EMPLOYMENT TRIBUNALS (SCOTLAND)

Case Number: 4106951/2020 (V)

Final Hearing held remotely on 29 April 2021

Employment Judge J Shepherd

Ms Deborah Halpern — **Claimant**
In person

Meltmongers Ltd — **Respondent**
Represented by:
Mr Alan McCormack
Solicitor

JUDGMENT

The judgment of the Tribunal is:

1. The Claimant's claim for unpaid holiday pay is dismissed.
2. The Claimant's claim for unlawful deductions from wages is dismissed.

REASONS

Introduction

1. The Claimant presented claims for unpaid holiday pay, unlawful deduction from wages in respect of a failure to pay the correct amount of furlough pay between 24 March 2020 and 20 July 2020, unpaid Statutory Sick Pay, and a claim for an award in respect of a failure to provide a written statement of employment particulars.

2. The Claimant appeared on her own behalf. The Respondent was represented by Mr McCormack, Solicitor.

3. The Claimant lodged a set of productions and gave evidence on her own behalf.

4. The Respondent lodged a set of productions and Mr Martin Boyle, Director for the Respondent, gave evidence on their behalf.

5. In discussion with the parties at the outset of the hearing, it was clarified that the issues relating to Statutory Sick Pay and holiday pay for the leave year 2020 had been resolved between the parties prior to the hearing. The remaining issues were confirmed by both parties as being:

    a. The claim for outstanding holiday pay accrued in the 2019 leave year.
    b. The claim for unlawful deduction from wages in respect of an alleged underpayment of furlough pay for the period 24 March to 20 July 2020.
    c. If any of the Claimant's claims succeed, should an award for failure to provide a statement of employment particulars be made?

Findings of Fact

6. The Tribunal makes the following findings of fact –

7. The Respondent describes itself as a 'fast casual grilled cheese American style restaurant' and at the time of the commencement of the Claimant's employment in June 2019 it operated from two shops in Edinburgh located at Dundas Street and Bruntsfield Place. The chefs' working hours for the Dundas Street shop were 9am to 3.30pm (6.5

hours) and 8.30am to 5pm at Bruntsfield Place (8.5 hours). At that time the Respondent had 10 or 11 employees.

8. The Claimant was initially employed by the Respondent from 11 June 2019 as a Head Chef, working full time on an annual salary of £24,000, working 40 hours a week over 5 days. There was no written contract of employment.

9. On 8 December 2019 the Claimant informed Mr Boyle that she had accepted a place at Edinburgh College and that she would be unable to continue in her position of Head Chef in full time employment from January 2020. In an email from the Claimant to Mr Boyle on 22 December 2019 the Claimant confirmed that her college course would commence on 20 January 2020 and that she would like to stay on as a part time employee thereafter. She explained that her college schedule would be Tuesday to Friday so she would be available to work as a chef for the Respondent for one day on the weekend and Mondays. She explained that she would prepare the rota with her working full time until Saturday 18 January 2020. The Respondent agreed that the Claimant could vary her working hours to part time, working Monday and one day at the weekend. She would normally work one day a week in each of the Respondent's shops. As the chefs worked different hours in each of the shops (6.5 at Dundas St and 8.5 at Bruntsfield Place) her normal weekly working hours would be 15 hours per week.

10. The Claimant would be paid an hourly rate of pay of £10 per hour once she commenced working part time.

11. The Claimant commenced her new, part time working hours on Monday 20 January 2020.

12. The Respondent's leave year ran from 1 January to 31 December. In 2019 the Claimant did not use her full annual leave entitlement accrued since the commencement of her employment. The Claimant was aware that the leave year ended on 31 December 2019, that she needed to take any accrued annual leave within that year, and that there was no agreement for her to carry leave over into the next leave year. The Claimant was responsible for organising the rota and felt a lot of responsibility for keeping the business working, being conscious that if she took annual leave, this would mean other employees would have to work additional hours. The Claimant was not refused any request for annual leave during 2019.

13. The Claimant queried payment for her unused holiday entitlement for 2019 with Mr Boyle and, on 11 March 2020, Mr Boyle emailed the Claimant stating "I'm somewhat confused by the holiday pay query given your awareness of company policy. You were in control of your own entitlement in 2019 and if you failed to request or take any outstanding then, to remind you as per the company policy, any holidays not taken do not carry over."

14. In February 2020 the Claimant took a week's holiday but was informed she would not be paid as she had not accrued sufficient holiday. In addition, she also had some shifts cancelled during February 2020 due to one of the shops being closed because of insufficient staff and was paid for 33.7 hours for the month of February.

15. In March 2020, the Claimant worked for the first week, she was then on sick leave from 10th to 23rd March, on Statutory Sick Pay, due to having to isolate because of suffering symptoms of Coronavirus.

16. On 24 March 2020 the Claimant was informed that, due to the business being forced to close as a consequence of the pandemic, she would be

furloughed on 80% of pay. This was confirmed in a written furlough agreement provided to her on 25 March 2020 that the Claimant subsequently signed to confirm her agreement to receive 80% of salary whilst furloughed. In March 2020 she was paid for 15.8 hours of work.

17. In April, May and June 2020, the Claimant was paid £520 per month, representing 80% of her monthly salary of £650 based on 15 hours of work per week at £10 per hour (£150 x 52 / 12 = £650).

18. On 6 July 2020 the Claimant was informed that she had been selected for redundancy due to the financial uncertainty caused by the pandemic and that her employment would terminate on Monday 20 July 2020.

Discussion and decision

The relevant law

19. A worker is entitled to 5.6 weeks annual leave in each leave year under Sections 13 and 13A of the Working Time Regulations 1998. Where a worker's employment is terminated during a leave year the worker is entitled to a proportion of that leave and a payment in lieu in respect of any leave not taken.

20. Section 13 of the Employment Rights Act ('ERA 1996') provides that an employer shall not make a deduction from wages of a worker employed by him unless the deduction is required or authorised by statute, or by a provision in the worker's contract advised in writing, or by the worker's prior written consent. Certain deductions are excluded from protection by virtue of s.14 or s.23(5) of the ERA.

21. Under s.13(3) ERA there is a deduction from wages where the total amount of any wages paid on any occasion by an employer is less than

the total amount of the wages properly payable by him to the worker on that occasion.

22. Under s.27(1) of the ERA 'wages' means any sums payable to the worker in connection with their employment including holiday pay.

23. S.23(2) of the ERA provides that an employment tribunal shall not consider a complaint of an unlawful deduction from wages unless it is presented before the end of the period of three months beginning with, in the case of a complaint relating to a deduction by the employer, the date of payment of the wages from which the deduction was made. Where a complaint is brought in respect of a series of deductions or payments the reference to deduction is to the last deduction in the series. In **Bear Scotland Ltd v Fulton and another [2015] ICR 221**, the EAT held that, whether underpayments constituted a series of deductions was a question of fact; that "a series" required sufficient similarity of subject matter to link each event factually with the next and a sufficient frequency of repetition.

Claim for holiday pay

24. The Claimant confirmed at the outset of the hearing that she had been paid for all outstanding holiday pay accrued in the 2020 leave year. The remaining claim related only to the accrued but untaken leave in the 2019 leave year.

25. The Claimant's employment did not terminate upon her change to part time hours in January 2020. The Claimant remained employed by the Respondent but the terms of her employment were varied by agreement. The Claimant was not therefore entitled to any payment in lieu of accrued annual leave upon termination of employment in 2019. Further, there was no entitlement or agreement for the Claimant to carry over the leave accrued in 2019 into the 2020 leave year. Reg 13 WTR provides

that leave may only be taken in the leave year in respect of which it is due and that it may not be replaced by a payment in lieu except where the worker's employment is terminated. There was therefore no statutory or contractual right for the Claimant to carry over the 2019 accrued leave and the failure of the Claimant to take that leave did not relate to the effects of coronavirus. Nor was there any statutory or contractual right for the Claimant to be paid in lieu of that untaken leave.

26. The Tribunal therefore finds that the Claimant is not entitled to any payment in lieu of untaken holiday in 2019 and the claim is dismissed.

27. Further, the Claimant's claim in this respect was brought outside of the relevant time limits. The Claimant did not receive payment in her payslip dated 31 January 2020 for any outstanding leave from the 2019 leave year. Any claim for unlawful deductions in that regard should have been brought within 3 months, by 30 April 2020. The Claimant was also made aware by the Respondent that she would not be paid anything in respect of her outstanding annual leave entitlement in 2019 by email of 11 March 2020. Even if that could arguably be the date from which time would start to run, the claim would still need to have been brought by 10 June 2020. The Claimant did not commence ACAS conciliation until after the time limit expired on 28 September 2020 and issued the claim on 2 November 2020. The Claimant explained that she had not brought the claim within the three month time limit as she had tried to get in touch with Citizens Advice but it was very difficult to get in touch with them. She also explained that because her employment with the Respondent was her only income source, she was afraid that bringing any claim might jeopardise that.

28. The Tribunal is satisfied that it was reasonably practicable for the Claimant to bring the claim within the required time limit, the claim for unlawful deduction from wages in respect of the outstanding holiday pay

was brought outside of the relevant time limit and would therefore also be dismissed on that basis.

Claim for arrears of pay during the period 24 March 2020 to 20 July 2020

29. The Claimant referred the Tribunal to the guidance entitled '*Claim for your employees' wages through the Coronavirus Job Retention Scheme*' that was published on the gov.uk website in April 2020 which reads, under the heading '*Employees whose pay varies*', "*If the employee has been employed for 12 months or more, you can claim the highest of either the:*

- *Same month's earning from the previous year*
- *Average month earnings for the 2019-2020 tax year*

If the employee has been employed for less than 12 months, claim for 80% of their average monthly earnings since they started work."

30. Having read this Government guidance for employers, the Claimant believed she was entitled to be paid average monthly earnings for the 2019 – 2020 tax year during the period she was furloughed. She had totted up her total earnings in her employment thus far, the majority of which was during the period that she had been employed in a full time salaried position, then averaged it over the total 10 months she had been employed. It was on this basis that she contended that she should have been paid a gross monthly sum of £1420.72 during furlough and that payments of £520 per month therefore amounted to an unlawful deduction from her wages.

31. The Claimant's suggested approach ignores the fact that, from 20 January 2020, the Claimant had suggested, and subsequently agreed to, an amendment to the terms and conditions of employment, reducing her agreed normal working hours from full time hours of 40 hours over 5 days per week earning a salary of £2000 gross per month, to working 2 days per week, working one day in each of the Respondent's shops, a

total of 15 hours at £10 per hour, £150 gross per week, or expressed on a monthly basis (£150 x 52/12), £650 gross per month.

32. The Government Guidance for employers claiming grants to assist with employee wages under the Coronavirus Job Retention Scheme does not impact upon the contractual position between an employer and an employee. The starting point for determining whether there has been an unlawful deduction from the Claimant's wages during the period of furlough is firstly to determine what wages were 'properly payable' to the Claimant under s.13(3) ERA. The Tribunal is satisfied that, as of 20 January 2020, the Claimant's normal working hours were 15 hours per week at £10 per hour, attracting wages of £150 gross per week. On 25 March 2020 the Claimant signed a furlough agreement accepting that she would be paid at a rate of 80% of her usual salary during the period of furlough from 24 March 2020. The wages properly payable to the Claimant during furlough were therefore £120 per week. Expressed as a monthly sum, this equates to £520 gross per month.

33. The payslips produced by the Respondent for the months April to June 2020 show that this is the rate at which the Claimant was paid during furlough. The Claimant's claim for unlawful deductions from wages with regard to the correct rate of furlough pay from 1 April 2020 to 20 July 2020 therefore fails and is dismissed.

34. The Claimant also states that an error was made in paying her for the final week of March 2020, that she should have been paid £120 gross furlough pay for that week, but was only paid an adjusted amount into her bank account on 15 May 2020 in the sum of £32.62.

35. Any claim for unlawful deduction from wages must be brought before the end of the period of three months beginning with the date of payment of the wages from which deduction was made, in this case being 15 May 2020. Any claim should therefore have been brought by 14 August 2020.

The Claimant did not commence early conciliation in respect of this claim until 28 September 2020, and did not issue the claim before the Employment Tribunal until 2 November 2020. The claim is therefore brought outside of the relevant time limits.

36. The underpayment the Claimant relies upon in respect of her wages for the last week of March does not form part of any series of deductions. The claim in respect of later deductions was brought on a different basis, namely that her employer had not calculated her furlough pay on the correct basis.

37. The Tribunal is therefore satisfied that this claim has been brought outside of the relevant time limits. For the reasons set out above in respect of the Claimant's holiday pay claim, the Tribunal is also satisfied that it was reasonably practicable for the Claimant to bring a claim in respect of the underpayment for the final week of March within 3 months of receiving the payment of £32.62 on 15 May 2020. That claim for the sum of £87.38 (£120 - £32.62) is out of time and this Tribunal does not have jurisdiction to consider it. That claim therefore fails and is dismissed

<u>Failure to provide statement of initial employment particulars</u>

38. The Respondent accepts that the Claimant did not receive a statement of terms and conditions of her employment. The Tribunal only has the power to award compensation under s.38 of the Employment Act 2002 where, upon a successful claim being made under any of the tribunal jurisdictions listed in Schedule 5 to that Act, it becomes evident that the employer was in breach of its duty to provide full and accurate written particulars under S.1 ERA. Compensation for breaching the provisions relating to an employer's obligation to provide a written statement can only be awarded in circumstances where the tribunal has heard (and found to be substantiated) one of more of the claims listed in Schedule 5

to the Employment Act 2002. As the Claimant's claims have been dismissed, no award falls to be made with regard to the failure to provide a statement of employment particulars.

Employment Judge: Jude Shepherd
Date of Judgment: 10 May 2021
Entered in register: 13 May 2021
and copied to parties