EMPLOYMENT TRIBUNALS

Claimant: **Mr A Herring**

Respondent: **Winns Coaches Limited**

On: **14 September 2021**
6 October 2021
14 October 2021 (in Chambers)

Before: **Employment Judge McAvoy Newns**

Heard at: **Leeds Employment Tribunal**

Appearances:

For the Claimant: **In person**

For the Respondent: **Mr B Hendley, Litigation Consultant**

RESERVED JUDGMENT

1. The Claimant's claim for unauthorised deductions from wages is well-founded and succeeds.

2. The Respondent is ordered to pay the Claimant the sum of £7,546. This is a gross sum and the Claimant is required to account for any tax or national insurance contributions which may be due on it.

3. The Claimant's claim for a statutory redundancy payment is not well-founded and is dismissed.

4. The Claimant's claim for breach of contract is not well-founded and is dismissed.

WRITTEN REASONS

Background and issues

1. This has been a remote hearing which has not objected to by the parties. The form of remote hearing was CVP. A face to face hearing was not held because it was not practicable and all issues could be determined in a remote hearing.

2. It was agreed that the purpose of this hearing would be to determine liability and remedy.

3. It was clarified at the outset of the hearing that the Claimant's claim was for unauthorised deductions from wages, a statutory redundancy payment and breach of contract (concerning notice pay). No claim for unfair dismissal (constructive or actual) was being pursued.

4. The Claimant's claim for unauthorised deductions from wages concerned:

    1. salary of £2,635 per month which the Claimant believed was owed between February and May 2021 inclusive. The Respondent conceded that the Claimant ought to have received a full month's pay in both April and May 2021. The Respondent did not however concede what that pay ought to have been (and did not accept that the Claimant's figures were correct), submitting that this was a matter that required determination by me. The Respondent denied that the Claimant was owed any pay for February and/or March 2021 and raised time limit issues in regard to these claims; and

    2. a payment in lieu of accrued but untaken holiday pay which the Claimant believed ought to have been paid upon the termination of his employment with the Respondent. In this regard the Claimant submitted that he was owed £3,387.90 for 30 days accrued but untaken holiday pay. The Respondent conceded that the Claimant was owed a payment in lieu of 30 days accrued but untaken holiday pay. The Respondent did not however concede what payment the Claimant ought to have received for these days, submitting that this was a matter that required determination by me.

5. The Claimant submitted that his claim for a statutory redundancy payment and notice pay arose by virtue of the lay off provisions set out in section 135(1)(b) of the Employment Rights Act 1996 (the "ERA"). The Claimant explained his claim for notice pay arose as part of this claim. He explained, when I questioned him about this at the beginning of the hearing, that he was not pursuing a claim for constructive wrongful dismissal. Such would have been inconsistent with the Claimant's claim for a redundancy payment given that, in the circumstances in which the claim was brought, it would have been defeated if the Claimant had been dismissed. A claim for constructive wrongful dismissal could however have been pursued in the alternative. This would have

necessitated an application for a postponement of the hearing which the Claimant did not wish to seek. Indeed, as set out in the case management summary dated 21 September 2021, the Respondent applied for the hearing to be postponed and the Claimant objected to that application.

6. The Claimant originally brought his claim against Mr Garry Winn. By order of Employment Judge Deeley, the name of the Respondent was substituted to Winns Coaches Limited accordingly.

7. The final hearing commenced on 14 September 2021. For the reasons explained in my summary dated 21 September 2021, that hearing was part-heard and adjourned until 6 October 2021. As there was no clarity from either party in their submissions about what the Claimant ought to have been paid for the months claimed, I reserved my decision to enable me sufficient time to calculate this myself.

Evidence

8. The Claimant served a witness statement and was cross examined on that statement. Mr Garry Winn of the Respondent also served a witness statement and was cross examined on that statement.

9. Between 14 September 2021 and 6 October 2021 further documents were disclosed by the parties. The Claimant was cross examined on the contents of some of those documents. The Respondent's witness did not attend on 6 October 2021 in order to answer questions from the Claimant about these additional documents. The Respondent's representative further informed me that he was be available to attend. The Claimant was offered but did not wish to pursue a postponement application.

10. I also had sight of two bundles of documents. The first, which was provided for the hearing on 14 September 2021, contained 73 pages. I have referred to this as "OB". The second, which was a supplementary bundle provided for the reconvened hearing, contained 68 pages. I have referred to this as "SB".

11. Having considered the evidence, both oral and documentary, I make the following findings of fact on the balance of probabilities.

Findings of fact

Background

12. The Respondent is a Coach Hire company. The Claimant commenced employment with the Respondent in March 2014 as a Coach Driver. He undertook European escorted holidays for Leger Shearing Group. The Claimant's employment terminated on 27 June 2021 following his resignation.

Hours of work

13. There was a dispute between the parties regarding whether the Claimant was, at the relevant time, working pursuant to a zero hour contract or not.

14. The Claimant acknowledged that, prior to April 2019, he was working pursuant to a zero hour contract [51 SB]. However, the Claimant said that he believed that from April 2019 onwards he was not and from this point he had a contractual entitlement to 250 days of paid work per year, in addition to 30 days paid holidays.

15. The Respondent said that the Claimant was entitled to be paid per day worked but the Claimant had no reasonable expectation of a fixed amount of days work per year. The Respondent did however concede that the Claimant would on average work at least 250 days per year.

16. I was provided with a contract of employment which was not signed by the Claimant [27 SB] and which the Claimant said he had not seen prior to these proceedings (and indeed he said he received this for the first time the day before this hearing reconvened). This does not give the Claimant a guaranteed number of hours/days of work (and relevant to one of the Claimant's other claims, does not include a clause entitling the Respondent to lay the Claimant off work or place him on short-time working).

17. Another document entitled "Principal Statement of Terms and Conditions" was also provided [64 SB]. This is unsigned and undated. It states that the Claimant's working hours will be "0 per week". It specifies the Claimant's daily rate of pay as being £100 per day which would be reviewed annually. It also does not include a clause entitling the Respondent to lay the Claimant off work or place him on short-time working. No evidence was adduced in relation to the status of this document.

18. There was also a dispute between the parties regarding what the Claimant's day rate was. At points he said that it ought to be £110 [15 OB]. During the grievance appeal meeting (considered later), he said that he thought it ought to have been £110 from March 2019 to 2020 [45-46 SB]. However, at other points [71 OB] including when relying upon the Pay Rise Agreement (referred to below), he said that it ought to have been £105. The Respondent maintained that the Claimant's daily rate was £105 and denied that there had been any increase effective from March/April 2019.

19. Linked to the above points, the Claimant sought to rely upon a document entitled "Pay Rise Agreement And Wage Increase" [32-33 OB] (**"Pay Rise Agreement")**. Neither party signed this agreement.

20. The Pay Rise Agreement stated that it was entered into on 5 April 2019 and that the Claimant *"will receive an daily wage of £105.00 over 250 days plus 30 bank holidays".* It stated that the Claimant's gross annual income was £29,400 and the Claimant's remuneration would be payable monthly.

21. The Respondent said that it was not aware of this document prior to these proceedings. Mr Winn gave evidence that he had not created this document

nor would anyone else, on behalf of the Respondent, have authority to do so. Mr Winn referred to the fact that his name had been spelled incorrectly as "Gary" rather than "Garry" and said that, had he produced and/or sent this document to the Claimant, he would have spelled his name correctly. The Respondent put to the Claimant that he had prepared this document, which the Claimant denied. In relation to the point concerning the spelling of Mr Winn's name, the Claimant noted that the document could have been prepared by someone else, on behalf of Mr Winn, who had spelt the name incorrectly. In this regard the Claimant referred to other documents in the bundle, prepared by others, who had spelt Mr Winn's name incorrectly [30 SB].

22. On the first day of the hearing, the Claimant confirmed that Mr Winn had sent this document to him via email and that he had a copy of such email. Such email was not however in the OB. The Claimant was ordered to disclose this email before the reconvened hearing. The Claimant did not do so explaining, at the reconvened hearing, that he could no longer find it.

23. It was accepted between the parties that in April 2019 it was agreed that the Claimant would be paid his basic salary over nine rather than 12 months [7 SB]. Overtime would however be paid should additional work be undertaken in the three months during which the Claimant would not receive a basic salary payment. Relevant to this is an email from the Respondent dated 27 April 2019 which stated:

"Your day rate is £105 based on 280 days (250 working and 30 annual leave) which gives a salary of £29,400. For April you have worked from the 17th so we have paid you 10 days on 26th April (10 x £105 = £1,050), when we spoke last week you advised you wished to be paid your salary over 9 months, so with 31st May being the first monthly pay you will receive £3,150 per month for the next 9 months (9 x £3,150 = £28,350 +£1,050 paid on the 26th April gives a total salary of £29,400)" [7 SB] .

24. Although the pay slips were not provided, it was not challenged by the Claimant that he received an amount different to £3,150 gross in May, June or July 2019. Between August 2019 and December 2019 the Claimant received gross monthly salary instalments of £3,150 [14 SB]. In January 2020 he received £1,785 gross. In February 2020 he received £1,680 gross. In March 2020 he received £840 gross.

25. It appeared to be common ground between the parties that the Claimant was expecting to receive a fixed monthly salary between April and December 2019 and overtime payments between January and March 2020.

Furlough leave and pay

26. As a result of the coronavirus pandemic, the Respondent closed its business and utilised the Government's furlough scheme with effect from March 2020. The Claimant was on furlough leave from March 2020 for approximately one year.

27. There was no written agreement between the Claimant and the Respondent confirming what the Claimant would be paid during his furlough leave. The oral evidence given by both parties in this regard was also vague.

28. The Claimant accepted in evidence that he agreed orally that his salary would be reduced to 80%. He also said that the Respondent had told him and his colleagues that they would pay him "whatever they could claim from the Government's furlough scheme" and that he had orally accepted that. The Respondent confirmed in evidence that he did not know how the pay had been calculated; they just paid what their accountant advised them to pay.

29. It appears that there was no discussion between the parties about whether the Claimant would receive his total annual entitlement to furlough pay spread over nine months, or 12 months. However, the Respondent's evidence was that, because the Claimant had requested that his pay be spread over nine months in the preceding year, and he had not raised any concerns about this, they had assumed that he wanted the same arrangement to apply during his furlough period.

30. In March 2020 the Claimant received £840 gross which the Respondent has explained represented eight days work [23 SB]. The Claimant's furlough payments commenced in April 2020 with a payment of £3,281.93 which included payment for furlough leave in March 2020. Between May 2020 and December 2020 the Claimant received gross monthly salary instalments of £2,196 [72 OB and 14 SB]. He received a gross payment of £1,095.07 for January 2021 but makes no complaint about this. He received no payment in February, March, April or May 2021 and raises complaints about each of these, the latter two unauthorised deductions having been conceded by the Respondent during the course of this hearing.

31. The Claimant accepted in cross examination that he did not challenge any of the payments that he received between April and December 2020 at the time. The Claimant's position was that he only realised he had grounds for complaint when he did not receive the same payments between January and March 2021.

32. The Respondent explained that it calculated the Claimant's furlough pay by averaging his earnings from August 2019 to February 2020 [17 SB]. The average monthly pay between this period was, according to the Respondent, £2,745 for which 80% was £2,196. The Claimant believes this was the wrong calculation and advanced a number of different alternatives during the course of the hearing one of which was based on the Claimant's pay for 2019/2020 as recorded on his P60 which the parties agreed was £30,555. Although the parties agreed that the Claimant was paid this amount in the 2019/2020 tax year, it was also agreed this included a payment for 30 days annual leave which was rolled up into the Claimant's salary.

33. On 25 January 2021, the Respondent wrote to the Claimant and his colleagues and stated:

"We have been advised by HMRC and our payroll team that once the threshold has be hit on a par with your 2019 earnings, we can't claim additional earnings until the start of the new tax year from April 2021 onwards. Therefore you may see a reduction in your furlough payments over the coming months so we just wanted to give you the reason behind this" [54 OB].

Re-opening of the Respondent's business

34. On 21 April 2021 the Respondent emailed the Claimant stating:

"It is with much joy that we write to advise that we will soon be in a position to reopen the business and get back on the road coaching. We are currently in discussions with our client Leger Shearing Group, to determine what tours and allocations we can expect" [35 OB].

35. On 27 April 2021, the respondent emailed the Claimant to confirm that the business would reopen with immediate effect to allow the Respondent to prepare and be ready for the allocated UK tours in May 2021. It stated:

"Whilst initially we will for sure see some changes with how our business is structured and the focus being on UK travel only at the moment, we intend to continue with European travel once the government gives us the green light!" [38 OB].

36. At 22.49 on 29 April 2021, very soon before the Claimant stated that he expected to receive his April 2021 salary instalment, the Respondent emailed the Claimant to confirm that, as the business had re-opened, they could no longer claim furlough. It said that, over the preceding 12 months, all employees had received the maximum amount of furlough that the Respondent was entitled to claim. It proposed to arrange individual one to ones with employees to discuss how the business would be working in the interim [36 OB].

37. On 9 May 2021 the Respondent emailed the Claimant regarding its forthcoming plans for the business. It explained that it was running its first tour that month on the silver service vehicle and that it intended to run with its UK tours until it was able to resume European tours. It asked for the Claimant's views on conducting these UK tours as well as his availability to assist with the vehicle preparation [39 OB].

38. On 10 May 2021, a conversation took place between the Claimant and Joanne Tonothy of the Respondent. Ms Tonothy did not give evidence at this hearing. The Claimant stated that during this conversation Ms Tonothy told him that work for his colleague, Pete, would commence at the beginning of June with eight five day UK tours allocated. The Claimant stated that he was told that allocations for Luxuria had not been received. Consequently, the Claimant requested that he be furloughed (either fully or flexibly) until the Luxuria work continued. This was refused by the Respondent for cost related reasons.

Request for a redundancy payment

39. On 10 May 2021, the Claimant wrote to the Respondent and stated:

    "As I've not been paid or furloughed for the last four consecutive weeks I am writing to formally apply for redundancy. If you haven't replied within the next seven days I will assume my application has been excepted & I will resign within three weeks of that deadline" [40 OB].

40. On 14 May 2021, the Respondent wrote to the Claimant asking him to attend for work at 9am on 17 May 2021. It said that the work required was different to his driving duties but covered other aspects of the Claimant's role. It stated:

    "Following from April 2021 you have been offered work throughout this period and it is you that has declined work, therefore, there is no shortage of work situation so you will have no right to claim redundancy" [49 OB].

41. The Claimant accepted in cross examination that part of his role involved keeping his coach clean and this is what the Respondent had asked him to do.

42. On 17 May 2021, the Respondent emailed the Claimant and asked him to confirm that, when UK single crew work is offered, he would be available for it. The Claimant confirmed he was. The Respondent confirmed it would contact the Claimant later in the week regarding allocations but in the meantime asked the Claimant to concentrate on cleaning the inside of the Luxuria bearing in mind that, following the pandemic, the Respondent would need to ensure all vehicles were cleaned and disinfected to the highest standards. The Claimant replied to say "no problem" [56 OB].

43. The Respondent put to the Claimant that he did not do the work offered to him because he was working as a truck driver for another organisation at this time. The Claimant denied this when giving evidence but later accepted, during submissions, that he had been a key worker, delivering nappies for organisations, during this time.

44. On 17 May 2021, the Claimant raised a formal grievance [51 OB]. This concerned, amongst other matters, the:

    1. non payment of salary for February, March and April 2021; and

    2. fact that the Claimant believed that duties allocated to him had been fabricated to avoid his claim for redundancy.

45. The Claimant said that he would not be attending work on 18 May 2021 as he did not consider it safe to do so [51 OB]. On 20 May 2021 and 2 June 2021, the Respondent wrote to the Claimant to remind him that it had work for him to undertake [59 OB].

46. On 27 May 2021, the Claimant resigned from his employment with the Respondent. His employment terminated on 27 June 2021. He stated that he assumed his request for a statutory redundancy payment had been accepted

as no valid counter notice had been received [70 OB]. He did not work during his notice period.

47. On 6 July 2021, the Respondent confirmed the outcome of the Claimant's grievance [11 SB]. In relation to the Claimant's complaints concerning:

    1. non payment of salary for February, March and April 2021, the Respondent stated: *"The business was forced to close on 16th March 2020 due to COVID 19, during this time you have received 80% of your salary as per the Government guidelines under the furlough scheme. This being calculated on your annual salary as 280 days (250 planned working days with 30 days holiday) at £105 per day".* It went on to state: *"your full salary (80% of £26,650) has been claimed and processed to you as part of the furlough scheme".* It further clarified that, *"in 2019 you received £30,555 as shown on your P60 and as clarified with myself on your grievance hearing call… In 2019, you worked a total of 291 days which is why you received a salary of £30,555. £30,555 divided by £105 equals 291"*; and

    2. his entitlement to a redundancy payment, the Respondent stated: *"The Company reopened in April 2021 and numerous work offers have been made available to you. You were asked if you would be available to cover any UK single crewed work, as currently because of COVID we are unable to offer any double crewed European work to you. You advised me via email on (copy enclosed) that you would be. Subsequently, as you have not been available the company have had to employ another individual to assist with this UK work".*

48. The Claimant appealed against the grievance outcome following which the Respondent arranged for Croner Face2Face to conduct a grievance appeal. A report was produced on 29 September 2021 making the following recommendations relevant to this claim:

    1. The Respondent liaises with their accountant to ascertain whether the payments received by the Claimant during the furlough period were calculated correctly. It was found that the Claimant's rate of pay was £105 per day [32 SB]; and

    2. The Respondent should pay the Claimant for the hours worked on 17 May 2021.

Submissions

49. Both parties provided oral submissions. They are not set out in detail in these reasons but both parties can be assured that I have considered all the points made, even where no specific reference is made to them.

50. The Respondent submitted that the Claimant was owed no wages for February and March 2021. In any event, these claims were out of time. It submitted that there was no lay off provision in the Claimant's contract of employment and

the Claimant was offered work, meaning that he was not entitled to a redundancy payment. As the Claimant did not work his notice, and based on the claim being pursued by the Claimant, he was not entitled to receive notice pay.

51. The Claimant submitted that his claims for unpaid wages for February and March 2021 were in time. He said that as he had not been paid wages or offered work by the Respondent he was entitled to make a claim for a statutory redundancy payment, which he did.

The Law

Unauthorised deductions from wages – time limits

52. Section 23(2) of the ERA states that, subject to subsection (4), a Tribunal shall not consider a claim for unlawful deduction from wages:

"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"

Unauthorised deductions from wages – general

53. Pursuant to section 13(1) of the ERA:

"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."

Section 13(2) of the ERA defines "Relevant provision" as 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."

Statutory redundancy payment

54. Section 135 of the ERA states:

An employer shall pay a redundancy payment to any employee of his if the employee—

(b) is eligible for a redundancy payment by reason of being laid off or kept on short-time.

55. Section 147 of the ERA states:

(1) For the purposes of this Part an employee shall be taken to be laid off for a week if—

(a) he is employed under a contract on terms and conditions such that his remuneration under the contract depends on his being provided by the employer with work of the kind which he is employed to do, but

(b) he is not entitled to any remuneration under the contract in respect of the week because the employer does not provide such work for him.

56. Section 148 of the ERA states:

(1) Subject to the following provisions of this Part, for the purposes of this Part an employee is eligible for a redundancy payment by reason of being laid off or kept on short-time if—

(a) he gives notice in writing to his employer indicating (in whatever terms) his intention to claim a redundancy payment in respect of lay-off or short-time (referred to in this Part as "notice of intention to claim"), and

(b) before the service of the notice he has been laid off or kept on short-time in circumstances in which subsection (2) applies.

(2) This subsection applies if the employee has been laid off or kept on short-time—

(a) for four or more consecutive weeks of which the last before the service of the notice ended on, or not more than four weeks before, the date of service of the notice, or

(b) for a series of six or more weeks (of which not more than three were consecutive) within a period of thirteen weeks, where the last week of the series before the service of the notice ended on, or not more than four weeks before, the date of service of the notice.

57. Section 149 of the ERA states:

Where an employee gives to his employer notice of intention to claim but—

(a) the employer gives to the employee, within seven days after the service of that notice, notice in writing (referred to in this Part as a "counter-notice") that he will contest any liability to pay to the employee a redundancy payment in pursuance of the employee's notice, and

(b) the employer does not withdraw the counter-notice by a subsequent notice in writing,

the employee is not entitled to a redundancy payment in pursuance of his notice of intention to claim except in accordance with a decision of an [employment tribunal]

58. Section 150 of the ERA states:

(1) An employee is not entitled to a redundancy payment by reason of being laid off or kept on short-time unless he terminates his contract of employment by giving such period of notice as is required for the purposes of this section before the end of the relevant period.

(2) The period of notice required for the purposes of this section—

(a) where the employee is required by his contract of employment to give more than one week's notice to terminate the contract, is the minimum period which he is required to give, and

(b) otherwise, is one week.

(3) In subsection (1) "the relevant period" —

(a) if the employer does not give a counter-notice within seven days after the service of the notice of intention to claim, is three weeks after the end of those seven days,

(b) if the employer gives a counter-notice within that period of seven days but withdraws it by a subsequent notice in writing, is three weeks after the service of the notice of withdrawal, and

(c) if—

(i) the employer gives a counter-notice within that period of seven days, and does not so withdraw it, and

(ii) a question as to the right of the employee to a redundancy payment in pursuance of the notice of intention to claim is referred to an [employment tribunal]1 ,

is three weeks after the tribunal has notified to the employee its decision on that reference.

(4) For the purposes of subsection (3)(c) no account shall be taken of—

(a) any appeal against the decision of the tribunal, or

(b) any proceedings or decision in consequence of any such appeal.

59. Section 152 of the ERA states:

(1) An employee is not entitled to a redundancy payment in pursuance of a notice of intention to claim if—

(a) on the date of service of the notice it was reasonably to be expected that the employee (if he continued to be employed by the same employer) would, not later than four weeks after that date, enter on a period of employment of not less than thirteen weeks during which he would not be laid off or kept on short-time for any week, and

(b) the employer gives a counter-notice to the employee within seven days after the service of the notice of intention to claim.

(2) Subsection (1) does not apply where the employee—

(a) continues or has continued, during the next four weeks after the date of service of the notice of intention to claim, to be employed by the same employer, and

(b) is or has been laid off or kept on short-time for each of those weeks.

Conclusions

Time limits

60. The Claimant started the ACAS early conciliation process on 16 May 2021. That process concluded on 21 June 2021 and the Claimant lodged his claim within one month of this date, on 10 July 2021. The Claimant's claims in relation to alleged deductions made on or after 17 February 2021 are therefore in time. As the Claimant relies upon deductions allegedly made from 28 February 2021 onwards, his entire claim for unauthorised deductions from wages is in time.

Agreement reached between the parties regarding the Claimant's furlough pay

61. On the balance of probabilities, I find that it was agreed that the Claimant would receive as furlough pay what the Respondent was able to claim as part of the Government's furlough scheme as of March 2020.

62. This was the evidence of the Claimant which was not disputed or challenged by the Respondent. This is also consistent with the Respondent's evidence, which was that their accountants calculated what the Claimant should be paid which would have presumably been done on the same basis.

63. Although the amounts which the Respondent may have been able to claim from the Government from July 2020 onwards may have changed, there is no evidence of an alternative agreement being entered into between the parties after March 2020 onwards.

Days of work and rates of pay

64. I find that, on the balance of probabilities, the Claimant was not working pursuant to a zero hours contract. No binding zero hours contract has been presented to me in evidence. Following the conversation and subsequent email of April 2019, considered earlier, the Claimant had a reasonable expectation of receiving at least 250 days paid work as well as 30 days paid holiday per year. Had this not been the Respondent's intention, it is unlikely that it would have effectively advance paid the Claimant for some of these days by paying him an annual salary spread over nine months.

65. I find that, on the balance of probabilities, the Claimant's rate of pay was £105 per day. This was the consistent evidence of the Respondent and, albeit at times wavering, the evidence of the Claimant.

66. Considering the above, the Claimant's gross annual salary was £26,250 (250 multiplied by £105) excluding holidays and overtime. This equates to a gross monthly salary of £2,187.50 excluding holidays and overtime.

Calculation of furlough pay

67. In determining what the Claimant's furlough payments ought to have been, consideration needs to be given to the Government guidance as of March 2020. This is because I have found that it was agreed that the Claimant's furlough pay would be calculated based on what the Respondent was able to claim from the Government as of March 2020.

68. This guidance provided that all UK employers, regardless of size or sector, could claim a grant from HMRC to cover 80% of the wages costs of furloughed employees, of up to £2,500 a calendar month for each employee or PAYE worker, plus the associated employer national insurance contributions on that wage.

69. Considering that guidance, the first point to determine is whether the Claimant was a fixed or non fixed rate employee. The second point is the Claimant's reference salary. Taking each of these in turn:

    1. Although I have found that the Claimant received an annual salary for a certain number of days per year, the salary was not payable in equal instalments and the Claimant received overtime pay in addition to this basic salary. Therefore, I find that the Claimant was a non fixed rate employee; and

2. In respect of any employee who is not a fixed rate employee, who has been employed by their employer for a full 12 months prior to the claim, the employer can claim for the higher of either:

    i. The same month's earnings from the previous year. In the Claimant's case, this would have involved consideration of his monthly pay for March 2019 which has not been provided as evidence in this case; or

    ii. Average monthly earnings from the 2019-20 tax year. The parties accept that this was £30,555 but that includes a payment representing 30 days holiday pay which had been rolled up into the Claimant's annual salary. On this basis, the Claimant's earnings less holiday pay for this year would have been £27,405 (£30,555 less £3,150 (30 multiplied by £105)).

70. As a result of the above, and applying the balance of probabilities given that neither party has confirmed the Claimant's pay for March 2019, I find that the Claimant ought to have received monthly furlough payments of £1,827 gross. This is based on 80% of £27,405 (£27,405 multiplied by 0.8 and then divided by 12).

71. For the 2019/2020 tax year, the parties agreed that the Claimant would receive his annual salary spread over 12 months. The Respondent applied the same formula when calculating the Claimant's furlough pay. On this basis, the Claimant ought to have received monthly gross payments of £2,436. This is £1,827 multiplied by 12 and then divided by nine.

72. The Claimant did not receive £2,436 per month between May and December 2020. Instead, he received £2,196 per month during this period. However, no complaint is made to this Tribunal about the payments received during these months.

73. Nevertheless, the payments received between April and December 2020 are relevant because the Respondent says that, when including the payments which the Claimant received between this period, he had "run out" of furlough pay by January 2021.

74. Considering the Claimant's entitlement from this perspective, £1,827 multiplied by 12 is £21,924. This was the Claimant's total annual entitlement to furlough pay, as explained above. Considering the calculation in a different way, it is £27,405 which is the Claimant's gross annual salary less holiday pay multiplied by 0.8.

75. Between April and December 2020, and bearing in mind the greater than average payment that the Claimant received for April 2020, the Claimant received a total of £20,849.93. This means that the Claimant was due to be paid £1,074.07 in January or February 2021.

76. In January 2021, the Claimant received a gross payment of £1,095.07 meaning that he was owed a gross payment of £21 either in January or February 2021.

77. The Respondent has not adduced any evidence of it being permitted to deduct this sum from the Claimant's wages in either month.

78. The Respondent has conceded that the Claimant ought to have received his full month's wages for April and May 2021. As I found earlier, the Claimant's gross monthly salary was £2,187.50. This was based on an annual salary of £26,250 which is 250 days multiplied by £105.

79. Consequently, I find that:

    3. £21 was deducted from the Claimant's wages without authorisation in February 2021;

    4. there was no unauthorised deduction from the Claimant's wages in March 2021; and

    5. £4,375 has therefore been deducted from the Claimant's wages without authorisation in April and May 2021 combined.

Holiday pay

80. In respect to the Claimant's holiday pay, the Respondent has conceded that the Claimant ought to have received a payment in lieu of 30 days holiday on the termination of his employment. I have found that the Claimant's daily rate of pay was £105. The sum of £3,150 has therefore been deducted from the Claimant's final salary instalment without authorisation.

Entitlement to a redundancy payment

81. This claim is more straightforward to address as it fails at the first hurdle. I have to ask myself whether a period of lay off or short time working has been imposed and for the reasons explained below I conclude they have not.

82. The ERA defines lay off at section 147. In respect to the first limb, the Claimant was employed under a contract on terms and conditions such that his remuneration under the contract depended on him being provided by the employer with work of the kind which he was employed to do. As concluded earlier, the Claimant was not working pursuant to a zero hour contract and had an entitlement to be paid for 250 days work per year, in addition to holidays and overtime. In respect of the second limb however, the Claimant was entitled to remuneration under his employment contract for April and May 2021. The business had re-opened and the furlough scheme was not being utilised. The Claimant would have only not been entitled to such remuneration if the Respondent had either exercised a contractual lay off provision or the Claimant provided his consent to be laid off. Neither applied in this case. The Respondent had no contractual right to lay the Claimant off. The Respondent did not request the Claimant's consent to be laid off and the Claimant did not

provide any such consent. Indeed the correspondence sent on 21 and 27 April and 9 May 2021 in particular demonstrated that the Respondent had no intention of laying the Claimant off.

83. I can understand why the Claimant may have perceived that he had been laid off because in April and May 2021 he was not provided with any pay. The Respondent has subsequently conceded this was mistake, a wrong which they have sought to rectify during these proceedings. However, the Claimant's perception of the situation is irrelevant to the test set out in section 147.

84. Therefore, the Claimant has no entitlement to a redundancy payment irrespective of the process which he followed in order to apply for one.

85. Although less relevant to this case, to help eliminate any confusion, I have also addressed the position between February and March 2021. The Claimant was not laid off during this period bearing in mind the definition at section 147 of the ERA. Instead, he had been placed on furlough leave in respect to which he received furlough pay, in accordance with the conclusions that I have drawn above.

86. The position in this case is confused by the fact that the Claimant received part of his furlough pay 'up front' meaning that he did not receive any payments at all in February or March 2021. However, the payments he received between April 2020 and January 2021 collectively represented the pay that was due between March 2020 and March 2021. The Claimant was therefore paid for February and March 2021; he was simply paid earlier than he might have expected.

Breach of contract

87. As the Claimant's case was that his entitlement to notice pay was dependent on his entitlement to a statutory redundancy payment, it follows that his claim for breach of contract should fail as well. The Claimant did not work his notice and did not pursue claims for constructive dismissal or constructive unfair dismissal.

88. Accordingly, the Claimant's claim for unauthorised deductions from wages is upheld to a limited extent. The Claimant's remaining claims are dismissed.

Employment Judge McAvoy Newns

Date: 21 October 2021