



# EMPLOYMENT TRIBUNALS

**Claimant:** Mrs K Buono

**Respondent:** Hobbs Ltd

**Heard at:** London Central (remotely by CVP)  
**On:** 27 May 2021

**Before:** Employment Judge Heath

## Representation

Claimant: Mr K Harrison (USDAW)

Respondent: Mrs L Piesley (solicitor)

# RESERVED JUDGMENT

1. The claimant was a variable rate rather than a fixed rate employee for the purposes of the Coronavirus Job Retention Scheme.
2. The respondent was entitled to take into account the claimant's sick pay in 2019-2020 in calculating her reference pay for the purposes of the Coronavirus Job Retention Scheme.
3. Unless the tribunal hears from the parties to the contrary, this claim shall be dismissed 21 day after this judgment is sent to the parties.

# REASONS

## Introduction

1. The claimant presented an ET1 on 25<sup>th</sup> of November 2020 claiming unlawful deductions from wages based on alleged underpayments under the Coronavirus Job Retention Scheme ("the CJRS" or "the Scheme"). The respondent denies the claims and asserts that it is paid all sums correctly in accordance with the CJRS.

## The procedure

2. The matter was listed for a final hearing before me with a time estimate of two hours on 27 May 2021. The respondent produced an agreed bundle of 239 pages. The claimant and Ms McGrath, the Respondent's Senior HR manager, produced witness statements. The representatives of both parties additionally provided helpful written submissions in advance of the hearing.
3. At the outset Mr Harrison indicated that he did not oppose the respondent's application to amend its Grounds of Resistance, and so I gave permission for this amendment. Mr Harrison also clarified a point of confusion that had arisen, and confirmed that the claimant was not bringing any discrimination complaint.
4. In attempting to clarify the issues at the start of the hearing it appeared to me that it might be difficult for me to determine whether the total amount of wages paid on any occasion by the respondent was less than the total amount of wages properly payable by them to the worker on such occasion. The reason for this was that the amount of alleged deductions during each pay period could not be determined on the information available today, and were subject to further investigation. These are the matters I would have needed to consider in order to determine whether or not the respondent had made unauthorised deductions from the claimant's wages.
5. At the heart of claimant's claim is the question of whether the respondent had been right to classify the claimant as a "fixed rate employee" under the CJRS. A subsidiary issue was whether the respondent, having classified the claimant as a variable rate employee, had been correct in the way it had factored in sick pay received by the claimant in 2019 in calculating her pay under the CJRS. In preliminary discussions, Mr Harrison and Mrs Piesley agreed that if I determined these two issues then it was extremely likely that the parties could agree financial figures between them.
6. I raised with the parties the power I had under rule 48 Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013 ("the ET Rules") to convert a final hearing into a preliminary hearing if I was satisfied that neither party would be materially prejudiced by the change. I raised with the parties the fact that I could then determine the above two issues as preliminary issues at the converted preliminary hearing. The parties were content with this approach. I considered that such an approach was in line with the overriding objective in that it was a proportionate and flexible way of properly considering the issues, while avoiding delay and saving expense.

## The issues

7. The issues I had to consider at the preliminary hearing were therefore as follows: –

- a. Was the claimant a fixed rate or a variable rate employee for the purposes of the CJRS?
- b. If the claimant was a variable rate employee, was the sick pay calculation made by the respondent in accordance with the CJRS?

## **Facts**

8. The claimant has been employed as a sales adviser by the respondent, a women's clothing, footwear and accessories retailer, at its Kensington store since 8 October 2013.
9. The following were provisions of the claimant's contract of employment, and indeed of all of the respondent's Sales Advisers: –

### **5. Hours of work**

*Normal working hours are 9am - 5pm which include an hour's break for lunch. If you work less than a full day, you will be entitled to a break of at least 20 minutes. Your breaks must be agreed with your Manager. Breaks will vary in accordance with hours worked and are unpaid. You will be expected to be flexible in your working arrangements, as the job will require you to work additional hours depending on the needs of the business. Wherever possible we will give you reasonable notice of any changes in your hours of work.*

### **6. Pay**

*"Your Base Salary is shown in Part A. Salaries payable monthly in arrears by bank transfer on or around the last working day of the month..."*

*In the event that you are required and authorised to work over time this will either be paid at your base hourly rate, or given as hours in lieu, at the discretion of your manager. Hours in lieu should be taken only when agreed with your manager. Unauthorised overtime will not be paid or given as ours in lieu.*

10. Part A of the contract contained the following "Base Salary (per annum): 3848.00" and "Hours of Work (weekly): 10:00".
11. At some point the claimant's hours increased to 20 hours per week, and she also received increased annual salary. At the relevant time prior to June 2020 the claimant's annual salary was £9277.16. This was equivalent to £773.10 per month. From June 2020 this was increased to £9414.50 per annum, or £784.54 per month.
12. Between 19 March 2019 and 16 February 2020 the claimant had high levels of sickness absence and was in receipt of company sick pay and statutory sick pay for periods [225] and [229]. The claimant worked 32 hours overtime in this period, according to questions put to Ms McGrath by Mr Harrison; her response was that this was a significant number of hours

when one takes her levels of sickness absence into account. The claimant's evidence, which was not challenged, was that she only occasionally worked overtime if her store was short-staffed, that she has been asked to work overtime on many occasions and refused without any form of sanction. I accept Ms McGrath's evidence that refusals to do overtime are not common.

13. As is well known, the coronavirus pandemic has had a devastating impact on the retail sector and its employees. The respondent's stores were closed with very little notice from 21 March 2020 and numerous staff members, including the claimant, were placed onto furlough. The respondent made use of the CJRS to ensure that staff on furlough received pay.
14. The government introduced Treasury Directions and published regularly updated guidance on claims under the CJRS.
15. The respondent had 1,166 sales advisers who worked a combined total of 129,115.5 hours overtime in 2019 at a total cost of £1,201,878.02 . This meant on average each of these employees worked 110.73 hours overtime in this period, which is equivalent to an average of £1030.77 per employee for overtime [224].
16. The respondent took the decision to classify the claimant, together with all sales advisers, as what have been termed "variable rate employees" to determine their furlough pay under the CJRS. Ms McGrath's evidence was that had the respondent not classified the sales advisers as variable rate employees their overtime would not have been taken into account in calculating their reference pay, and that they would have as a whole been worse off.
17. The respondent made furlough payments to the claimant calculating her payments in accordance with its understanding of the Treasury Directions and government guidance. In doing so they took account of the fact that she had received company and statutory sick pay for periods of 2019.

## **The law**

18. The Treasury, in exercise of powers conferred by section 71 and 76 of the Coronavirus Act 2020 issues The Coronavirus Act 2020 Functions of Her Majesty's Revenue and Customs (Coronavirus Job Retention Scheme) Direction on 15 April 2020. This is the "First Treasury Direction".
19. It contained a Schedule setting out the CJRS. The purpose of the CJRS is set out at paragraph 2 and includes at paragraph 2.1 "*The purpose of CJRS is to provide for payments to be made to employers on a claim made in respect of them incurring costs of employment in respect of furloughed employees arising from the health, social and economic emergency in the United Kingdom resulting from coronavirus and coronavirus disease*".

20. A Second Treasury Direction was issued on 20 May 2020 which amended and replaced the First Treasury Direction. There have been further Treasury Directions which have not made material differences to the matters at issue in this claim.

21. Paragraph 5 of the First Treasury Direction sets out costs of employment (known as qualifying costs) in respect of which an employer can make a claim under the scheme. They include costs relating to employees who have been paid in the 2019/20 tax year who have been furloughed, and who meet the conditions set out in paragraph 7.

22. Paragraph 7 of the First Treasury Direction sets out the conditions relating to qualifying costs and includes the following: -

***Qualifying costs – further conditions***

*7.1 Costs of employment meet the conditions in this paragraph if:*

*(a) they relate to the payment of earnings to an employee during a period in which the employee is furloughed, and*

*(b) the employee is being paid*

*(i) £2500 or more per month (or, if the employee is paid daily or on some other periodic basis, the appropriate pro-rata), or*

*(ii) where the employee is being paid less than the amounts set out in paragraph 7.1(b)(i), the employee is being paid an amount equal to at least 80% of the employee's reference salary.*

*7.2 Except in relation to a fixed rate employee, the reference salary of an employee or a person treated as an employee for the purposes of CJRS by virtue of paragraph 13.3(a) (member of a limited liability partnership) is the greater of:*

*(a) the average monthly (or daily or other appropriate pro-rata) amount paid to the employee for the period comprising the tax year 2019-20 (or, if less, the period of employment) before the period of furlough began, and*

*(b) the actual amount paid to the employee in the corresponding calendar period in the previous year.*

*7.3 In calculating the employee's reference salary for the purposes of paragraphs 7.2 and 7.7, no account is to be taken of anything which is not regular salary or wages.*

*7.4 In paragraph 7.3 "regular" in relation to salary or wages means so much of the amount of the salary or wages as:*

*(a) cannot vary according to any of the relevant matters described in paragraph 7.5 except where the variation in the amount arises as described in paragraph 7.4(d),*

*(b) is not conditional on any matter*

*(c) is not a benefit of any other kind, and*

*(d) arises from a legally enforceable agreement, understanding, scheme, transaction or series of transactions.*

**7.5 The relevant matters are:**

*(a) the performance of or any part of any business of the employer or any business of a person connected with the employer*

*(b) the contribution made by the employee to the performance of, or any part of any business*

*(c) the performance by the employee of any duties of the employment, and*

*(d) any similar considerations or otherwise payable at the discretion of the employer or any other person (such as a gratuity).*

**7.6 A person is a fixed rate employee if:**

*(a) the person is an employee or treated as an employee for the purposes of CJRS by virtue of paragraph 13.3(a) (member of a limited liability partnership)*

*(b) the person is entitled under their contract to be paid an annual salary*

*(c) the person is entitled under their contract to be paid that salary in respect of a number of hours in a year whether those hours are specified in or ascertained in accordance with their contract ("the basic hours")*

*(d) the person is not entitled under their contract to a payment in respect of the basic hours other than an annual salary*

*(e) the person is entitled under their contract to be paid, where practicable and regardless of the number of hours actually worked in a particular week or month in equal weekly, multiple of weeks or monthly instalments ("the salary period"), and*

*(f) the basic hours worked in a salary period do not normally vary according to business, economic or agricultural seasonal considerations.*

*7.7 The reference salary of a fixed rate employee is the amount payable to the employee in the latest salary period ending on or before 19 March 2020 (but disregarding anything which is not regular salary or wages as described in paragraph 7.3).*

*7.8 In paragraph 7.6 “contract” means a legally enforceable agreement as described in paragraph 7.4(d).*

23. The Second Treasury Direction amended paragraph 7.3 in that it added that benefits in kind and anything provided in lieu of a cash payment (such as a salary sacrifice scheme) would not be taken into account in calculating the employee's reference salary. It also amended paragraph 7.4 to set out the meaning of “regular” in respect of wages, as meaning such amount of wages as:

*(a) cannot vary according to a relevant matter except where the variation in the amount arises from a non-discretionary payment (see paragraph 7.19), and*

*(b) arises from a legally enforceable agreement, understanding, scheme, transaction or series of transactions*

Paragraph 7.19 sets out circumstances in which a variation in the amount of wages (including overtime payments) arise from non-discretionary payment.

24. The government also published guidance to help employers and employees understand and implement the Scheme, including **Calculate how much you can claim using the Coronavirus Job Retention Scheme**, published on 12 June 2020 (and updated 6 May 2021) [204-223]. I was referred to 2 parts of this guidance. On [208] the guidance states “HMRC will not decline or seek repayment of any grant based solely on the particular choice of pay calculation, as long as a reasonable choice is made”.

25. At [209] this guidance states: -

*“If your fixed pay employee has worked enough overtime to have significant effect on the amount you need to claim, you should calculate 80% of their usual wages using the method for employees whose pay varies. Examples of situations where overtime could have a significant effect on the claim amount include where the employees worked overtime:*

- *In the reference period*

- *In the corresponding calendar period to the pay period you're claiming for*
- *A lot, or often in the tax year up to the reference period"*

26. In this Guidance it further states under the heading **Returning from statutory leave**, *"if your pay varies, and you are furloughed on your return from statutory leave your employer should calculate the grant using either the: \* same months earnings from the previous year \* average monthly earnings for the 2019-2020 tax year"* [105]. Statutory leave includes sick leave.

27. I also drew the representatives' attention to a passage in *Harvey* Division BI 40.38 under the heading "Problem areas", which reads: -

*(iv) Another area of difficulty is determining whether an individual is a fixed-rate employee or a non-fixed-rate employee. Fixed-rate employment is defined to include a salaried employee with basic working hours who does not work overtime and is not contractually entitled to a bonus for work done in their basic hours. It is not however altogether clear whether an employee who is paid a bonus which relates to company, rather than individual, performance or an employee who occasionally works paid overtime will be classed as a fixed-rate employee.*

## Conclusions

28. I share the concerns of the editors of *Harvey* that provisions I am dealing with are not altogether clear. I have taken into account the parts of the Treasury Directions and to the guidance which were brought to my attention in making my decision. I have endeavoured to read this as a whole and having regard to the purpose of the Scheme.

29. Focussing on paragraph 7.6 of the Treasury Directions, the claimant uncontroversially satisfies the definition of a fixed rate employee under paragraphs (a) to (d) and (f). Paragraph (e) is more problematic, and bears repeating: *"(e) the person is entitled under their contract to be paid, where practicable and regardless of the number of hours actually worked in a particular week or month in equal weekly, multiple of weeks or monthly instalments ("the salary period")"*.

30. On the one hand it seems arguable that the claimant is "entitled" to be paid equal monthly instalments regardless of the number of hours she actually works per month. If she works overtime she is "entitled" to be paid additional sums in addition to the equal sums she is "entitled" to for her basic pay. The latter entitlement, it could be said, does not diminish the former entitlement and thus she falls within (e). On the other hand, it seems possible to characterise the claimant's employment is not falling within paragraph 7.6(e) in that she is entitled to monthly instalments of pay which are not equal when she has worked overtime, which depends on the number of hours she works.



31. I have looked at the guidance to help me resolve this difficulty, and that itself is not unproblematic. The guidance says that if a fixed rate employee works enough overtime to have a significant effect on the amount the employer needs to claim from the government then that employee's wages should be calculated the same way as a variable pay employee. It does not say, in terms, that a fixed pay employee becomes a variable pay employee, but that he or she should be treated as one.
32. I remind myself that the purpose of the Scheme is to allow employers to claim costs of employment of furloughed employees. The Scheme itself sets out a way of calculating employment costs which seek to compensate an employee for wages he would otherwise have earned but for the coronavirus pandemic. Clearly it is not a perfect scheme, and on the face of the guidance quoted above a degree of latitude is given to the employer in selecting a reasonable choice of calculation.
33. On balance therefore, reading paragraph 7.6 of the Treasury Directions together with the guidance I consider that an employee who has worked enough overtime to have a significant effect on the amount and employer needs to claim can be considered to fall outside of the scope of paragraph 7.6 (e), and can be treated as a variable pay employee.
34. I turn now to the question of whether the claimant's circumstances are such that she is considered a fixed pay employee or a variable pay employee.
35. As I stated above, Mr Harrison, in cross examining Ms McGrath, put to her that the claimant had only worked 32 hours of overtime in 2019/20. The respondent's case was that the average number of hours overtime worked by the respondent sales advisers in that period was 110.73. Ms McGrath, in evidence, said that given the significant levels of sickness absence of the claimant in this period 32 hours is a significant amount of overtime.
36. It is not known how many sales advisers are full-time or part-time, and it is not entirely clear quite how much time off the claimant had sick (though it was clearly a significant amount [225] and [229]), so there are a few variables at play. On any view, the claimant worked just under 1/3 of the average number of hours of overtime worked by the respondent sales advisers in a year when she had significant levels of sickness absence. I consider, therefore, that it could be said that she had worked enough overtime to have a significant effect on her pay.
37. It follows that I consider that the claimant could rightly be classified as a variable rather than a fixed rate employee for the purposes of the Scheme.
38. I turn now to the question of how the respondent took into account the claimant sick pay.
39. The claimant's case in Box 8.2 of her ET1 is that the respondent  
*"erroneously included time off sick and on sick pay the previous year and*

*working out my fellow pay which directly contradicts the government guidelines on furlough pay”.*

40. Guidance in respect of fixed rate employees would suggest that furlough pay should be calculated against salary before tax and not the pay rate they received whilst off sick. However, this does not apply to variable rate employees. The relevant calculation for variable rate employees is as set out at paragraph 26 above.
41. In the circumstances the respondent was entitled to take into account sick pay received by the claimant in calculating her furlough pay.

## **Disposal**

42. I understood from the parties that it was highly likely that the parties would be able to with the financial implication of my decision on the preliminary issue. My assumption is that my decision will mean that the claimant's claim will fall away as she has been paid all sums due to her based on my determinations. However, I will allow a period of time for either of the parties to contact the tribunal if I am wrong in that assumption. If no contact has been made within an appropriate timescale the claim will be dismissed.

Employment Judge **Heath**

10 June 2021\_\_\_\_\_

RESERVED JUDGMENT & REASONS SENT TO THE PARTIES ON  
15/06/2021...

FOR EMPLOYMENT TRIBUNALS