EMPLOYMENT TRIBUNALS

Claimants: **(1) Emily Windle**
(2) Charlotte Hooks

Respondent: **Fusion Lifestyle**

Heard at: **East London Hearing Centre** **On: 2 December 2020**

Before: **Employment Judge S Knight**

Representation

Claimants: Mr Paul Hooks
Respondent: Ms Louise Ford

JUDGMENT having been sent to the parties on 7 December 2020 and written reasons having been requested in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided:

REASONS

Introduction

The parties

1. The Claimants are lifeguards employed on "zero hours contracts" by the Respondent. The Respondent is a leisure provider which operates over 70 leisure facilities around the country.

The claims

2. The Claimants claim for unauthorised deductions from wages, in the form of deductions from furlough payments made under the Coronavirus Job Retention Scheme ("**CJRS**").

3. On 8 June 2020 ACAS was notified under the early conciliation procedure. On

10 June 2020 ACAS issued the early conciliation certificate. On 15 June 2020 an ET1 Claim Form was presented in time. On 4 August 2020 the ET3 Response Form was filed in time. A subsequent ET1 Claim Form was also filed and a further early conciliation certificate was provided by ACAS. No further ET3 Response Form was filed.

Procedure, documents, and evidence heard

Procedure

4. This has been a remote hearing which has been consented to by the parties. The form of remote hearing was "***A****: audio whether partly (someone physically in a hearing centre) or fully (all remote)*". A face-to-face hearing was not held because it was not practicable due to the COVID-19 pandemic and no-one requested the same. The documents that I was referred to are in a bundle, the contents of which I have recorded.

5. The parties attended the hearing via telephone conference.

6. At the start of the hearing I checked whether any reasonable adjustments were required. Those in attendance confirmed that none were required.

Documents

7. The Claimants had submitted ET1 Claim Forms and Schedules of Loss. The Respondent had submitted contract documents and an ET3 Response Form.

8. The parties had also submitted considerable further documentation. I have read and considered with care the written submissions prepared by both parties, both at the start of the hearing, and then reminding myself of the relevant parts of them at the conclusion of the hearing.

Preliminary issues: hearing together

9. With the consent of the parties, at the outset of the hearing I directed that the claims be heard together.

Preliminary issue: extension of time

10. The Claimants requested that all of the furlough time be counted including continuing loss. They said that it would be an abuse of process and wasteful to exclude continuing loss, up to 16 August 2020. To this end, they requested an extension of time.

11. The Respondent said that the ET1 did not refer to "continuing loss" and so I should not consider any loss in respect of any date after the submission of the ET1. The Respondent argued that it would be contrary to the overriding objective for that to be added now.

12. I allowed the amendment to the claim including an extension of time to bring the claim. I concluded that it was not reasonably practicable for the Claimants to bring their claims earlier, and in coming to that conclusion I considered the

young ages of the Claimants, and that only a minor change was required.

Evidence

13. At the hearing I heard evidence under affirmation from the Claimants, and read their witness statements. I took a full note of the evidence in my Record of Proceedings. In the end, none of the oral evidence determines the claim.

14. The determinative evidence in this case was a letter sent on 17 April 2020 to both Claimants, from the Respondent. Both parties agree that the letter varied the contracts of employment of the Claimants. It made reference to the CJRS. It called it "furlough". It then said the Claimants would be placed on the furlough scheme. It said that the Claimants would receive 80% of the average of their monthly earnings. The document made repeated references to the furlough scheme and its terms.

Relevant law

Unauthorised deductions from wages

15. Sections 13 to 27B Employment Rights Act 1996 ("**ERA 1996**") sets out the statutory basis for a claim of unauthorised deduction from wages. Section 13 ERA 1996 provides in particular as follows:

> "(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.
>
> (2) In this section *"relevant provision"* , in relation to a worker's contract, means a provision of the contract comprised—
>
> > (a) in one or more written terms of the contract of which the employer has given the worker a copy on an occasion prior to the employer making the deduction in question, or
> >
> > (b) in one or more terms of the contract (whether express or implied and, if express, whether oral or in writing) the existence and effect, or combined effect, of which in relation to the worker the employer has notified to the worker in writing on such an occasion.
>
> (3) Where the total amount of wages paid on any occasion by an employer to a worker employed by him is less than the total amount of the wages properly payable by him to the worker on that occasion (after deductions), the amount of the deficiency shall be treated for the purposes of this Part as a deduction made by the employer from the worker's wages on that occasion.

(4) Subsection (3) does not apply in so far as the deficiency is attributable to an error of any description on the part of the employer affecting the computation by him of the gross amount of the wages properly payable by him to the worker on that occasion.

(5) For the purposes of this section a relevant provision of a worker's contract having effect by virtue of a variation of the contract 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 variation took effect.

(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.

(7) This section does not affect any other statutory provision by virtue of which a sum payable to a worker by his employer but not constituting "wages" within the meaning of this Part is not to be subject to a deduction at the instance of the employer."

16. "Wages" is widely defined. According to section 27(1) ERA 1996, it includes "*any fee, bonus, commission, holiday pay or other emolument referable to his employment, whether payable under his contract or otherwise*".

The CJRS

17. The CJRS as it applied at all relevant times was set out in a Treasury Direction dated 15 April 2020. In relevant part it provided:

"7.2 Except in relation to a fixed rate employee, the reference salary of an employee […] is the greater of-

(a) the average monthly (or daily or other appropriate pro-rata) amount paid to the employee for the period comprising the tax year 2019-20 (or, if less, the period of employment) before the period of furlough began, and

(b) the actual amount paid to the employee in the corresponding calendar period in the previous year."

Findings of fact

18. The findings of fact I need to make are limited. I find that the Claimants were placed on furlough on the date claimed, and returned from furlough on the agreed date. I find that the Claimants were paid as claimed during furlough.

19. I find that the letter of 17 April 2020 varied the Claimants' contracts and that was the intention of the parties.

Conclusions

20. I conclude that the letter of 17 April 2020 varied the contracts to match the terms of the CJRS. I come to this conclusion because it is agreed that the contracts were varied, and because of the repeated mention in the variation letter of the furlough scheme, by reference to which the contracts were intended to be varied.

21. I find that as a result of the variation of the contract, the Claimants had a right to wages, and they would be calculated in accordance with the CJRS.

22. As such, despite its best efforts to support its staff, the Respondent using its best endeavours and in an understaffed situation made an honest mistake in how it calculated the wages owed to each Claimant.

23. I find that the amount paid to each Claimant was £407.95 and £607.60 respectively.

24. I find that the amount due to each was £1,615.05 and £1,237.10 respectively. This was calculated using the workings agreed between the parties at the hearing, based on the spreadsheet provided by the Claimants' representative.

25. I find that there was an unauthorised deduction of £1,207.10 gross in respect of the First Claimant and £629.50 gross in respect of the Second Claimant.

Employment Judge S Knight
Date: 19 April 20201