



# EMPLOYMENT TRIBUNALS

**Claimant:** Mr R Fonio

**Respondent:** Crook Hand Car Wash Ltd

**Heard:** Remotely (by video link) **On:** 2 July 2021

**Before:** Employment Judge S Shore

## Appearances

For the claimant: In Person

For the respondent: Mr M Haque, Solicitor

## RESERVED JUDGMENT

The decision of the Tribunal is that:

1. The claimant's claim of unauthorised deduction of wages is well founded and succeeds. The respondent will pay the claimant **£6,409.60** less any tax and National insurance that may be due.
2. The correct name of the respondent is Crook Hand Car Wash Ltd and the Tribunal's records are amended accordingly.

## REASONS

### Introduction

1. The claimant was employed as a Car Washer by the respondent from 20 January 2020 until 13 February 2021, which was the effective date of termination of his employment. The claimant started early conciliation with ACAS on 9 February 2021 and obtained a conciliation certificate on 1 March 2021. The claimant's ET1 was presented on 1 March 2021. The respondent is a car wash company.
2. The claimant presented claims of:
  - 2.1. Unauthorised deduction of wages for the period March 2020 to the end of his employment.

## **Issues**

3. A list of issues (questions that the Tribunal had to find the answers to) had not been agreed before the hearing, so I drafted one and sent it to the parties during a break in the hearing before I started to hear the evidence. No objection was raised by either party to the following list:

### **Unauthorised deductions**

- 1.1 Were the wages paid to the claimant between March 2020 and February 2021 less than the wages he should have been paid?
- 1.2 Was any deduction required or authorised by statute?
- 1.3 Was any deduction required or authorised by a written term of the contract?
- 1.4 Did the claimant have a copy of the contract or written notice of the contract term before the deduction was made?
- 1.5 Did the claimant agree in writing to the deduction before it was made?
- 1.6 How much is the claimant owed?

## **Law**

### **Unauthorised deductions from wages**

4. Sections 13 to 27B Employment Rights Act 1996 (“ERA 1996”) set out the statutory basis for a claim of unauthorised deduction from wages. Section 13 ERA 1996 provides in particular as follows:

*“(1) 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.*

*(2) In this section “relevant provision”, in relation to a worker's contract, means a provision of the contract comprised—*

*(a) in one or more written terms of the contract of which the employer has given the worker a copy on an occasion prior to the employer making the deduction in question, or*

*(b) in one or more terms of the contract (whether express or implied and, if express, whether oral or in writing) the existence and effect, or combined effect, of which in relation to the worker the employer has notified to the worker in writing on such an occasion.*

*(3) Where the total amount of wages paid on any occasion by an employer to a worker employed by him 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 for the purposes of this Part as a deduction made by the employer from the worker's wages on that occasion.*

*(4) Subsection (3) does not apply in so far as the deficiency is attributable to an error of any description on the part of the employer affecting the computation by him of the gross amount of the wages properly payable by him to the worker on that occasion.*

*(5) For the purposes of this section a relevant provision of a worker's contract having effect by virtue of a variation of the contract does not operate to authorise the making of a deduction on account of any conduct of the worker, or any other event occurring, before the variation took effect.*

*(6) For the purposes of this section an agreement or consent signified by a worker does not operate to authorise the making of a deduction on account of any conduct of the worker, or any other event occurring, before the agreement or consent was signified.*

*(7) This section does not affect any other statutory provision by virtue of which a sum payable to a worker by his employer but not constituting "wages" within the meaning of this Part is not to be subject to a deduction at the instance of the employer."*

5. "Wages" is widely defined. According to section 27(1) ERA 1996, it includes "any fee, bonus, commission, holiday pay or other emolument referable to his employment, whether payable under his contract or otherwise".

### **The Coronavirus Job Retention Scheme ("CJRS")**

6. The CJRS as it applied at all relevant times was set out in a Treasury Direction dated 15 April 2020. In relevant part it provided:

*"7.2 Except in relation to a fixed rate employee, the reference salary of an employee [...] 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. The CJRS sets out a relationship between the UK government and employers. It does not impact on the contractual relationship between employer and employee.

In order for an employer to pay an employee 80% of their wages, there has to be a written agreement in place that amends the employee's contractual right to be paid 100% of their wages.

### **Housekeeping**

7. The claimant was unrepresented. I advised him that the Tribunal operates on a set of Rules. Rule 2 sets out the overriding objective of the Tribunal (its main purpose), which is to deal with cases justly and fairly. It is reproduced here:

*The overriding objective of these Rules is to enable Employment Tribunals to deal with cases fairly and justly. Dealing with a case fairly and justly includes, so far as practicable —*

- (a) ensuring that the parties are on an equal footing;*
- (b) dealing with cases in ways which are proportionate to the complexity and importance of the issues;*
- (c) avoiding unnecessary formality and seeking flexibility in the proceedings;*
- (d) avoiding delay, so far as compatible with proper consideration of the issues; and*
- (e) saving expense.*

*A Tribunal shall seek to give effect to the overriding objective in interpreting, or exercising any power given to it by, these Rules. The parties and their representatives shall assist the Tribunal to further the overriding objective and in particular shall co-operate generally with each other and with the Tribunal.*

8. I tried to ensure that we answered any questions that the claimant had about the procedure of the Tribunal and the relevant law. We also attempted to deal with the hearing in a flexible way that maximised the possibility of achieving a just and fair result. An example was offering the claimant the opportunity to ask further cross-examination questions after witnesses had been asked questions by me and Mr Haque had been given the opportunity to ask re-examination questions of his witness.
9. The respondent produced a bundle of 87 pages. If I refer to pages in the bundle, the page number(s) will be in square brackets [ ]. Mr Fonio said he had not seen the bundle. Mr Haque said that the claimant had not been sent a copy because he did not have the claimant's address. I pointed out that the claimant's email address was on his ET1. I decided that the claimant could not have a fair hearing without sight of the bundle, so I arranged for a copy to be emailed to him from the Tribunal office and he was given an hour to read the papers.
10. When we reconvened, the claimant said he was happy to continue.
11. The claimant gave evidence in person and produced a witness statement that was 3 pages long [69-71].
12. Evidence was given in person on behalf of the respondent by its sole director, Osman Mohmoud, who produced a witness statement that ran to 10 paragraphs [1-2].

13. The respondent included witness statements from two of its other employees – Jozef Jakab [3] and Zsolt Jakab [6], but neither attended to give evidence. I can give very little weight to either statement because the witnesses did not attend and give Mr Fonio an opportunity to cross examine them.
14. The witnesses gave evidence on affirmation. The claimant went first and was cross examined by Mr Haque. Mr Osman was cross examined by the claimant.
15. At the end of the evidence, I heard closing submissions from Mr Haque and Mr Fonio. Because of the delay caused by the need to provide the claimant with an opportunity to read the bundle and the case taking longer than it had been estimated to last, I did not have time to consider my decision and deliver an oral judgment, so I reserved my decision.
16. The hearing was conducted by video on the CVP application and ran intermittently, with some technical issues. I am grateful to all who attended the hearing for their patience and good humour in the face of the technical glitches we encountered.

### **Findings of Fact**

17. All findings of fact were made on the balance of probabilities. If a matter was in dispute, I will set out the reasons why we decided to prefer one party's case over the other. If there was no dispute over a matter, I will either record that with the finding or make no comment as to the reason that a particular finding was made. I have not dealt with every single matter that was raised in evidence or the documents. I have only dealt with matters that I found relevant to the issues I have had to determine. No application was made by either side to adjourn this hearing in order to complete disclosure or obtain more documents, so I have dealt with the case on the basis of the documents produced to me. I make the following findings.

### **Agreed Facts**

18. The claimant was employed as Car Washer by the respondent from 20 January 2020 until 13 February 2021, which was the effective date of termination of his employment. The claimant started early conciliation with ACAS on 9 February 2021 and obtained a conciliation certificate on 1 March 2021. The claimant's ET1 was presented on 1 March 2021. The respondent is a car wash company that employed the claimant, Mr Osman and Jozef and Zsolt Jakab.
19. The respondent closed its business due to the pandemic lockdown on 23 March 2020 and remained closed until the claimant's employment ended.
20. It was agreed that the claimant worked 16 hours per week and was paid £610.40 gross per month. It was agreed that the claimant was never given a written statement of terms and conditions of employment as is required by sections 1(1) and 1(4) of the ERA 1996.
21. No evidence was placed before me that suggested that the claimant was ever notified or requested in writing to agree a reduction of salary to 80% of his usual pay, so I make a finding that no such agreement was made.

22. It was never disputed that the claimant was an employee of the respondent from 20 January 2020 to 13 February 2021.

Disputed Facts

23. The central dispute of fact in this case is that the claimant says that his place of work closed because of lockdown and that he was not paid any wages (whether furlough payments under the CJRS or as normal pay) from the end of February 2020 to 29 January 2021. The respondent's position is that the claimant was placed on furlough and received 80% of his wages until he resigned his employment to take up better-paid work in February 2021.

24. The respondent produced a number of documents in its bundle that it says show that the claimant received furlough pay. These included:

- 24.1. A WhatsApp exchange between Mr Osman and the claimant on 5 February in which the claimant acknowledged that he had "just" been paid £610.40 by the respondent [9];
- 24.2. Ten monthly wage slips in the name of the claimant covering the period April 2020 to January 2021 [19-24];
- 24.3. HMRC records confirming CJRS claims had been submitted by the respondent covering the periods 1 March 2020 to 1 April 2020 [29-32]; 1 May 2020 to 31 May 2020 [33-36]; 1 June 2020 to 30 June 2020 [37-40]; 1 July 2020 to 31 July 2020 [41-44]; 1 August 2020 to 31 August 2020 [45-48]; 1 September 2020 to 30 September 2020 [49-52]; 1 October 2020 to 31 October 2020 [53-55] (there was no page 56 in the bundle); 1 November 2020 to 30 November 2020 [57-59] (there was no page 60 in the bundle); 1 December 2020 to 31 December 2020 [61-62] (there was no page 63 or 64 in the bundle); and 1 January 2021 to 31 January 2021 [65-68];
- 24.4. A letter dated 23 June 2021 from the respondent's accountants [83];
- 24.5. An email from the respondent's accountants dated 23 June 2021 [84] with a summary of the totals paid to its four employees between April 2020 and March 2021;
- 24.6. An undated breakdown of the claimant's basic and furlough pay for the period April 2020 to January 2021 [85]; and
- 24.7. The claimant's P60 from the respondent for the tax year to 5 April 2021 [87].

25. I give no weight to the statements of Jozef and Zsolt Jakab because:

- 25.1. Neither attended to give evidence;
- 25.2. Neither statement was dated;
- 25.3. There was no credible explanation given for their absence. It was said that Jozef "could not make it" and that Zsolt had returned home. If Zsolt was in Hungary, there was nothing stopping him participating in a virtual hearing;

- 25.4. Whilst Jozef's witness statement was presented with a copy of his driving license, Zsolt's witness statement was presented with a copy of Jozef's Hungarian ID card;
  - 25.5. Both statements were word for word identical and ran to four paragraphs;
  - 25.6. The first paragraph added nothing to the evidence of the claimant that he was always paid in cash;
  - 25.7. The second paragraph confirmed that they had both been paid during furlough;
  - 25.8. The third paragraph alleged that the claimant had approached them to make a false statement against the respondent because they had been paid in cash and could "recover more money from [the respondent] by black emailing (sic) and threatening (sic) him by saying we will take further action against him as he has no proof of payment". This point was not put to the claimant in cross examination; and
  - 25.9. The fourth paragraph repeated the assertion that the witnesses had been paid furlough payments during lockdown.
26. I find the claimant's evidence on the main points that are relevant to his claim to be more credible than the of the respondent because:
- 26.1. The respondent's evidence in chief (Mr Osman's witness statement) was entirely silent on how he communicated the fact that his business was closing because of the pandemic and what the arrangements for payment were. I therefore find that the respondent had no legal right to require the claimant to go on furlough or to pay him only 80% of his usual wages;
  - 26.2. I find that the schedule of payments that Mr Osman says were paid to the claimant in paragraph 7 of his witness statements do not match the wage slips that were produced [19-24]. All those wage slips were for the same amount - £610.40 gross, with no deductions for tax or National Insurance. The schedule of payments had 8 payments of £488.32 (the last of which was in January 2021) and payments of £459.76 (March 2020), £427.28 (September 2020), and £366.24 (October 2020);
  - 26.3. I asked Mr Osman about the variable payments, but his explanation was that the government changed the CJRS and required employers to pay a higher percentage (which I find makes no logical sense in respect of the amount the claimant would receive) and that the accountants told him what to pay;
  - 26.4. I take judicial notice of the terms of the CJRS:
    - 26.4.1. From the start of the CJRS in March 2020 to August 2020, the UK government contributed 80% of wages and paid employers NI and pension contributions;
    - 26.4.2. From August 2020, employers had to start paying employers' NI and pension contributions;

- 26.4.3. From September 2020, employers contributed 10% of wages and the government contributed 70%; and
- 26.4.4. From October 2020, employers contributed 20% of wages and the government contributed 60%.
- 26.5. I therefore find that if the respondent's evidence about paying furlough pay to the claimant throughout the period from March 2020 to January 2021, the amount received by the claimant would have been constant. This finding seriously damages the credibility of Mr Osman's evidence;
- 25.3. I find the claimant's evidence that he was given a payslip in January 2020, when he started work, but did not receive another to be more credible than Mr Osman's evidence;
- 25.4. Mr Osman's statement at paragraph 10 said that the claimant's claim was lodged on 1 March 2021 (which is correct), and that he paid the claimant "a further cash of £610 in March 2021". I asked Mr Osman why his witness statement claimed to have made a payment that wasn't on his schedule of payments in paragraph 7, He said it was a typographical error and the money was paid on or about 5 February 2021, as evidenced by the exchange of text messages [9];
- 25.5. He confirmed that the payment around the end of January 2020/beginning of February 2021 was £610, but when he was asked why he had paid the money, Mr Osman said it was because the claimant had said he had no money;
- 25.6. When he was asked why he paid the claimant 100% of his average gross pay, Mr Osman said it was because he was generous. I find that less likely than the claimant's account that he had been chasing for some payment since March of the previous year;
- 25.7. I do not find that the claimant was paid anything by the respondent between February 2020 and the single payment of £610 in January or February 2021;
- 25.8. I find the documents produced by the respondent's accountant do no more than evidence that the respondent made claims under the CJRS in respect of all its employees, including the claimant. The documents do not evidence that the furlough pay received for the UK government was passed to the claimant;
- 25.9. I found the claimant's witness statement to be internally logical and cogent. He was cross-examined at some length by Mr Haque and I found his answers to cross-examination questions were consistent with his written evidence and logically consistent, both internally and when compared with the documents;
- 25.10. In his cross-examination, he explained that he was unaware of the CJRS until he read a discussion about it on a Facebook group. He went to the DWP and was told that he was not eligible for benefits because a claim was being made under the CJRS (which it was);
- 25.11. He says he pressed the respondent for payment without any success until late January 2021. I find that to be a credible account;



- 25.12. I find that it assists the claimant that when he was asked to provide a receipt for the £610, he did so immediately [9]. There was nothing stopping Mr Osman asking for receipts for previous payments, if they had been made; and
- 25.13. The claimant is not a lawyer, so I understand why he pressed some points that were not relevant to the issues that I had to decide, but his core evidence was more credible and complete than that of the respondent, which gave me the impression of being created after the event to meet the case brought by the claimant.
26. I find that the respondent did not have the right to put the claimant on furlough because there was no written agreement between them that gave the respondent such a right. I find that there was no written agreement between the parties that the claimant would accept 80% of his usual wage. I find that the claimant was entitled to his entire wage from 1 March 2020 to 13 February 2020.

### Applying the Findings of Fact to the Law and Issues

27. Using the list of issues above, I make the following findings:
- 27.3. I find that the wages paid to the claimant between March 2020 and 13 February 2021 were less than the wages he should have been paid?
- 27.4. No deduction was required or authorised by statute?
- 27.5. No deduction was required or authorised by a written term of the contract?
- 27.6. The claimant did not have a copy of the contract or written notice of the contract term before the deduction was made?
- 27.7. The claimant did not agree in writing to the deduction before it was made?
- 27.8. The claimant is owed **£6,409.60** less any tax and National insurance that may be due as calculated below. His claim is well-founded.
28. The calculation I make is based on the agreed figure for the claimant's average monthly gross pay - £610.40. He was not paid for 11 whole months (March 2020 to January 2021 and 13 days of February 2021, which is half a month's pay. I therefore calculate his gross entitlement to be  $11.5 \times £610.40 = £7,019.60$ . He has to give credit for the £610.00 paid in late January/early February 2021, which gives a final figure of **£6,409.60**.
29. As the respondent had no right to put the claimant on furlough, he is entitled to 100% of his wages, so I find that he is entitled to **£6,409.60** less any tax and National insurance that may be due.

Note: This has been a remote hearing. The parties did not object to the case being heard remotely. It was not practicable to hold a face to face hearing because of the Covid19 pandemic.

Employment Judge Shore  
5 July 2021