



## **EMPLOYMENT TRIBUNALS (SCOTLAND)**

**Case No: 4106681/2020 and 4106679/2020 combined (V)**

**Held in Glasgow by CVP on 14 January 2021**

**Employment Judge Murphy (sitting alone)**

**Mr T Callaghan**

**First Claimant  
Represented by:  
Mrs Callaghan -  
Wife**

**Mr E Hamilton**

**Second Claimant  
In Person**

**YWR Airdrie Ltd**

**Respondent  
Represented by  
Mr J Stocks  
Director of the  
Respondent**

## **JUDGMENT OF THE EMPLOYMENT TRIBUNAL**

### Mr T Callaghan

1. The Respondent has made an unauthorised deduction from wages contrary to section 13 of the Employment Rights Act 1996 and the Respondent is ordered to pay to the First Claimant the sum of £2,861.65 in respect of 11 weeks' wages to which he was entitled in the period between 26 March and 21 July 2020.
2. The Respondent has breached the First Claimant's contract and is ordered to pay to the First Claimant the sum of £863.27 in respect of damages for the Respondent's failure to give the minimum statutory notice period under section 86 (4) of the Employment Rights Act 1996.

3. The First Claimant is entitled to a redundancy payment under section 135 of the Employment Rights Act 1996 and the Respondent is ordered to pay to the first claimant the sum of £1,485 in this respect.
4. The Respondent has made an unauthorised deduction from wages contrary to section 13 of the Employment Rights Act 1996 and the Respondent is ordered to pay to the First Claimant the sum of £726 in respect of wages relating accrued untaken holiday.
5. The sums awarded in items 1, 2 and 4 above are expressed gross of tax and national insurance. It is for the Respondent to make any deductions lawfully required to account to HMRC for any tax and national insurance due on the sums, if applicable.

Mr E Hamilton

6. The Respondent has made an unauthorised deduction from wages contrary to section 13 of the Employment Rights Act 1996 and the Respondent is ordered to pay to the Second Claimant the sum of £2,445.41 in respect of 9.4 weeks' wages to which he was entitled in the period between 26 March and 21 July 2020.
7. The Respondent has breached the Second Claimant's contract and is ordered to pay to the Second Claimant the sum of £1,193.27 in respect of damages for the Respondent's failure to give the minimum statutory notice period under section 86 (4) of the Employment Rights Act 1996.
8. The Second Claimant is entitled to a redundancy payment under section 135 of the Employment Rights Act 1996 and the Respondent is ordered to pay to the Second Claimant the sum of £1,980 in this respect.
9. The Respondent has made an unauthorised deduction from wages contrary to section 13 of the Employment Rights Act 1996 and the Respondent is ordered to pay to the Second Claimant the sum of £726 in respect of wages relating accrued untaken holiday.
10. The sums awarded in items 6, 7 and 9 above are expressed gross of tax and national insurance. It is for the Respondent to make any deductions lawfully required to account to HMRC for any tax and national insurance due on the sums, if applicable.

**REASONS****Issues to be determined**

1. The Claimants brought claims for unpaid wages during the period between 26 March 2020 and 21 July 2020 when their employment terminated. They likewise claimed payments arising out of the termination of their employment including payments in lieu of notice, outstanding holiday pay and statutory redundancy payments. The Respondent accepted that payments had not been made but responded to the claims on the basis that the Respondent had not received funds from HMRC further to claims made by the Respondent for grant monies under the Coronavirus Job Retention Scheme.

**Findings in Fact**

2. The tribunal made the following findings in fact.
3. The Claimants were employed by a company which traded as Your Waste Recycled. The First Claimant's employment commenced on or about 1 January 2017 and the Second Claimant's employment commenced on or about 1 July 2016. The Claimants (and some other employees) transferred to the employment of the Respondent under the Transfer of Undertakings (Protection of Employment) Regulations 2006 on or about 14 February 2020. Neither Claimant had a written contract of employment with the Respondent or the predecessor employer that they had been able to locate.
4. The Respondent hand delivered a letter dated 26 March to the Claimants, asking them to agree contractual changes to their terms and conditions relating to their being placed on 'furlough'. Both Claimants agreed to be furloughed. They both signed a document signifying their agreement to the terms set out in the Respondent's letter of 26 March 2020.
5. They remained on furlough until their employment was terminated with immediate effect at a meeting on 21 July 2020 when the Respondent's Mr Stocks told them he was making them redundant.

6. As at that time, although some wages had been paid for certain weeks in the period from 26 March (based on the reduced level of approximately 80% of the Claimants' normal gross weekly wage), there were other weeks for which no payment was made. The First Claimant did not receive eleven weeks' wages and the Second Claimant did not receive 9.4 weeks' wages during the period in question. The Respondent had experienced difficulties in its claims to HMRC for the grants to support its furloughed employees and had not received payment from HMRC at the date of the hearing. HMRC's position was that a time limit had been missed but the Respondent maintained that the fault for the lateness did not lie with the Respondent, who had struggled to obtain an authorization code for which they waited three weeks. The matter is subject to an appeal within HMRC.
7. On terminating the employment of the Claimants, Mr Stocks did not provide the statutory minimum notice or payment in lieu thereof. He did not pay the Claimants statutory redundancy payments. He did not pay them any monies in lieu of untaken holidays outstanding at the date of termination.
8. The practice with respect to annual leave was that employees were given 28 days' annual leave inclusive of public holidays. The holiday year ran from 1 January. On a pro rata basis, and having regard to public holidays which had been taken, the Claimants each had an accrued untaken holiday entitlement of 11 days when their employment terminated.
9. The Claimants both had a gross weekly wage of approximately £330 prior to the changed terms which took effect on being furloughed. This had been their gross salary since at least April 2019. The Claimants' furloughed weekly wage was £260.15.
10. The First Claimant had three complete years of continuous service when his employment terminated, and the Second Claimant had four complete years of continuous service when his employment terminated.

### **Observations on the Evidence**

11. The facts above were either agreed between the parties or not disputed at the hearing. Both Claimants were given the opportunity to cross-examine Mr Stocks and neither did

so. Mr Stocks was given the opportunity to cross-examine both Claimants and did not do so. Figures for the furloughed wage and the number of weeks' unpaid were specifically agreed by the parties at the hearing. There was some discussion with the Claimants with respect to the approach taken to the calculations as set out in their ET1 forms but neither Claimant felt able to speak to the approach taken, having relied on advice from others at the time of preparing the forms.

12. No documentation was available for the Second Claimant. He indicated he believed he may have sent documents for consideration but could not recall when or indeed if he had definitely done so. In any event, relevant facts were agreed between the Second Claimant and the Respondent without reference to documentation.

## **Relevant Law**

### *Statutory Redundancy Payments*

13. Section 135(1)(a) and section 155 of the Employment Rights Act 1996 govern the rights of employees to a statutory redundancy payment. Section 145(5) of that Act defines the "relevant date" in cases where an employer has terminated the employment without providing the statutory minimum notice period. In such cases, for the purposes of section 162(1) of the Act, the relevant date is the date on which the notice would have expired, had it been given on the date of termination. Section 162(1) of the Act provides that the amount of a redundancy payment shall be calculated by determining the period ending with the relevant date during which the employee has been continuously employed. Sections 145 and 162, therefore, operate to apply a 'legal fiction' that the employment continues to the end of the would-be statutory notice period for the purposes of the calculation of redundancy entitlement.
14. Regulations known as the Employment Rights Act 1996 (Coronavirus, Calculation of a Week's Pay) Regulations 2020 came into effect from 31 July 2020 and contained, among other matters, provision as to how a week's pay should be calculated in relation to employees with normal working hours for the purposes of calculating entitlement to statutory redundancy payments (Reg 4). The Regulations provide that, for these

purposes, any reduction in the employee's weekly wage due to being furloughed should be disregarded.

#### *Unpaid wages while furloughed*

15. A deduction from a worker's wages is unlawful unless one of the limited exceptions set out in section 13(1) of the Employment Rights Act 1996 is satisfied. Section 13(1)(b) provides for one such exception where the worker has previously signified in writing his consent to the making of the deduction. The Coronavirus Job Retention Scheme legislation and Treasury Directions do not of themselves impose contractual changes upon employers and employees (albeit that agreement to certain contractual changes is a prerequisite for eligibility for the grant monies).

#### *Annual leave*

16. Under Reg 14 of the Working Time Regulations 1998, employees are entitled to accrued untaken holiday outstanding at the date of termination. This can be enforced by way of a claim for an unauthorised deductions from wages under section 13 of the Employment Rights Act 1996.

#### *Statutory minimum notice*

17. Under section 86(4) of the Employment Rights Act 1996, a statutory minimum notice period linked to the employee's period of continuous employment is incorporated into the contract of employment. The remedy in the event of failure to give due notice is a claim for breach of contract **Westwood v Secretary of State for Employment** [1984] IRLR 209, HL and **Secretary of State for Employment v Wilson** [1977] IRLR, 483, EAT. Under section 88(1)(a) of ERA, if the employee has normal working hours during the period of notice and is ready and willing to work all of those normal working hours but no work is provided, the employer is liable to pay a sum not less than the amount of remuneration for all the working hours based on the calculation of a week's pay as set out in Chapter 11 of the Act. With effect from 31 July 2020, however, the aforementioned Employment Rights Act 1996 (Coronavirus, Calculation of a Week's Pay) Regulations 2020 came into effect with new provision as to how a week's pay should be calculated for the purposes of the statutory minimum notice entitlement (Reg

4). Again, the Regulations provide that, for these purposes any reduction in the employee's weekly wage due to being furloughed should be disregarded with effect from their commencement date.

#### *Restrictions on Contracting out*

18. There are restrictions on contracting out of the entitlement to a statutory redundancy payment and the statutory minimum notice entitlement (section 203 of the Employment Rights Act 1996). Likewise, there are restrictions on contracting out of the rights regarding annual leave under the Working Time Regulations (WTR 1998 R35). Any agreement is void in so far as it purports to exclude or limit the operation of the respective legislation unless specified stringent conditions are satisfied.

#### **Discussion and Decision**

19. No submissions were made by the parties. Although the Respondent's Mr Stocks explained the difficulties experienced with the claims made to HMRC in respect of the Claimants, he did not develop arguments as to how these matters were said to have affected or negated the Claimants' various entitlements.
20. The letter issued by the Respondent to the Claimants on 26 March 2020 included the following passage:

*"To minimize the need for redundancies because of the temporary closure of your place of work and the temporary reduction in the need for your role, or a downturn in business, we require you to:*

- *"furlough" your employment; and*
- *Reduce your pay which will be subject to the maximum amounts payable through the Government's Job Retention Scheme)*

*This means that, even though we are not providing you with work, we can continue to pay you through funding we receive from the Government's Coronavirus Job Retention Scheme.*

*During any furlough period, you would:*

- *Continue to be employed by us;*
- *Not carry out any work for us; and*
- *Continue to receive a proportion of your wage / salary*

*Your other terms and conditions of employment and your continuity of employment would not be affected during this period...*"

21. In agreeing to these terms, the tribunal is not satisfied that the Claimants agreed that their entitlement to receive wages during the furlough period would be conditional upon the Respondent's successful and timeous receipt of grant monies from the Government. They agreed to a reduction in pay which was to be subject to the maximum amounts "*payable*" (my emphasis) through the Scheme. The varied terms did not limit their entitlement to the amounts *paid* by Government through the scheme. Furthermore, the letter specified that during any period of furlough the Claimants would continue to receive a proportion of their wage; in fact, there were many weeks during which the Claimants received no proportion of their wage.
22. If the parties intended to pass the risk of an unsuccessful grant claim on to the Claimants, then clear language expressly stating that payment of wages would be conditional upon receipt of Government funding would be expected. There was no evidence that it was the parties' intention that the contract should be altered such that payment of wages would be conditional upon the Respondent's timeous receipt of Government funds. Indeed, the Respondent paid both the Claimants for a number of weeks in the period from 27 March to 21 July 2020 despite not having received grant monies from HMRC for those weeks.
23. The Respondent's letter dated 26 March included no indication that the Claimants were being asked to agree to waive any statutory entitlements to redundancy payments, or annual leave or minimum notice periods, and certainly none which would satisfy the conditions for contracting out of these rights.



## The Calculations

24. The approach to the calculations of the sums owing are set out below, as these differ from the sums contended for by the Claimants in their ET1s.

### *Statutory Redundancy Payments*

25. The Claimants' effective date of termination (21 July 2020) predated the Employment Rights Act 1996 (Coronavirus, Calculation of a Week's Pay) Regulations 2020 which came into effect from 31 July 2020 and which clarified the approach to calculating a week's pay for employees on furlough leave who became entitled to a statutory redundancy payment. Notwithstanding this, because the relevant date is not the termination date, but the date on which due notice would have expired, it is concluded that these Regulations do apply for the purposes of the Claimants' statutory redundancy payment calculations (by virtue of sections 145 and 161 of the Employment Rights Act 1996). That being so, the reduction in the Claimants' pay due to being furloughed has been disregarded and the relevant amount of a week's pay for each Claimant is £330. The calculations are:

- a. For the First Claimant:  $3 \times 1.5 \times \pounds 330 = \pounds 1,485$
- b. For the Second Claimant:  $4 \times 1.5 \times 330 = \pounds 1,980$

### *Breach of contract (notice)*

26. The First Claimant was entitled to 3 weeks' notice and the Second Claimant was entitled to 4 weeks' notice. For the part of the notice period which pre-dated 31 July 2020, the relevant amount of a week's pay was £260.15 based on the approach in Chapter 11 of the Employment Rights Act 1996 because the Claimants did not yet have the benefit of the operation of the Employment Rights Act 1996 (Coronavirus, Calculation of a Week's Pay) Regulations. For the balance of their "would-be" notice periods from and after 31 July 2020, the applicable weekly rate is the unreduced figure of £330.

- a. For the First Claimant:  $1.8 \text{ weeks @ } \pounds 260.15 = \pounds 467.27 + 1.2 \text{ weeks @ } \pounds 330 = \pounds 396 = \pounds 863.27$

b. For the Second Claimant: 1.8 weeks @£260.15 = £467.27 + 2.2 weeks @ £330  
= £726 = **£1,193.27**

27. The 11 days' holiday in both cases has been calculated at the rate of £66 per day (i.e. £330/5), given the Claimants worked 5 days per week, and the Coronavirus Job Retention Scheme envisaged holidays would be paid at 100% of pay as opposed to the reduced furloughed rate.

28. The unpaid wages during the furlough period have been calculated at the furloughed rate of £260.15 per week.

a. The First Claimant: 11 weeks x £260.15 = **£2,861.65**

b. The Second Claimant: 9.6 weeks x £260.15 = **£2,445.41**

Employment Judge: Lesley Murphy  
Date of Judgment: 22<sup>nd</sup> January 2021  
Entered in Register: 16<sup>th</sup> February 2021  
Copied to Parties