



EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4104569/2020

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Held via Cloud Video Platform (CVP) on 21 January 2021

Employment Judge B Campbell

10 **Ms S Black**

**Claimant
In Person**

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Edinburgh Cleaning Services Limited

**Respondent
Represented by:
Mr F Watson -
Director**

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JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The judgment of the employment tribunal is that an unlawful deduction was made from the claimant's wages contrary to section 13 of the Employment Rights Act 1996, and the respondent is ordered to pay the claimant the sum of £58.74 as compensation.

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REASONS

1. This claim arises out of the claimant's employment by the respondent, which began on 12 September 2019 and ended on 9 June 2020 with her resignation. The claimant asserts that she was underpaid or not paid at all on a number of occasions in respect of work she carried out or as furlough pay under the terms of the UK government's Coronavirus Job Retention Scheme, as detailed below.
2. The claimant represented herself at the hearing and gave evidence. Her partner, Ms Julia Davis also gave evidence. The respondent was represented by Mr Fraser Watson, a director and senior employee of the respondent. He also gave evidence. Both parties submitted documents which were

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considered at the hearing and those were useful in clarifying a number of details. The claimant's indexed bundle, which she had taken some time to prepare, and the respondent's spreadsheet showing various payments made in the key months of 2020 were particularly helpful.

5 **Legal issues**

3. The legal questions before the tribunal were as follows:

3.1. Did the respondent pay the claimant less furlough pay than she was entitled to under the Coronavirus Job Retention Scheme (the 'scheme') between the dates 24 March and 7 May 2020 inclusive?;

10 3.2. By either clawing back furlough pay made to the claimant between 8 May and 9 June 2020 or not paying it at all, did the respondent make an unlawful deduction from her wages?

4. 3.3. If yes to either, what is the monetary value of the shortfall?

Applicable law

15 5. By virtue of section 13 of the Employment Rights Act 1996 a worker is entitled not to have unauthorised deductions made from their wages. Therefore, subject to specific exceptions provided for in that part of the Act, there will have been an unauthorised deduction if the worker is paid less than they have earned, depending on how their earnings are calculated, or not paid at all for

20 their work. The date of the deduction is deemed to be either the day when less is paid to them than they have earned, or when they would normally have been paid but were not.

6. Examples of lawful deductions would include PAYE income tax properly deducted or a sum which the worker had explicitly consented to having

25 deducted in advance by writing. Section 14(1) of the Act expressly states that an employer may recover a previous overpayment from a worker's wages, and this will not be treated as an unlawful deduction.

7. A worker who has suffered one or more unlawful deductions from their wages may submit a claim to the employment tribunal under section 23 of the Act.

There are detailed requirements as to the timing of complaints to ensure that a tribunal can determine them. In short, if a claim is about a series of deductions, the claim process (initiated by way of commencement of Early Conciliation through ACAS) must begin within 3 months of the last alleged deduction.

The Government Coronavirus Job Retention Scheme

8. As a response to the Covid-19 pandemic and in an attempt to help businesses, the UK government introduced the scheme on 20 March 2020. It has gone through a number of variations since its implementation. The substantive rules, and any changes to them, have been published by way of Treasury Directions issued by the Chancellor to HMRC. The first was on 15 April 2020 and a later Direction was issued on 20 May 2020, largely to clarify aspects of the original scheme.

9. A third Treasury Direction was published on 26 June 2020 which provided further clarification in relation to the scheme as it was, and created a new option of 'flexible furlough' which permitted employers for the first time to engage their workers on a combination of normal working hours and furlough time, being paid accordingly for each. Before 1 July 2020, employees could be on furlough and receive furlough pay or undertake paid work, but not a combination of the two. Further, as set out in paragraph 6.1 of the first Treasury Direction, to be eligible for furlough pay an employee had to be carrying out no work by reason of the Covid-19 pandemic for a minimum of 21 days continuously. Thus, furlough pay could only be made for blocks of three weeks or more when no work was being done.

10. From November 2020 further Treasury Directions have been published which further continued and amended the scheme.

Findings in fact

11. The following findings of fact were made as they are relevant to the issues in the claim.

12. The claimant was an employee of the respondent from 12 September 2019 until her resignation date of 9 June 2020. The respondent provides cleaning products and services to commercial and domestic customers. She was initially recruited as a Laundrette Operative but on 9 December 2019 moved to the position of Hard Goods Technician and Warehouse Operative. This brought an increase in her hourly pay from £8.21 to £9. She remained in that role until she resigned.
13. The claimant did not have fixed hours of work. She was paid monthly for whatever hours she worked. She gradually built up the hours she worked from her commencement date and further increased the average number of hours she worked from around 27.5 per week to 37.5 per week when moving to her new role in December 2019. She produced payslips for December 2019 onwards but not for any previous months. The respondent's payroll cut-off date is the 19th of each month, and accordingly each payslip would cover the period from the 20th of the month before until the 19th of the month in which it was dated.
14. On 24 March 2020 the claimant was notified that she was being placed on furlough under the scheme. This was communicated by way of a Whatsapp message from Mr Watson to a group which included the claimant. The claimant accepted she was being furloughed and ceased working. She understood she would receive 80% of her normal pay.
15. As the March cut-off date for pay fell before the beginning of her furlough, she was paid as normal in that month for the hours she worked up to 19 March.
16. As the payroll cut-off date in April 2020 approached the respondent had not managed to establish how much pay its furloughed workers were due. Payroll is outsourced to the respondent's accountants and they had not provided the figures. As the scheme was new there was an element of getting up to speed with the rules and procedures involved and the respondent was still waiting for confirmation from the government that furlough payments would be reimbursed to the business. Rather than not pay anything to the affected employees, Mr Watson took the decision to pay them an estimated amount

and make any adjustments necessary in the following month. The claimant received £650 as her pay for April 2020. A payslip was sent to her by post but it did not reach her.

- 5 17. On 6 May 2020 the claimant was contacted via Whatsapp by Mr Watson's wife, Kirsty Watson. She offered the claimant some pricing jobs which could be carried out from the claimant's home. She would be paid for them based on the time spent. Mrs Watson stated that the claimant would receive pay in that way and still be paid her 80% furlough pay. The claimant responded to accept. The claimant did not know at that time that the rules of the scheme
10 did not permit the claimant to resume paid work and still be eligible for furlough pay. She accepted what Mrs Watson told her.
18. Mrs Watson worked in a different part of the respondent's operations from the claimant, but at an equivalent level of seniority. Mr Watson was the claimant's line manager, although the claimant would contact Mrs Watson about work
15 matters if she could not reach him.
19. The claimant carried out various pricing jobs and, conscious of the payroll cut-off date, sent a note of her time spent to Mrs Watson on 19 May 2020. That showed that the claimant had worked on 8, 11-15 and 18 and 19 May for a total of 29 hours, 15 minutes. Mrs Watson responded to say she would pass
20 this information on to her husband.
20. The claimant worked additional hours from home between 20 and 30 May 2020, totalling 12 hours, 15 minutes.
21. By mid-May 2020 the respondent had enrolled on the scheme and had established the correct payments to be made to furloughed staff. In the
25 claimant's case this was £579.78 net per month. As she had been paid £650 the month before, she had been overpaid by £70.22. The respondent deducted this amount from her furlough pay for May 2020 and she was paid £509.56 at the end of that month. In paying the claimant in this way Mr Watson, who had overall authority over payments to staff, was not aware of
30 the claimant carrying out work from home and understood she was still on furlough.

22. When the claimant saw her May wages appear in her bank account on 1 June 2020, she was surprised and disappointed as she expected to receive more than the month before, not less. She sent a Whatsapp message to Mr Watson and then called his mobile number to leave a message. She had not by this point seen payslips for April or May 2020.
23. Mr Watson called the claimant back on 2 June 2020 when she was at home with her partner, Julia Davis. The claimant answered the call using the speaker on her phone and Ms Davis overheard it. Mr Watson understood that the claimant was asking for clarification about her pay, believing it to be too little. He explained that the payment only covered furlough pay and that she would be paid in her June wages for the work she had done. He had only just found out about the claimant working, having spoken to his wife on receipt of the claimant's voicemail. He did not know at that time that the rules of the scheme did not permit a worker to resume working and continue to receive furlough pay.
24. The claimant therefore still understood that she could both work and receive furlough pay. As part of the conversation she had with Mr Watson on 2 June 2020 she agreed to come back into the respondent's depot to work, having been assured by him that it was now consistent with government guidance to do so. It was agreed that she would return on Monday 8 June 2020.
25. The claimant went to work at the respondent's depot on 8 and 9 June 2020, completing a total of 14 hours, 30 minutes. She submitted timesheets to vouch these hours and those carried out in the latter part of May. This took the total number of hours she had worked since 8 May 2020 to 56 hours.
26. By the time she returned home in the evening of 9 June she had decided to resign from her employment with the respondent. She considered that the direction and values of the respondent were not consistent with her own. She sent a Whatsapp message to Mr and Mrs Watson that evening confirming her resignation with immediate effect.
27. By 1 July 2020 the claimant had received no pay for June and contacted Mr Watson. He called her back and stated that she had breached he contractual

obligations, without elaborating further, and that she would hear from the respondent's HR officer in writing. The claimant was unaware of the respondent having an HR officer. Mr Watson was referring to a Mr Gary Gibson who is an external consultant providing HR advice and services to the respondent.

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28. Mr Gibson wrote to the claimant under the respondent's letterhead on 1 July 2020 and she received the letter by post. It suggested that she had received a letter from the respondent on 24 March 2020 outlining the terms on which she was being put on furlough and asking her to countersign and return that letter to confirm her acceptance. The bulk of the letter of 1 July purported to be verbatim repetition of the earlier letter. The alleged original text said, among other things, that the claimant was being put on furlough as of 23 March 2020, she would receive 80% of her pay, she should not undertake any paid work during this period, and that her furlough was anticipated to end on the earlier of any date she was asked to return to work and the date when the scheme ended. However, the claimant did not receive that earlier letter. This was her evidence and it is consistent with the understanding she had, in May 2020 at least, that she would be able to work from home and still be treated as on furlough. She stated that only upon receipt of the letter of 1 July 2020 did she begin to appreciate that being asked to work from home might jeopardise her status as a furloughed worker.

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29. The claimant contacted Mr Watson by email on receipt of the letter of 1 July 2020 as she did not know Mr Gibson and had no contact details for him. Mr Gibson emailed the claimant in response on 10 July 2020. He promised to send her payslips (she had not received any since March 2020) and a P45. He went on to say that on the basis of his understanding that the claimant began working from home on 7 May 2020, she should have been removed from the scheme at that point and her furlough pay should be recalculated to end then. Once that had been done she would be paid for the hours she had worked.

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30. The claimant had no further dialogue directly with the respondent after this point. She contacted ACAS in August 2020 to begin Early Conciliation. She

also sought advice from a local Citizens Advice Bureau. This prompted her to consider that the calculation of her furlough pay figure was too low.

31. The respondent attempted to provide clarification of what payments had been made to the claimant from April 2020 onwards, what the payments should have been, and what was the resulting figure owed to the claimant. By its reckoning the respondent still owed the claimant £58.74 and was willing to pay that sum. Believing she was due more, the claimant would not accept it.

Conclusions

Issue 1 - Correct calculation of weekly furlough pay figure

32. Part of the claim is that the claimant believes that when she was given furlough pay, it was less than she was entitled to. She cites the fact that the figure of £579.78 net for April 2020 is less than 80% of her net wages for January, February and March, which were £978.16, £1,079.44 and £912.95 respectively.
33. The scheme states that for employees who do not have fixed pay, the amount of their furlough pay should be calculated as an average over the tax year 2019-2020 or, if the employee has not worked for the employer that whole time, the figure should be their average pay from their commencement date. In the claimant's case therefore her furlough pay would be based on her average weekly earnings from 12 September 2019. The claimant did not provide payslips to cover September, October or November 2019 but her evidence was that she initially worked in a role with a lower hourly rate, and that she started by performing a smaller number of hours which she increased over time. Mr Watson was unable to offer any detail as to how the figure had been calculated as he had handed over that task for all furloughed employees to the respondent's external accountants and trusted them to have performed the exercise correctly.
34. It is not possible on the evidence provided to the tribunal to verify the precise figure for her furlough pay, but on the evidence which was available it is very possible that the figure is correct if calculated as above. Accordingly, no

finding is made that she suffered a deduction from wages in relation to any furlough pay which she did receive.

Issue 2 - Whether furlough pay was wrongly clawed back or withheld

35. The rules of the scheme as it applied between March and June 2020 are clear
5 in stating that an employee cannot carry out paid work for their employer and
also receive furlough pay from that employer. It is regrettable that the claimant
was unaware of that when contacted by Mrs Watson with the offer of work,
and that she relied on the assurance given at that time to the effect that she
could do both. However, Mrs Watson was simply mistaken about that and had
10 no authority to create a free-standing right to pay beyond what the rules of the
scheme allowed.
36. The consequence of this is that the claimant was eligible to receive furlough
pay up to and including 7 May 2020, but not at any time after. Her working
days were such that she did not again complete a continuous three week
15 period without work and so she did not again become eligible for furlough pay.
37. The respondent provided a spreadsheet along with payslips for the claimant
which were helpful in addressing the questions of what the claimant was paid
and what she ought to have been paid. The position is as follows. All figures
are for net pay:
- 20 37.1. **March 2020** – the claimant was paid as normal at her full rate and no
adjustment is required.
- 37.2. **April 2020** – the claimant was paid £650 which was explained to her
to be an estimate. It was later correctly established that the correct
figure should have been £579.78 and so she had been overpaid
25 £70.22.
- 37.3. **May 2020** – the claimant received £509.56, which was calculated as
a further month's furlough pay at £579.78 but under deduction of the
overpayment made in April of £70.22. However, she should have
received furlough pay from 20 April to 7 May and then payment for her
30 hours worked from 8 to 19 May;

37.4. **June 2020** – the claimant was not paid at all. She should have been paid for the hours she worked between 20 May and 9 June.

Issue 3 – what is the amount of any unlawful deduction(s)?

5 38. The overall effect once the correct figures were established and adjustments made was that the claimant had been paid a total of **£2,072.51** between March and June 2020 and ought to have been paid **£2,131.25** for that period. She had been underpaid by **£58.74** net as the respondent had established, albeit only after the claimant had commenced the process of making her claim.

10 39. On the basis of the above findings the claimant suffered an unlawful deduction from her pay in the amount of **£58.74** and this is the sum the respondent is ordered to pay.

15 Employment Judge: Brian Campbell
Date of Judgment: 04 February 2021
Entered in register: 05 February 2021
and copied to parties