Case Nos: 1406710/2020
1400369/2021
1400395/2021
1400538/2021

EMPLOYMENT TRIBUNALS

Claimants: (1) Miss S Spicer
(2) Miss B Johnson
(3) Miss T Holt
(4) Miss E Hillman

Respondent: R & S Hotel Management Limited

Heard at: **Bristol (by video - VHS)** **On:** **29 October 2021**

Before: **Employment Judge Livesey**

Representation
Claimants: All in person
Respondent: Mr Maratos, Consultant with Peninsula

JUDGMENT having been sent to the parties on 26 November 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

1. <u>The claims</u>

1.1 By claim forms dated 30 December 2020 and 12, 15 and 27 January 2021, the Claimants brought complaints of unlawful deductions from wages. They are identified in these Reasons as they have been numbered above.

2. <u>The evidence</u>

2.1 All of the Claimants gave evidence in support of their claims and Ms Davies, a Director, give evidence on behalf of the Respondent.

2.2 The case was conducted by video (VHS). The First and Fourth Claimants were unable to join by video but were able to join by audio only and their evidence and submissions were heard in that manner with all parties'

consent.

2.3 The following documents were received;
- C2; a bundle of evidence from the Second Claimant;
- C4; a bundle of evidence from the Fourth Claimant;
- R1-4; separate bundles from the Respondent in respect of each Claimant's claims.

3. <u>The facts</u>
3.1 The following factual findings were reached on the balance of probabilities. Findings were limited to matters which were relevant for a determination of the issues between the parties.

3.2 The Respondent operates a hotel in Crewkerne, Somerset. The directors are Ms Davies and Mr Burgess.

3.3 All claims relate to furlough payments which the Claimants assert were due during the second government coronavirus lockdown in the autumn and winter of 2020.

3.4 Two of the Claimants (the First and Fourth) alleged that, in anticipation of that closure on 5 November 2020, Miss Davies made certain oral representations on 4 November; that the Respondent was going to apply for furlough payments on behalf of all of them and that they would therefore be paid. Specifically, the First Claimant said that Ms Davies had said that furlough was "*in hand",* that *"Simon* [Mr Burgess] *was dealing with it*" and "*that she was confident*" that payments would be made. The First Claimant did not question it. She had faith in her. That was broadly what the Fourth Claimant also said.

3.5 The other two Claimants had not been present when Ms Davies had made those representations on 4 November but the Second Claimant also understood that the Respondent was applying for furlough and that payments "*were coming*" and messages that she received from her employer were confirmatory. Several WhatsApp messages were referred to in evidence which indicated that all that the Respondent was waiting for was a code to access payment through the HMRC portal. The Third Claimant stated that she "*was told that we would be getting furlough.*"

3.6 The Hotel then closed on 5 November.

3.7 The Respondent's case was, very broadly, that it took over management of the Hotel in September 2020, it having been closed for some time prior and there having been no employees at that point. All employees who they then engaged were engaged under zero hours contracts with the following relevant term within their contracts (Clause 6.1, R2);

> "*You have no normal hours of work and your hours will vary according to the needs of the Company and your availability to work. The Company is under no obligation to provide you with work or to provide you with a minimum number of hours work each day*

*or week and you are not obliged to accept any work that is offered. If you have accepted an offer of work: (a) you are obliged to complete it; and (b) you will be entitled to an unpaid break …*etc..”

3.8 Ms Davies’ evidence about conversations before the Hotel closure was that she had said that the Respondent would ‘*look into*’ the possibility of the business making an application for furlough payments, but nothing was guaranteed and its application to HMRC ultimately failed. She highlighted page 20 of R4, an email from HMRC dated 20 February 2021, in which she was informed that she was not eligible to apply for furlough payments on behalf of her staff. That was not only a surprise and disappointment to her, but the consequences were that the Respondent then failed to make any payments to the Claimants in this case.

3.9 Having considered that evidence, I was satisfied that Ms Davies had made the assurances that the Claimants asserted in relation to furlough payments. I did not consider that they would have been satisfied by the employer simply saying that it would ‘look into’ the possibility of furlough and the WhatsApp messages also corroborated the Claimants’ stance.

3.10 Each Claimant’s individual position was considered separately during the evidence.

3.11 According to her Claim Form, the First Claimant commenced work on 20 September 2020. In her Claim Form, she claimed to have been employed to undertake work for 18 hours per week. Her HMRC profile showed that she received the sum of £126.34 on five occasions (20 and 27 November and 4, 11 and 18 December), a total of £631.70. The Respondent’s case was that the HMRC Gateway information was an error and that no furlough payments had ever been received by it on her behalf.

3.12 No contract was produced in her case but she assumed that she had signed one. It was reasonable to assume that a contract was signed in the same way that it was in the case of the other Claimants and had since been lost.

3.13 The documents showed that she had worked for a variety of different hours each week before the Hotel shut, ranging from 4.5 at their least to 23.75 at their greatest, an average of 15.35 hours/week (R1, pages 38-45).

3.14 In the case of the Second Claimant, she was employed on 10 September 2020 as a chef and she claimed to have worked for 30 hours/week. The payslips in her case (R2, 34-44) showed an average of 30.45 hours/week, over a much narrower range than the First Claimant; between 26 hours and 34 hours/week.

3.15 Although the Second Claimant also had a contract with the same Clause 6.1 within it which bore her name, she stated that, at interview, she was told that she was going to have been allocated at least 26 hours of work

per week. She said that she would not have left her previous job for any less because she had then been doing 24 hours/week in that role. She did not, in fact, ever work less than 26 hours/week. Her evidence on that issue was compelling and I considered it unlikely that she would have resigned her former role if the representations had not been made. Consequently, I considered it probable that they had been made at interview and had formed a contractual term between the parties.

3.16 The Third Claimant started on 6 September 2020 and stated in evidence that she undertook a number of different roles; as a waitress, in the kitchen and in housekeeping. She very candidly accepted that the zero hours contract in her case (R3, pages 27-32) was the document which she signed and she recognised that her hours were flexible. That had been the nature of the work that she had applied for. She worked for between 16.50 and 26.50 hours/week before the closure, an average of 19.88 hours (R3, pages 41-8).

3.17 The Fourth Claimant was employed as a housekeeper from 7 September 2020 and, in her Claim Form, claimed to have been employed for 16 hours/week. She considered that her contract contained such a provision explicitly in handwriting. No contract was produced into evidence but it was notable that all of the payslips contained payments for 16 hours/week (R4, pages 31 and following). Ms Davies stated that the 16 hour ceiling was because the Claimant was in receipt of benefits and that was the least number of hours that she could have worked to have preserved them.

3.18 Although that may have been the reason for the manner in which the parties chose to govern their relationship, I nevertheless found that that was the agreed basis upon which the Claimant had worked. The Claimant had a very clear recollection of a handwritten change to her contract and, in the particular circumstances of her case, it was probable that such an alteration had been made.

4. Conclusions

4.1 It was important to remember that the government's Job Retention Scheme ('JRS') was an arrangement between the employer and the government. It did not govern, limit or alter the relationship between employers and the employees.

4.2 The contracts between the Respondent and the Claimants did not have a term enabling the Respondent to furlough them, lay them off or permit short-term working. There was no right for the Respondent to do so therefore.

4.3 An employer which laid an employee off unilaterally or demanded that they took furlough, did so at their own risk and in breach of contract. This was so irrespective of the fact that the business may have had to close. Faced with that problem, an employer had two options; either to make employees redundant or dismiss them for some other substantial reason or, secondly, to attempt to reach agreement with them over furlough.

4.4 The JRS was not defined in legislation, although it had its root in the Coronavirus Act 2020, s. 76. The Scheme was primarily defined and based upon an updated Government Guidance document, the relevant extract of which said this with regard to eligibility;

> "*Employees can be on any type of employment contract including full-time, part-time, agency, flexible or zero hours.*"

4.5 Clause 6.1 in these contracts was not a term which entitled the Respondent to lay off, stand-off or furlough the Claimants. Agreement therefore had to have been reached before that could have happened.

4.6 Clause 6.1, or clauses similar to it, were often seen in zero hours contracts. They were the reason why the contract *was* of a zero hours nature. It was sometimes argued that the term defeated the requirement for mutuality of obligation, rendering individuals who worked under them workers, not employees. That was not argued by the Respondent in this case. It was accepted by Mr Maratos at the start of the case that all of the Claimants were employed by the Respondent and they were paid by the PAYE scheme.

4.7 As a result of my earlier findings, both the Second and the Fourth Claimants were employed under contracts for a specific number of hours work/week. Ultimately, in light of the conclusions set out below, it made little difference.

4.8 The first question which needed to be addressed was whether furlough had been agreed in this case. As determined above, it had not been agreed in the written contracts.

4.9 On the basis of the factual findings above in relation to the Respondent's assurances, there was, in effect, a verbal agreement to furlough on or about 4 November. In other words, sufficient promise was made as to the receipt of furlough payments by the employer that the Claimants consented to not working or otherwise demanding their full rights, which would otherwise have been 100% of their salaries. Their expectation was that they would have received 80% whilst furloughed on the basis of the assurances that were given. The First Claimant gave clear evidence to that effect. That was therefore the sum 'properly payable' under s. 13. There was no evidence from either side that a top up beyond 80% was promised or expected.

4.10 An agreement to furlough was, of course, to the Respondent's benefit; on furlough, the Claimants were agreeing to 80% of their salary through the JRS. If agreement had not been not reached, the Respondent would have been in breach of contract to the extent of 100% of their salaries.

4.11 The next question was how the furlough payments ought to have been calculated. What was the 80% slice to have been applied to. The Government Guidance clearly indicated that, if an employee had been

employed for 12 months or more, he/she would have been entitled to claim the highest of two figures; the figure for the equivalent month in the previous year or their average monthly earnings for the 2019/2020 tax year. For employees who had been employed for less than 12 months, like these Claimants, the Guidance suggested that an average of their monthly earnings, between the date that they started work and the date of furlough, ought to have been used.

4.12 The Claimants' average earnings were set out above and they were therefore entitled to 80% of those average figures.

5. Remedy

5.1 Following the findings on liability, time was given to the parties to see if they could agree sums for remedy. That proved fruitless and further findings were made in the case of each Claimant. The calculations were worked through with the parties and the arithmetic was agreed with the Respondent in all cases on the basis of the conclusions that had been reached.

5.2 The First Claimant resigned on 17 April 2021 (R1, page 34). The calculation in her case was therefore;

15.35 hours x 23 weeks x £8.72 – 20% = £2,462.88.

5.3 The Second Claimant assumed that she had been made redundant on 11 April 2021. The Calculation in her case was therefore;

30.45 hours x 22 weeks x £8.72 – 20% = £4,673.22.

5.4 The Third Claimant stated that she had heard nothing about her employment with the Respondent and assumed that she was still employed. That said, she had started to look for work at the start of September 2021. Ms Davies stated that there was a P45 in her case dated 28 March 2021, but which was not produced in evidence. That had been issued, she said, on Peninsula's advice.

5.5 I indicated to the Third Claimant that I could assume that her employment ended on 28 March as the Respondent asserted or, since the P45 was not available and since some doubt remained as to its existence, I could adjourn her case to see whether it could have been produced. She was keen to have her claim resolved and was prepared to proceed on the basis that her employment had ended on 28 March as the Respondent asserted. The calculation in her case was therefore;

19.88 x 20 x £5 – 20% = £1,590.40.

5.6 The Fourth Claimant had recently registered as self-employed. When the Hotel had reopened fully in August, she was not given any more work because, she said, of 'things said around town'. Since August, therefore, she was entitled to 100% of her wages since furlough ought to have ended

for her. The calculations were therefore;

38 (weeks unto the Hotel re-opening) x 16 x £8.72 – 20% = £4241.41;and
13 (weeks since re-opening) x 16 x £8.72 = £1,813.76;
A total of £6,055.17.

Employment Judge Livesey
Date: 01 December 2021

Reasons sent to the parties: 14 December 2021

FOR THE TRIBUNAL OFFICE