Case No: 2401374/2021

EMPLOYMENT TRIBUNALS

Claimant: **Daniel McFarlane**

Respondent: **City of Bradford Metropolitan District Council**

Heard at: **Manchester Via CVP** **On:** **9 June 2021 and 5 July 2021 (in Chambers)**

Before: Employment Judge Serr

Representation
Claimant: Mr McFarlane in Person
Respondent: Ms Sandhu, Solicitor

JUDGMENT

1. The Respondent did not make an unlawful deduction from the Claimant's wages and the Claimant's claim is dismissed.

REASONS

The Issues

1. By a claim form dated 27 January 2021 the Claimant brings a claim for unlawful deduction of wages. The Claimant in his form also sought resolution in respect of his status under IR35. The Claimant was informed that the Tribunal has no jurisdiction to deal with the issue of IR35 status and the Claimant indicated this issue would not be pursued.

2. The Claimant's claim is for unlawful deduction of wages under s.13 Employment Rights Act 1996 (ERA). He provided ad hoc services to the Respondent as an outdoor activity instructor and was paid per session. The activity centre was closed from March 2020 due to the Pandemic. The Respondent paid the Claimant for all the sessions that had been pre-booked prior to the closure but nothing else. The Claimant states that the Respondent was contractually entitled to pay him going forward based on average monthly payments for the previous 12 months using the Coronovirus Job Retention Scheme (CJRS). The Respondent denies this stating that it has paid the Claimant all it was contractually entitled to do.

3. The Claimant did not assert he was an employee within the meaning of s.230 (1) ERA. The Respondent conceded for the purposes of this claim that the Claimant was a worker within the meaning of s.230 (3) (b) ERA 1996 and the Tribunal proceeded on this basis.

The Procedure before the Tribunal

4. The Claimant represented himself and the Respondent was represented by Ms Sandhu, Solicitor. The Tribunal had before it a bundle of documents running to 249 pages and witness statements. It heard evidence from the Claimant himself and Lee Paskin, business development manager for the Respondent. The Tribunal permitted the parties to supplement their oral submissions on the day with further written submissions addressing the issues identified during the course of the hearing as well as some additional documents. These submissions have been considered by the Tribunal.

The Facts

5. The Tribunal made the following findings of fact necessary to resolve the claim, based on the balance of probabilities.

6. The Respondent operates outdoor activity centres which are hired by schools and youth groups. The Respondent employs outdoor education tutors to run outdoor activities for these hirers. From time to time the Respondent also required additional instructors on a more flexible basis. The Claimant was engaged from January 2018 as one of these additional instructors. The key purpose of the instructor role according to the job description was 1. to deliver safe, fun, and challenging programmes of outdoor learning activity to students and their accompanying staff, ensuring that the activities are both educational and adventurous appropriate to the needs of schools and other groups 2. To advise, guide and lead, acting as a source of inspiration and technical expertise 3. To ensure that activities are carried out in line with the Centre's operating guidelines and other procedures.

7. The Claimant was given a payroll number in January 2018 and placed at the request of the Respondent under the IR35 tax code. When the Respondent required additional instructors Mr Paskin, or the operational leads of each centre would normally email (or at short notice contact by phone) the Claimant to see if he was available. The Claimant would reply letting the Respondent know if he was available in which case, he would be booked for that session and he would confirm it in his own diary. The daily session rate was £138. The Claimant would present an invoice to the Respondent following completion of the sessions. The Claimant's invoice would be paid subject to deduction for PAYE and he received an annual P60. There was no requirement for the Respondent to offer a minimum number of sessions to the Claimant. There was no requirement on the

Claimant to work a minimum number of sessions. There was no written contract governing the Claimant's engagement with the Respondent.

8. Following the announcement of the first lockdown in March 2020 the Respondent closed its outdoor activity centres with effect from 19 March 2020. In the 12 months prior to this shut down the Claimant had invoiced and been paid £11 165 in fees at an average of £930 per month.

9. According to the evidence of Mr Paskin, if the hirer cancelled its booking with the Respondent, after the Claimant had been booked by the Respondent, the Respondent could in theory cancel the Claimant without having to pay a fee of any kind. It was a theoretical right because there was no incident of work having been booked and then cancelled during the Claimant's engagement with the Respondent. This is reflected in the view of Mr Paskin's email dated 19 March 2020 entitled 'freelance staff at Buckden House and Ingleborough Hall'. In that email Mr Paskin stated that the Respondent would only pay for work booked in until 3 April 2020 (although work had been booked in considerably beyond this period). In fact, as will be seen, the Respondent later agreed to pay for all work booked in prior to the shutdown.

10. On 30 March, the Claimant asked Mr Paskin by email if he would be paid under the CJRS. The answer initially given on 3 April by Mr Paskin was that the Claimant should seek financial support from the government under one of the established schemes and that furlough will not be available.

11. The Claimant continued to press Mr Paskin to be placed on the CJRS. He stated that guidance supported the assertion that he was eligible to be placed on the scheme.

12. The Tribunal has had sight of some of the guidance referred to. This includes Guidance notes on Payments to Suppliers for Contingent Workers impacted by COVID-19 issued by Cabinet Office March 2020 and an updated version in June 2020. It has also seen Action Note PPN 02/20 Procurement Policy Note – Supplier relief due to Covid -19 issued by Cabinet Office March 2020 and referred to in the said Guidance notes.

13. Mr Paskin on 8 April wrote to the Claimant by email:
The Contingent Worker document that I have seen is primarily written for Central Government Departments, though 'encourages other public sectors authorities' to take the same approach. I have sent this point back to finance and HR to see what the way forward can/should be. Before I commit to; no pay; 80% furlough; 100% pay; or whatever; I want to be absolutely certain that the Council has done everything properly and followed the correct guidance/advice. I don't want to tell you you'll get something/nothing and then have to tell you you'll get nothing/something

14. The Tribunal did not receive any evidence from the Respondent's finance or HR department in connection with the Guidance notes, nor did it receive any specific submissions from the Respondent on the correct interpretation of the Guidance notes. Nevertheless, the Tribunal accepts the evidence of Mr Paskin that the Respondent interpreted the Guidance notes to require it only to pay the Claimant for pre-existing bookings which could not take place because of the closure of the activity centres at 80% of the daily session rate.

15. On 29 April 2020 Ms Wilson, a commissioner of youth provisions within the Respondent, wrote to the Claimant and others by email. The email stated:

Apologies this has taken me a few days to sort, but I am now in a position to advise you on the Councils intended action in relation to IR35 contractors and how these are to be processed.

I understand that each of you have already been processed within council payroll systems for the work undertaken up to March 29th 2020, which took you up to the Easter holidays.

Please can I now ask that each of you submit an invoice directly to Lee Paskin (cc in either Tom or Jonathan as the operational leads) for the hours you were expecting to work between the period 20th April to 3rd May. You are to have a continuity of pay for these hours paid at 80% of whatever the individual hours were that you were contracted to work during this period. We will process this for the next payroll run to enable payments to be made to you as soon as practically possible.

We will then look to process each month, invoices on the same pattern for work you have been contracted to undertake until I am advised otherwise or centres are able to reopen.

16. The Tribunal finds that this was an assurance that the Respondent would honour all existing bookings with the Claimant made prior to the closure at 80% of the normal agreed rate (that is £110.40 per session)

17. On 29 April 2020 the Claimant presented an invoice for £662.40 representing 3 sessions booked for 22-24 April and 3 sessions booked for 29 April- 1 May. These sessions would have been charged at £828 in total. £662.40 represented 80% of the normal session pay.

18. On 10 June 2020 the Claimant was presented with a document headed 'agreement to be placed on furlough'. The covering email from Mr Paskin stated
Hello Dan,

Please see the attached letter. The detail is that the centre can place you on furlough for the work you would have done since late March. This doesn't affect your actual 100% pay which you have and will continue to receive but

does allow us to claim back the 80% proportion through the Coronavirus Job Retention Scheme.

Please reply by email confirming if you agree to be placed on furlough or not.

19. The reference to 100% pay was seemingly to the fact that the Respondent had now agreed to pay for bookings made prior to the closure at 100% of the normal pay figure, not 80% as originally indicated on 29 April.

20. The letter itself was dated 9 June 2020 (the furlough agreement) and stated:
AGREEMENT TO BE PLACED ON FURLOUGH – IR35

Name: Dan McFarlane

Personnel / Payroll Number: 11074575

Service: Activity Centres

The Council is seeking your agreement to be placed on furlough in accordance with the Government's Coronavirus Job Retention Scheme, due to the closure of Bradford Council Activity Centres and the significant loss of income to the Council as a result.

The aim of the Job Retention Scheme is to support employers with salary and other costs, so enabling them to retain people in work rather than having to consider making redundancies.

This letter sets out the provisions of being on furlough and is a temporary variation to your working arrangements in accordance with the Government's Coronavirus Job Retention Scheme.

We agree that from 24th March 2020, when you ceased being able to do your job and have not worked, you are to be designated as a furloughed worker until further notice.

The following provisions will apply for any period during which you are designated as a furloughed worker:-

Your Obligations

- *You must not have undertaken and will not undertake any work for us whatsoever. If you have undertaken any work for the Council, or a school, since the above date, you must let us know. This does not prohibit you from undertaking any unpaid voluntary work.*
- *You may be required to undertake training.*
- *You will be permitted to retain any Council equipment (such as a laptop or mobile phone), but you must not use it for work-related purposes. If you are not permitted to use the equipment for personal reasons, then you must not use it at all.*
- *You must ensure that you are in a position to recommence work immediately should you be recalled to work.*
  Pay

- *You will continue to be paid your full (100%) normal pay.*
- *The normal deductions for tax, national insurance, pension contributions (if appropriate) and any other normal deductions will continue to be made from your pay and the Council will continue to pay the normal employer contributions for national insurance and pension (if appropriate).*

Working Arrangements

- *You will remain on your existing contractual working arrangement with the Council, unless that is ended for a normal reason unconnected with being on furlough e.g. resignation, retirement etc.*
- *Your statutory and contractual rights are not affected.*
- *If you are due to take a statutory absence eg Maternity, Paternity, Adoption or Shared Parental Leave during the period of furlough, then this is unaffected and will commence on the due dates already notified.*
- *The Council will continue to consider redeployment opportunities in appropriate cases.*

Review

- *The Council reserves the right to amend the period of furlough subject to service need and in accordance with government / HMRC guidance we may make reasonable consequential amendments to this agreement, which shall take effect retrospectively if appropriate, by giving you notice of those changes in writing. Any changes will not impact on your existing working arrangements.*

- *Therefore, we will be keeping your circumstances under review in case the period of furlough needs to change or end.*

Ending of Furlough

Your furlough shall end on the earliest of the following events: -

(a) the government's Coronavirus Job Retention Scheme ending

(b) either you or the Council ceasing to be eligible for funding under that scheme

(c) the Council deciding to end your furlough and asking you to return to work, which we can do at any time and with immediate effect; or

(d) your working arrangement ending for any reason.

When your furlough has ended, you will return to your current work on your existing working arrangements. Should the Council need to make future changes to the service in which you work, you being placed on furlough will have no impact on your individual position in those circumstances. you to go back on furlough. If we do, it will be on the same terms as set out in this agreement.

Agreement

This letter, once it is signed and dated by you, will be a formal notification of your status as a furloughed worker.

21. Despite the form of the agreement and the reference to being placed on furlough, as per the covering email of Mr Paskin the Tribunal finds that the reference to full 100% normal pay was to the sessions that had been pre booked prior to closure and were no longer able to be proceeded with because of closure. It was not a reference to the average pay that the Claimant had earned with the Respondent prior to the pandemic.

22. On 10 June 2020, the Claimant sent an email to Mr Paskin accepting the furlough agreement.

23. After this the Claimant wrote to Mr Paskin to ask whether the Respondent would make payments beyond the date when sessions had been booked and then cancelled following the shutdown. His answer on 17 June by email was that the Respondent would only pay for work currently committed to (that is booked in with the Claimant) and that this would be up until about mid-July.

24. The Claimant was paid £6 624 for work booked prior to the closure of the activity centres but cancelled following the closure occasioned by the Pandemic. No further money was paid to the Claimant over and above that referable to the existing bookings. By a Claim form received on 27 January 2020 the Claimant claimed £6 030 being the difference between the sum paid to him to date of issue of the Claim Form and a sum he says he ought to have received, had he been placed on furlough under the CJRS at £930.41 per month, being the average monthly pay for the period 12 months prior to the ceasing of activities due to the pandemic.

<u>The Law</u>

25. The right not to suffer an unauthorised deduction is contained in section 13(1) of the ERA:
"An employer shall not make a deduction from wages of a worker employed by him unless—

(a) the deduction is required or authorised to be made by virtue of a statutory provision or a relevant provision of the worker's contract, or
(b) the worker has previously signified in writing his agreement or consent to the making of the deduction."

26. Section 13(3) ERA provides that:

"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 (after deductions), the amount of the deficiency shall be treated … as a deduction made by the employer from the worker's wages.'

27. Section 23 ERA gives a worker the right to complain to an Employment Tribunal of an unauthorised deduction from wages.

28. The words 'properly payable' in ERA 1996 s 13(3) refer to a legal, but not necessarily a contractual, entitlement on the part of the worker to the payment. Therefore, the preliminary stage is to consider whether there is a sum legally due. It is only if the answer to this question is in the affirmative that consideration should then be given as to whether there has been a deduction from that sum- *New Century Cleaning Co Ltd v Church* [2000] IRLR 27.

29. Employment tribunals may construe a contract where necessary to decide if a sum is properly payable- *Agarwal v Cardiff University* [2019] IRLR 657. In construing the contract of employment the Tribunal may consider both the individual contract and general rules of contract law- *Cleeve Link Ltd v Bryla* [2014] IRLR 86.

Conclusions

30. The Claimant's original contract with the Respondent required only that (i) the Claimant work the sessions that he agreed to undertake in advance (ii) that he undertake the duties of the role as instructed (iii) that he submit an invoice for the sessions that were worked (iv) that he be paid for a session that he in fact worked and submitted and invoice for at a rate of £138 per daily session subject to a deduction under PAYE.

31. The Tribunal is invited by the Claimant to find that following the closure of the activity centres the above position changed and the Claimant was contractually entitled to be paid a regular monthly amount referable to that earned by the Claimant with the Respondent prior to the closure of the activity centres in March 2020. The basis for this could only be either the 'furlough agreement' dated 9 June 2020 and/or Cabinet Office Guidance provided in the Procurement Policy Notes and Payments to Suppliers for Contingent Workers impacted by Covid 19.

32. The Tribunal finds that objectively viewed the contractual effect of the furlough agreement was that the Respondent only agreed to pay the Claimant for work booked in advance of the shut-down, but not undertaken due to the fact of the shutdown, at a rate of £138 per session. The reason for this is essentially three- fold. Firstly, the covering email of 10 June from Mr Paskin indicated this was the effect of the document. Secondly the

agreement stated that the Claimant will continue to be paid 100% normal pay. It does not refer to average pay. The reference to being "continue to be paid" can only mean what had been the practice prior to this point following the shut-down which was to pay the Claimant for work booked but not undertaken. Finally, the document refers to the Claimant remaining on his existing contractual working arrangement with the Council. The document does not purport to substantially alter the existing contractual arrangement with the Claimant.

33. The Tribunal has considered the Cabinet Office Guidance referred to by the Parties. Both the March 2020 and June 2020 version of Payments to Suppliers for Contingent Workers impacted by Covid 19 states at paragraph 20

20. How do you calculate payment for a Contingent Worker who only works on an ad hoc basis, i.e. On-demand?

This guidance is only applicable for those workers who were performing live assignments at the time at which they became unable to work as a result of COVID-19. In this event, conducting calculations to determine monthly and weekly pay for Contingent Workers who have ad hoc working patterns, Suppliers should conduct a retrospective view of the previous 12 weeks (or as many weeks as the Contingent Worker has been on assignment) to determine the average days or hours worked. This average should be used to underpin the calculation of 80% of gross pay to the £2,500 cap as outlined in above.

34. On the face of it that would seem to provide some support for the assertion that the Claimant should receive pay based on an average prior to the enforced closure. The Guidance note however does not directly apply to the Respondent as a Local Authority- see paragraph 1. The guidance seems to be directed at suppliers of contingent workers i.e., intermediaries between the end user contracting authority and the worker- see paragraph 8. The aims of the measures in the guidance include protecting "Supplier revenue with the intention of keeping them solvent so they remain a part of our ongoing supply chain in the future". The Guidance lay outside of the CJRS and the self-employed income support scheme- see paragraph 17.

35. As the Tribunal has found, the Respondent interpreted the guidance to require it to pay the Claimant only for bookings made in advance of the shutdown that could not be fulfilled. The Respondent paid 100% of the normal payment for these sessions rather than 80% (although it understood the Guidance to only require 80% to be paid). It may be that the Respondent's understanding is based on the reference to the requirement to be performing 'live assignments' at the time at which the Claimant became unable to work as a result of the Pandemic. The live assignments would be those already booked and accepted at the date of shut down. Such an interpretation would be reasonable and certainly not obviously incorrect or irrational.

36. The Tribunal does not find that the Cabinet Office Guidance provides a free-standing legal right to the Claimant to receive monthly payments from the Respondent based on his previous earnings during the enforced closure of the activity centres. Equally, the Cabinet Office Guidance does not require a term to be implied into the contract with the Claimant to that effect.

37. For these reasons the Respondent has not made an unlawful deduction of wages and the Claimant's claim is dismissed.

Employment Judge Serr

Date: 5 July 2021

JUDGMENT & REASONS SENT TO THE PARTIES ON

7 July 2021

FOR THE TRIBUNAL OFFICE