EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Mr Mortimer	**v**	**Fusion Lifestyle**

Heard at: Watford **On**: 15 April 2021

Before: Employment Judge Bartlett (Sitting alone)

Appearances

For the Claimant: in person
For the Respondent: Ms Emma Ford

JUDGMENT

1. The claimant and respondent agreed to vary the terms of the employment contract between the parties relating to pay on or around 17 April 2020 such that the claimant would be paid 80% of average monthly earnings.

2. The contract of employment between the claimant and respondent included an implied term that average monthly earnings would be calculated in accordance with the guidance set out on the gov.uk website relating to the operation of the Coronavirus Job Retention Scheme.

3. The claimant had one employment with the respondent (even though he carried out different roles) and therefore all of his earnings should be taken into account in the calculation of average monthly earnings.

4. The claimant has suffered an unlawful deduction of wages in the amount of £2092.42.

REASONS

Background

1. The claimant was employed by the respondent from February 2016. He carried out various roles and had varying hours of employment at different times during those five years. On 16 October 2017 he became part of the Central Work Bank in Enfield. Additionally, the claimant held a fitness

instructor position which he carried out until 31 December 2018. Relevant to this claim is that from 5 February 2018 he commenced a role as a fitness class instructor within the Haringey division of the respondent at Park Road leisure centre. He was issued with an employment contract specific to this role. The claimant stopped his contracted fitness class instructor role on 29 December 2019 and remained on his “casual” contract which was the Central Work Bank contract. This was a zero hours contract. In January, February and March 2020 the claimant carried out some work under the Work Bank Contract and at the end of March 2020 he was placed on furlough. The claimant’s claim is concerned with his amount of pay under the furlong arrangements.

The hearing

2. The hearing took place via cvp. There were no difficulties with connection or communication during the hearing. I was satisfied that all parties were able to understand each other clearly and I checked that this was the case.

3. At the hearing the claimant and Miss Emma Ford, who appeared as a witness for the respondent, affirmed and adopted their witness statements. Miss Ford asked the claimant a number of questions and these are set out in the record of proceedings. The claimant asked Miss Ford a number of questions and again her questions and answers are set out in the record of proceedings.

4. The parties made submissions which are recorded in the record of proceedings

The issues

5. At the start of the hearing I sought clarification on the issues that were to be decided. This is because from the claimant’s perspective and, to some extent the respondent’s, the issues were about furlough pay. However the Employment Tribunal has a limited jurisdiction and the furlough scheme is not an area of itself over which the tribunal has jurisdiction. Instead the tribunal considers claims for unlawful deduction of wages or breach of contract arising from changes to the employment contract that may have arisen indirectly from the furlough scheme.

6. The respondent's position was that:

   6.1 since 2016 the claimant had been employed in a number of different employments as evidenced by different employment contracts which were signed and agreed for different roles at different times;
   6.2 the claimant’s fitness instructor role, which was a part time employed role with regular hours, ended on 29 December 2019;
   6.3 after this date the claimant was employed on a zero hours contract;
   6.4 the respondent has over 3000 employees and over one and a half thousand zero hours contract employees;
   6.5 around March 2020 when the country entered the first lockdown the respondent decided to furlough not only permanent employees but those who regularly worked on zero hours contracts;

6.6 as the claimant was an individual who had worked regularly on a zero hours contract he was furloughed and a standard letter was sent to him. This letter set out that his pay would be at 80% of average monthly pay;
6.7 the respondent used the three months preceding April 2020 as the calculation for average pay;
6.8 they paid the claimant and other employees 80% of this average figure which resulted in the claimant being paid roughly £799.00 pm.
6.9 the respondent's submission was that the claimant had one employment as the fitness instructor and one employment as the central bank worker. The employment as the fitness instructor ended and therefore it was not possible to furlough this role and its pay should not be considered in the average monthly pay calculation.

7. The claimant's position was that:

7.1 he had one continuous employment with the respondent;
7.2 the contractual changes to his employment contract terms relating to pay should have used the calculation methods set out in the Coronavirus Job Retention Scheme (CJRS) guidance set out on the gov.uk website. This set out that pay for employees with variable hours such as the claimant should be calculated by using pay in the corresponding month in the previous year or earnings during the 2019/20 tax year, whichever results in the higher figure.
7.3 if they had done this it would have resulted in pay of £3911.76 in respect of the period March to August 2020 rather than the payment he received of £1819.35

Decision

8. The respondent has proceeded on the basis that the claimant was an employee at all times even from 29 December 2019 when he worked under a zero hours contract. It seems to me that it was open to the respondent to argue that the claimant was a worker rather than an employee (on the basis that there was a lack of mutuality of obligations regarding the obligation to provide and accept work) however the respondent has not made this argument and I will not take it any further.

9. The basic principles of the furlough arrangements are that the employer and employee agree to vary the contract of employment. This can be in a number of ways and the terms most likely to be varied are those relating to carrying out work and pay.

What was the claimant's contractual entitlement as regards pay from on or around 17 April 2020?

10. This requires consideration of what the contractual terms were.

11. On 17 April 2020 the respondent send a standard letter to all Central Work Bank workers. It is not disputed that this was received by the claimant on or around that date. The relevant part of the letter is as follows:

"You will not do any work for us during the furlough. We will then use the governments coronavirus job retention scheme to access a grant which covers 80% or a maximum of £2,500 per month for you based on an average of your monthly earnings…in order to receive your payment now and in the future, it is important that you confirm that you have ceased all work in relation to your employment. Please click here to confirm this…by being placed on furlough, the terms and conditions of your agreement with Fusion will be temporarily varied. As a casual in our work bank any assignments offered to you and taken up by you are not guaranteed, and there is no obligation for Fusion to offer you any shifts. Your period of furlough began on 18 March 2020. In the April payroll you will be paid for actual work done up to 18th in the normal way…in May, subject to the furlong schemes still operating we will make a payment based on average monthly casual hours pre-crisis…while your statutory rights are unaffected by this variation, your entitlements to pay and other financial benefits during the furlough period are limited to these points."

12. The case proceeded on the basis that the claimant did click to confirm his agreement.

13. There was no other communication about the calculation of the claimant's pay under these arrangements. As can be seen from the above the respondent's letter set out that 80% of average monthly earnings would be paid. The claimant accepted that he agreed to these arrangements. The parties therefore agreed to vary the terms relating to pay in his contract of employment. The contractual term relating to pay became "The claimant will be paid 80% of average monthly earnings ". The issue therefore is what does average monthly earnings mean?

14. The claimant's witness statement sets out his attempts to contact the respondent about the payments. This was unchallenged by the respondent and they accepted that they had not responded to him for some time because most of the HR team was furloughed and they received a large volume of communications. I have set out the relevant passage from the claimant's witness statement below:

"I have detailed a brief summary of my long list of email conversations in a separately attached document. I first contacted Fusion Lifestyle's HR department on the 20th of May 2020, the first day I possibly could, when I pointed out the incorrect Furlough payment for April 2020, and a week later I chased them because I'd heard nothing. Note that I am paid one month in arrears on the 20th, so my initial contact to them was immediately after I became aware of the error in calculation when I checked my May 20th Payslip (which concerns the month of April) on the day it was issued. In June, Fusion began replying but I was told that they were unable to give me a breakdown of numbers, i.e how the payment was calculated. This went back and forth for a month, where HR continued to state they couldn't give me a breakdown of numbers, and eventually stated that further queries would be filed "without response". In the beginning of July, I forwarded the whole email chain to Fusion's Enfield Employee Representative, Peter Lochan. I conversed with

Peter Lochan for a while to give him the full information. In mid July he had managed to get in contact with the Head of Payroll Jeanette Edwards, who said that HR really should have dealt with this. It's about this time that I also begin to talk to Michael Twiggins, the Area Manager about my problem, and towards the end of the month he said he could give me no further information. I continued back and forth with emails to Peter Lochan, but he began to be stonewalled by the same people that I have been stonewalled by too. At the beginning of August, Peter said that unfortunately with how his colleagues were acting that he was unable to help me further. Having now been totally stonewalled and exhausted all internal procedures and contacts I could, I had no choice but to speak to ACAS and accordingly on the 11th of August I called to begin the process of early reconciliation."

15. I find that this sets out that the respondent had communicated that the claimant would be paid 80% of monthly earnings calculated on a monthly average but did not set out further information about how this would be calculated. Shortly after the claimant received his first payment under these new arrangements he contacted the respondent and asserted that he had been paid the incorrect payment. There was no substantive disagreement about any of the facts in this case.

16. As there was no express agreement as to how average monthly pay was to be calculated I consider that, as a result of the officious bystander test, the formula to calculate pay must be an implied term of the contract. Alternatively to give business efficacy to the contract there must be an implied term as to how pay is calculated. The term average monthly earnings is insufficiently precise and I consider that as a result of the above tests there is an implied contractual term as to how to calculate average monthly earnings.

<u>Scope of the implied term of how to calculate monthly average pay</u>

17. The respondent's letter dated 17 April 2020 sets out:

Thank you for your patience following the Government's announcement of the Coronavirus Job Retention Scheme (or "furlough"). We are writing to inform you that we will be accessing the furlough scheme on your behalf as a casual worker.

You will not do any work for us during the furlough period. We will then use the Government's Coronavirus Job Retention Scheme to access a grant which covers 80% or a maximum of £2,500 per month for you based on an average of your monthly earnings.

18. I find that this specifically makes reference to the CJRS and that this will be used to access the grant of 80% pay based on average monthly earnings.

19. The legal background and operation of the CJRS is very complicated. It operates under the scheme established by the Coronavirus Act 2020 Functions of Her Majesty's Revenue and Customs (Coronavirus Job Retention Scheme) Direction given by the Treasury under section 71 and 76 of the Coronavirus Act 2020 as modified from time to time by further directions given by the Treasury under those sections. Due to these changing and complex arrangements, I do not accept that there was an express term nor

can there be implied a contractual term that the rules under the Treasury Direction[s] were intended to be incorporated into the contract between the claimant and the respondent. I do not consider that this is a reasonable assessment of the situation between the claimant and the respondent. An officious bystander would not expect the claimant to locate, read, analyse and agree to arrangements set out under the Treasury Direction. Instead I find that a reasonable bystander would consider that the arrangements set out in the government guidance on the www.gov.uk website is what the respondent and claimant wanted to incorporate into the contract of employment. This is because the guidance is a public document which is easy to obtain through a simple Internet search, it is written in clear language which is designed to be accessible to the public. The claimant and the respondent read the guidance.

20. The CRJS guidance on the gov.uk website sets out two methods to calculate what to pay an employee with variable hours such as the claimant. The relevant extract from the gov.uk guidance is:

    "Employees whose pay varies

    If your employee has variable pay, how you work out their usual wages depends on their reference date. This section summarises the rules. You should also read the more detailed guidance in this guide.

    For employees with a reference date of 19 March 2020, calculate 80% of the higher of the:

    wages earned in the corresponding calendar period in a previous year
    average wages payable in the tax year 2019 to 2020."

21. The 'corresponding calendar period' referred to in the guidance is a month. The higher of the two figures calculated by the above two methods is to be used to work out the usual wages.

22. The respondent accept that it used the preceding three months earnings commencing on the date of contractual variation to calculate the monthly average earnings. The respondent's evidence was that their finance director had decided on this period because they have such a large number of casual workers and it was too complex to take a different reference period. I am also aware that a three month period can be used to calculate pay for certain purposes under the Employment Rights Act 1996. However this was not communicated to the claimant. There was in fact no mention of it to the claimant despite him chasing for several months to understand the basis on which the calculations had been made. I considered that an officious bystander would not accept that this term could be implied into the contract. Instead the implied term is to calculate the average pay by reference either to wages earned in the corresponding month in the previous year or average wages as set out in the guidance.

What should be included in the corresponding calendar period or average wages payable?

23. This requires consideration of the respondent's argument that the claimant had two separate employments, one as a fitness instructor and one as a central bank worker. The respondent submitted that becomes the fitness instructor role ended on 29 December 2019 this employment ended payments under the employment could not be considered for the purposes of pay or earnings calculated after this date.

24. The claimant relies on the undisputed fact that he was paid parental leave pay on the basis of the aggregate of his earnings from two different roles under two different contracts with the respondent as evidence that the respondent had treated him as having one employment previously.

25. The respondent has accepted that, throughout its relationship with the claimant, the claimant has been employed.

26. I find that it would be artificial to analyse the claimant's arrangements as a series of different and separate employments for the purposes of determining his pay under the contract variations in light of the CJRS. I find that the different contracts of employment set out the terms that related to certain aspects of his employment that the claimant carried out. It was beneficial for the respondent to have a clear record of what certain arrangements were given their large number of employees and the different and in many cases small number of hours worked. However I do not accept that this creates an arrangement whereby there was separate employments.

27. I consider that this analysis is supported by the respondent using earnings from all the claimant's roles to calculate parental leave pay. It is also supported by the general tenor of the guidance on the gov.uk website which is that if there are choices, the choice most beneficial to the employee should be selected.

28. If I am wrong in the above, I find that there was an umbrella contract of employment under which any specific roles or duties carried out by the claimant fell. I make this conclusion on the basis that the claimant carried out a number of roles and had a number of different contracts for these roles but that at all times he was employed by the respondent.

29. Whichever of the above analysis are used the impact on the remaining part of my judgement is the same. This is because even if this was an umbrella contractual relationship the implied contractual term relating to the calculation of pay in accordance with the guidance would include, when calculating average monthly earnings, all the pay or earnings received by the claimant under the umbrella contract.

30. There is no reference in the guidance to limiting the pay that is used for the calculation to the arrangements under which the employee was working at the reference date. It is common for rates of pay, working hours and even roles to change at various points during employment. When these changes fall within

a reference period there are always some who are disadvantaged and some who benefit. The respondent made them argument that it would be absurd for the claimant's pay in respect of the fitness instructor role to be taken into account given that he no longer performed that role. I do not consider it would be absurd rather it is one of the consequences of a scheme that uses a reference period. An employee who had reduced their hours for whatever reason would equally benefit and an employee who had gone from part-time to full-time for example would be disadvantaged. Whilst it may not seem fair it is a natural consequence of using a reference period.

31. As can be seen from the wording above extracted from the gov.uk website the reference is to wages earned or average wages there is no provision to take into account changes to these wages which have occurred for whatever reason since the date they were paid.

32. In conclusion I find that the calculations of the claimant's pay must be made by reference to the earnings the claimant received in 2019 which includes all of his earnings from the respondent, i.e. it includes earnings from the fitness instructor role and earnings under the Central Work Bank.

33. The respondent accepted that if this was my conclusion the claimant's calculation of the amount he had suffered as from deduction from wages was correct.

34. I find that the claimant has suffered an unlawful deduction of wages in the amount of £2092.42

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Employment Judge Bartlett

Date: 20 April 2021

Sent to the parties on: ...11th May 2021..
THY

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For the Tribunal Office