EMPLOYMENT TRIBUNALS

Claimant: Ms M Mones

Respondent: Lisa Franklin Limited

Heard at: London Central (via CVP) **On:** 9th July 2021

Before: Employment Judge Nicklin

Representation
Claimant: in person
Respondent: Mr D Franklin (Director of the Respondent)

Note: This has been a remote hearing. The parties did not object to the case being heard remotely. The form of remote hearing was V – video, conducted using Cloud Video Platform (CVP). It was not practicable to hold a face to face hearing because of the COVID-19 pandemic.

RESERVED JUDGMENT

1. The Claimant having not paid the deposit as ordered previously under Rule 39, the claim of unfair dismissal is struck out.

2. It is the judgment of the tribunal that the Respondent made the following unauthorised deductions from the Claimant's wages:

    a. A deduction of **£109** in October 2020 in respect of the cost of a locksmith;
    b. A deduction to the Claimant's pay for the month of September 2020 in respect of attendance at a 3-hour induction event for which she was only paid at 70% furlough pay. The amount deducted was **£11.70**.
    c. A deduction in respect of a 'top up' to the Claimant's full pay for 5 ½ hours worked in July and August 2020, in the sum of **£21.45**.
    d. A deduction in respect of accrued but untaken holiday pay upon termination of employment, in the sum of **£145.66**.

3. The Respondent must therefore pay the Claimant the total sum of **£287.81** in respect of the above amounts, subject to any deductions to be made from that sum, if necessary, for tax and/or National Insurance.

REASONS

Introduction

1. By a claim form presented on 10th January 2021, the Claimant brought claims of:
   1.1. Automatic unfair dismissal (s103A of the Employment Rights Act 1996 ("ERA"));
   1.2. Unlawful deductions from wages; and
   1.3. Holiday pay.

2. At a hearing before Employment Judge J Burns on 13th May 2021, a deposit order was made (pursuant to Rule 39 of the tribunal's Rules of Procedure) in relation to the unfair dismissal complaint. That deposit was not paid by the due date and, accordingly, that complaint is struck out.

3. The remainder of the claim was heard at this hearing on 9th July 2021 via CVP. There are five aspects to the claim, which are summarised in the issues section, below. At the beginning of the hearing, I clarified each of these five issues with both parties.

4. The Claimant represented herself at the hearing but had been able to obtain some advice and assistance from a lawyer to prepare for the hearing. She provided a written submission and a detailed revised schedule of loss for use at the hearing. The schedule of loss sets out the five aspects of the claim. The Claimant gave sworn evidence to the tribunal and I considered her witness statement and the relevant documents in the bundle. The Claimant also provided a witness statement from Ms Adamska. However, this witness did not attend the hearing so I was unable to attach much weight to her written evidence because it had not be tested by questioning from the Respondent.

5. Mr and Mrs Franklin appeared together on behalf of the Respondent company. They are the directors. It was agreed at the outset of the hearing that Mr Franklin would represent the company during the hearing and Mrs Franklin would give sworn evidence. I also considered Mrs Franklin's witness statement and the relevant documents in the bundle.

6. The bundle ran to 182 pages. Mr Franklin also emailed me a copy of the Claimant's furlough letter dated 30th March 2020 during the hearing and I admitted this as an additional piece of evidence because it was relevant to the issues in the case.

Issues to be determined

7. The issues I had to determine were:

   Issue 1:
   7.1. Was the Respondent's deduction to the Claimant's pay on 5th October 2020 in the sum of £109 for the cost of changing the locks to the Respondent's premises authorised and therefore lawful? The Respondent accepts that it made the deduction.
   7.2. If not, how much is owing to the Claimant?

   Issue 2:

7.3. Did the Respondent require the Claimant to attend a mandatory induction event on 5th September 2020 for which she should have been paid? The Respondent says this was a social event and/or training event which was not compulsory.
7.4. If she was required to attend, has the Claimant been paid for this attendance and, if not, how much is owing?

Issue 3:
7.5. Was the Claimant required to perform work for the Claimant between April and August 2020 whilst she was furloughed and subject to reduced pay?
7.6. If so, should the Claimant's pay for any such work performed be topped up to her full pay?
7.7. If so, was the claim brought in time?
7.8. If not, was it reasonably practicable for such a claim to have been brought in time and, if not, has it been brought within a further reasonable period?
7.9. If so, how much is owing to the Claimant?

Issue 4:
7.10. What are the contractual terms of the furlough agreement in respect of the method of calculating the Claimant's pay for her furlough period? The Claimant says her pay should be calculated with reference to the guidance found on the gov.uk website and the terms of the Treasury Directions to HMRC regarding the Coronavirus Job Retention Scheme ("CJRS"). The Respondent says her pay should be calculated with reference to the terms of the furlough agreement, as set out in a letter to the Claimant dated 30th March 2020 and the Claimant has been paid in accordance with those terms (or on terms at least as advantageous as that agreement).
7.11. Is there a shortfall in the Claimant's furlough pay for the period April – August 2020?
7.12. If so, is there a series of deductions which are in time?
7.13. If not, was it reasonably practicable for such a claim to have been brought in time and, if not, has it been brought within a further reasonable period?
7.14. If so, are those deductions authorised and therefore lawful?
7.15. If not, how much is owing to the Claimant?

Issue 5:
7.16 Has the Claimant been paid all of her holiday entitlement accrued for the 2020 leave year?
7.17 If not, how much is owing?

Findings of Fact

8. I set out the following findings of fact below.

9. The Respondent is a specialist skin care clinic based in Chelsea. The Claimant was employed by the Respondent as a part time Receptionist from 3rd November 2018 until 17th September 2020. The parties agreed a contract for the Claimant to work 9 hours per week. I was not presented with a signed copy of this contract, but the Claimant accepts that this initial contract (p.1-3 of the bundle) governs the terms of her employment relationship with the Respondent.

10. From commencement of her employment, the Claimant generally worked Saturdays in this role but this arrangement ceased in or around December 2019.

11. From January 2020, she began working Fridays from around 2pm until 8.30pm by way of a variation to her regular days/hours.

Furlough agreement and pay

12. Like many other businesses in this sector, the Respondent was affected by mandatory closures arising from the COVID-19 pandemic in and after March 2020.

13. On 30th March 2020, the Claimant was sent a 'furlough letter' by Mr Franklin, director of the Respondent, setting out the terms upon which the Claimant would be furloughed, whilst the Respondent was able to obtain financial assistance through the CJRS. From around the middle of March, the Claimant had already decided to self-isolate owing to the pandemic.

14. The relevant part of the letter said:

> *I can confirm that the Company will change your employment status to a furloughed employee from the 3 April 2020. This date takes into account that you were self-isolating for 14 days from 20 March 2020 (two Friday's). I can confirm you are being paid Statutory Sick Pay in accordance to your contract and government guidelines for the period 20 March to 3 April 2020.*
>
> ***What this means:***
> *Your change of status means that the Company is retaining you as an employee on furlough during this period of crisis instead of making you redundant. It also initiates income support for you from HMRC throughout the period of closure.*
>
> *HMRC will cover 80% of your regular wage, plus the associated Employer National Insurance contributions and minimum automatic enrolment into your pension contributions on the subsidised wage.*
> *Because you employment changed to working Friday's and ad-hoc less than a year ago, we will average your monthly earnings since you started this change to calculate your ongoing wage.*
>
> *This change will wholly apply to your pay from 1 April onwards and you will continue to make payment in to your bank in the normal way on the last working day of each month* (sic).

15. The Claimant accepted in her evidence that she was furloughed in line with these arrangements. However, she queried with Mr Franklin the proposed method of calculation of her furlough pay. As is stated in the letter, the Respondent calculated this by reference to the Claimant's Friday working hours (commenced from January 2020) rather than by reference to her 2019 Saturday working hours or by an average of the two.

16. On 1st April 2020 (p.68 of the bundle), the Claimant sent an email to Mr Franklin suggesting that he had calculated her pay as if she had been working for the Respondent for less than a year. She said she had read the Government's website (in reference to this topic). The response on the same date said:

> *We actually took advice on this. Although you have been with us for over a year your original contract was for set hours on a Saturday. However, when you could no longer work Saturday's, you switched to variable hours (mainly Friday's) therefore, the correct assessment of your current income is to average from when you started working flexible hours* (sic).

17. I accept the Claimant's evidence that, aside from her regular shifts (Saturdays to 2019 and then Fridays from 2020) she worked variable hours during the course of her employment. The Claimant's payslips from 2019 show a variable number of hours being paid month to month.

18. From January 2020, her normal day was Friday, working a 6-hour shift although she worked on other occasions on an ad-hoc basis, as shown on her payslips.

19. I find that, during the furlough period, the Claimant was paid in accordance with the furlough letter dated 30th March 2020 (i.e. she was paid from April 2020 at 80% of her average pay received since moving onto the new working arrangement in January 2020). This is the Respondent's position and it was not challenged by the Claimant. She says that the pay should have been calculated in accordance with the Treasury Direction to HMRC rather than the furlough letter (which I shall deal with in my conclusions below), but there was no evidence before me to show that the amount she had been paid in the furlough period was not calculated in accordance with the terms of the furlough letter. The Respondent's calculation (p.140 of the bundle) was based on the terms of her new role. Mrs Franklin suggested that the Respondent may have overpaid the Claimant in its calculation, but this point was not pressed and there was no contract claim brought in these proceedings by the Respondent.

20. As to what the parties had actually agreed in respect of furlough pay, the only evidence of agreement is the furlough letter dated 30th March 2020. The Claimant agreed to be furloughed and the letter, necessarily, varied the terms of her contract of employment for this period. Whilst the Claimant had queried the calculation of her pay on 1st April 2020, this was before the variation took effect on 3rd April 2020. She did not further challenge or query the calculation after Mr Franklin's response. I find that she therefore accepted those terms by entering into the period of furlough without further protest.

Alleged work during the furlough period

21. At paragraph 8 of the Claimant's witness statement, she says that she was required to attend a total of 5 hours of remote meetings (via Zoom) between April to July 2020. I find that these 5 occasions were not work meetings falling outside of the existing furlough agreement because:

    21.1. The Claimant said in her witness statement and in her oral evidence that the meetings were made to feel mandatory. This is because a Zoom meeting had been proposed by her employer and she felt personally that she must therefore attend. However, the invitations were not cast in this way. The Zoom invite for a meeting on 30th June 2020, for example, was described as a 'Catch Up'. Similarly, the 'Whats App' messages on this occasion show positive messages about colleagues seeing each other and, prior to the event, confirming whether or not they can attend (p.46-7). The messages also show one member of staff attending late because she was on the bus and another describing it as a 'lovely chat'.

    21.2. On 1st June 2020 (ahead of a meeting which the Claimant says took place on 3rd June) Mrs Franklin sent a message to the 'Whats App' group saying: "*For those that haven't please reply to all points within my last*

email and if we zooming Wednesday!" (sic). This is persuasive evidence that Mrs Franklin was not calling a mandatory meeting.

21.3. The staff did not consider that these were formal arrangements where they were performing work. I find, on the balance of probabilities, that, if they had been, it is more likely that Mrs Franklin would have taken more formal steps to ensure attendance and participation.

21.4. I accept Mrs Franklin's evidence that she had attempted to ensure staff were connected to each other during the uncertainty of lockdown. She considered this was important in terms of staff morale and mental health. Her evidence is corroborated by her email to the Claimant on 16th April 2020 (p.66 of the bundle) where she said: "*In an attempt to keep the team together, I thought I would get in touch as I would love to know how you are getting along and how you have been filling your time. I'm here to help and support you in any way I can*…".

21.5. The Claimant says that, on one occasion, the meeting was moved to accommodate her availability. This was a reasonable response from her employer in the circumstances. Where a Zoom meeting was being arranged to enable staff to converse and 'catch up', there would be a danger of an employee feeling excluded if they could not be involved. I do not consider that this shows that the meetings were of a mandatory nature.

22. The Claimant claims for 2 hours in April and June 2020 for performing work for the clinic on Instagram. The Claimant joined this social media platform on 24th April 2020 (p.99 of the bundle). At paragraph 9 of her witness statement, the Claimant points to a number of Whats App messages posted by Mrs Franklin which suggest that members of staff should use their work Instagram accounts to push the Respondent's brand. Whilst some of the messages do appear to encourage this, I do not find, on balance of probabilities, that the Claimant was instructed to carry out 2 hours of work in this regard. These messages are sent to a wider group and do not direct the Claimant to carry out any work. I find that Mrs Franklin is correct in her evidence when she said that, if the Claimant did carry out 2 hours work in this regard, it was not on her express instructions to do so.

23. Finally, the Claimant claims a total of 8.5 hours for research work she says was carried out in June, July and August.

24. The first of these items arises from a telephone call which took place between the Claimant and Mrs Franklin on 4th June 2020.

24.1. I accept Mrs Franklin's evidence, as set out in her witness statement, that this telephone call was made in order to support the Claimant. The Whats App message from the day before (p.36 of the bundle) shows Mrs Franklin asking the Claimant is she is OK and telling her she will ring her the next day "*to personally catch up*". That accords with Mrs Franklin's evidence that she wished to check in on the Claimant from a welfare perspective rather than to set work tasks.

24.2. The brand requirements of the Respondent were clearly discussed in this call because the Claimant set about finding various items, but I prefer Mrs

Franklin's evidence that this arose because of the Claimant wanting to be involved.

24.3. Accordingly, I accept that the spreadsheet sent to Mrs Franklin was unsolicited as it was not work which was performed under any instruction from the Respondent.

25. As regards the second item claimed, 5 hours of research submitted to Mrs Franklin on 20th July 2020, I find that there was an express instruction for this work to be carried out. That is made clear by the Whats App message from another employee (p.38 of the bundle) who, on the balance of probabilities, was chasing up this research work on behalf of the Respondent. The message on 20th July 2020 says: "…*I hope you are well. I wanted to know where you were with the little list you had to work on*…". The Claimant's reply was: "…*All good thanks…I'm still trying to find a few things. I'll send what I have to Lisa at end of play today*". The reply: "*Perfect!! :) Thank you for doing this, it really helps!...".*

26. Further to that exchange, at 17.36 that day, the Claimant then emailed some research work to Mrs Franklin, saying in her email: "*Sorry for the delay. Please find attached a couple of ideas for the clinic*".

27. Unlike the research performed in June, the message sent to the Claimant on 20th July shows that the Respondent had set the Claimant a task (referring to a list) for which she was being held accountable. The Claimant was acting in her capacity as an employee of the Respondent by following instructions to perform work.

28. Whilst the Respondent had a design team equipped to deal with various brand researching tasks, the Respondent was preparing for its reopening by this stage with a view to bringing staff back to work. From 1st July 2020, flexible furlough could begin. I have considered the evidence relied on by the Respondent showing another employee placing orders for items. However, these show the orders placed and the invoices generated as a result. They do not establish, one way or the other, the instructions given to other staff as regards research.

29. In light of the instructions given to the Claimant in July, I accept the Claimant's evidence that she was requested to carry out further research which she sent to Mrs Franklin on 2nd August 2020 (p.129 of the bundle).

30. There is no other evidence, beyond that given by the Claimant herself, as to the amount of time spent on this work. I accept the Claimant's evidence that these two items of work amounted to 5 ½ hours in total.

31. The parties agree that payment made in one month is referable to the work performed in the previous month. The Claimant was paid on the 5th of each month. As the last piece of work performed was on 2nd August 2020, this work should have been paid on 5th September 2020.

32. The Claimant has calculated the loss for these hours at £3.90 per hour (based on 70% furlough pay at the time). I accept that calculation based on her regular hourly rate.

Induction – 5th September 2020

33. On 5th September 2020, the Claimant was invited to attend a restaurant before going to visit the Respondent's new clinic premises. This was two days prior to the re-opening. The meeting lasted for 3 hours (2 hours at the restaurant and 1 hour at the clinic). I find that that this was an induction/training event which was mandatory for the Claimant to attend as an employee because:

    33.1. Mrs Franklin accepted in her oral evidence that this was training. She said that it was "*ahead of going live*" and to deliver "*a few expectations*". Whilst Mrs Franklin said that it was not compulsory and therefore no payment was due, the purpose of the event was to prepare the staff for the re-opening. At one stage in her evidence, Mrs Franklin suggested that the Claimant had been paid for it because she was still on furlough until 7th September and could attend training within her furlough period. I found her evidence on this issue to be a little confused as to the Respondent's position on training as distinct from a voluntary social gathering. The purpose of this event was not the latter.

    33.2. Whilst the Respondent says that food and drink were paid for, this is of no significance as to whether the Claimant was or was not working. I accept the Claimant's evidence that, at the clinic, the staff were given a tour and given passcodes and keys. In the Whats App group (p.59 of the bundle), it was described as '*Induction Day'*, to include a '*team meeting'* at the restaurant. Staff were told to '*bring a note pad'* and to '*learn and practice to be fully ready for the 7th September'*.

Second contract

34. On 31st August 2020, the Respondent sent the Claimant a copy of a new contract (p.4 of the bundle). Significantly, paragraph 10 of the contract differed from the previous contract agreed in 2018. At the end of the paragraph, the second contract included the following:

    "*The Employee agrees that the Company can deduct monies from the Employees final salary payment where necessary to enforce clause 14 of the contract or otherwise*".

35. Paragraph 14 of the second contract concerns the repayment of a fixed sum for training if the employment contract is terminated within 18 months of the employee's start date.

36. In the Whats App group on 16th September 2020, there was a message sent on behalf of the Respondent requesting that the staff returned the signed contracts 'before Friday' (i.e. 18th September).

37. The Respondent did not have a signed copy of this contract (no copy was provided in the bundle). I accept the Claimant's evidence that, whilst she refers to two contracts being provided in her ET1 claim form, she did not sign or agree to this variation to her original contract. These events occurred over a short amount of time whilst the clinic was reopened. Staff had not returned them by 16th September and the Claimant's employment terminated the following day.

Dismissal

38. Having returned to the clinic following reopening on 7th September, the Claimant was dismissed by the Respondent with effect from 17th September

2020. I do not need to make findings about those events because the reasons for dismissal are not relevant to the issues in the claim.

39. Following termination, there was a dispute between the parties regarding the return of the Respondent's keys to the clinic. The Respondent deducted the invoiced cost of a locksmith from the Claimant's wages. This was the cost incurred by the Respondent to change the clinic locks in the sum of £109 because it had not received the Claimant's keys. This was confirmed to the Claimant in an email of 6th October 2020 (p.94 of the bundle).

40. The Claimant had not provided any prior written consent to this deduction being made.

Holiday pay

41. The contract of employment provides as follows as to holiday entitlement:

> *The Employee shall be entitled, based on hours worked to 6 days paid annual leave, inclusive of Bank Holidays, if applicable. The company leave year runs from the 1st January to 31st December. You must take your entitlement within the leave year, unused holiday days cannot be carried forward to the following year unless agreed by the Company and confirmed in writing. Please advise us at least four weeks in advance of any holiday days you wish to take over three days consecutively. The company shuts down between Christmas and New Year so it is a company requirement that you allow enough days from your annual holiday entitlement to cover this period. Due to business demands in the lead up to Christmas no holiday other than the Company Shut down period will be authorised, unless agreed in writing by the Company.*

42. The Claimant took one day's holiday during the furlough period. She was paid for this (calculated as 6 hours at her hourly rate of £13 per hour = £78) on 5th October 2020 (and it is showing on her payslip for that month). She was then paid for outstanding holiday pay, following termination of her employment, on 5th November 2020 in the sum of £144.30. This was calculated as 11.10 hours at her hourly rate (1.85 days). She has therefore been paid a total of £222.30.

43. The Respondent calculated that the Claimant was entitled to 3.85 days of holiday out of her annual contractual entitlement to 6 days. Allowing for the day paid on 5th October, a deduction of 1 day was made to allow for an alleged overpayment of furlough pay.

44. The leave year ran from January to December and, at the date of termination, the Claimant had been employed for 260 days in the leave year.

45. Adopting Schedule 3 of the Claimant's schedule of loss (which uses the actual figures paid for the 52 weeks prior to termination) but adjusting the asterisked figures which have been increased for claimed additional furlough pay (to which, as above, I find the Claimant is not entitled because this did not represent the terms of the furlough agreement between the parties), but calculating the paid amounts for the furlough period at full pay (because the Claimant's holiday pay is calculated based on full pay, not furloughed pay) the Claimants average weekly pay (based on 52 weeks) was £4,795.59 / 52 = £92.22 per week.

46. This is calculated using the actual paid figures (as shown on Schedule 3 of the schedule of loss) but increasing the months of April to August 2020 to the monthly sum of £415.51, having been uprated from the reduced furlough sums

for the purpose of this holiday pay calculation. The furlough payment for April – June was £332.41 at 80% of full pay. £332.41 / 80 x 100 = £415.51. The same amount should apply for July and August, when the furlough percentage was lower. The Respondent accepted it should 'top up' holiday pay from the reduced furlough pay (for the relevant period) in an email to the Claimant dated 17th October 2020 (p.85 of the bundle).

47. The Claimant's statutory entitlement, having been employed for 260 days of the leave year, was 3.99 weeks which amounts to £367.96 in holiday pay (based on the calculated weekly pay).

48. Under the contract, the Claimant was entitled to 6 days holiday pro rata, which is calculated as 4.27 days. The Respondent has calculated a day's holiday pay at £78 (as per the payment on 5th October 2020), as explained above. £78 x 4.27 days = £333.06.

49. Accordingly, the Claimant's statutory entitlement exceeds the contractual entitlement in the circumstances.

50. The Respondent has deducted a day's pay in calculating the £222.30 it has paid. This was said to be because of an overpayment in furlough pay during the relevant period. This was explained in an email from Mr Franklin to the Claimant on 2nd November 2020 (p.92 of the bundle) as follows:

> *"…we took around a day off you to cover the overpayments above the furlough made to you in error during lockdown rather than deduct this from your pay - for your information this equated to more than a days holiday pay…"*

51. The Claimant did not provide any prior express consent for this deduction from her holiday pay. It was unilaterally deducted by the Respondent. The contract agreed in 2018 provides (at paragraph 6):

> *If the Company accidentally overpays the Employee the Employee agrees to return the monies to the Company immediately or to have a deduction made from their next payment.*

52. The Respondent did not set out for the Claimant how the amount of 1 day's pay was calculated with reference to any alleged overpayment of furlough pay.

Law

53. Section 13 of the ERA provides as follows (in respect of an unauthorised deduction from wages claim):

> *(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.

54. Section 23 of the ERA provides (as regards complaints to a tribunal):

(1) A worker may present a complaint to an employment tribunal—

(a) that his employer has made a deduction from his wages in contravention of section 13 (including a deduction made in contravention of that section as it applies by virtue of section 18(2)),

(b) that his employer has received from him a payment in contravention of section 15 (including a payment received in contravention of that section as it applies by virtue of section 20(1)),

(c) that his employer has recovered from his wages by means of one or more deductions falling within section 18(1) an amount or aggregate amount exceeding the limit applying to the deduction or deductions under that provision, or

(d) that his employer has received from him in pursuance of one or more demands for payment made (in accordance with section 20) on a particular pay day, a payment or payments of an amount or aggregate amount exceeding the limit applying to the demand or demands under section 21(1).

(2) Subject to subsection (4), an employment tribunal shall not consider a complaint under this section unless it is presented before the end of the period of three months beginning with—

(a) in the case of a complaint relating to a deduction by the employer, the date of payment of the wages from which the deduction was made, or

(b) in the case of a complaint relating to a payment received by the employer, the date when the payment was received.

(3) Where a complaint is brought under this section in respect of—

(a) a series of deductions or payments, or

(b) a number of payments falling within subsection (1)(d) and made in pursuance of demands for payment subject to the same limit under section 21(1) but received by the employer on different dates,

the references in subsection (2) to the deduction or payment are to the last deduction or payment in the series or to the last of the payments so received.

55. The statutory basis for the CJRS is found in section 76 of the Coronavirus Act 2020, which provides for the enabling power for HM Treasury to direct functions to HM Revenue and Customs ("HMRC"). The CJRS was then established through such Treasury Directions, the first of which was made on 15th April 2020.

56. A worker is entitled to 5.6 weeks holiday in a leave year, in accordance with Regulation 13 and Regulation 13A of the Working Time Regulations 1998 ("WTR").

57. From 6th April 2020, the Employment Rights (Employment Particulars and Paid Annual Leave) (Amendment) Regulations 2018 amended Regulation 16 of the WTR to provide that the calculation of a week's pay for a worker whose remuneration varies according to time of work (as set out in section 222(3) of the Employment Rights Act 1996 ("ERA")) should be read as 52 weeks.

58. Section 222(2) of the ERA provides that: the amount of a week's pay is the amount of remuneration for the average number of weekly normal working hours at the average hourly rate of remuneration.

Conclusions

Issue 1: the locksmith invoice deduction

59. It was not disputed that the sum of £109 was deducted from the Claimant's wages in October 2020. Such a deduction could only be authorised, and therefore lawful, if it was permitted within section 13 of the ERA. There was no statutory basis for this deduction and so it can only be authorised by the employment contract, a variation of it, or where the Claimant had previously signified in writing her agreement or consent to the deduction (before the deduction was made). That is the combined effect of section 13(1), (5) and (6) of the ERA.

60. The Respondent relies on the second contract and paragraph 10. As I have found, the Claimant did not sign or agree to this second contract, sent to her very shortly before the clinic reopened and the Claimant's subsequent dismissal. Accordingly, the Respondent cannot rely on this provision as a variation to the employment contract because the Claimant had not agreed to any such variation before the deduction was made in October. Similarly, there was no written agreement or consent to the making of this deduction.

61. Even if I had found that the Claimant had agreed to the second contract, I would have found that the wording of clause 10 did not cover this deduction in any event. This is because the purpose of the clause is to enable the Respondent to recover a fixed sum spent on training in circumstances where an employee's employment is terminated within the first 18 months. That is not applicable here. The words 'or otherwise' do not, in my judgment, stretch as a 'catch all' to cover any other deduction of any type. If that were the case, the Claimant would be deemed to have consented to any deduction the Respondent wished to make, at any time.

62. For these reasons, the deduction of £109 was an unauthorised deduction and must be repaid to the Claimant.

Issue 2: the induction on 5th September 2020

63. As I have found that the Claimant attended a mandatory induction event for 3 hours on 5th September 2020, she was entitled to be paid for her work under her contract of employment. Whilst the Claimant claims 3 hours at her contractual hourly rate, I conclude that she is only properly entitled to the uplifted amount for those 3 hours, because she was on furlough at this time and had been paid at the furloughed rate. The Claimant has claimed for other work done in her furlough period on the footing that she is entitled to a 'top up' to full pay. In my judgment, attending 3 hours of training at the end of her furlough period is the same situation. To award her full pay on top of her furlough pay would award her remuneration beyond the scope of her contract.

64. At this stage, the Claimant was being paid 70% furlough, so she is entitled to the additional 30% for the 3-hour induction. This is calculated as 3 hours x £3.90 = £11.70.

Issue 3: additional work during the Claimant's furlough period

65. The Claimant performed 5 ½ hours work in July and August 2020. The payment for the 'top up' to the Claimant's pay should either have all been in her pay on 5th September 2020 or the 5 hours should have been paid on 5th August and the remaining half an hour on 5th September. This is because the two items of work were performed on 20th July and 2nd August respectively.

66. This claim for unpaid wages is therefore within the time limit prescribed by section 23(2) of the ERA. The claim was presented on 10th January 2021, within a month of the Claimant completing the ACAS Early Conciliation process (11th November to 11th December 2020). At it is highest, time ran for three months prior to this period, from 13th August 2020.

67. If the first payment was due on 5th August, I conclude it is part of a series of deductions ending with the deduction on 5th September (i.e. failure to pay for the half hour worked on 2nd August), which was in time. Accordingly, the tribunal has jurisdiction to hear this complaint.

68. I therefore conclude that the Respondent made an unlawful deduction to the Claimant's wages in respect of these 5 ½ hours and £21.45 must be paid by the Respondent for these deductions. This is calculated as £3.90 x 5.5 = £21.45.

Issue 4: calculation of furlough pay

69. I have carefully considered the Claimant's calculations in her schedule of loss and the written submission supplementing it. The Claimant's argument proceeds on the basis that she should be entitled to be paid furlough pay based on the formulae set out in the Treasury Direction. This means she seeks to import that formulae into her contract. The flaw in this argument is to assume that the Treasury Direction governs the contractual relationship and the Claimant's employment rights. The CJRS concerns HMRC and the employer. The scheme grants funding to employers for their furloughed workers based on claims made by those employers, subject to various conditions. It is does not alter the Claimant's existing employment rights. The contractual variation which arises from the decision to furlough is simply the agreement formed

between an employer and an employee as to the employee becoming furloughed. Whilst that step may be required in order for the employer to claim under the CJRS, it is not open to the Claimant to seek to enforce the Treasury Direction against her employer where this differs from the terms of her agreed contractual variation.

70. The Claimant's remuneration is subject to the variation to her employment contract which, as I have found, was concluded in the terms of the letter of 30th March 2020. If she had not agreed to become furloughed, subject to the terms in the letter, there would have been no variation to her contract and the Respondent would then have had to decide whether it could maintain that situation or whether it would have to consult with the Claimant about redundancy. Necessarily, the furlough agreement avoided redundancy at that time.

71. Given that the terms of her period of furlough were governed by the letter of 30th March and she was paid in accordance with that letter (or at least on terms as advantageous as that letter), there is no contractual basis for her pay to be increased after the event.

72. Accordingly, I conclude that the Respondent has not made any unauthorised deductions to the Claimant's wages in respect of the calculation of the furlough pay period.

Issue 5: holiday pay

73. The Claimant's statutory entitlement exceeds the calculation based on her contract and hourly rate. The Claimant was entitled to 3.99 weeks' statutory pay which I have calculated above as £367.96 based on 52 weeks' pay (with the furlough period being factored at the full rate of pay). This is more than the contractual calculation of 4.27 days on the Claimant's hourly rate: £333.06. Accordingly, the Claimant was entitled to be paid her statutory holiday pay up to termination on 17th September 2020.

74. The Respondent deducted what is described in the email of 2nd November 2020 as 'around a day' for overpayments in respect of its furlough calculation. I conclude that there was no lawful basis to make this deduction. It is not evidenced and it is not clear how the Respondent arrived at a day's pay as the correct sum to deduct. Whilst paragraph 6 of the 2018 contract provides for accidental overpayments to be recovered 'from [the employee's] next payment', there is no evidence to show that this was deducted from the 'next payment' upon discovery or that there was an accidental overpayment amounting to the value of a day's pay. The Claimant did not consent to this deduction.

75. In any event, there was no basis, in contract or law, to deduct it from the Claimant's statutory holiday entitlement.

76. The Claimant was therefore entitled to holiday pay in the sum of £367.96 and has been paid £222.30. The Respondent has therefore made an unlawful deduction to the Claimant's final wages in respect of accrued but untaken holiday pay in the sum of £145.66.

Outcome

77. The Respondent therefore made unauthorised deductions to the Claimant's wages in the amounts set out in the judgment, for the reasons given above. To that extent only, the claim succeeds. If, which may not be the case, there is any tax or National Insurance liability arising on these amounts, these should be deducted so that the Claimant is paid net.

Employment Judge Nicklin

Date 5th August 2021

RESERVED JUDGMENT & REASONS SENT TO THE PARTIES ON

09/08/2021

FOR EMPLOYMENT TRIBUNALs