



# EMPLOYMENT TRIBUNALS

**Claimant:** Ms. G Statkute

**Respondent:** Syft Online Limited

**Heard at:** London Central

**On:** 25 June 2021

**Before:** Employment Judge Joyce

## Representation

**Claimant:** Ms. G Statkute (In-person)

**Respondent:** Mr. T Goodwin (Counsel); Ms. J Bowman (Solicitor)

**JUDGMENT** having been sent to the parties on 29 June 2021 and written reasons having been requested in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided:

# REASONS

## Introduction

1. These written reasons are given pursuant to a request from the Claimant dated 2 August 2021.
2. The Respondent is an online recruitment platform that engages about 45,000 agency workers who it pairs with clients primarily in the hospitality and retail sectors. The Claimant was engaged by the Respondent as an agency worker from 3 August 2019.
3. By claim form dated 29 January 2021, the Claimant brought a claim for unpaid furlough payments. The Claimant also sought compensation for time spent writing complaints, calculating her furlough payments and making contact with ACAS.
4. The case came before me in the form of a full merits hearing remotely by CVP on 25 June 2021. The Claimant appeared in person. The Respondent was represented by Mr. Timothy Goodwin of Counsel and Ms. Jessica Bowman, Solicitor. Having read the case, I heard evidence and closing argument before delivering judgment.

5. The issues were narrowed considerably at the start of the hearing. In essence for May and June 2020, the Claimant claimed that she had intended to participate in the furlough scheme and therefore should have been paid in accordance with it. The issue was whether she had agreed to be part of the furlough scheme. From August to October 2020, the Claimant claimed that she should have been paid a 'reasonable amount' of furlough, although the Respondent was not participating in the scheme during those months. For November, the Claimant did not dispute the figure she was paid for flexible furlough but disputed that she had signed up for the flexible furlough scheme and stated that she should have been paid furlough for the full month of November 2020 based on her pay for 2019. As to December 2020 she claimed that she had been paid £882.16 in December of 2019 and so should have been paid 80% of that amount as furlough payment for December 2020.

### **The Legal Framework**

6. S. 13 Employment Rights Act 1996 provides:

**Right not to suffer unauthorised deductions.**

**(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.**

7. S. 76 of the Corona Virus act 2020 provides:

**HMRC functions**

**Her Majesty's Revenue and Customs are to have such functions as the Treasury may direct in relation to coronavirus or coronavirus disease.**

8. S.76 of the Coronavirus Act was supplemented by the Corona Virus Act functions of her Majesty's Revenue and Customs (Corona Virus Job Retention Scheme) Direction of 15 April 2020 which provides in relevant part:

**6.1 An employee is a furloughed employee if:**

**(a) the employee has been instructed by the employer to cease all work in relation to their employment,**

**(b) the period for which the employee has ceased (or will have ceased) all work for the employer is 21 calendar days or more, and**

**(c) the instruction is given by reason of circumstances arising as a result of coronavirus or coronavirus disease.**

**(...)**

**6.7 An employee has been instructed by the employer to cease all work in relation to their employment only if the employer and employee have agreed in writing (which may be in an electronic form such as an email) that the employee will cease all work in relation to their employment.**

**(...)**

**Qualifying costs – further conditions**

**7.1 Costs of employment meet the conditions in this paragraph if:**

**(a) they relate to the payment of earnings to an employee during a period in which the employee is furloughed, and**

**(b) the employee is being paid**

**(i) £2500 or more per month (or, if the employee is paid daily or on some other periodic basis, the appropriate pro-rata), or**

**(ii) where the employee is being paid less than the amounts set out in paragraph 7.1(b)(i), the employee is being paid an amount equal to at least 80% of the employee's reference salary.**

**7.2 Except in relation to a fixed rate employee, the reference salary of an employee or a person treated as an employee for the purposes of CJRS by virtue of paragraph 13.3(a) (member of a limited liability partnership) 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.**

9. The above direction was replaced by what became known as 'flexible furlough' on 1 July 2020 which permitted those on furlough to both be paid for days of work and also be paid furlough payments on days where they were not working.

10. The Corona Virus Act functions of her Majesty's Revenue and Customs (Corona Virus Job Retention Scheme) Direction of 25 June 2020 provides in relevant part:

**7 A CJRS claim may be made by a qualifying employer in respect of an employee who is flexibly-furloughed in a CJRS claim period.**

**10.1 An employee is a flexibly-furloughed employee in a CJRS claim period if-**

**(a)The employee is a qualifying employee for the purposes of CJRS,**

**(b)The employee has been instructed by the employer**

**(i) to do no work in relation to their employment during a CJRS claim period, or**

**(ii) not to work the full amount of the employer's usual hours in relation to their employment during the CJRS claim period,**

**(c)The employee-**

**(i) Does no work in relation to their employment during the CJRS period, or**

**(ii) Does not work the full amount of the employee's usual hours in relation to their employment during the CJRS claim period**

**(...)**

**Facts**

11. On 3 August 2019, the Claimant was engaged by the Respondent as an agency worker.
12. From March until July 2020, the Respondent engaged in the Government's Coronavirus Job Retention Scheme ("Furlough Scheme").
13. On 8 April 2020, the Respondent sent a communication to the Claimant (along with other agency staff) requesting her consent to be part of the Furlough Scheme and setting out the pay arrangements under the scheme. The Claimant was invited to provide her consent by clicking on a link in the email sent to her. The Claimant opted in to the Furlough Scheme for the months of March and April 2020 by clicking on the link in the email.
14. The Claimant received £231.74 as pay under the Furlough Scheme for the month of March 2020 and for the month of April received £139.05 pay under the Furlough Scheme.
15. On 15 June 2020, the Claimant was sent a further email asking her to consent to participate in the Furlough Scheme for the month of May 2020. On 19 June 2020, the Claimant was sent a further reminder email stating that consent would have to be given by midnight on 22 June 2020 in order to be part of the Furlough Scheme. The Claimant did not click on the link in the email and therefore did not indicate her consent to being part of the Furlough Scheme for the month of May 2020.
16. On 15 July 2020, the Claimant was sent an email asking her to consent to participate in the Furlough Scheme for the month of June 2020. A further reminder email was sent on 20 July 2020. The Claimant did not click on the link in the email and therefore she did not indicate her consent to being part of the Furlough Scheme for the month of June 2020.
17. On 6 July 2020, the Respondent sent an email to the Claimant to advise her that it would not be participating in the Furlough Scheme beyond July 2020. The Respondent sent the Claimant a further email on 31 July 2020 confirming that it would not be extending its participation in the Furlough Scheme. The Respondent did not participate in the Furlough Scheme for the months of July, August, September and October. The Claimant was not paid any furlough payments during these months, but she did work during these months and was paid for the work she completed.
18. From November 2020, the Respondent once again participated in the Furlough Scheme. The scheme had changed since the Respondent had first engaged in it, in that the scheme now permitted staff to work on certain days of the month, and be paid furlough pay on non-working days. This scheme was known as 'flexible furlough' ("Flexible Furlough Scheme")
19. On 20 November 2020, the Respondent sent the Claimant an email in which it was explained to her that she met the initial criteria to be eligible to participate in the Flexible Furlough Scheme. The email explained that "if you accept an offer of work, this will have the effect that you will become "flexibly furloughed" meaning that the amount of pay you receive from that work will be taken into account when establishing how much you are entitled to

receive under the furlough scheme.” The email further specified that the Claimant’s “furlough period would start from the date on which [she] agree[d] to this status until January 2021”. On 22 November 2020, the Claimant elected to participate in the Flexible Furlough Scheme.

20. The Claimant’s pay was calculated on the basis of her being flexibly furloughed. She received furlough pay for the 9 days from 22 November to 30 November 2020 in the amount of £46.15. The Claimant did not dispute that this was the correct amount for payment but rather claimed that she did not wish to be subject to flexible furlough and wished to remain on the previous rate of furlough pay i.e. 80% of her pay for the same month in 2019.
21. The Claimant was paid £557.29 for the work she completed in December 2019. She did not work in December and so was paid furlough pay of 80% of that full amount, equating to £445.83.

### **Conclusions**

22. I found that an essential part of the Furlough Scheme and the Flexible Furlough Scheme was that the worker, in this case, the Claimant had to consent along with their employer to be part of the scheme. The documentary evidence on file showed that the Claimant had consented to being part of the Furlough Scheme for March and April 2020 by clicking on the link in the email sent to her by the Respondent.
23. The documentary evidence also showed that similar emails had been sent to the Claimant for the months of May and June but she did not click on the link within those emails in order to indicate her consent to being part of the Furlough Scheme. For this reason, I found that an essential part of the scheme, namely the Claimant’s agreement to it, was not met and consequently the Claimant was not entitled to any furlough pay for the months of May and June 2020.
24. For the months of July August, September and October, the Respondent was not part of the Furlough Scheme. As such, the Respondent was not claiming any furlough payments for the Claimant (or any other worker) from the government. While the Claimant urged me to order the Respondent to pay her a ‘reasonable amount’ of pay, I concluded that I did not have the power to do so in the absence of the Respondent’s own participation in the Furlough Scheme.
25. For the month of November 2020, the Claimant did not dispute that what she was paid was correct under the Flexible Furlough scheme. Rather she contended that she had not understood that she was part of that scheme. I concluded that the email sent to her on 20 November 2020 made clear that the Furlough Scheme had changed to ‘flexible furlough’. By clicking on the link in the email on 22 November 2020, I considered that the Claimant had clearly consented to being part of the Flexible Furlough Scheme.
26. Moreover, the email to the Claimant on 20 November 2020 informed her that she was entitled to furlough payment from the date on which she agreed to be part of the scheme. Therefore, per the terms of the agreement, she was not entitled to full furlough pay for the month of November 2020. Rather,

she was entitled to, and paid, furlough pay for the 9 days from 22 November to 31 November 2020.

27. As to December 2020, the Claimant initially claimed that she had been paid £882.16 in December of 2019 and so should have been paid 80% of that amount for December 2020.

28. However, it then emerged at the hearing that the Claimant had in fact been paid £557.29 in December of 2019, and that she had been paid 80% of that amount, namely £445.83. The Claimant then sought to argue that although this was the correct amount it was insufficient and she should be paid 'a reasonable amount'. I again concluded that I did not have the power to determine what a reasonable amount might be, but rather was confined to awarding what was set out in the Furlough Scheme.

29. As to the Claimant's claim for compensation for writing complaints, contacting ACAS, and calculating her furlough payments I also concluded that there was no legal basis for, nor did I have the power to, make such awards.

**Outcome**

30. For the above reasons, the proceedings were dismissed

Employment Judge **M Joyce**

\_\_10.09.2021\_\_\_\_\_

REASONS SENT TO THE PARTIES ON

10/09/2021.

FOR THE TRIBUNAL OFFICE