



# EMPLOYMENT TRIBUNALS

**Claimant:** Mr D.McLean

**Respondent:** Staffline Recruitment Ltd

**Heard at:** Leeds ( via CVP)

**On:** 07 April 2021

**Before:** Employment Judge T.R. Smith

## **Representation**

**Claimant:** In person

**Respondent:** Mr Symons ( Solicitor)

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.

## **RESERVED JUDGMENT**

The Claimant's complaint of an unlawful deduction from wages is dismissed.

# **REASONS**

## **The Issues**

1.The issues were as follows.

- Firstly whether, putting aside furlough, the Claimant had been subjected to unlawful deduction from wages (that is he was not paid his contractual entitlement under his contract).
- Secondly whether the sums paid to the Claimant whilst on furlough had been subject to unlawful deduction from wages (that is the Claimant contended he was not paid the sums to which he was entitled)
- Thirdly, if there was any delay in payment of the Claimant's contractual entitlement whether the Tribunal should exercise its discretion to order

the Respondent to pay to the Claimant such amount as the Tribunal considered appropriate in all the circumstances to compensate the Claimant for any financial loss attributable to that late payment (see section 24(2) Employment Rights Act 1996).

2.The Claimant accepted that the first issue had now been resolved and that he did not dispute he had received his full contractual entitlement. .

3.The second issue was in dispute. .

4.The third point appeared to be conceded by the Claimant at the start of the hearing, but during the course of the hearing he contended he was owed various sums in respect of interest. following the pawning of some of his property.

### **Evidence.**

5.The Tribunal had a bundle that was placed before it together with some additional bank statements from the Claimant .

6.The Tribunal heard evidence from the Claimant.. The Tribunal had before it a statement from Mr Jarman for the Respondent

7.The Tribunal had full regard to all the documentation place before it, even if it is not referred to it expressly in its judgement.

### **The Law**

8.The Tribunal applied the law set out in part two of the Employment Rights Act 1996.

9.At the heart of the case was what was “properly payable” to the Claimant.

The Tribunal also considered the coronavirus job retention scheme, further details of which appear below.

### **Findings.**

10.Given the concession of the Claimant at the start of the hearing the Tribunal have only addressed issues two and three.

11.The Claimant presented his claim form at the Tribunal on 27 January 2021.

12.The Claimant is an agency worker.

13.His relationship with the Respondent is governed by a written agreement (37 to 55). The Tribunal had full regard to that agreement.

14.He has no contractual entitlement to any guaranteed hours of work.

15.He is subject to PAYE.

16.Subject to be allocated and undertaking of work and submitting a property completed timesheet, the Claimant was then paid weekly by the Respondent.

17.It is common ground that the Coronavirus Job Retention Scheme (CJRS) applied to him.

18.The CJRS has legislative backing under S.76 of the Coronavirus Act 2020, which came into force on 25 March 2020 and confers on HMRC '*such functions as the Treasury may direct in relation to coronavirus or coronavirus disease*'. The Treasury first issued such a direction on 15 April 2020, setting out the detail of the scheme, and updates and clarifications were made in further directions issued on 22 May, 30 June and 02 October. A further Treasury Direction extending the CJRS to March 2021 was made on 12 November 2020. The Tribunal has made reference of those directions and the guidance issued under those directions.

19.Mr Symons contended that, given the CJRS was an agreement between the Respondent and HMRC, the calculation methods of furlough pay to and in the guidance were not applicable to the Claimant, as the agreements were not incorporated into the Claimant's contractual relationship with the Respondent.

20.The Tribunal rejected that argument. Whilst nothing in the CJRS prevents an employer paying more than the sums received from HMRC, an employer cannot pay less and nor can it make any form of deduction for the administration of the scheme. It follows therefore that the Claimant is entitled, as a minimum, to the sum claimed by the Respondent from HMRC for the Respondent to lawfully access the scheme

21.The Claimant's case was that he should have received 80% of £370.22.

22.He based this figure on 80% of one payslip for 30 October 2020 (71)

23.It was not disputed that the Claimant did not receive 80% of this figure.

24.The dispute was as to how the furlough payment should have been calculated.

25.The Respondent's case was that they had actually paid the Claimant more than he was entitled to under the furlough scheme.

26.It is proper to record that the method of calculation of wages set out in the Employment Rights Act 1996 is not applicable in respect of the calculation of furlough pay. It follows therefore the Tribunal looked only at the guidance issued in order to establish the correct calculation.

27.The published government guidance states that the calculation is 80% of the average wage payable between 6 April 2020, or, if later, the date the employment started, to the day before they were first furloughed.

28.Wages are defined as regular payments that the employer is obliged to make to the employee.

29.The guidance states that to work out usual wages the employer should start with the wages payable to the employee in the reference period.

30.The reference period involves a complicated calculation of four separate stages but in principle furloughed and non-furlough days have to be identified.

31.The Respondent adopted a broader brush approach.

32.The Claimant's engagement commenced with the Respondent on 24 September 2020.

33.He was placed on furlough on 11 January 2021.

34.It follows therefore that the reference period is from 24 September 2020. The Respondent, rather than calculating individual days simply looked at what the Claimant earned whilst he was working, which totalled 11 weeks in the relevant period.

35.The Claimant received £3191.34 during the reference period (11 weeks). The average wage was therefore £272.69 and 80% that figure amounted to £232.10 which was the sum that was paid to the Claimant.

36.In fact the Tribunal considered that the Respondent made an error because in two of those weeks the Claimant did not work, but received SSP. SSP should not be taken into account as regards wages which would reduce the reference period from 11 to 9 weeks (although it would also result in a deduction of two weeks SSP from the total wages) and increase the sum payable.

37.However If the calculation is done on the basis of days( as it should be under the guidance) then a lower figure is achieved, a net figure of £160.91 which would represent 80% of the sum due.

38.It follows the Claimant has received more than the Respondent would have recouped from HMRC. The fact therefore that the Tribunal considered there had been a mis application of SSP is irrelevant because even if it was deducted from the gross earnings and the reference period reduced from 11 to 9 weeks the Claimant still received well in excess of what he was entitled too.

39.Further it would be curious in the extreme if the government guidance meant that furlough pay for an agency worker was simply based on one payslip especially given the information supplied as regards a reference period..

40.In the circumstances there has been no unlawful deduction from wages.

41.The Claimant has received what was properly payable to him.

Turning to the third issue.

42.The Claimant contended there was a delay, in two tranches, of the payment of his wages for a total of six weeks, approaching and following Christmas. The Claimant's case was that he had to pawn two items to make ends meet. Originally the Claimant put his claim at £329.50 p. The Tribunal pointed out it was for the Claimant to prove his claim and at its highest, it was the interest he had to pay on the money borrowed for the period of alleged late payment.

43.The Claimant then indicated this was £35.75 p. The Tribunal was satisfied that there was evidence from the Claimant's bank statements that he was making regular payments to pawnbrokers in that sum and it did appear to start at the time of the alleged delayed payments.

44.The Claimant's case was, according to his claim form, that he started shielding in November but did not receive a shielding letter until 02 December 2020 but at the time was hospitalised. He did not receive sick pay until 18 December 2020. He received a further payment on 31 December 2020

45.The Claimant was paid according to his payslips on 20 November 2020.

46.Whilst shielding the Claimant then went on to SSP. The Claimant requested to be furloughed and the appropriate written agreement was finalised on 28 January 2021 although the request for furlough was made by the Claimant prior to that date. On 18 January 2021 he was then designated a furloughed worker.

As CJRS does not permit a furloughed worker to receive SSP the Claimant was not paid on 22 January 2021 because the request to change the Claimant status to a furloughed worker was not received until the payroll cut-off date that week. The Claimant then received two weeks furlough pay on 29 January 2021.

47. Whilst accepting that the Claimant has had to borrow money the Tribunal has a discretion to make an award in respect of interest. This is clear from the word “may” of the Employment Rights Act 1996. In addition an award may only be made where the Tribunal “considers appropriate” . Had there been none payment the Tribunal would have had little hesitation in making an award as it was satisfied the Claimant had to borrow money and has suffered a loss. However here there was no deliberate non-payment. There was a difficult situation caused by the interaction of SSP, processing relevant documents and furloughing. Confusion was also caused to the Respondent because the claimant’s sick note referred to prostate cancer.

48. In the circumstances whilst the Tribunal has sympathy for the Claimant it did not think this is an appropriate case to exercise its discretion.

49. In the circumstances the Claimant’s complaint must be dismissed.

Employment Judge Smith

Date 07 April 2021