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EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4108945/2021

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Hearing Held by Cloud Based Video Platform (CVP) on 22 June 2021

Employment Judge Neilson

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Mr R Kincaid

**Claimant
In Person**

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Booth Welsh Automation Limited

**Respondent
Represented by:
Mr D Hay,
Advocate**

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JUDGMENT OF THE EMPLOYMENT TRIBUNAL

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The Judgment of the Employment Tribunal is that the claim of unlawful deductions from pay is dismissed.

REASONS

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1. This was a claim for unlawful deductions of wages under section 13 of the Employment Rights Act 1996. At the time of lodging his claim the claimant was still in employment.

2. The position of the Claimant was that during the period of his absence from work from Monday 18 January through to Tuesday 26 January 2021 due to Covid -19 the Company was obliged to place him on furlough. Had he been placed on furlough he would have received a higher rate of pay than he did –
5 and he has lost wages as a consequence. He claims for the loss of those wages.
3. The claimant gave evidence and on behalf of the respondent evidence was led from Ms Hazel Thomson, HR Manager of the respondent (“Ms Thomson”) and Mr Gary Mutter, Business Operations Director of the respondent (“Mr
10 Mutter”).
4. The respondent had prepared and lodged a bundle of documents.
5. The alleged lost wages were agreed in the gross sum of £828.94. The dates of employment were agreed.
6. On behalf of the respondent Mr Hay confirmed that the correct name of the
15 respondent was Booth Welsh Automation Limited.

Findings in Fact

7. The claimant commenced employment with the respondent on Monday 11 January 2021 as an Approved Electrician working at the respondent’s client site at DSM Nutritional Products, Dalry, Ayrshire.
- 20 8. The claimant was employed under a written contract of employment dated 20 December 2020 (“the contract of employment”). The contract of employment incorporated the National Working Rules of the Scottish Joint Industry Board for the Electrical Contracting Industry (“SJIB Rules”).
9. The SJIB Rules provide for payment of Statutory Sick Pay (“SSP”) only in the
25 case of absence for ill health.
10. The contract of employment specifically provided that in cases of absence due to ill health the claimant was entitled to the payment of SSP only.

11. The claimant was absent from work, having contracted Covid-19, from Monday 18 January 2021 through to Tuesday 26 January 2021 inclusive. He returned to work on Wednesday 27 January 2021.
12. The claimant received SSP only whilst absent from work from 18 January to 26 January 2021.
13. There was no evidence of any agreement whether written or oral to place the claimant on furlough leave.
14. There was no evidence of any written or oral agreement to pay any wages to the employee of an amount greater than SSP during any period of absence due to ill health.
15. On 18 January 2021 Mr Mutter attended the Dalry site. He attended to speak to the workforce as there had been concerns raised about the workforce not complying with Covid restrictions and in particular not wearing face masks. In the course of a meeting with the workforce Mr Mutter was asked about payments for those absent through contracting Covid -19. Mr Mutter replied that the entitlement, in line with the contract of employment, would be to SSP only. He was then asked what would happen if the entire workforce was absent? Mr Mutter replied that the Company would work within the Government guidelines, work with the client and do what was necessary. When asked if that would include putting the employees on furlough he replied "if possible, yes but not for the current cases."
16. The claimant raised with Ms Thompson his concern that he should have been placed on furlough and received furlough pay whilst absent in January 2021.
17. The respondent responded to the claimant that they had not placed the claimant on furlough as their view, having checked with the SJIB and having checked Government guidelines, was that it was not appropriate to place an employee on furlough where there was a short term absence.

18. The respondent did not consider that it was appropriate to place the claimant on furlough leave.

The Law

19. Under section 13 of the Employment Rights Act 1996 (“ERA”) an employee has a right not to suffer an unlawful deduction from wages. Where there is such an unlawful deduction an employee may present a complaint to an Employment Tribunal under section 23 of the Employment Rights Act 1996.
20. To have a right to bring a claim under section 16 ERA there must be a contractual right in the first place to receive the payment.
21. The obligation to pay under contract could arise through an express term in writing or verbally or could be implied by custom and practice.
22. Where implied by custom and practice that could arise through conduct, custom, the officious bystander test, as a matter of business efficacy or as a characteristic term.
23. The Treasury issued a Direction on 12 November 2020 (“the Treasury Direction”) setting out the rules around the Government Coronavirus Job Retention Scheme (“CJRS”). The Treasury Direction sets out the rules that govern whether or not an employer can recover furlough payments from the government. It does not directly deal with the issue of whether an employee has any entitlement to be paid by an employer in respect of any period on furlough leave.

Submissions

24. The claimant submitted that there is a legal obligation upon the respondent to pay furlough pay when people are off ill because of the difficulties and problems occasioned by people not taking time off work when they were ill. The Government have provided the CJRS and in these circumstances it is incumbent upon the respondent to use that scheme and place employees on furlough leave when they are ill and pay them under the CJRS.

25. The respondent insisted that for a claim under section 13 ERA there had to be a legal agreement to pay and there simply was no such agreement in this case. There was no dispute on the evidence that the contract of employment provided only for SSP.
- 5 26. Mr Hay made reference to the Treasury Direction and the requirements set out therein for an agreement to place the employee on furlough leave (paragraph 7.1). He submitted there was simply no evidence of an agreement for furlough leave on either an individual or collective basis. That being the case there can be no entitlement on the part of the claimant to access the
10 benefits of the CJRS.
27. With regard to any contention of a right arising by implication through custom and practice – there was no evidence to support this. The only evidence related to the comments of Mr Mutter – however he was simply expressing a view on a hypothetical situation. A situation that did not arise. It could not
15 amount to a contractual commitment. The case must fail in the respondents submission.

Discussion

28. The legal position regarding a claim for unlawful deductions is clear – there must be a legal right, under the contract, to receive the payment – before one
20 can consider if there has been an unlawful deduction. This is not a case where there is any jurisdiction to consider a breach of contract claim. The claimant was still employed at the point in time when he brought the claim. The claim proceeds under section 13 ERA only.
29. The Government provided for the CJRS and thus does provide a mechanism
25 whereby employers can effectively lay off their staff on furlough leave and pay to them wages. The employer can then recover, in broad terms, up to 80% of those wages from the Government. To be able to recover those monies the employer must have placed the employee on furlough leave in accordance

with the terms set out in the scheme – paragraphs 6 and 7 of the Treasury Direction set out the rules.

30. There is no automatic right to be placed on furlough. Whether an employee is placed on furlough or not is a matter for the employer and employee to agree.
5 In addition there must also be agreement on the level of pay that will be paid to the employee whilst they are on furlough leave.
31. In circumstances where the claimant admits that his contract of employment and the SJIB provide only for SSP he would need to point to some other agreement with the employer to establish an entitlement to a higher rate of
10 pay. The claimant fully accepted in giving his evidence that his contract only entitled him to receive SSP.
32. There was no evidence of any express agreement to place the claimant on furlough leave and pay an amount higher than SSP. The only evidence that the claimant was able to point to were the comments made by Mr Muttar.
15 However by themselves these comments do not amount to any form of agreement or offer capable of acceptance. Mr Muttar was simply discussing a hypothetical situation which did not in fact occur.
33. As regards any implied term arising there was again no evidence led to support such a contention. There was no evidence of any custom or practice
20 of placing employees such as the claimant on furlough leave for short term absences. There was no evidence that it would be standard to provide for furlough in the respondent's industry in these circumstances. The only evidence as regards conduct related to Mr Muttar's comments – and these, as explained, amounted to no more than an observation on a different
25 hypothetical situation. There is an express term that clearly provides only for SSP when an employee, such as the claimant, is absent through ill health. The fact that the Government have brought into place the CJRS does not, by itself, give rise to any implication or obligation that an employer must utilise the CJRS to provide a higher level of pay for employees who are absent
30 through ill health. The evidence disclosed that the respondent did not consider

it appropriate to utilise the CJRS in respect of the claimant's short term absence. In these circumstances it cannot be said that there is any requirement to imply a term on the grounds of business efficacy or that a term could be implied applying the officious by-stander test.

5 34. Accordingly there being no evidence of any contractual agreement to place the claimant on furlough and pay any higher level of pay there can be no unlawful deduction and accordingly the claim must fall to be dismissed.

35. The Employment Tribunal thanks both Mr Hay and Mr Kincaid for the professional and courteous manner in which they dealt with this claim.

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15 Employment Judge: Stuart Neilson
Date of Judgment: 30 August 2021
Entered in register: 30 August 2021
and copied to parties

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