



EMPLOYMENT TRIBUNALS
London Central Region

Heard by CVP on 17/8/2021

Claimant: Mr E Ogazi

Respondent: Crest Plus Operations Ltd

Before: Employment Judge Mr J S Burns

Representation

Claimant: In person

Respondent: Mr T Hunt (Director)
Ms Samantha Mead (Head of Payroll and Projects)

JUDGMENT

The claim is dismissed

REASONS

Introduction

1. I heard evidence from the Claimant and then from the Respondent's witnesses Mr T Hunt and Ms S Mead (Head of Payroll and Projects). The documents were in a bundle of 75 pages. After hearing from the Claimant, I adjourned the hearing for 30 minutes to allow the Respondent to produce further documents in the form of screen-shots of its online furlough acceptance process, and for the Claimant to carry out legal research.
2. This was a claim initially for arrears of pay in the sum of £5616 being 80% of net wages for the months of July to October 2020. The Claimant subsequently sought to increase the quantum of his claim to cover the period between the issuing of his ET1 and the hearing. This claim was for arrears of pay, and depended on what had been agreed between the parties in that regard.
3. The judge at the previous case management hearing had identified a possible additional claim under the Agency Workers Regulations 2010 *"in respect of which the Claimant says that as an agency worker he had an equivalent entitlement to other employees to the payment of furlough, the placing of the Claimant on furlough and the duration of his receipt of payments from the Coronavirus Job Retention Scheme"*. I refer to this again in my conclusions.

Findings of fact

4. The Claimant was employed by Mango Pay Ltd from 8/4/2019 and was TUPE transferred to the Respondent in April 2020. The Claimant worked as an agency worker.
5. The Claimant worked under an "umbrella" employment contract which contemplated him being provided with assignments to hirers. Beyond guaranteeing at least 336 hours of paid work every 12 months, the contract did not oblige the Respondent to provide any amount of work or pay. When the Claimant was not on assignment or on paid holiday he was not entitled to any pay.

6. The actual assignments were arranged by a third-party company called Executive Resource Group Ltd (ERG). He was assigned as a Finance Officer to Westminster Council (the hirer).
7. He was assigned in March 2020 for the month of April 2020 and then again for May 2020 which appears to have been extended and then formally terminated by ERG on 22/5/2020.
8. When the Covid19 lockdown started at the end of March 2020 the Respondent classified its "umbrella employees" – ie persons such as the Claimant, - into various categories and decided that the Claimant as a "category 9 employee" should get one month's furlough only. There were sound business reasons for this.
9. The Respondent sent the Claimant an email on 16 June 2020 which he received the same day and which gave him a basic explanation about the CRJRS. It did not state in terms that the Claimant would receive only a month's furlough.
10. The email referred to the government guidance about the scheme which was available on the internet at that time.
11. The email provided live links which the Claimant could click to access the Respondent's online furlough application process.
12. The Claimant applied online using those links on 16 June 2020.
13. The Respondent produced during the hearing screenshots of the generic application process which I am satisfied the Claimant must have gone through in order to make his on-line application on 16 June 2020. This required the Claimant to formally accept the Respondent's generic "*Coronavirus Job retention Scheme terms and Conditions*", which were also accessible to read on-line in the same location. The Claimant thereby accepted the terms and conditions, whether or not he had in fact read them.
14. The terms and conditions recorded the employee's agreement that the Respondent was not obliged to offer assignments to the employee at any time and that the Respondent by agreeing to pay furlough payments was not obliged to continue. Paragraph 1 provided that "*any decision to extend any period of furlough will rest exclusively with us*". Paragraph 13 provided "*there is a minimum three-week furlough period but after that minimum period we may bring the furlough period to an end. For the avoidance of doubt, if you agree to be furloughed, there is no obligation upon us to continue the furlough period beyond the minimum three week period.*"
15. The Claimant phoned the Respondent on 17 June 2020 to ask when he would receive his furlough payments – and was told by an Account manager Mr P Dunlea "*your furlough payment is going to cover one month due to the length of your assignment*" to which the Claimant replied "Okay".
16. Having received and accepted the Claimant's application on this basis, the Respondent provided the Claimant with furlough payments covering the period from 25 May 2020 until 5 July 2020.
17. He was not assigned to work anywhere and received no wages or furlough payments after 5 July 2020.
18. By 12 August 2020 the Claimant had queried the matter and been told in terms by a Respondent's manager that the Respondent's CJRS payments to the Claimant had ended with the payment made on 13/7/20. The Claimant recorded his awareness of this in his email of 12/8/20.

Conclusion

19. The previous judge's reference to the Agency Workers Regulations 2010 can be construed reasonably as a reference to regulation 5, which in summary confers on an agency worker the rights to the same basic terms and conditions as would apply if the worker was employed directly by the hirer.
20. However, apart from referring me to the last paragraph on page 46 of a Dept of Business, Energy and Industrial Strategy guidance document about the regulations updated in October 2019 (which paragraph is irrelevant), the Claimant did not lead evidence about or develop any regulation 5 claim.
21. In particular he did not adduce any evidence as to what if any terms and conditions pertaining to furlough the Westminster Council direct employees might have had.
22. In any event I find that provisions under the CJRS scheme were exceptional and so did not fall within the scope of regulation 5 (which defines basic conditions as those which are "ordinarily" included in employment contracts.)
23. For these reasons I find that no breach of the regulations has been shown.
24. Turning to the wages claim;
25. The Claimant was offered furlough payments subject to the Respondent's terms and conditions which expressly excluded any right to continuation beyond a minimum three-week payment. The Claimant's acceptance was subject to these terms and conditions which expressly provided that he had no additional entitlement beyond three weeks' furlough pay.
26. The facts that the government guidance did not reproduce the Respondent's terms and condition, and that the scheme could have been applied more generously by the Respondent, are irrelevant. The government scheme does not itself create rights and obligations between employers and employees. Any rights in an employee as against an employer for furlough payments must be created by and depend upon the agreement between the employer and employee.
27. I agree that the Claimant was not told on 16 July that his furlough payment would be for one month only. However, he was told this on 17 July and on his own correspondence was fully aware of this by 12 August 2020.
28. In any event, any ignorance about this on his part would not have expanded his contractual entitlement, which the Respondent's payments to him have exceeded.
29. For these reasons the claim is dismissed.

J S Burns Employment Judge
London Central
17/8/2021
For Secretary of the Tribunals
Date sent to parties: 17/08/2021