



EMPLOYMENT TRIBUNALS

Claimant: Ms T Gordon
Respondent: Huntress Search Limited
Heard: London South by CVP On: 28 July 2021
Before: Employment Judge Truscott QC

Appearances:

For the claimant: In person
For the respondent: Mr A Kang, Director

JUDGMENT

The claimant's claim of unauthorised deduction of wages is not well-founded and is dismissed.

REASONS

Preliminary

1. The claimant sought payment of £2048.54 on the basis that she had been in employment from 24 February 2020 to 24 May 2020 and had been underpaid that sum. The claimant presented a claim of unauthorised deduction of wages.
2. The respondent produced a statement of its position which is to be found at the front of the bundle. The claimant was given an opportunity to explain where she disagreed with what was said. She took the opportunity and explained the advice she had been given by HMRC,
3. There was one volume of documents to which reference will be made where necessary. The numbering in the judgment refers to the pages in the electronic bundle.
4. The material facts were not disputed.

Findings of fact

1. The respondent is a recruitment company.
2. The claimant completed her registration with the respondent [29-30] and agreed to the terms of the Temporary Worker Agreement (TWA) on 31 October 2019 [31-32]).
3. Clause 2.2 of the TWA states that “this agreement does not give rise to a contract of employment”. Clause 3.2 states that “the nature of temporary work means that there may be periods when no suitable work is available”. Clause 4.2 states that “the Temporary Worker is not entitled to receive payment from the Employment Business for time not spent on assignment”.
4. During the tax year 2019/2020, the claimant worked at various assignments at various pay rates and differing hours per day/week all under the TWA (Examples of assignment schedules can be found in pages 33-38). It is the nature of temporary work that the actual pay varies from one assignment to another and within the same assignment if the client decides to reduce the hours. There may also be periods during which she did not work.
5. The claimant’s latest assignment started on 24 February 2020 and was due to finish on 24 May 2020. The assignment schedule [37] confirmed the claimant’s hourly rate for the duration of her assignment for this end client, in accordance with the terms of the TWA. Even though the respondent advertised the temporary assignment as “temp to perm” on behalf of the client, the claimant entered a TWA with the respondent. The claimant’s assignment was terminated on 24 March 2020 due to Covid-19 [30-40].
6. The Coronavirus Job Retention Scheme was announced on 23 March 2020 however the initial guidelines issued by the Government did not address the particular circumstances of temporary workers’ eligibility to the scheme. Upon further Government updated guidance, the respondent decided to implement the Coronavirus Job Retention Scheme to its temporary workers under the Huntress Temporary Worker Furlough Agreement. It was not legally obliged to do so.
7. Mr H Beck, the respondent’s Operations Director, identified temporary workers who met the eligibility criteria and communicated to them accordingly. On 28 May 2020, Mr Beck emailed the Huntress Temporary Worker Furlough Agreement to the claimant [42-44]. The claimant confirmed her acceptance on the following day [41].
8. Clause 4 of the Huntress Temporary Worker Furlough Agreement states that the claimant agreed to be paid “80% of her average variable pay subject to a cap of £2,500 per month”. This is further explained in clause 6 and clause 13 which stipulates that the terms of the Temporary Worker Furlough Agreement intend to apply the rules of the CJRS and that “To the extent that this Furlough Agreement is inconsistent with the rules of the CJRS then this Furlough Agreement shall be deemed by the parties to be varied so as to be consistent with the rules of the CJRS”.
9. The claimant was placed on furlough from 25 March 2020 to 24 May 2020 being the anticipated end date of the assignment [46].
10. The claimant received her furlough pay under the Temporary Worker Furlough Agreement on 5 June 2020 and was issued a corresponding payslip [49].
11. The claimant requested payment of her accrued holiday after being informed of the

termination of her assignment, as it is usually the case. This was paid to the claimant on the 9 April 2020 and she was issued a payslip reflecting the payment made [48].

12. The request for and the payment of the claimant's accrued holiday took place after her assignment was terminated and whilst on furlough leave. Therefore, the holiday payment had no bearing on the calculation of the claimant's furlough pay.

13. The claimant raised her concerns on 3 June 2020 to Mr Beck [57] and escalated her complaint to Marie-Claire Bouchali, HR Manager on 15 June 2020 [77]. From 3 June 2020 to 25 June 2020, the respondent tasked three people, including Mendis Brown, former Payroll Manager, to independently review the method of calculation and each time agreed with the chosen method of calculation. This was explained to the claimant on several occasions, based on and quoting the Government guidelines.

Law

14. Section 13 of the Employment Rights Act 1996 ("ERA") gives an employee or a worker the right not to have unauthorised deductions made from their wages.

15. The UK Government introduced the Coronavirus Job Retention Scheme ("CJRS") in March 2020 and made subsequent amendments [58-71]. It is not legislation, it is a direction with guidance. It does not amend any existing law. Employees and workers had the same rights as before furlough.

DISCUSSION and DECISION

16. The guidance issued by the Government for the purpose of calculating furlough pay requires the respondent to take into account the Temporary Workers earnings for the tax year 2019-2020 during which the claimant had variable earnings under the TWA. The claimant's payslip issued on 3 April 2020 [47] which includes the last timesheet submitted shows the year to date earnings for the relevant tax year.

17. Because of the TWA, the method of calculation for the claimant's furlough pay under the Furlough Temporary Worker Agreement fell under the "Employees whose pay varies" heading [62-63]. The respondent based its calculation on the weeks in which the claimant was assigned work during the tax year 2019-2020, from 31 October 2019 to 24 March 2020 (end date of the claimant's last assignment) [78]. The calculation is based on total earnings of £4,210.21 in the tax year 2019-2020 [47] over 22 weeks from the first assignment on 31 October 2019 to last payment at the end of March 2020 results in a weekly pay of £191 .3. At 80% maximum furlough pay this amounted to £153.10 per week or £30.62 per weekday. This is consistent with the guidance issued by the Government. A key part of the guidance under the variable pay section states "Every day after the employee commenced employment with you is counted in making this calculation. This includes non- working days."

18. In the ET1 form, the claimant states that she was on a "set rate for the entire month she worked at St James Group Ltd", this is correct but it does not alter the fact that she was contracted under a TWA. The effect is that the calculation is based on the 2019/20 tax year rather than the employment from March 2020 to May 2020. The key point is that furlough does not affect the terms of the worker's contract. The contract is between the claimant and the respondent not between the claimant and St James Group Ltd.

Conclusion

19. The respondent applied the correct calculation for the purpose of determining the claimant's furlough pay and no further payment is due and no unauthorised deduction has been made.

Employment Judge Truscott QC

Date 29 July 2021