EMPLOYMENT TRIBUNALS

Claimant: **Ms J Lenny**

Respondent: **National Federation of Roofing Contractors Ltd**

Heard at: London Central (remotely by CVP) **On:** 11 December 2020

Before: Employment Judge Nicklin

Representation
Claimant: in person

Respondent: Mr N Thornsby (Counsel)

Note: This has been a remote hearing. The parties did not object to the case being heard remotely. The form of remote hearing was V – video, conducted using Cloud Video Platform (CVP). It was not practicable to hold a face to face hearing because of the COVID-19 pandemic.

JUDGMENT

1. The Claimant's application to amend her claim to include an additional complaint of an unlawful deduction from her wages for the month of August 2020 is refused.

2. The Claimant's complaint of unauthorised deductions from her wages is not well-founded. This means that the deductions made to the Claimant's wages were not unlawful. The claim is dismissed.

REASONS

Introduction

1. By a claim form presented on 23 July 2020 the Claimant brought a complaint of unlawful deduction from her wages for the pay period April to July 2020. In

response to national measures brought about by the COVID-19 pandemic and the implementation of the UK Government's Coronavirus Job Retention Scheme ("CJRS"), the Claimant's pay during this period was affected by her being furloughed. This claim concerns deductions made to the Claimant's salary as a result of her being furloughed.

2. The Claimant was employed by the Respondent as a Sponsorship and Advertising Sales Manager from 1 May 2018. At the time of presenting this claim, the Claimant remained employed by Respondent although I am told that her employment was terminated by reason of redundancy on 10 September 2020.

Procedure and the hearing

3. There was a short delay in commencing the hearing, by around 20 minutes, owing to a technical difficulty for the Claimant in joining the hearing by video. However, once the hearing began, the parties/witnesses were all able to participate without difficulty and we could all hear and see each other.

4. I was provided with an electronic bundle of documents running to 238 pages comprising all of the documents on which the parties wished to rely. The Claimant had also sent some audio files to the tribunal in advance of the hearing, however neither I nor the administrative staff at the tribunal could open these files. When I enquired, the Claimant confirmed that they did not relate to being furloughed and she was therefore content for the hearing to proceed without those audio files. I was satisfied that the audio material would not assist me in determining the issues.

Issues

5. The claim was presented as a claim for unlawful deduction from wages. The Respondent queried whether the Claimant may be seeking to proceed with the claim at the hearing as a contract claim given that the Claimant's employment had terminated. There was no application to amend the claim and the Claimant confirmed that her claim, as presented, was for unlawful deductions from wages.

6. The claim concerns deductions made in the months of April to July 2020. The Claimant's last pay date prior to presenting the claim was 19th July 2020. As such, her claim consisted of 4 consecutive months of deductions.

7. Mr Thornsby also confirmed that the Respondent accepted that any amount which has been deducted from the Claimant's pay amounted to wages for the purposes of section 27 of the Employment Rights Act 1996.

8. The Claimant explained that there were 10 days at the beginning of August 2020 when she was also paid at the same reduced rate (prior to her notice pay, which was paid at full pay). She said she would like to claim for those additional days if possible. As the deduction to the Claimant's August pay was made after the claim had been presented, the claim would need to be amended to consider those additional days.

9. A claim for a deduction made to the Claimant's wages on 19 August 2020 was out of time and, accordingly, the tribunal would only have jurisdiction to hear it if

satisfied that it was not reasonably practicable for the complaint to be presented before the end of the three-month period (s23(4) Employment Rights Act 1996 "ERA"). I decided that I would consider the application at the end of the case when I had heard evidence and submissions.

10. The final item in the claim concerned a complaint regarding the Claimant's need to use 7 days of her annual leave during her furlough period. The Claimant told me that she took these leave days during her furlough period because they were paid in full and this had the effect of 'topping up' her monthly income to assist her in meeting her rent and bills. This was not a claim for holiday pay and I understood the Claimant to be raising a claim for consequential loss arising on alleged unlawful deductions under section 24(2) of the ERA. The Claimant agreed that this was the case.

11. There was no dispute that the Claimant had been paid £2,500 gross per month from April 2020 until she was paid her redundancy notice from August 2020 and that a deduction had been applied to her contractual salary, which was monthly gross pay of £4,250 per month. The Claimant also referred to 'commission' in her claim form but confirmed at the outset of the hearing that her claim was limited to the reduction in her regular salary down to £2,500 gross per month.

12. The issues that I therefore needed to decide were: -

    a. Whether the parties had agreed a reduction in the Claimant's salary from April 2020 to £2,500 gross pay or £2,500 net pay per month as a result of the Claimant being furloughed;
    b. Whether the Respondent was entitled to extend the period in respect of deductions after May 2020;
    c. What deductions had therefore been agreed and for what period;
    d. Whether any such deductions were authorised under section 13 of the ERA;
    e. If not, what amount was owing to the Claimant in respect of deductions for April – July 2020;
    f. Whether the claim should be amended to include a claim for deductions to the first 10 days of August 2020 and, if so, the outcome of that complaint in light of findings on the above issues; and
    g. Whether there was any consequential loss arising by virtue of the Claimant having taken 7 annual leave days during her furlough period.

Evidence

13. I heard evidence on oath from the Claimant and Ms Tanya Cooper (the Respondent's Chief Operating Officer) and considered their respective witness statements. Ms Cooper's witness statement was provided to the tribunal unsigned and, before she confirmed the contents of it to be true to the tribunal, she corrected an error in paragraph 9 of her statement, explaining that she did not recall using the words gross or net during her telephone conversation with the Claimant on 30 March 2020 (about the Claimant being furloughed). Her statement suggested that she had told the Claimant that her reduced pay of £2,500 per month would be paid gross.

14. I was also taken to a number of documents relied on by the Claimant and Respondent, all of which were within the electronic bundle.

Findings of Fact

The agreement to furlough and oral discussion

15. The starting point in the evidence and chronology of this claim is a telephone call which took place on 30 March 2020 between the Claimant and Ms Cooper. It is not in dispute that the purpose of the call was for Ms Cooper to inform the Claimant that the Respondent wished for the Claimant to be furloughed as it would be able to obtain the financial support offered by the CJRS. This was as an alternative to redundancy in circumstances where the Respondent, like other businesses, had been affected by the onset of the COVID-19 pandemic and had taken the decision to suspend all forthcoming events or commercial activities, including advertising and sponsorship.

16. I had the benefit of hearing from both witnesses about this telephone call, but I did not have any contemporaneous evidence of exactly what was said. It was the Claimant's case in her oral evidence before me that the word 'net' was used when Ms Cooper told her that, under the scheme, her monthly pay would be reduced to £2,500.

17. I find that the Claimant was told that her salary would be reduced to £2,500 per month but that the words net or gross were not used during the telephone call on 30 March 2020 for the following reasons:

17.1 The Claimant prepared a detailed witness statement but she did not refer to the word "net" as part of the discussion about this telephone call. This is a significant omission in circumstances where the Claimant had carefully prepared her statement.

17.2 At another point in her oral evidence, the Claimant referred to her "assumption" that the Respondent would be "topping up" her monthly pay.

17.3 The evidence of both parties as to what exactly was said during the telephone call was vague. Neither had a clear recollection of the details of the call.

17.4 Ms Cooper's statement at paragraph 9 was amended at the beginning of her evidence, as set out above. Her oral evidence was that she had no recollection of saying gross or net in the telephone call. She had therefore changed her evidence but I noted that she had not signed the statement and she told me it had been drafted for her by the Respondent's solicitors.

17.5 I have had regard to a point made by Mr Thornsby in submissions that the Claimant was waiting on confirmation about how much the net amount of pay would be as a result of the furlough deduction. The Claimant refers to this in a letter of concerns she sent to Ms Cooper, dated 5 May 2020 (at page 73 of the bundle) in reference to a conversation which took place on 31st March 2020. At paragraph 5 of the Claimant's letter she said:

> "*You advised that my salary would not be 'topped up' and that you would let me know how much (net) salary I would receive whilst on Furlough that day (March 31st). I did not receive this information and therefore understood my net monthly income would be £2,500 (£685 less than I normally receive)".*

17.6 I find that it is unlikely that a request for this information would have been made or the Claimant would be waiting on such details if there was clarity over the net amount in the telephone call on 30 March 2020 (or any subsequent call the following day) as such an enquiry would not have been required if it had been clearly agreed from the outset that £2,500 was the net payment. It is also apparent from paragraph 5 of the Claimant's letter that any belief she may have had about a net payment was an assumption (which is supported by her use of that term during her oral evidence during the hearing).

17.7 The Claimant referred to the letter of concerns dated 5 May 2020 and a response to that letter from Ms Cooper dated 11 May 2020. At paragraph 5 of that response, the Claimant relies on a reference to 'net pay' where net pay is erroneously described as "salary before tax". The description of net pay, in this paragraph, is plainly an error and the author has mixed up the words net and gross. I considered that this letter was signed by Ms Cooper but Ms Cooper's evidence was that this letter was drafted by HR Services Partnership. The error was then spotted and it was remedied by an email of 21 May 2020 from Ms Cooper (at page 90 of the electronic bundle). In my judgment, whilst the Claimant has placed weight on this, I find that it does not affect the position as to what was agreed. It is an error in drafting which was subsequently corrected.

17.8 The arrangements for placing the Claimant, amongst others, on furlough and agreeing the terms of that arrangement occurred amid the escalation of the COVID-19 pandemic. This occurred within a relatively short amount of time and, in this case, it is clear that such a step was being taken as an alternative to redundancy. The CJRS provided, at that time, for a furloughed employee's salary to be reduced to 80% (up to a maximum of £2,500) and this was subject to tax and National Insurance in the employee's hands. As such, it would have been an unusual step for an employer in the Respondent's position to have adopted the terms of the furlough scheme but to have instead opted to pay the reduced salary amount net. Effectively, the Claimant's pay would have been topped up beyond the funding obtained by the Respondent under the CJRS and the Claimant has confirmed in her letter dated 5 May 2020 that she had been told her pay would not be 'topped up'.

The written furlough agreement

18. After the telephone call, a series of emails between the Claimant and Ms Cooper followed, which are found at p.64-5 of the electronic bundle. There was an email from Ms Cooper at 10.04am on 31 March 2020 which said:

> *"Hi Lenny,*

Following our conversation yesterday, please find attached your letter advising that you are being put on the Furlough Scheme. Please read through and confirm your acceptance as advised in the letter.

If you have any questions, please do not hesitate to give me a call

Kind regards,

Tanya".

19. At 11.33am on the same day, the Claimant responded:

"Hi

I completely forgot to ask if I can plse put my expenses in – its not much but I will not access to my emails after today…(sic)"

20. Ms Cooper replied at 12.07am:

"Hi Lenny,

Yes, please forward your expenses and I'll pass this to accounts for processing this week.

Can you confirm back to me in writing your acceptance of the scheme by close of play today please

Thanks,

Tanya".

21. The letter dated 31st March 2020 sent through that exchange of emails, (page 68 of the electronic bundle) is the written agreement setting out the furlough scheme and what terms were being offered. The letter sets out that the Claimant was becoming a 'furloughed worker' under the CJRS. It says "*You have agreed to become a furloughed worker as an alternative to redundancy*". Amongst other things, it provides:

- *You will be paid 80% of your current monthly gross salary (subject to a maximum of £2,500 per month). We understand that this sum will be subject to the usual deductions for tax, NI and pension*
- *This arrangement will continue until 31 May 2020 at which point we will review your furloughed status. In the unlikely event that our circumstances change and we required you to return to work, we will give you 2 working days' notice that we require you to return to work.*
- *If the Chancellor continues to offer this support and the Coronavirus situation is such that our circumstances remain the same, you would continue to be a furloughed worker.*

22. I find that the Claimant agreed to reduce her salary to £2,500 per month gross based on the terms set out in the letter. This is because:

22.1 The written agreement is sufficiently clear and precise in its meaning. In particular, it says: *you will be paid 80% of your current monthly gross salary*. This is an amount which anyone reading the agreement can calculate as to what their gross monthly salary will be on the scheme. It is subject to a maximum of £2,500.

22.2 These terms cannot, on any reading, mean £2,500 net. The letter refers to the sum being subject to the usual deductions. On that basis, the £2,500 maximum, given that 80% of the Claimant's salary exceeded this sum, was subject to tax and other such deductions. It follows that the £2,500 is plainly the gross figure to which the Claimant's pay was to be reduced.

22.3 The letter was signed by the Claimant and was returned by email at 15.41 on 31 March 2020 (the email is at page 66 of the electronic bundle). That email does not raise any objection, protest or complaint about the terms set out.

22.4 Whilst I have considered the Claimant's argument about time to consider and consult on the furlough agreement, I find that this does not affect the validity of the agreement. The Claimant was concerned about this agreement changing the terms of her employment contract on a temporary basis. However, both parties were aware that there was not going to be the type of work available for the Claimant to do which she normally performed in her role and the alternative was the redundancy process. The Claimant accepted in her evidence that there were no events to sell sponsorship to and she had been told this on 30 March 2020. In those circumstances and the timeframe, the Claimant did proceed to sign the letter which didn't simply signify consent to a scheme generally, but actually signified her consent to the terms of the agreement set out in the letter dated 31 March 2020.

22.5 I find that, whilst the agreement was concluded within a limited amount of time within the context of the new CJRS, there was no undue pressure placed on the Claimant in order for her to say that the agreement in signed writing was invalidated in any way. The Claimant did know, upon signing the agreement, that her pay was going to be reduced. Whether she thought it was a variation to her contract or something else, she understood what the terms meant. At the time of entering into the agreement, I find that she accepted its terms which were sufficiently clear as to the gross amount which would be paid and its duration.

22.6 I have considered the ACAS model furlough letter which the Claimant took me to at page 236 of the electronic bundle. However, this form is not prescribed in law and I have found that the agreement letter provided by the Respondent was sufficiently clear as to its terms.

Extension of the furlough agreement beyond May 2020

23. I find that the written furlough agreement provides sufficiently clear terms for the continuation of the furlough arrangements after 31 May 2020 without the requirement of further consent or review from the Claimant. This is because the agreement says, clearly, that whilst the arrangement will run to 31 May, the Respondent will then review that arrangement. The terms there, in my judgment, are set out in such a way that the Respondent will look at whether it is in a position to have the Claimant back to work and, if they are, notice would be given. However, if the CJRS continued and the Respondent's circumstances remained the same, the Claimant would continue to be a furloughed worker. Therefore, the terms of the letter anticipate that the scheme would continue and that the agreement would continue beyond 31 May 2020. That is subject to a decision by the Respondent as to whether it could call the Claimant back and, if it was able to do so, the mechanism is such that it would be for the Respondent to act to make that happen. The terms do not require action, in this regard, on the Claimant's part. She would remain furloughed unless notified.

Subsequent events

24. The Claimant lodged a grievance on 27th May 2020 complaining about the way she had been treated in respect of the furlough agreement, amongst other things. I have considered that insofar as it is relevant to the issues to be determined. Many of the grievance points mirror the points raised about the process of the furlough arrangement taken by the Claimant at the hearing. As I have found, the agreement was signed by the Claimant in circumstances where both parties had consented to the furlough arrangement with few alternatives given the impact of COVID-19.

The annual leave during furlough

25. The Claimant accepted during her evidence that she has suffered no financial loss as a result of taking this leave and was unable to identify any loss which would give rise to a claim for compensation.

Amendment of the claim

26. The 10 days in August 2020 were paid at the reduced rate (pro rata to £2,500 gross) on 19 August 2020. I have not seen payslips covering this period, only pay slips for March and April 2020, but I accept the Claimant's evidence that she was paid at the same rate for those 10 days as the previous months because there is no dispute that she remained furloughed on the same terms.

27. In respect of the time limit issue, the Claimant told me that she could not have afforded a solicitor and wasn't aware that she could have applied to amend the claim earlier. There were no other reasons for the delay. I find that I have not had sufficient evidence before me to embark on the process of considering whether it was or was not reasonably practicable to have brought the claim within the time limit (section 23(4) of the ERA).

Law

28. Section 13 of the Employment Rights Act 1996 provides for the right not to suffer unauthorised deductions from wages. So far as relevant to this case:

> *(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.*
>
> *(6) For the purposes of this section an agreement or consent signified by a worker does not operate to authorise the making of a deduction on account of any conduct of the worker, or any other event occurring, before the agreement or consent was signified.*

29. Section 24(2) also provides for a worker to claim compensation for loss which is attributable to an unlawful deduction found by the tribunal:

> *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.*

30. For the purposes of section 13(1)(b), it is incumbent upon the employer to obtain the consent or agreement of the worker not only prior to the deduction which is to be made but also prior to the incident giving rise to the deduction. That is the effect of section 13(6).

31. Signing an agreement and giving consent is not ineffective simply where it is signed under protest (see Laird v AK Stoddart [2001] IRLR 591). In Laird, the EAT held that agreeing a contractual variation even under protest could be said to be affirmed where the worker remains in the workplace. A lack of consent may be evidenced by a refusal to accept the position or by succumbing to some form of duress or pressure such as to amount to vitiation of consent (i.e. consent being ineffective).

Conclusions

Issue 1: whether the parties had agreed a reduction in the Claimant's salary from April 2020 to £2,500 gross pay or £2,500 net pay per month

32. As I have found above, the parties agreed that the Claimant's monthly pay would be reduced to £2,500 gross per month from April 2020. This was agreed in the form of the written furlough agreement which the Claimant signed on 31 March 2020 and emailed back to Ms Cooper.

Issue 2: Whether the Respondent was entitled to extend the period of deductions after May 2020

33. The written furlough agreement provided for the deductions to run until 31 May 2020 or such later time as may be determined by the Respondent whilst the circumstances remained the same and the furlough scheme still operated. The written furlough agreement envisaged the continuation of the scheme and of the Claimant's continued status as a 'furloughed worker'. This is in the context of the Respondent not being in a position to offer work for the Claimant to perform. Had the Respondent's business needs changed, it could have served notice on the Claimant to return. However, the parties had expressly agreed at the outset that the Claimant would otherwise continue to be furloughed after May 2020 if the circumstances remained the same.

34. During the extended period (after May 2020) the Respondent continued to pay the Claimant the same salary as before, as had been agreed in the written furlough agreement.

Issue 3: What deductions had therefore been agreed and for what period?

35. It follows that the parties agreed a deduction in monthly salary to £2,500 per month gross from April 2020 and this agreed deduction continued for the full period of deductions brought in this claim.

Issue 4: Were the deductions authorised?

36. In my judgment, the terms, timing and effect of the written furlough agreement fall within section 13(1)(b) of the ERA. The Claimant signified in writing her agreement or consent to the making of the deductions by signing and returning the written furlough agreement on 31 March 2020. This was concluded before the furlough period began on 1 April 2020, which was the event giving rise to the deduction. The agreement or consent was therefore given in accordance with sections 13(1)(b) and 13(6).

37. Accordingly, I accept the Respondent's submission that I do not need to consider other ways in which the deductions might be authorised under section 13.

38. Whilst the Claimant has challenged the process of entering into the written furlough agreement, as I have found, there is no basis to say that her consent was ineffective. I do not find that she had been subjected to undue pressure or any such similar conduct and, in the event, the Claimant did not provide the consent under protest. The agreement was returned on 31 March 2020 without issue. The Claimant did later raise concerns, including in her grievance, but I do not find that those concerns make out a basis to say that what she agreed with the Respondent on 31 March 2020 was ineffective. This was a challenging point in time for both

parties because of the effect of the pandemic on the Respondent's business and the consequential effect on the Claimant – being at risk of redundancy. However, those challenges do not undermine the agreement reached between the parties in signed writing.

39. For these reasons, the deductions were authorised and are not unlawful.

Issue 5: is anything owing to the Claimant?

40. It follows that there is nothing owing to the Claimant in respect of the deductions complained about in this claim.

Issue 6: should the claim be amended?

41. On this matter, I have had regard to the principles in Selkent Bus Co Ltd v Moore [1996] ICR 836 and the overriding objective in considering whether to amend the claim to include the further 10 days in August 2020. The Claimant's pay for this short period was also at £2,500 gross, prior to the Claimant receiving full pay for her redundancy notice. This complaint concerns a deduction made on 19 August 2020 which post-dates the issue of the claim in July 2020.

42. In my judgment, the Claimant is unable to establish that it was not reasonably practicable to bring the August claim in time. However, the amended claim could not succeed in light of my findings of fact made in the primary claim in any event. Any deduction in August was made on the same basis as April to July and, accordingly, amending the claim would not be of any assistance to the Claimant and the amendment is refused.

Issue 7: Whether there was any consequential loss arising by virtue of the Claimant having taken 7 annual leave days during her furlough period.

43. This is a head of loss brought under section 24(2) of the ERA. As a result of the deductions which form the complaint being found to be authorised, there is no consequential loss which can be claimed under this section. Accordingly, this head of loss fails. However, even if there had been unauthorised deductions, it is clear that the Claimant suffered no financial loss as a result of having taken annual leave during the furlough period. The Claimant did this to top up her income and, whilst she considered that to be a waste of holiday, in the absence of any financial loss there is no actionable claim on this point before the tribunal.

Outcome

44. For the above reasons, the application to amend the claim to include 10 days in August 2020 is refused and the claim for unlawful deductions from the Claimant's wages is not well founded and the claim is dismissed.

Employment Judge Nicklin

Date 30 December 2020

JUDGMENT & REASONS SENT TO THE PARTIES ON

12/1/21.

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FOR THE TRIBUNAL OFFICE