's pocket and that she would not work for Mr. Brahimi again as she did not consider him to be honest.

18. Specifically, I asked Mr. Brahimi to comment on the alleged date of dismissal of 3 June 2020. Mr. Brahimi maintained that the claimant was dismissed on 3 June 2020 because she was undertaking paid work at the takeaway. He submitted that in his opinion people on furlough would only be working if they were fiddling money. He didn't consider it fair that the claimant received furlough and wages from the takeaway. He maintained that the claimant's furlough money for June 2020 had, on the advice of his accountant, been returned to HMRC. Finally, he said that he had run a successful business for 6 years and had had no problems with employees.

Discussion & Conclusions:

19. I find that the claimant was employed by the respondent until 7 July 2020 when she informed Mr. Brahimi of her decision to leave her employment with the respondent. I have considered Mr. Brahimi's argument that the claimant's employment terminated on 3 June 2020. I reject that contention. In reaching my conclusion, I rely on the following findings of fact which are detailed in full above:

    19.1. At no time between 3 June 2020 and 7 July 2020 did Mr Brahimi contact the claimant to discuss her allegedly working at the takeaway and inform her of her dismissal. Specifically, Mr Brahimi did not write to the claimant and did not send any text messages to Masimo's mobile phone.

    19.2. On 4 July 2020, being approximately 1 month after the claimant was allegedly dismissed, the respondent asked the claimant to work [4.2/35.]

    19.3. On 7 July 2020, when the claimant informed Mr Brahimi of her decision to leave her employment with the respondent, Mr Brahimi did not say anything about the claimant already having been dismissed.

    19.4. On 14 July 20, the respondent, via Dani, asked the claimant to return to work as kitchen porter without any mention having been made of her allegedly working for the takeaway.

    19.5. At no time prior to 17 July 2020, had the respondent told the claimant that her leaving date was 3 June 2020. The first time the claimant was aware of this was in her P45. She immediately requested that the P45 was corrected.

    19.6. At the meeting on 21 July 2020, Mr Brahimi did not seek to justify the 3 June 2020 leaving date on the basis of the claimant allegedly working at the takeaway. In fact, he

sought to uphold it on the basis that he had been told that she had not returned after that date.

19.7. Further and for the avoidance of doubt, the claimant was contractually entitled, if she so wished, to take on additional paid employment with third parties. On the facts as found, this did not occur, but had it occurred it would not have entitled the respondent to cease paying the claimant's wages.

20. Accordingly, I find that the claimant was entitled to be paid her pre-furlough and furlough wages in full for the period from 27 March 2020 to 7 July 2020. The claimant's gross taxable income to 03 July 2020 was £3,213.24. The claimant's gross taxable income for the period 4 – 7 July 2020 is £119.58, being £209.28 / 7 x 4. Therefore, the claimant's gross taxable income for the relevant period is £3,332.82, being £3,213.24 plus £119.58.

21. The claimant received £1,720.00 net. In order to calculate the total deductions made by the respondent, it is necessary to deduct from the gross pay of £3,332.82 the gross equivalent of the £1,720.00 net pay received by the claimant. I note that the claimant's net pay pre-furlough was approximately 95% of her gross pre-furlough wages, being £235.46 / £246.30 x 100. Further, I note that the claimant's net pay during furlough is approximately 98% of her gross furlough wage, being £206.13 / £209.28 x 100. I have decided to use 97% to calculate the gross equivalent of the £1,720.00 net received by the claimant. I have chosen 97% because an adjustment is required as the period from 27 March 2020 to 7 July 2020 is a mixture of 2 weeks pre-furlough wages and 13 weeks and 4 days of furlough wages. I calculate the gross equivalent of the £1,720.00 net received by the claimant as £1,773.20, being £1,720.00 / 0.97.

22. I conclude that the respondent has made deductions from the claimant's wages in the gross sum of £1,559.62, being £3,332.82 - £1,773.20, and that such deductions were unlawful as they were not authorised in accordance with S.13 (1) (a-b) ERA.

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Employment Judge Newstead Taylor

Date: 12 February 2021

RESERVED JUDGMENT AND REASONS SENT TO THE PARTIES ON

18 February 2021

FOR THE TRIBUNAL OFFICE

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Judgments and reasons for the judgments are published, in full, online at www.gov.uk/employment-tribunal-decisions shortly after a copy has been sent to the claimant(s) and respondent(s) in a case.

NOTICE

THE EMPLOYMENT TRIBUNALS (INTEREST) ORDER 1990

Tribunal case number: **2414136/2020**

Name of case: **Mrs S la Croce** v **Il Vecchio Ltd**

The Employment Tribunals (Interest) Order 1990 provides that sums of money payable as a result of a judgment of an Employment Tribunal (excluding discrimination or equal pay awards or sums representing costs or expenses), shall carry interest where the sum remains unpaid on a day ("*the calculation day*") 42 days after the day ("*the relevant judgment day*") that the document containing the tribunal's judgment is recorded as having been sent to the parties.

The rate of interest payable is that specified in section 17 of the Judgments Act 1838 on the relevant judgment day. This is known as "the stipulated rate of interest" and the rate applicable in your case is set out below.

The following information in respect of this case is provided by the Secretary of the Tribunals in accordance with the requirements of Article 12 of the Order:-

"the relevant judgment day" is: **18 February 2021**

"the calculation day" is: **19 February 2021**

"the stipulated rate of interest" is: **8%**

For and on Behalf of the Secretary of the Tribunals