Case number: 2603170/2020 (V)

EMPLOYMENT TRIBUNALS

BETWEEN:

Claimant		**Respondent**
Miss L Graham	And	Mr Ben Healey T/A The Blue Bell Inn

AT A FINAL HEARING

Held: At Nottingham and via CVP (Hybrid) **On**: 14 May 2021

Before: Employment Judge R Clark. (Sitting Alone)

REPRESENTATION
For the Claimant: Miss Graham in person (by CVP)
For the Respondent: Mr Healey did not attend and was not represented

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JUDGMENT

1. The claim of unlawful deduction from wages **succeeds**. The respondent shall pay to the claimant the sum of **£1,332.64.**

REASONS

1. Introduction

1.1 By a claim presented on 24 August 2020, following Early Conciliation between 19 July and 19 August 2020, the claimant claims arrears of pay arising out of her employment as "front of House" staff at the respondent's public house. The issues engage with an informal agreement to a period of furlough leave.

2. Preliminary issues

2.1 The respondent did not attend. A clerk made contact and was told Mr Healy would not be attending as he could not get transport due to his wife's health which meant she could not drive him. There was no application to postpone. It may not have made any difference if there had been as this is a final hearing that the respondent has successfully applied to postpone on two previous occasions. On 15 January it was postponed due to the respondent no longer having access to a stable internet connection to conduct the hearing via CVP. The format was therefore changed to hybrid for him to attend. On 18 March, it was again postponed due to the respondent being unwell due to apparent symptoms of Covid 19. Both applications were made by email at around 5:30 am on the morning of the hearing. Had there been an application, rule 30A of the 2013 rules of procedure would have applied requiring either consent to postpone for settlement or alternatively the identification of exceptional circumstances. Travel arrangements may well have fallen outside the scope of exceptional circumstances.

3. Evidence

3.1 On 3 December 2020 the parties were ordered to exchange and file any relevant documents to be relied on at the hearing by 8 January. The evidence produced is very limited.

a) Ms Graham has produced evidence in response to the order. She has then provided further evidence on two further occasions. One is a letter from HMRC, the other is her apprenticeship training agreement.

b) Mr Healy has not produced evidence.

c) I also have what the parties tell me in their ET1 and ET3.

3.2 That, together with what Ms Healey could add in evidence today is the sum of the evidence before me.

4. Facts

4.1 The respondent operates a public house under the name The Bluebell Inn. The hospitality sector has been significantly affected by Covid 19 and the associated lockdowns and restrictions. However, whilst those measures and challenges might alter the lens through which either parties' contractual rights and obligations may be viewed, it does not in itself absolve either of them from performance of those contractual obligations nor does it vary those obligations.

4.2 The claimant started working on a part time basis. This soon led to an offer of a full-time apprenticeship from 23 October 2019. The parties entered into a verbal contract of employment under which the claimant was employed as a front of house apprentice for 40 hours per week. The rate of pay was £200 paid weekly (£5 per hour)

4.3 IN January, the contractual hours were reduced to 30 per week. I reject the respondent's contention that the claimant asked to reduce her hours. I find this was imposed on her due to the January lull in the trade following the Christmas period. However, I find this variation was accepted by the claimant and the contract otherwise imposed was subsequently affirmed in its varied terms.

4.4 I find at the material time her gross rate of pay remained £5 per hour equating to £150 per week for the 30 hours week and the same net due to her low earnings (although I suspect there should have been some deductions for national insurance and employer's NI when she was earning at the rate of £200 per week). There were times when, by agreement, the claimant worked additional hours due to staff shortages sometimes returning to 40 hours but I find the contract remained at 30 hours.

4.5 Relatively recently, in these proceedings, the claimant has obtained a copy of her apprenticeship training agreement with a third party called the RNN Group and entitled an "apprenticeship commitment statement". This describes the employer and the employment and records the hours as 40 hours per week. I find this reflects the original agreement and not the varied contact. It does not have contractual force.

4.6 From 20 March 2020 public houses were required to close followed by the first national lockdown from 23 March. I find there was limited work available for the claimant as a result. The pub was limited to providing take-out food for a few hours a day only. For a period of around 2 weeks the pub closed completely whilst Mr Healey and his family self-isolated.

4.7 The claimant was laid off without a pre-existing contractual power to do so in what I find to be an informal furlough arrangement loosely based on the publicly understood terms of the Coronavirus Job Retention Scheme ("CJRS") that was then widely publicised. It was not reduced to writing and did not actually comply with the CJRS as it had within it scope for the claimant to perform work from time to time at her normal pay. It is clear from the text messages I have seen during the relevant period that an agreement was reached that the claimant would be put on furlough leave - by which I find she agreed to furlough leave to be paid at 80% of contracted pay or in her case was £120 per week. However, the nature of this informal employment being as it was, I also find that there was agreement that the claimant would be available if and when there was some work to do and this was in fact performed from time to time during the period. The concept of flexible furlough did not come into the CJRS until 1 July 2020 which is after the relevant period. Had this been a scheme for which the employer may have obtained reimbursement, it is likely to have failed the HMRC conditions for reimbursement. However, I am not concerned with whether the respondent can recover the costs from HMRC or not, but only with what I can find or infer was agreed between the parties as a variation to their contractual terms. The claimant was therefore in both on an open ended period of agreed furlough leave but able to be called in to work at normal rates.

4.8 Some payments were received when work was done. It seems to me the claimant was entitled to the balance of any contractual hours not actually worked under the terms of the

informal furlough leave based at a rate of 80% of what would have been due, that is £4 per hour.

4.9 That further furlough payment was never received.

4.10 I have seen the respondent's schedule of payments throughout the relevant period of employment. Most of those coincide with the evidenced of the claimant. As such I accept the schedule is accurate. I accept the respondent's evidence and find as a fact that the pay date is paid two weeks in arrears. However, the employer's record keeping and formalities are poor. I have seen a letter from HMRC which supports the claimant's concern that she was not "on the books" in that HMRC did not have a record that she was an employee of the respondent. It follows from that that, over and above what I said about flexible furlough, Mr Healey could not have benefitted from the reimbursement under the CJRS and that may explain some of the evidence before me of him repeatedly contacting HMRC and no money being paid to the claimant. Again, that is an entirely separate matter to whether he and his employee agreed to furlough leave or not and on what terms.

4.11 I find the employment came to an end on 23 June 2020 when the claimant informed the respondent in a text message that she had another job to start the next day. This was sent in the course of trying to chase progress on her outstanding wages. I find the pay records before me, which end on or around this date, must therefore be extended by 2 weeks to reflect the two weeks in arrears principle.

4.12 I reject the contention that the claimant refused to undertake work that was available for her to do. She denies that and had clearly done so during the previous period and there is nothing to explain why that would have changed.

4.13 In the schedule I have seen and accepted, the relevant period of furlough covers 15 weeks. The claimant was entitled under the agreement to a payment of 80% of normal pay, that is £120 per week. That would give a total due of £1800 for 450 notional hours. Some weeks she worked and received some payments. The respondent must be credited with those at least in respect of the actual hours worked and at her normal rate of pay of £5. They total £584.20 for what the arithmetic shows was 116.84 hours work (based on £5 per hour). That leaves 333.16 hours to be compensated under the parties' informal furlough agreement at £4 per hour equating to £1332.64

4.14 I do not replicate the week by week schedule here and acknowledge that the question of what is properly due is strictly a matter to be assessed on each pay date. However, it is sufficient in the circumstances of this case to summarise the total period between 20 March and 9 July (two weeks after her resignation). There is a series of deductions covering each week in that period and no question of time limits therefore arises. The total sum properly due over that period was £1916.84. The claimant received £584.20 of that meaning there has been an unlawful deduction of £1332.64 which must now be paid.

4.15 There is no further claim for consequential loss.

4.16 There was, however, a second limb to the claimant's claim in that she suggested that all the above should be calculated on the basis of 40 hours per week and not 30. This stems from the recent receipt of the apprenticeship agreement which recorded the original agreement of a working week of 40 hours per week. There are two issues with this part of the claim that would lead me to reject it. I invited comment on them but the claimant accepted the premise and did not seek to pursue this much of the claim.

4.17 In short, the first issue was one of jurisdiction. The imposition of the change is said to occur during January 2020. The claimant commenced early conciliation on 19 July meaning the earliest date in time was 20 April. This claim is therefore out of time. It is a cause of action for which time can be extended under the "not reasonably practicable test" but there did not seem to be a basis to support that.

4.18 The second issue was one of substance. To the extent that it was a variation imposed on the claimant, it was nonetheless accepted by performance if not expressly so as to affirm the contract in those terms. I would therefore dismiss any further claim based on a higher contractual working week.

EMPLOYMENT JUDGE R Clark

DATE 14 May 2021

JUDGMENT SENT TO THE PARTIES ON

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AND ENTERED IN THE REGISTER

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FOR SECRETARY OF THE TRIBUNALS