



# EMPLOYMENT TRIBUNALS

**Claimant:** Ms. S. Mullaney  
**Respondent:** Bis Recruitment Ltd

**London Central by remote technology (CVP)**  
**Before:** Employment Judge Goodman

**On:** 6 January 2021

## **Representation**

**Claimant:** in person  
**Respondent:** Ms Chrys Street, company director

## **JUDGMENT**

The respondent is ordered to pay the claimant £1,268.57 unlawfully deducted from wages.

## **REASONS**

1. This claim for unpaid wages arises from the operation of the furlough scheme for job retention introduced in the face of the 2020 Covid-19 pandemic.
2. I heard evidence from the claimant, Sinead Mullaney, and from Chrys Street, a director of the respondent company. Neither side had prepared a hearing bundle, and at my request the parties emailed documents to me during a short adjournment for the purpose – contemporary emails between them, and the agency worker agreement.

### **Factual Summary**

3. There was no dispute on the facts.
4. The respondent is an agency supplying temporary office staff “on assignment” to clients. There may be several hundred staff on their books, some actively seeking work, while some, such as actors and students, may contact the agency when available. At any one time, around 40 (before the pandemic) were actually working for clients.
5. The claimant signed up with the agency in February 2019. The parties signed a standard form agency agreement on 18 January 2019. It provides for the claimant to be supplied to work on a contract for services, not of employment. Neither side was

under obligation to offer or accept any assignment. She was entitled to statutory annual leave proportionate to the time worked. The rate of pay and working hours would be determined by the particular assignment.

6. She worked for various periods on assignment to two clients from 12 February to 29 November 2019. She has not worked for the agency since then. She took some holiday in December and January and at other times worked for a casting studio. No cessation of work was notified to HMRC, and no P45 (Leaving certificate) was issued.
7. When the furlough scheme was announced in March 2020 the claimant contacted the respondent asking to be furloughed. Her usual point of contact had herself been furloughed, so there was some trouble getting through until she phoned the office direct. On 4 May the respondent agreed to put her on furlough and to backdate it to 1 March. She was sent a standard letter to say so. Paragraph 2 states there is no obligation to provide an assignment when furlough ends. Paragraph 7 provides that furlough ends when the scheme ends, or when either side ceases to be eligible, or when the respondent decided to cancel furlough and return her to work.
8. The claimant then received three payments, totalling £1,131.03. She believed this was underpayment and queried it. Ms Street referred the calculation query to the payroll company to whom the work was outsourced, which told her that after reviewing written guidance from REC, a trade body for recruitment agencies, that as the claimant had not worked for some time when the scheme was introduced, she was not eligible, and HMRC might view this as abuse or fraud. In view of this the respondent ended the arrangement with the claimant. The claimant was so informed in a telephone discussion on 17 June, confirmed in an email on 18 June.
9. Other temps placed on furlough by the respondent were notified on 13 July that furlough would end when the current scheme ended on 26 July. The letters sent to them do not suggest they were not eligible.

### **Legal Framework**

10. Neither side made any submission on the law. Ms. Street was concerned to explain she intended no ill will to the claimant, but was only concerned that the respondent might be deemed to have been fraudulent or abusing the scheme.

### **The Furlough Scheme (CJRS)**

11. 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, but this case concerns the original version. This states at 2.1 : “the purpose of CJRS is to provide for payments to be made to employers on a claim made in respect of them incurring costs of employment in respect of furloughed employees arising from the health, social and economic emergency in the United Kingdom resulting from coronavirus and coronavirus disease”. Paragraph 2.2 states: “Integral to the purpose of CJRS is that the amounts paid to an employer pursuant to a claim under CJRS are only made by way of reimbursement of the expenditure described in paragraph 8.1 incurred or to be incurred by the employer in respect of the employee to which the claim relates”. paragraph 8.1 is: “the gross amount of earnings paid or reasonably expected to be paid by the employer to an employee”. Paragraph 2.7 states: “No CJRS claim may be made in respect of an employee if it is abusive or is otherwise contrary to the exceptional purpose of CJRS”.
12. No employer is compelled to furlough employees. The scheme merely refunds some

of the cost if an employee is retained without working. If the employer agrees to furlough a worker, there must be written confirmation of this.

13. In the scheme, 'employee' has the meaning in section 4 of ITEPA 2003 – (section 13). This is wider than the definition in the Employment Rights Act. The Direction specifies a number of types of employee are eligible for reimbursement of furlough payments. Eligible employees include agency workers

14. For the employer to be eligible to claim, the employer must have a real time information PAYE scheme as of 19 March 2020. The respondent did, and the claimant was on it. This requirement afforded HMRC an opportunity to check that claims were made for bona fide employees.

15. By section 5, claims are made for an employee

(i) to whom the employer made a payment of earnings in the tax year 2019-20...in relation to whom the employer has not reported a date of cessation of employment on or before that date, and

(iii) who is a furloughed employee (by paragraph 6, 'someone who has been instructed to cease all work in relation to their employment for 21 days or more by reason of circumstances arising from coronavirus disease'), and

(b) meet (s) the relevant conditions in paragraphs 7.1 to 7.15 in relation to the furloughed employee.

14. Paragraph 6 covers what should happen if an employee was unpaid leave:

6.4 If an employee was enjoying an unpaid sabbatical or other period of unpaid leave on 28 February 2020 ("relevant day"), the period described in paragraph 6.1(b) does not begin in respect of the employee until expiry of the period of leave agreed or contemplated at its commencement or, where the duration of the leave was uncertain on the relevant day because its duration is determinable by reference to a particular circumstance, completion of a particular purpose or occurrence of a specified event, the ending of the circumstance, completion of the purpose or occurrence of the event.

6.5 No claim to CJRS may be made in respect of an unpaid sabbatical or other period of unpaid leave of an employee beginning before or after 19 March 2020 (whether agreed or otherwise arranged conditionally or unconditionally on, before or after that day).

15. Paragraph 7 concerns what costs of employment qualify for reimbursement by HMRC. Except for fixed rate employees, the employer can claim 80% of whichever is the greater: either the *average monthly amount* paid to the employee in tax year 2019/20, or the *actual amount paid to the employee in the corresponding week* the previous year.

16. Fixed rate employees who were on unpaid leave or social benefit leave at the start of the scheme are subject to the special provisions 7.10 and 7.13. The claimant was not being paid when the scheme started, because she was not an assignment, but It does not appear from the claimant's employment pattern that she was a fixed rate employee to whom these provisions apply. She was entitled to paid only when on assignment, and only for the hours worked for the client, usually at £12 per hour, so her earnings varied.

### **Relevant Employment Law**

17. The CJRS scheme for furlough applies between an employer and HMRC. As between employer and employee (or worker), rights and obligations are governed by the contract between the parties, and any variation to that contract, and are supplemented by statute.
18. The Employment Rights Act provides at sections 13-16 and 23 a right to workers to claim for unlawful deductions from wages. In summary, a worker may claim for the difference between the amount 'properly payable' in any period and the amount paid. Claims must be made within three months of the deduction, or the last deduction if it was part of a series. The claim was presented on 10 October 2020. I do not have the dates on the early conciliation certificate, but including the additional month allowed for conciliation, the claim appears to be have been made in time.

### **Discussion and Conclusion**

19. The respondent was not obliged to furlough the claimant, but once it did, that was an amendment to the contract between them. It was implied that while furloughed she would be paid on the basis set out in the CJRS.
20. There was no provision for notice of termination either in the agency agreement or in the furlough letter. The respondent had in the letter reserved the right to bring the furlough period to an end when, among other things, the claimant ceased to be eligible. This must include their belief that she had never been eligible. The arrangement came to an end for this reason on Thursday 18 June 2020.
21. Despite the respondent's belief, it appears the claimant was eligible. She was on the PAYE record for the previous tax year. She was entitled to a proportion of her wages paid or "reasonably expected to be paid". She was entitled to work elsewhere when on furlough, as the scheme only prohibits work for the furloughing employer. It is not unreasonable that she would have been looking for and placed on assignment in the period from 1 March but for the pandemic restrictions, as she was not in fact working elsewhere when the scheme began and had usually taken temp work when not working elsewhere or on holiday, and it was she who had made contact. The purpose of the scheme was to keep staff on the books, and the provision to pay an average or for the corresponding week of the previous year was there to cover those who worked irregularly, or intermittently, or for irregular hours. The uncertainty arose from the provisions of paragraph 6 for unpaid leave. There was in fact no agreement for unpaid leave. If the claimant might be held to be on unpaid leave when not working, then the event that would bring it to an end was her contacting the

respondent seeking work. On the facts this was sometime in March, and may well have been from 1 March, the date agreed for commencement of furlough. It follows that as a matter of contract she was while on furlough entitled to be paid the amounts provided for in the CJRS scheme.

22. She was entitled to furlough payments of 80% of her wages for the corresponding week of the previous year, if greater than the average. On the schedule of payments made in tax year 2019/20 provided to the tribunal, the claimant should be paid on a corresponding weeks basis, as the average (about £101) is lower than those weeks. It seems the respondent in fact paid her on the annual average basis.
23. The payments made in 2019 for the weeks ending 3 March 2019 to 16 June 2019 total £2,992, and 80% of that is £2,399.60. That is the amount "properly payable" to the claimant for 1 March to 18 June 2020. From that must be deducted the amount actually paid, £1,131.03. The balance, £1,268.57, was unlawfully deducted.

Employment Judge

Date 11 January 2021

JUDGMENT SENT TO THE PARTIES ON

.15/1/21.

.....  
FOR THE TRIBUNAL OFFICE