EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4108026/2020

Held in Dundee (by CVP) on 5 May 2021

Employment Judge B. Beyzade

Miss Shonagh Howe	**Claimant** **Represented by:** **Margaret Coleman** **Lay Representative**
Leisure and Culture Dundee	**Respondent** **Represented by:** **Jack Boyle** **Solicitor**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

1. The judgment of the Tribunal is that:

1.1. the complaint of unauthorised deduction from wages in respect of arrears of pay from March 2020 made by the claimant is not-well founded and is dismissed.

REASONS

Introduction

2. The claimant presented a complaint of unlawful deduction from wages (arrears of pay from March 2020) which the respondent denied.

3. A final hearing was held on 5 May 2021. This was a hearing held by CVP video hearing pursuant to Rule 46. I was satisfied that the parties were content

to proceed with a CVP hearing, that it was just and equitable in all the circumstances, and that the participants in hearing were able to see and hear the proceedings.

4. The parties prepared and filed a Joint Inventory and Bundle of Productions in advance of the hearing consisting of 105 pages. The claimant prepared and submitted a Schedule of Loss, which was updated to 1 May 2021.

5. At the outset of the hearing the parties were advised that the Tribunal would investigate and record the following issues as falling to be determined, both parties being in agreement with these:

(i) Is the claimant entitled to pay arrears from March 2020?

6. The claimant confirmed that her claim was for unlawful deduction of wages, the relevant provisions for which are set out in section 13 of the Employment Rights Act 1996 ("ERA 1996") and the Tribunal set out the following questions which require to be determined:

a) Were the wages paid to the claimant less than the wages she should have been paid?

b) Was any deduction required or authorised by statute?

c) Was any deduction required or authorised by a written term of the contract?

d) Did the claimant have a copy of the contract or written notice of the contract term before the deduction was made?

e) Did the claimant agree in writing to the deduction before it was made?

f) How much is the claimant owed?

7. The claimant gave evidence at the hearing on her own behalf. The respondent did not call any witness evidence.

8. The respondent was represented by a solicitor and the claimant were represented by a lay representative (who was the claimant's mother). Both parties made closing submissions.

Findings of Fact

9. On the documents and oral evidence presented the Tribunal makes the following essential findings of fact restricted to those necessary to determine the list of issues -

10. The claimant was employed by the respondent from 10 April 2017. The claimant was employed by the respondent as a lifeguard at Olympia Leisure Centre in Dundee. Although she was a lifeguard, the claimant would also be required to carry out cleaning duties in the respondent's changing village. The claimant's manager would be one of three duty managers (Amy Carmichael, Ian Hendry, and Phil Blackwood), depending on who was assigned to work during the claimant's shifts.

11. The claimant's working hours varied depending on the availability of shifts during a particular week. On Saturday mornings at 8.00am she would contact the Duty Officer and the claimant's shifts for the following week would be agreed with her.

12. During her shifts, the claimant was required to spend 40 minutes working on the pool at one time, following which she could come off the pool. However, during her shifts, she was always on call and she may have been required to carry out cleaning.

13. The claimant was a full-time student, although she had a few days off from her studies. On or around 31 August 2017 the claimant became a casual member of staff working for the respondent on days when she was not required to attend university where there were available shifts that had been agreed.

14. Between 6 April 2019 and 5 April 2020, the claimant was paid an average of £792.00 per month. As the claimant's earnings were below the income tax threshold, the claimant's net and gross pay were the same.

15. The claimant was entitled to receive her normal contractual pay for any shifts that she agreed to work up to and including 23 March 2020.

16. At this point it is necessary to recall what was happening around that time. On 23 March 2020, the UK Government put the country into 'lockdown' because of the COVID-19 pandemic. On that day, the government said that people were going to be required to stay at home and work at home. All but essential workers were required, by law, to stay at home. There were only limited exceptions, such as for exercise and the purchase of essential items. It was a criminal offence to be outside if an exception did not apply. Social distancing of 2M had to be observed, apart from in respect of people living in the same household.

17. The COVID-19 pandemic is generally recognised to be the greatest peacetime emergency that this country (and indeed, the world) has ever faced. It has already caused the biggest shrinkage in the UK's economy on record, and its effects are likely to be felt for generations to come. Accordingly, the world shifted on its axis on 23 March 2020 and the government introduced the Coronavirus Job Retention Scheme to assist employers with payment of employees' pay and to retain employees who may otherwise have not retained their employment.

18. The respondent provided leisure and cultural services in Dundee, which was likely to suffer because of the pandemic and there was a substantial period during which the respondent's services had to be closed. The respondent experienced a significant reduction in business that resulted from the Government's advice to members of the public to work from home and to socially isolate because of Coronavirus, and certain services which were required to be closed.

19. In acknowledgment that the situation had changed the respondent sent correspondence to the claimant dated 22 April 2020 proposing to pay the claimant pursuant to the Coronavirus Job Retention Scheme. The letter summarised the respondent's position, the fact that from 24 March 2020 the claimant will no longer be required to work. The letter stated:

> *"You will be treated as having been placed on 'Furlough Leave' from **24th March 2020**. This means that your agreement to work on a casual basis will continue, but you are not required to work.*
> *Your Furlough Pay will be based on your average earnings for the period January to March 2020 and you will be paid 100% of this average figure. Your Furlough Pay will be subject to deductions for tax and employee national insurance contributions and employee pension contributions*."

20. The letter advised that the claimant's furlough leave would end when the Coronavirus Job Retention Scheme was closed (expected at the time to be end of June 2020), or if the respondent were no longer able to claim under the terms of the said scheme, or if the respondent required the claimant to return to work. If the claimant were still on furlough leave when the scheme ended, the respondent would keep the claimant on its workers list until such time as the claimant advised the respondent otherwise.

21. Additionally, the same letter indicated as follows:

> "*It is essential that we have a record of your agreement to the terms of this letter as an indication of your agreement by 27th April 2020 in order to place you on Furlough Leave. Please confirm your agreement by signing this letter electronically."*

22. The claimant duly signed the letter dated 22 April 2020 on 23 April 2020 and returned the same to the respondent. The letter was signed by the claimant, dated and the words "Casual Employee" appeared beside the claimant's signature.

23. Accordingly, the claimant was placed on furlough leave by agreement with effect from 24 March 2020. From this date the respondent would pay the

claimant at the rate of 100% of her average earnings from January to March 2020 (80% to be claimed from the Coronavirus Job Retention Scheme and 20% to be paid by the respondent).

24. On 12 May 2020, the claimant sent an email to Steve Welsh stating that the furlough guidelines were not being followed by the respondent. The claimant advised that with the furlough scheme being extended to October 2020 she could not afford to be paid based on the present calculation.

25. A number of correspondences followed between the parties, and in addition, Helen Meldrum, GMB Scotland Organiser sent an email to Judy Dobbie, Acting Director Leisure & Culture/Acting Managing Director L&CD on 19 May 2020 expressing that GMB Scotland could not support the respondent's furlough arrangements and that these were a clear departure from government guidelines. A meeting was held on 22 May 2020 which was attended by representatives from Unison, Unite, GMB and employees of the respondent.

26. The claimant sent an email on 01 July 2020 to Stewart Hosie to raise her concerns about her furlough pay. This email was forwarded to Gregory Colgan on 08 July 2020 and thereafter to Judy Dobbie.

27. A formal grievance was sent by the claimant to Tracy Edgar by email dated 14 July 2020.

28. A reply was sent by Judy Dobbie dated 14 August 2020 advising the claimant that the respondent had decided to pay casual workers furlough pay based on 100% of the three-month average between 1 January 2020 and 31 March 2020, that this meant that the respondent would be covering 20% of the costs of this, and she confirmed that the claimant was a casual worker and therefore she could not raise a grievance. Following further correspondences between the parties, Judy Dobbie confirmed this decision in an email sent to Stewart Hosie on 03 November 2020.

29. According to the claimant's payslips dated 30 April 2020 and 30 November 2020, the claimant worked during the months of April 2020 and November

2020 and in respect of the said months she was paid according to the hours that she worked.

Observations

30. On the documents and oral evidence presented the Tribunal makes the following essential observations on the evidence restricted to those necessary to determine the list of issues –

31. The Claimant suggested that in her email correspondences sent on 12 May 2020 (and thereafter) she told the respondent she disagreed with being placed on furlough leave based on the arrangements for calculating her reference salary between January-March 2020 that the respondent used. The claimant also gave evidence that she did not believe the furlough leave agreement between her and the respondent was valid, that the respondent was not following Government guidance, and that she was made to sign the agreement after false statements were made to her. There was no suggestion that the employment contract had been reduced and thereby she set it aside (in any event the Tribunal would have no jurisdiction to hear a reduction claim, and this would normally be brought in the Sheriff Courts as a plea exception and such a claim is not properly set out in the pleadings). According to the correspondence dated 22 April 2020 the correct furlough payments were made to the claimant from 24 March 2020.

32. The totality of the evidence and the parties' conduct suggests that the furlough rate of pay was due to be paid to the claimant from 24 March 2020.

33. Had the claimant declined the respondent's proposed furlough arrangements on 22 April 2020, the claimant would have received no pay at all during the periods in which she did not work. This was because the claimant worked on a casual and as required basis and the claimant would not receive pay where she was not assigned to work any particular shift. While the respondent's premises were closed due to the Government's restrictions the claimant was not due to be paid any amount, but for the furlough arrangements that were agreed between the parties.

Relevant law

34. To those facts, the Tribunal applied the law –

35. Section 13 of the Employment Rights Act 1996 ('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 workers contract advised in writing, or by the worker's prior written consent. Certain deductions are excluded from protection by virtue of s14 or s23(5) of the ERA 1996.

36. A worker means an individual who has entered into or works under a contract of employment, or any other contract whereby the individual undertakes to personally perform any work for another party who is not a client or customer of any profession or business undertaking carried on by the individual (s230 15 ERA 1996).

37. Under Section 13(3) 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.

38. Under Section 27(1) of the ERA 1996 "wages" means any sums payable to the worker in connection with their employment.

39. A complaint for unlawful deduction from wages must be made within three months beginning with the due date for payment (Section 23 ERA 1996). If it is not reasonably practicable to do so, a complaint may be brought within such further reasonable period.

40. Emergency legislation (Coronavirus Act 2020) was passed by the House of Commons without a vote on 23rd March 2020 and became law on 25th March 2020. There followed a raft of secondary legislation including legislation which required all but essential businesses to close and severely restricted the ability of people to go to work and to travel.

41. The starting point is that contracts of employment which give rise to the entitlement to pay are a matter of contract: based upon an agreement

between the parties, employer, and employee, although it is recognised that those two parties rarely have the same bargaining power. Many forms of employment protection have been established by Parliament over the years to ensure that employers deal properly and in accordance with minimum contractual entitlements with their employees. In short, employers will not be acting lawfully if they act on a unilateral basis. The statutory provisions dealing with the relevant employment protection rights are set out in Part II of the ERA 1996, particularly at Sections 13, 14, 23 and 24, for the unlawful deduction from wages claims. The Tribunal had regard to its overriding objective at Rule 2 of the Employment Tribunals Rules of Procedure 2013 to deal with cases fairly and justly.

42. The Covid-19 pandemic has caused 2020 to be an exceptional year in terms of employment with the Chancellor of the Exchequer announcing his Coronavirus Job Retention Scheme in March 2020. However, that scheme is not a statutory arrangement but gives direction and guidance from the Government making arrangements for employers to receive reimbursement or advanced payment from the Treasury covering 80% of the normal wages of eligible employees and workers put on furlough with their agreement given the exceptional circumstances of the virus and national lockdown. The original scheme announced on about 19 March 2020 was to cover the months of March, April and May and was soon extended to cover June 2020 with a further scheme and greater flexibility introduced from July 2020 onwards. The original scheme involved employees not working or attending for work but still receiving the reduced 80% payment (unless the employer topped that up to full wages). There was no entitlement for an employee to be placed on furlough; it needed to be specifically agreed between the employer and employee and the provisions of the scheme were such that only the employer had direct dealings with HMRC.

43. Strictly, the effect on the individual contract of employment between employer and employee was an agreed variation of the contract whereby the employee received just the 80% wages (up to a limit of £2,500.00 per month, unless the

employer paid in full) and the employee was required not to do work. All other existing employment protection rights continued unchanged.

44. In the course of submissions, the respondent's representative drew the Tribunal's attention to the following authorities all of which the Tribunal found informative:

    (a) Meena Agarwal v Cardiff University [2018] EWCA Civ 2084;

    (b) Marks and Spencer PLC v BNP Paribas [2015] UKSC 72: and

    (c) Mr A Besong v Connex Bus (UK) Ltd UKEAT/0436/04/RN.

45. In addition, the Tribunal was asked to consider the decision of the Leeds Employment Tribunal on 17 November 2020 in *Mrs M Ferguson v Tuck Inn Café UK Ltd Case No 1803798/2020 (V)*. Although, this is another Employment Tribunal decision and therefore it is not binding upon this Tribunal, the Tribunal read the decision and the relevant section to which it was referred.

Discussion and decision

46. On the basis of the findings made the Tribunal disposes of the issues identified at the outset of the hearing as follows –

47. Whilst the claimant (like many others) may not have felt she had much alternative, the Tribunal concluded that the proper interpretation of the facts was that she had agreed a variation of her contract of employment: to be put on furlough backdated to 24 March 2020 when this was offered to her by her employer, the respondent, on 22 April 2020. She did not challenge the respondent's letter of 22 April 2020 (she signed and returned this to the respondent on 23 April 2020 indicating her acceptance of the varied terms) and the variation is further evidenced by the payments to the claimant eventually of 100% furlough wages from 24 March 2020 onwards. The respondent was clearly not entitled unilaterally to put the claimant on paid or unpaid furlough.

48. It is ascertainable from the terms agreed by the claimant on 23 April 2020 that she agreed to be on furlough until the end of the Coronavirus Job Retention Scheme, until the respondent could no longer make a claim pursuant to the terms of the said Scheme or until the respondent required the claimant to return to work. The claimant thus agreed to be on furlough leave until one of those three events transpired and she acted in reliance on the respondent's letter of 22 April 2020. She did not repudiate, she accepted payments following receipt of the said letter, she did not work (except during April 2020 and November 2020 in respect of which she was paid for the hours she worked), so there was clearly ample evidence from which to infer the claimant accepted she was on furlough leave pursuant to the terms agreed on 23 April 2020 from 24 March 2020 in any event.

49. The Tribunal was grateful to the claimant, the claimant's representative, and the respondent's representative for their clear and helpful submissions. Mr Boyle submitted that whilst the respondent accepted that the claimant was a worker for the purposes of her unlawful deduction of wages claim and that furlough payments did amount to wages, the terms of the Coronavirus Job Retention Scheme and the mechanism and options available to the respondent to claim a particular amount from the Government under the scheme are a distinct matter not giving rise to any right by the claimant to make a claim under section 23 of ERA 1996. Accordingly, he submitted that the Treasury Direction did not confer any contractual rights or rights of enforcement. He referred to paragraph 37 of the Leeds Employment Tribunal's decision cited above. In his submission, for the claimant's furlough pay claim to succeed, the Tribunal would have to imply a term into the agreement requiring the respondent to calculate the claimant's pay based on a 12-month average, and there was no basis for the Tribunal to imply such a term. He stated that the letter at pages 53-54 reflected a clear and unambiguous agreement by the claimant to the respondent's furlough arrangements and scheme, and that without such agreement the claimant would have received nil remuneration. In the alternative, he invited the Tribunal to dismiss the claim in respect of the months in which work were carried out by the claimant, namely in April and November 2020. The Tribunal

found that there was no basis to imply a contractual term, where there were clear express terms in the agreement between the parties in relation to furlough pay and the determination thereof.

50. The claimant's submissions focussed upon the fact that the respondent erred by calculating her furlough pay based on the three-month average paid to her between January – March 2020. At the time of agreeing to the respondent's furlough terms, the claimant stated that she was advised that the Trade Unions were consulted and supportive, and that this was the best way forward. The claimant discovered subsequently that this was not the case. The claimant referred to paragraph 7.2 of the Treasury Direction. The claimant also submitted that she was required to agree to a term that was to her detriment and to legislation, setting out her belief that the terms of the respondent's furlough scheme (which were agreed by the claimant on 23 April 2020) did not match the terms of the Coronavirus Job Retention Scheme. This was clearly an erroneous belief as the terms of the said scheme are not relevant to the respondent's obligation to pay wages and the said scheme applies to the obligations between the respondent and HMRC.

51. The claimant contended that the wages that were paid to her during her furlough leave were less than her entitlement, that this difference in pay was not authorised by statute, she signed the respondent's furlough leave terms but that these were prepared without Trade Union agreement, and she contended that the terms of the furlough agreement (agreed by the claimant on 23 April 2020) were not valid.

52. The claimant claimed £7540.93 (updated to 1 May 2021), and her Schedule of Loss provided the breakdown in relation to the said amount claimed by her.

53. Given the circumstances and on the evidence, it is reasonable and proper to infer that the claimant was on furlough and thereby entitled to receive pay at the agreed furlough rate from 24 March 2020.

54. The Tribunal concluded without hesitation that, on the evidence, the claimant, did not prove that any pay arrears were due to be paid to her by the

respondent. The Tribunal were satisfied that the furlough arrangements of the respondent set out in the respondent's letter dated 22 April 2020 were agreed between the parties and that the respondent made all payments that were properly payable to the claimant in respect of 24 March 2020 and thereafter.

Conclusion

55. The claimant's claim that the respondent has made an unlawful deduction of wages in the sum of £7540.93 fails for the reasons set out above and is accordingly dismissed.

I confirm that this is my judgment in the case of Miss Shonagh Howe -v- Leisure and Culture Dundee 4108026/2020 and that I have signed the Judgment and Reasons by electronic signature.

Employment Judge: **Beyzade Beyzade**
Date of Judgment: **01 June 2021**
Date sent to parties: **02 June 2021**