EMPLOYMENT TRIBUNALS

Claimant: Miss K Kirkham

Respondent: B & M Retail Limited

Heard at: Manchester (by CVP) **On:** 6 October 2021

Before: Employment Judge McDonald
(sitting alone)

REPRESENTATION:

Claimant: In person
Respondent: Mr S Proffitt of Counsel

JUDGMENT

The judgment of the Tribunal is that the claimant's claim that the respondent made unlawful deductions from her wages was brought outside the required time limit. It was reasonably practicable for it to have been brought in time and therefore the claim fails and is dismissed.

REASONS

Introduction

1. The claimant brought a claim of unlawful deduction from wages against the respondent. There are two elements to that claim. The first is that the period of furlough pay which ran from 21 May 2020 until 1 August 2020 ("the furlough period") should have been backdated to 1 March 2020; the second is that the approach of the respondent to calculating the furlough pay paid during the furlough period was incorrect.

2. The respondent defends the claim and also says that the Tribunal does not have jurisdiction to hear the claim because it was brought outside the relevant time limit.

3. The hearing was conducted by CVP. At the hearing the claimant represented herself and the respondent was represented by Mr Proffitt of counsel. There was a bundle of documents in electronic form (88 pages plus index). During the hearing I was forwarded an email from the claimant explaining how she worked out the money she said she was due during the furlough period. I was also forwarded links to two pieces of government guidance for employers explaining how to work out how much pay they could claim for an employee under the Coronavirus Job Retention Scheme ("the furlough scheme")

4. I heard evidence on oath from the claimant. The claimant had not prepared a written witness statement. Instead, she gave her evidence by answering questions put to her by Mr Proffitt and by me. There is was not much dispute of fact about the central issues in the case.

5. Mr Proffitt had supplied a written skeleton argument which had been emailed to the claimant. Although the claimant initially said she had some difficulty opening it she confirmed to me after giving her evidence that she had been able to do so and had a chance to read it. I heard oral submissions from Mr Proffitt and the claimant.

6. I gave oral judgment and the claimant requested the reasons for my judgment in writing.

The Issues

7. In terms of the issues to be decided, they were:

   a. Whether the claimant's claim was brought in time

   b. Whether the respondent had made an unlawful deduction/series of deductions from her wages by failing to backdate her entitlement to furlough pay to March 2020.

   c. Whether the respondent had made an unlawful deduction/series of deductions from her wages by underpaying her during the furlough period. The claimant said this underpayment amounted to £273.60 in total.

8. The claimant had referred in an email setting out the amounts she was claiming dated 7 September 2021 (p.24) to unpaid statutory sick pay and hours worked but unpaid. Those were not matters included in her claim form so did not form part of this case.

Findings of Fact

9. The claimant was employed by the respondent from 1 April 2019. On 21 July 2019 the claimant started a period of sickness absence which has continued to date. On 20 May 2020 the claimant provided a letter confirming that her mother was

required to shield because of coronavirus. From 21 May 2020 the respondent placed the claimant on furlough. On 1 August 2020 the respondent brought the furlough period to an end for all its employees including the claimant. The claimant was still signed off sick. After the furlough period she was back on sick leave. She did not return to work and has not done so as at the date of this final hearing.

10. The letter proposing furlough was dated 11 June 2020 and was at page 33 of the bundle ("the furlough letter"). That letter confirms that with effect from 21 May 2020 it was proposed that the claimant be furloughed. It was accepted by both parties at the hearing that the claimant was hourly paid rather than salaried. In the case of hourly paid colleagues, the furlough letter said that the monthly calculation of furlough pay would be 80% of either "the same month's earning from the previous year"("the equivalent month basis") or "average monthly earnings from the 2019/2020 tax year" whichever was the higher. The claimant accepted that she agreed to be furloughed. The only dispute is about how much furlough pay she was entitled to and for what period.

11. The claimant was paid furlough pay from 21 May 2020 until 1 August 2020. The claimant was on SSP for the majority of the tax year 2019-2020. The parties at the hearing were agreed that the equivalent month basis would result in a higher figure that her average pay in 2019-20 and the respondent therefore used the equivalent month basis to calculate her furlough pay. The claimant did not dispute that the equivalent month basis was the correct approach.

12. Using the equivalent month basis, the respondent paid the claimant the following furlough pay:

a. £457.20 on 20 June 2020 for 17 May to 13 June 2020 (80% of the £631.40 paid to her for 19 May to 15 June 2019)

b. £357.73 on 16 July 2020 for 14 June to 11 July 2020 (80% of the £459.67 paid to her for 16 June to 13 July 2019)

c. £208.86 on 15 August 2020 for 12 July to 8 August 2020 (80% of the £254.18 paid to her for 14 July to 810 August 2019).

13. The claimant says that that during the furlough period, her pay should have been worked out by taking the hours worked in each equivalent pay month in 2019 and multiplying those hours by the National Minimum Wage ("NMW") rate applicable to her in May 2020 rather than basing her furlough pay on the amounts actually paid in the equivalent 2019 months. I find that in May 2020 the claimant was 25 years' old. I find that the relevant NMW rate was £8.72. The claimant accepted that the rate of £8.91 she had used in her calculations was wrong because it was the rate applicable from 6 April 2021.

14. Based on the 2019 payslips I find the hours the claimants worked in the equivalent 2019 periods were 82 hours (19 May 2019 to 15 June 2019 - p.72), 56 hours (16 June 2019 to 13 July 2019 - p.73) and 8 hours (14 July 2019 to 10 August 2019 - p.74).

15. In terms of findings relevant to the time limit issue, I find that early conciliation in this case did not start until 16 December 2020. The pay packet from which the last deduction was alleged to have been made was dated 15 August 2020. I find that the time limit of three months began to run from 15 August 2020 and ended on 14 November 2020. In this case Early Conciliation was not started before the time limit expired, which means there is no extension to that time limit because of Early Conciliation (see the **Pearce** case referred to in "the Law" section below).

16. The claimant lodged her claim with the Tribunal on 19 January 2021. It was therefore slightly over two months out of time.

17. The claimant was throughout advised by her union representative from USDAW. It is clear from some of the documents in the bundle that as early as 10 August 2020 the claimant had raised issues about her furlough pay, specifically the fact that it was not backdated. There was an email to that effect at page 42 of the bundle. That email makes it clear that at that point the claimant had been advised by USDAW to seek clarity about her furlough pay.

18. The claimant told me, and I accept, that she did on occasion have difficulty in obtaining information from her USDAW representative. I also accept the claimant's evidence that her USDAW representative was on paternity leave for six weeks from some point in October 2020 until some point around 16 December 2020. However, I find that for substantial periods (certainly from August to October 2020 and from mid December 2020) the claimant had access to advice from her USDAW rep.

19. I find that the claimant was very able to correspond with the respondent regarding matters relating to her pay (both furlough pay and SSP) and that it is clear from some of the emails she sent to the respondents that she was able to research and establish what her rights were. I find that she herself put together a grievance letter (albeit based on a template) which she sent to the respondent on 16 December 2020 (p.47). It is also clear that she was in contact with ACAS at least once before she started Early Conciliation in December. I find that she was aware of her right to take a case to the Tribunal if she was not able to resolve matters with the respondent.

The Law

20. I set out briefly the relevant law, particularly the law relating to time limits, because my decision in this case has been that the claim was brought out of time.

<u>Unlawful deductions from wages</u>

21. In relation to a claim for deduction from wages, s.13(1) of the Employment Rights Act 1996 ("ERA") says:

> "(1) An employer shall not make a deduction from the wages of a worker employed by him unless-
>
> the deduction is required or authorised to be made by virtue of a statutory provision of a relevant provision of the worker's contract, or

the worker has previously signified in writing his agreement or consent to the making of the deduction."

22. In **New Century Cleaning Co Ltd v Church 2000 IRLR 27, CA** the Court of Appeal held that a worker would have to show an actual legal, although not necessarily contractual, entitlement to the payment in question in order for it to fall within the definition of "wages". That case was followed by the EAT in **Balfour Beatty Power Networks Ltd v Tucker and ors EAT [2002] 4 WLUK 81**.

Time Limits

23. S.23(2) of the ERA says that an unlawful deductions claims has to be brought before the end of the period of three months beginning with the date of payment of the wages from which the deduction was made or (in the case of a series of deductions) beginning with the date of the last deduction in that series.

24. That time limit is extended by the rules relating to ACAS Early Conciliation so long as Early Conciliation is begun within that primary three-month time limit (**Pearce v Bank of America Merrill Lynch and ors EAT 0067/19**).

25. If the claim is brought outside that time limit the Tribunal does not have jurisdiction to hear it unless the Tribunal is satisfied (i) that it was not reasonably practicable for the claim to be presented before the end of the relevant period of three months and (ii) that it was presented within such further period as the Tribunal considers reasonable (s.23(4) of ERA).

26. When it comes to the meaning of “reasonably practicable”, the courts have said that that means “reasonably feasible” **Palmer v Southend-on-Sea Borough Council [1984] ICR 372, CA**. In **Marks and Spencer Plc v Williams-Ryan [2005] ICR 1293** the Court of Appeal confirmed that a liberal approach in favour of the employee was still appropriate. What is reasonably practicable and what further period might be reasonable are ultimately questions of fact for the Tribunal.

27. When it comes to ignorance of one’s rights that can make it not reasonably practicable to present a claim as long as that ignorance is itself reasonable. In **Porter v Bandridge Ltd 1978 ICR 943, CA,** the Court of Appeal, ruled that the correct test is not whether the claimant knew of his or her rights but whether he or she ought to have known of them. An employee aware of a right to bring a claim can be expected to make enquiries about time limits: **Trevelyans (Birmingham) Ltd v Norton [1991] ICR 488** EAT.

28. An adviser’s incorrect advice about the time limits, or other fault leading to the late submission of a claim, will bind the claimant. The general principle derived from **Dedman v British Building and Engineering Appliances Ltd ([1974] ICR 53)** is that where a claimant takes advice about his or her rights and is given incorrect or inadequate advice, the employee cannot rely upon that fact to excuse a failure to make a complaint to the Tribunal in due time. The fault on the part of the adviser is attributed to the employee. That principle applies to trade union representatives as well as solicitors (**Ashcroft v Haberdashers’ Aske’s Boys School [2008] ICR 613**).

Discussion and Conclusions

29. In terms of the time limit point I note, as I have said, that the claimant was well able to research the relevant issues relating to her pay claim. It is clear from the email correspondence that she was aware of the issues relating to backdating of her furlough pay from at least August 2020, and she would have been aware of an underpayment of the actual amount of furlough pay paid from the receipt of her payslip on 15 August 2020. At that point she was receiving advice from USDAW and it is clear that at least once she also contacted ACAS. It seems to me that in those circumstances the claimant was aware of a potential dispute relating to her pay and I am satisfied that she was in a position where she reasonably ought to have made further enquiries to establish what rights she had and what relevant time limits applied to bringing any claim in relation to those rights.

30. I have taken into account the claimant's evidence that her USDAW representative was unavailable for a period of time, but despite that it seems to me that the claimant ought to have taken further steps to establish what time limit applied to her claim. She had the benefit of the USDAW representative's advice at least until October 2020 and then again from mid December 2020 but the claim was not lodged until January 2021. It is clear from the email trails in the bundle that she did speak to him on a relatively regular basis on the phone. She had tried to email USDAW, based on her evidence, in October 2020 when he was absent, but it does not seem that she took any further steps to chase up knowing that he was away on paternity leave. In any event I find that even in the absence of any response from USDAW the claimant had, from her other correspondence with the respondent, shown an ability to establish what her rights were in relation to SSP and I see no reason why in those circumstances it was not reasonable for her to also establish what the position was in relation to bringing a claim to the Employment Tribunal in relation to her furlough pay.

31. Ultimately therefore my decision is that it was reasonably practicable for the claimant to have brought her claim within the time limit applicable to it and because she did not, I dismiss the claim on that basis. It is for her to take up with her USDAW representative any issues relating to the failure by that representative to ensure that the claim was brought in time. To the extent that any argument about reasonable practicability is based on the union representative's failure to bring the claim in time, the authorities (see **Dedman** and **Ashcroft** above) also tell me that the claimant is, as it were, fixed with that failure. I therefore find that even if the claimant's argument is that she was relying on the union representative it was reasonably practicable for the claim to have been brought in time.

32. Because I have decided that the claim should be dismissed on a time limit basis I do not have to go on and decide the substance of the claims. However, out of courtesy to the parties and in case I am wrong about the time limit point I have briefly set out my conclusions on the arguments I heard below.

33. In relation to the backdating claim, the claimant's argument that her furlough pay should be backdated to March 2020 was based on her understanding that the Government had said that claims of furlough should be backdated to March 2020 if an employee was placed on furlough. The claimant accepted that an employer had a

discretion whether to actually put employees on furlough. However, her argument was that once an employer had made that decision, they were required to backdate furlough pay to March 2020 when the furlough scheme started.

34. I prefer Mr Proffitt's submission on this, which is that the furlough scheme is not mandatory. It does not require an employer to backdate pay when an employee is placed on furlough. The furlough scheme governs when the employer can claim furlough pay from the Government. The employee's entitlement to pay is still governed by their contract with the employer. In this case, the agreed terms of the contract between the claimant and the respondent as to her pay during the furlough period is set out in the furlough letter (p.33). Those are the terms agreed between the parties, and it is very clear from that the furlough letter that those terms are that furlough pay starts from 21 May 2020. The claimant did not point me in the direction of any other materials which suggested that the employer was not allowed to start the furlough period and pay from 21 May 2020 without backdating it to March 2020. When it comes to the unlawful deduction claim relating to the failure to backdate the furlough period therefore, I would have found that the claim failed even had it been brought in time.

35. When it comes to the calculation of the furlough pay for 21 May 2020 to 1 August 2020, the claimant explained that she understood that furlough pay was to be calculated by taking the hours actually worked in the corresponding months in 2019 and then multiplying that by the relevant NMW rate for 2020. As the claimant had her 25th birthday in June 2019 she would have been entitled to the full NMW in the summer of 2020 had she been working, i.e. £8.72. The claimant's calculation was therefore that there had been an underpayment because the furlough pay should have been 80% of that higher figure rather than 80% of the pay she actually received in the equivalent 2019 months which was based on a lower NMW rate.

36. Again, looking at the furlough letter it is clear that in terms of the agreement between the claimant and the respondent that was that furlough pay would be "based on the same months earnings from the previous year" (p.33) (my underlining). That, it seems to me, means that the claimant's legal entitlement was to 80% of the actual pay received rather than 80% of a calculation based on the underlying hours worked.

37. I can understand the claimant saying that that does not seem right given that it in effect means that her furlough pay was based on the employer in 2020 paying her less than the NMW for 2020-2021. However, I accept Mr Proffitt's submission that the NMW legislation applies when an employee is working. When an employee is on full furlough they are not working, and the furlough scheme rules themselves make it clear that a furlough payment can go below the NMW. It seems to me therefore that there was nothing to stop the respondent in this case basing the furlough pay for the claimant on the equivalent 2019 payments rather than on the equivalent 2019 hours worked. I therefore find that the calculation of the furlough pay made by the respondent as set out in Annex A to its response was correct. The claimant was paid the furlough pay she was entitled to under her contract.

38. In fairness to the claimant, I understand that the issues around furlough are complicated and that it is not sometimes clear whether what the Government is

doing is advising employers on what they should and can contract to pay their employees as opposed to what they can reclaim from the Government as part of the furlough scheme. Had the claim been brought in time I would have found that the respondent did not make any unlawful deductions from the claimant's wages during the furlough period.

39. In summary therefore what I find is that the claimant's claim was out of time and is dismissed on that basis. Had the claim been in time I would have dismissed the claim for the reasons given above.

Employment Judge McDonald
Date: 8 October 2021

JUDGMENT AND REASONS SENT TO THE PARTIES ON
11 October 2021

FOR THE TRIBUNAL OFFICE