Case No: 2206655/2020 V

EMPLOYMENT TRIBUNALS

Claimant: Mr. Fernando Alves

Respondent: Team Support Staff Limited

Heard by video at: London Central Employment Tribunal

On: 22 January 2021

Before: **Employment Judge Heath**

Representation
Claimant: Mr. Nicholas Toms (Counsel)
Respondent: Mr. Greg Taylor (Director of Respondent)

RESERVED JUDGMENT

The judgment of the tribunal is that: -

1. The claimant's complaint of unlawful deduction from wages between 4 April to 31 May 2020 is not well-founded and is dismissed;

2. The respondent unlawfully deducted the sum of £303.21 gross from the claimant's wages from the claimant's July 2020 wages and must pay that sum to the claimant, subject to deduction of tax and National Insurance at the appropriate rate.

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. It was not practicable to hold a face-to-face hearing because of the Covid19 pandemic.

REASONS

Claims and issues

1. By a claim presented on 12 October 2020 the Claimant claimed unlawful deduction from wages in respect of sums he says the Respondent should have paid him under the Coronavirus Job Retention Scheme (CJRS). His claim has two elements: first, he says he was paid nothing in respect of 4 April to 31 May 2020 because the respondent wrongly failed to make a claim under the CJRS; and second, that there was an error of calculation of sums paid under the CJRS for July 2020 wages.

2. The issues which I have to decide are set out below: -

   a. Was the claimant a worker within the meaning of section 230 Employment Rights Act 1996 (ERA) and thus able to make a claim under Part II ERA?

   b. What wages were properly due to the Claimant between 4 April to 31 May 2020? In particular:-

      i. Was it an implied term of the claimant's contract that the respondent would either draw his attention to the CJRS, or make an application under it in respect of his wages?

      ii. Was it an implied term of the claimant's contract that the respondent would exercise its discretion rationally and lawfully in deciding whether to backdate an application under the CJRS for the period 4 April to 31 May 2020?

      iii. Was the respondent in breach of the above implied terms by failing to pay the claimant any sums for the period 4 April to 31 May 2020?

   c. What wages were properly payable in respect of the claimant's July 2020 wages? In particular: -

      i. Did the respondent fail to take account of 3 day's wages from July 2019 in calculating the amount payable under the CJRS in respect of the claimant's July 2020 wages?

   d. Are sums payable under the CJRS (commonly called furlough pay) "wages" as defined in section 27 ERA and so can a worker make a claim under the ERA?

Preliminary matters

3. Written submissions drafted by Mr. Toms, were emailed to the tribunal offices and cc'd to Mr. Taylor at 7.08 pm the evening before the hearing. Also attached were copies of several legal authorities running to some 125 pages. At 9.08 am on the day of the hearing Mr. Taylor emailed the tribunal

to say that he had received these submissions, was concerned that documents were being provided outside the relevant timescale, that he considered that he was being deliberately blindsided and was at a major disadvantage. He said the submissions contained inaccuracies and should be rejected by the tribunal, but if they were to be accepted, he requested that the hearing be postponed to allow time for a professional response.

4. At the start of the hearing Mr. Taylor explained that he had not seen the submissions until 9 am when he had got into work. He was concerned that the submissions raised issues of employment status rather than furlough. He said he was at a disadvantage if the case proceeded and would need to take professional advice.

5. In response Mr. Toms pointed out that he was under no obligation to share his submissions prior to the hearing. He had been instructed late, as counsel originally instructed had been taken ill suddenly. He had prepared the submissions quickly and was addressing the issue of employment status as lack of mutuality of obligations had specifically been put in issue by the respondent in its witness statement. He was advancing the case that the claimant is a worker, and he needs to establish this as a prerequisite to claiming unlawful deduction of wages. He also had to set out the contractual basis on which it is said that wages were properly payable under Part II ERA, but accepted that the case now advanced on implied terms had not been raised before. The submissions cannot be "rejected". He resisted a postponement for the respondent to obtain representation as the respondent knew that the claimant was represented all along, and it had chosen not to be represented. Mr. Toms accepted that the submissions raised arguments that would not be easy for a lay person to follow, but said that his client wished to proceed.

6. I considered that it would not be fair or just to postpone the hearing. Mr. Toms had not been obliged to share his submissions and authorities in advance of the hearing, and, if anything, this was a courtesy to the respondent and to the tribunal as the submissions helped to clarify in advance the case that he was running for the claimant. The respondent had chosen not to be represented, and I was not prepared to delay the hearing of this case any further to allow for representation. However, I accepted that the legal issues raised in Mr. Toms' written submission were not the easiest for a lay person to follow, and I noted that the claimant had not raised the question of implied terms in his ET1. I considered that the best way to deal with the case fairly and justly in the circumstances was to put the hearing back for a couple of hours for Mr. Taylor to read the submissions more thoroughly. I asked Mr. Toms if, during the short break, he would email Mr. Taylor and the tribunal the paragraph numbers of the authorities he was relying on, which he agreed to do. The tribunal therefore adjourned at around 10.40 am to reconvene at 1 pm.

7. The claimant had prepared a 94-page paginated bundle for the hearing (I will refer to page numbers in the bundle as follows – page 10 [10]). He also provided a witness statement signed and dated 19 January 2021, and he gave oral evidence. Mr. Taylor provided a document headed "Respondent submission" signed by him and dated 14 January 2021, which he confirmed

was his witness statement on behalf of the respondent, and he also gave oral evidence. At the conclusion of the evidence Mr. Toms expanded orally on his written submissions and Mr. Taylor made oral submissions. I reserved my decision.

Facts

8. The respondent is an employment agency. The claimant has been engaged by the respondent as an agency worker since 23 September 2015, supplied to London Underground Limited (LUL) as a driver's mate. Before this date he was also a driver's mate for LUL but supplied through a different agency,

   Planned Personnel. When Planned Personnel became insolvent, he was "transferred over" to the respondent, but carried on his day-to-day work with LUL. The claimant was supplied with a written agreement, the Terms of Engagement for PAYE Temporary Workers (Contract for Services), ("the Terms of Engagement") which he believes was similar or the same as an unsigned document in the bundle [28] which includes the following terms: -

   2. THE CONTRACT

   > *2.1. These Terms together with any applicable Assignment Details Form ("Terms") constitute the entire agreement between the Employment Business and the Temporary Worker for the supply of services to the Client and they shall govern all Assignments undertaken by the Temporary Worker. However, no contract shall exist between the Employment Business and the Temporary Worker between Assignments. These Terms shall prevail over any other terms put forward by the Temporary Worker.*
   >
   > *2.2. During an Assignment the Temporary Worker will be engaged on a contract for services by the Employment Business on these Terms. For the avoidance of doubt, the Temporary Worker is not an employee of the Employment Business although the Employment Business is required to make statutory deductions from the Temporary Worker's pay. These Terms shall not give rise to a contract of employment between the Employment Business and the Temporary Worker. or the Temporary Worker and the Client. The Temporary Worker is supplied as a worker, and is entitled to certain statutory rights as such, but nothing in these Terms shall be construed as giving the Temporary Worker rights in addition to those provided by statute except where expressly stated.*

9. The claimant worked out of a depot in Acton and his role was to pick up items in a van and transport them around to various LUL sites. His evidence that he never refused a shift was not challenged, and a schedule of his shifts and payments in 2019-2020 [93-4] shows that he worked full time hours most weeks during those years. He was not signed up with any other employment agencies and only worked for LUL. If the claimant took holiday or was sick he would not work and would not get paid.

10. The claimant was paid at the rate of £15.51 for hours he worked up to 35 hours per week, and at the rate of £19.38 for hours worked in excess of 35

hours. He was paid holiday pay at what appears to be the rate of 12.05% of his pay. His payment was processed as follows: LUL submitted timesheets to the respondent, which in turn passed them on to its accountants, Mazars, which deducted tax, national insurance and also pension contributions.

11. The claimant worked his last shift as a driver's mate on 3 April 2020, as LUL had no need for driver's mates because of the pandemic. The parties agree that he did not and could not work and so he did not get paid. On 30 April 2020 the claimant emailed his manager, Abdul Dehbouzorgi, the Respondent's Operations manager at Ealing, to wish him well and to say "*I continue to respect the lockdown after more than two weeks of self-isolation. Please keep me informed of any update*" [34-5]. Mr. Dehbouzorgi emailed back on 1 May to say that there were no updates and said "*When you are ready to work then do please let us know*" [35]. Between and 12 and 20 May there was a further exchange of emails between the claimant and Mr. Dehbouzorgi in which the claimant asked for his P60 [36-43]. I will set out the email correspondence as it is without correction or comment.

12. On 2 June 2020 the claimant emailed the respondent's Ealing Office and said "*Until the present I did not received an email, any payment from our company about the distribution of UK/GOV (80%) Please keep me informed*" [48].

13. Mr. Cliff Bradley, the respondent's regional director emailed back later that same day to ask what the claimant meant [47]. The claimant responded "*This email has to do only with paylow* [the claimant meant furlough]. *Some colleagues from Team Support that worked with me at the Underground/ Tube Lines received their payment first even after finishing the work days after me. (From April 20 2020). (Some received an email assuring that payment). I hope is more clear now. I would like to know what is my situation about pay low. Please I hope you understand there is not and never was question of blame*" [46].

14. Mr. Bradley replied later that day "*Fernando since the Virus 19 happened a lot of business's closed or reduced the staffing because of it. The govt kindly bought in a scheme where company's can put their staff on Furlough and the Govt will pay 80% of the average salary the worker was getting. Not everybody was entitled to this and it is down to individuals to see if they are applicable. A number of previous staff who worked at Tube Line came forward and asked if they qualified for Furlough and we looked into this and in some cases the answer was yes and in others the answer was no. At this stage you have not come forward and asked us hence you would not have been looked into and hence you would not have received any money. If this is what you are referring to then you may make an official request to see if you can be put on Furlough and we will investigate this for you. If you mean something else then please clarify*" [46].

15. The claimant responded that he was interested and asked Mr. Bradley to consider that he had made an official request to be put on the scheme [45]. Mr. Bradley said that he would investigate and get back to the claimant.

16. On 5 June Mr. Taylor emailed the claimant [49] using wording from a template prepared by the respondent's trade federation. In it he set out brief details of the CJRS and attached a furlough agreement which had also been adapted from a template prepared by the trade federation [50]. The email contains the sentence "*The Scheme is a temporary scheme open to all UK employers for at least three months which will be backdated to 1 March 2020*". The furlough agreement appears to have been e-signed by Mr.
Taylor and Mr. Alves on 5 June 2020 and includes the following terms.
1. We agree that from 1st June 2020 you shall be on furlough" and

…

4. Your pay is calculated as the higher of:

(i) your same month's earnings from the previous tax year; or, (ii)

your average monthly earnings from the 2019-20 tax year.

17. The term on calculation of pay reflects the advice given in the government's **Claim for your employee's wages through the Coronavirus Job Retention Scheme** Guidance published 26 March 2020 (the CJRS Guidance) under the heading "Employees whose pay varies" [69-70].

18. Mr. Taylor emailed the claimant on 8 June 2020 confirming that he had been placed on furlough leave in accordance with the agreement, and that the period of furlough leave would begin on 1 June and last for 3 weeks, and that he would be paid in accordance with the agreement [54].

19. Later that day the claimant emailed Mr. Taylor with a couple of questions, including asking why the furlough started on 1 June when his last working day was 10 April. He mentioned that a couple of colleagues had been paid under the scheme after stopping work and said that he assumed he was "*in the pool and would get paid as well*". [52-53].

20. It was Mr. Bradley, again, who responded later the same day to say "*The rules of how payments by the Govt Furlough scheme work are quite specific and although for the very first payment we made we where allowed to back date payments for all payments after that we can only go from the last payment made out so hence your payment would start from the 1st of June. Your colleagues asked if they where applicable for Furlough pay before you did hence why some of them have already had payments. Your mistake is by your own words the fact that you assumed you where in the pool. This is not how it works as we as a business have no idea if you have found work else where so the responsibility of applying to see if you are entitled to Furlough is down to you as an individual. The furlough period runs roughly every 3 weeks so the next payment due will be around the 26th June. If there is still no work at Tube Lines and you have not gained other work you will be put in for another Furlough period*" [52].

21. On 9 June 2020 the claimant emailed Mr. Taylor [58-9] thanking him for putting him on the furlough scheme. He indicated that he wanted to try all

possible routes to obtain furlough from 20 April until 31 May. He also indicated that an application could be back dated. He said that some of his friends who were working for certain airlines and internal London Underground staff had been put on furlough. He assumed he would be in a similar position.

22. It was Mr. Bradley again who replied on 10 June [58] saying "*you must do what ever you feel you must but we can only do what thr Govt scheme let's us do. I will correct you in a couple of your assumtions. I did say we did manage to back date some people's Furlough But we could only do this on the original / first payment from the Govt and not as you are thinking which is that it applies to a person's original payment*". He went on to say that the claimant's friends working directly for LUL and airlines were in a different position to him in that he was not a permanent member of staff. He could be signed up with different agencies and working for many different companies should he choose to. Mr. Bradley said that because the claimant was not a permanent member of staff the respondent had no way of knowing whether or not he was working elsewhere and took the view that it was for the claimant to come forward to ask if he was applicable for furlough.

23. Almost a month and a half later, on 21 July, the claimant emailed Mr. Bradley again. He had called the HMRC helpline to seek advice about backdating furlough. The claimant set out the advice he received, namely "…*if we both - me and T.S.S. Ltd - agree, yes it is possible. He explain me that the first period - the 2 weeks of self-isolation - can be paid as sick pay and the remain time until June 1st can be agreed by Job Retention Scheme (JRS). We have just a few days before the deadline (July 30th - please confirm). I am asking to the company T.S.S. Ltd. please sign me for this two periods: sick pay and J.R.S.*". The claimant also raised a couple of other issues not relevant to this claim.

24. Mr. Bradley replied on 22 July 2020 [55-6] saying "*we are under NO LEGAL OBLIGATION to offer furlough to any worker and as you state you are an agency worker and your contract for services also clearly states we are under no Legal obligation to offer you any work and you have no legal obligation to accept work either. After a conversation with our client we decided it would be reasonable to try and offer Furlough from the 1st of June which you accepted*". The claimant sent a further couple of emails which do not take the matter further.

25. Going back a year, on the week commencing 29 July 2019 the claimant worked a 35 hour week plus overtime, including 2.75 hours overtime on Monday 29 July. The first three days of that week were the last three days of July. The claimant's earnings in July 2019 would be the basis for calculating his wages under the CJRS for the following July, unless his average pay for the whole 2019/2020 tax year were higher.

The law

Worker

26. The term worker is defined by Section 230(3) ERA as meaning,

"…… an individual who has entered into or works under (or, where the employment has ceased, worked under)—

(a) a contract of employment, or

(b) any other contract, whether express or implied and (if it is express) whether oral or in writing, whereby the individual undertakes to do or perform personally any work or services for another party to the contract whose status is not by virtue of the contract that of a client or customer of any profession or business undertaking carried on by the individual."

Unlawful deductions

27. Section 13 of the ERA 1996 provides that an employer shall not make unauthorised deductions from a worker's wages, except in prescribed circumstances. On a complaint of unauthorised deductions from wages, a tribunal must decide, on the ordinary principles of common law and contract, the total amount of wages that was properly payable to the worker on the relevant occasion.

28. In ***Scally v Southern Health and Social Services Board*** **(1991) ICR 771** it was held that there was an implied term of the contract of employment for the employer in the circumstances of that case to draw to the attention of the claimant employees a valuable right contingent upon his acting as required to obtain the benefit.

29. In ***Braganza v BP Shipping Ltd*** **(2015) IRLR 487** it was held that where a party to an employment contract was given power under the contract to exercise a discretion that would affect the rights and obligation of both parties, there would be an implied term that the employer would exercise that discretion in good faith without being capricious or irrational (sometimes termed as "Wednesbury unreasonable").

30. Section 27 of the ERA provides that: - ""*wages", in relation to a worker, means any sums payable to the worker in connection with his employment, including—*

(a) any fee, bonus, commission, holiday pay or other emolument referable to his employment, whether payable under his contract or otherwise"

Excluded from the definition of wages under section 27(2)(e) is "*any payment to the worker otherwise than in his capacity as a worker*".

Conclusion

Worker status

31. The claim put forward by the claimant was that he was a "worker" under section 230(3)(b), sometimes referred to as a "limb b worker".

32. Mr. Toms submitted that this was the claimant's status based on an analysis of **the *Autoclenz Ltd v Belcher* [2011] ICR 1157, *Secretary of State for Justice v Windle and Arada* [2016] ICR 721** and ***Pimlico Plumbers Ltd v Smith*** in both the Court of Appeal **[2017] ICR 657** and the Supreme Court **[2018] ICR 1151**. In short, he urged me to look beyond the paper documentation to the reality of the relationship between the parties and he drew attention to the disparity in bargaining power between them. The pattern of the claimant's work was that he was doing it week in week out for around six years and was not a casual worker – "This was his job" as Mr. Toms put it. The claimant had no other income, did not work for anyone else, never turned down a shift and there was not a power of substitution. Although he primarily provided services to LUL, he did nonetheless provide a service to the respondent and was under a degree of direction by them.

33. In response Mr. Taylor submitted that the claimant was engaged on a contract for services. He is paid for the actual hours that he works and is paid by the respondent regardless of whether LUL pays the respondent for his services.

34. Turning to the definition of a worker under section 230(3)(b). The claimant has certainly entered into and works under the Terms of Engagement contract [28]. The question is whether he performs personally any work or services for the other party to the contract, i.e. the respondent. It is clear that the respondent is not a client or customer of any profession or business undertaking carried on by him. Given that there is no express, implied or *de facto* right of substitution, this seems to narrow things down even further. Does he perform work or services for the respondent?

35. The definitions in the Terms of Engagement describe the "Temporary Worker" as meaning the claimant "*supplied by the Employment Business* [that is to say the respondent] *to provide services to the client*". I have set out above §2.2 of the Terms of Engagement which states "*The Temporary Worker is supplied as a worker, and is entitled to certain statutory rights as such, but nothing in these Terms shall be construed as giving the Temporary Worker rights in addition to those provided by statute except where expressly stated*".

36. The contract describes the claimant as a worker and he enjoys the benefits associated with worker status, such as being paid holiday pay by the respondent (see his payslips at [82]). While he undoubtedly, as the contract says, provides services to LUL, he also provides services to the Respondent by satisfying its client's need for labour. Without doing a disservice to Mr. Toms' able arguments, I consider that there is a shorter route to finding that the claimant was a worker.

Unlawful deductions

The claim for backdated wages April to 31 May

37. The critical question for the purposes of section 13 ERA is whether wages in respect of 4 April to 31 May 2020 were "properly payable" to the claimant. This depends on him having an entitlement, contractual or otherwise, to payment of wages. Under his terms of engagement, his contractual entitlement is to be paid for the hours that he worked during his assignments to LUL, but this was obviously not possible during the early stages of the spring 2020 lockdown as there was no work for the claimant to do and he had no express right to be paid.

38. The claimant puts his case that wages were properly payable for this period on two alternative bases: -

    a. That there was an implied term that the respondent would draw his attention to the CJRS (*per Scally*); and

    b. That there was an implied term that the respondent would exercise its discretion to backdate an application for wages in respect of this period in a "Wednesbury reasonable" way (*per Braganza*).

39. *Scally* was concerned with contributions and benefits under a statutory superannuation scheme for medical professionals in Northern Ireland. The House of Lords held that where a contract of employment contained a term conferring on the employee a valuable right contingent on acting as required to obtain a benefit, of which s/he could not be expected to be aware unless the term was brought to his or her attention, then there was an implied obligation on the employer to take reasonable steps to bring the term to the employee's attention.

40. It is clear from the judgment in *Scally* that the implication of such a term is appropriate "*if the category of contractual relationship in which the implication will arise is defined with sufficient precision*" (Lord Bridge at 781G). Lord Bridge went on to define such a relationship as "*the relationship of employer and employee where the following circumstances obtain: (1) the terms of the contract of employment have not been negotiated with the individual employee but result from negotiation with a representative body or are otherwise incorporated by reference; (2) a particular term of the contract makes available to the employee a valuable right contingent upon action being taken by him to avail himself of its benefit; (3) the employee cannot, in all the circumstances, reasonably be expected to be aware of the term unless it is drawn to his attention*". Subsequent authorities have further suggested that *Scally* is a narrow decision based on its own facts (see *Harvey* at AII [187.01]).

41. The claimant cannot bring himself within the precise relationship defined by Lord Bridge. First, his relationship with the respondent is not one of employment. Second, he was aware of the benefit under the CJRS as he had heard about it on the news and from his friends and colleagues. In the circumstances I find that there is no scope to imply a term that the

respondent should have brought the CJRS to the claimant's attention or to have made an application under the scheme themselves.

42. Mr. Toms contended in his written submissions that the claimant's contract with the respondent was subject to the following implied term "*when exercising a discretion, to do so lawfully and rationally; see* Braganza".

43. It is important to bear in mind that, again, *Braganza* concerned decisionmaking under a contract of employment. Lady Hale stated at para 31 that "*whatever term may be implied will depend on the terms and the context of the particular contract involved*". She went on to say that "*[a]*ny *decisionmaking function entrusted to the employer has to be exercised in accordance with the implied obligation of trust and confidence. This must be borne in mind in considering how the contractual decision-maker should approach the question of whether a person has committed suicide*" (para 32).

44. Again, the claimant's contract with the respondent is not a contract of employment. He was a temporary worker supplied by the respondent to provide services to its client.

45. *Braganza*, is an authority on decision-making "*entrusted to the employer*" within the context of a relationship of employment. The requirement to act rationally, according to Lady Hale, is located within the implied term of trust and confidence. The term of trust and confidence is implied into contracts

> of employment but not, as far as I am aware, into agency workers' contracts. Without the necessary foundation of trust and confidence, I consider that it is not appropriate to imply a *Braganza* implied term to exercise a discretion in a Wednesbury reasonable manner into a non-employment contract.

46. I will, however, go on to consider the position if I am wrong on this, and such a term is implied into the claimant and respondent's agreement.

47. The claimant first asked why his furlough could not be backdated to April in his email of 8 June 2020 [52-3]. Mr. Bradley's response on this issue [52] was that the rules were that only the first furlough payments could be backdated and the respondent could only backdate to 1 June. He repeats this in his email of 10 June [58].

48. The claimant told Mr. Bradley on 21 July 2020 that he had been informed by someone on the HMRC coronavirus helpline that his employer could make a backdated application under the CJRS [57]. Mr. Bradley's response was that the respondent was under no obligation to offer furlough, or indeed to offer work under the contract and the claimant was not obliged to accept work. Nonetheless, the respondent had discussed the situation with LUL and considered that it was reasonable to offer furlough from 1 June [56].

49. Mr. Toms submitted that the respondent had a discretion as to whether to make a backdated application under the CJRS for the claimant's wages. He says there was nothing within the CJRS Guidance to suggest they could not do this, and that when exercising that discretion, they should not do so

irrationally or unreasonably in the Wednesbury public law sense. Mr. Toms submits that Mr. Bradley in his 21 July email is refusing to make the backdated application simply because there was no legal obligation to make the application, and that, effectively, just saying "no" was therefore irrational and unreasonable. Mr. Toms also points out that Mr. Bradley was not called to give evidence to expand on his decision-making on this point.

50. Mr. Taylor gave evidence that the advice from the auditors was that it was possible to backdate the first round of furlough payments (which went in three week cycles) to the 1 March 2020, but that it was not possible to backdate further submissions. He accepted that in reality, and with hindsight, it would have been possible to make later backdated applications, but that this was not the advice that the auditors were giving at the time. He said that there was a lot of conflicting information going around at the time, and a lot of pressure on the business. Mr. Taylor said that it could have been the case that the claimant had another job, but this was only speculation. He accepted that Mr. Bradley did not refer to the auditor's advice in his email of 21 July, but only appeared to be making his decision on the basis that there was no legal obligation to apply to offer furlough.

51. While I accept that Mr. Bradley has not given evidence and is therefore unable to expand on his decision-making on 21 July, I also bear in mind that the claimant did not put his case on the basis of an implied term to exercise a discretion in a way that is not Wednesbury unreasonable until the day before the hearing. I also take account of the fact that on 8 June 2020 Mr. Bradley told the claimant that the respondent was then unable to backdate the application for furlough as they had with the first payments, and on 10 June says that the respondent can only do what the scheme allows them to do. This appears to have been wrong, but it also appears at least to have been consistent with Mr. Taylor's evidence to the tribunal that the auditors had advised that backdating after the first round of payments was not possible.

52. Mr. Taylor's email of 5 June contains the words ""*The Scheme is a temporary scheme open to all UK employers for at least three months which will be backdated to 1 March 2020*". However, I accept Mr. Taylor's evidence that he had neglected to update the pro-forma wording of this email after it had been sent out to other workers when the scheme was first announced, and when the respondent believed it could backdate applications under the CJRS. As Mr. Taylor pointed out, the agreement attached to this email contained the clear term that the claimant would be on furlough from 1 June 2020.

53. Mr. Bradley's email of 21 July cannot be viewed in isolation. In addition to the reason put forward in that email (that the respondents were not under a legal obligation to offer furlough) the respondents were also operating on a belief that they were unable to make a backdated application for furlough payments based on professional advice they were given. Such a decision, while it may not have been correct, was not in bad faith, irrational, capricious or arbitrary, and was not the sort of decision that no reasonable employment agency could have taken in respect of an agency worker on its books.

54. In the circumstances, I find that neither of the terms advanced by the claimant should be implied into the contract he had with the respondent and that the claim in respect of April to 31 May 2020 fails. Even if the *Braganza* term had been implied, I would not have held that the respondent exercised any discretion it had in a Wednesbury unreasonable way. This is in the context of the fact that there is indeed no right to be furloughed and the respondent could just have brought the assignment to an end and left it there.

Calculation of July wages

55. The furlough agreement and the CJRS Guidance both set out how the claimant's wages under the scheme are to be calculated, namely the higher of: -

    "(i) [the claimant's] same month's earnings from the previous tax year; or,

    (ii) [the claimant's] average monthly earnings from the 2019-20 tax year".

56. Mr. Taylor's evidence was that claim periods under the CJRS do not run across the month, and that payments under the CJRS were made according to claim periods and not months. He accepted that the assessment of the claimant's July wages would have cut off the last three days of his July 2019 income. He said that this discrepancy would have been paid to the claimant later, but had no means of evidencing that.

57. The claimant's evidence was that there was a shortfall of £379.01 as the last three days pay of July 2019 were not taken into account. He worked as follows: -

3 x 7 hour days (29 to 31 July) paid at the rate of £15.51	= £325.71
2.75 hours overtime paid at £19.38	= £53.30
Total	= £379.01
80% of £379.01	= £303.21

58. I consider that the claimant has shown that the total of sums due under the furlough scheme for July 2020 was £303.21 gross less than was properly payable to him.

59. I have said "sums due" rather than wages, at this stage, as Mr. Taylor took the point that money payable under the CJRS was in the nature of a grant and was thus excluded from the definition of wages being "*payment to the worker otherwise than in his capacity as a worker*" (see section 27(2)(e) ERA). Mr. Toms, on the other hand, pointed to the definition of wages under section 27(1) ERA as being "*sums payable to the worker in connection with his employment*". He referred to a number of references to "wages" in the CJRS Guidance, not least its title "**Claim for your employee's wages through the Coronavirus Job Retention Scheme**". He pointed out that section 27 ERA merely requires that sums be "in connection" with

employment to amount to wages, and there is not even a requirement that they be actually in respect of work done.

60. For the reasons put forward by Mr. Toms I consider that sums payable under the CJRS are wages within the meaning of section 27 ERA. They are clearly in connection with the claimant's "employment". While the sums payable might be understood in terms of being a grant to the employer, the purpose of the grant is made clear in the CJRS Guidance "*You will receive a grant from HMR.C to cover the lower of 80% of an employee's regular wage…*"[69].

61. I accordingly make a declaration that the claimant's claim for an unlawful deduction of £303.21 in respect of his July 2020 wages is well-founded.

Employment Judge Stephen Heath

Date 1 February 2021

RESERVED JUDGMENT & REASONS SENT TO THE PARTIES ON

02/02/2021

.....

FOR EMPLOYMENT TRIBUNALS