



# EMPLOYMENT TRIBUNALS

**Claimant:** Miss E Gnanaselvan

**Respondent:** Premier Leisure Limited – Active4

**Heard at:** Birmingham via CVP

**On:** 13<sup>th</sup> January 2022

**Before:** Employment Judge Beck

## **Representation**

Claimant: Mr Ball, volunteer advocate, Free Representation Unit, Nottingham Law School

Respondent: Miss Hall, Managing Director, Triangle HR

# RESERVED JUDGMENT

1. The claimants claim for unauthorised deductions from wages is upheld in respect of the claimant's furlough pay between April and June 2020 in the sum of £126.50.
2. The claimants claim for unauthorised deductions from wages is upheld in respect of the claimants accrued but untaken annual leave between January and June 2020 in the sum of £1,107.79.
3. The claimants claim for breach of contract (notice pay) is upheld and the claimant is awarded £82.10 for notice pay.
4. The claimants claim for redundancy pay is upheld and the claimant is awarded £82.10 for redundancy pay.

# REASONS

## **Introduction**

1. The claimant presented an ET1 form on the 8/11/20, in respect of her claims for furlough pay owing, holiday pay, notice pay and redundancy pay. She was employed as an operations coordinator between the 9/3/15 and the 25/6/20 by the respondent.

2. I was able to confirm with the parties the 24 items of evidence I had received, which the claimant had provided. The respondent had previously submitted a bundle which was not available to me, which contained 44 items of evidence. Both parties had the 44 pieces of evidence, and the respondent was able to e mail the additional 20 items to me prior to the hearing, to enable the hearing to proceed.

3. I heard evidence from the claimant, and my attention was drawn to a statement provided by Mrs Campbell, an accountant the claimant had consulted concerning this matter. For the respondent I heard evidence from Mrs Hughes, Finance Co Ordinator and Mr Scott, Managing Director.

### Agreed facts

4. The parties agree that the claimant was absent from work on maternity leave for the period 19/4/19 until the 17/4/20. The claimant was due to return to work on the 20/4/20. Prior to her return to work, the claimant in December 2019 had made a flexible working request. Whilst the respondent was not able to offer the claimant the terms she sought; the respondent made an alternative offer which the claimant accepted. The parties agree that on the 30/1/20 the claimant accepted a 20 hour per week contract, which would be effective for 48 weeks per year, the remaining 4 weeks being taken as unpaid leave by the claimant. The new contractual terms were to take effect from the 20/4/20.

5. On the 20/3/20 the Government announced the introduction of the Coronavirus Job Retention Scheme (CJRS), and on the 23/3/20 a national lockdown was imposed.

6. The parties agree that the claimant had 20 days of accrued leave, which included 5 days carried over from 2019, relating to her period of maternity leave and 2019. The claimant made a request for this accrued annual leave to be used from the 20/4/20 until the 18/5/20, which was granted by the respondent, using up the full 20 days which had been accrued.

7. On the 29/4/20 the respondent confirmed in writing to the claimant she would be placed on furlough, rather than subject to lay off, which contractually the respondent was entitled to do. There is a discrepancy as to when this was to take effect. The respondents letter referred to the furlough starting on the 23/3/20. Mr Scott confirmed in evidence that this was an error, and the furlough started for the claimant on the 20/4/20. The claimant in evidence stated she understood the furlough to take effect from the 23/3/20. She has e mailed the respondent on the 30/4/20 confirming her agreement to being placed on furlough.

8. The claimant's contract of employment provides for a holiday year which runs from the 1<sup>st</sup> January to the 31<sup>st</sup> December. The claimants holiday entitlement is 28 days to include 8 bank holidays.

9. The notice period provided by the claimant's contract is one month. The parties accept that the provisions of **section 86(1) Employment Rights Act (1996)** apply on the basis they are more favourable, and the claimant based on 5 years of service was entitled to notice pay calculated on 5 weeks salary.

10. The claimant's contract of employment was terminated by reason of redundancy by letter dated 29/6/20, which took effect from the 25/6/20.

11. The parties agree the claimant's salary prior to leaving on maternity leave was £1791 per month gross, £413.46 per week gross, and £82.69 per day gross.

12. The parties agree the claimant's salary under the new contractual terms from April 2020 was £826.92 per month gross, £206.73 per week gross, and £51.68 per day gross.

13. The parties agree the claimant received 3 payments which have been evidence by pay slips for the periods April, May and June 2020. In April 2020 the claimant was paid £744.23 gross, In May 2020 £1240.38 gross and in June 2020 £3313.11, a total of £5297.72.

### **Disputed facts**

14. When was the claimant placed on furlough? Was it the 23/3/20, 18/4/20 or 19/5/20? The claimant stated it was the 23/3/20, the respondent's position it was the 18/4/20.

15. When if at all did the terms of the flexible working agreement take effect? The claimant's position is that she is entitled to furlough pay, holiday pay, notice pay and redundancy pay based on her full-time hours. The respondent argues that the permanent change to the claimants' terms and conditions took effect from the 20/4/20, and therefore furlough pay, holiday pay, notice pay and redundancy pay should all be based on the claimant's part time working hours which had been agreed.

16. What is the correct amount of pay due to the claimant in respect of her furlough pay, holiday pay, notice pay and redundancy pay. The claimant's position is she is owed an additional £4,782,76. The respondent concedes the claimant is owed additional monies, but maintains this is in the sum of £373.22.

### **Evidence Heard**

17. The claimant confirmed in evidence that she placed reliance on the letter from the respondent dated 27/4/20, indicating she to be treated as a furloughed worker with effect from the 23/3/20. Mr Scott in evidence accepted the date of the 23/3/20 should not have been referred to in the letter. Furlough for the claimant he advised started on the 20/4/20. He also pointed out the claimant did not query this at the time.

18. The claimant confirmed when cross examined that her part time hours were due to commence on the 20/4/20. The respondent's evidence on this point was that the contractual variation was agreed from the 20/4/20, and refers to the letter he sent the claimant on the 30/1/20 confirming the agreed 20 hour per week arrangements, the letter confirming they were to take effect from the 20/4/20.

## Findings of fact

19. The claimant's period of furlough began on the 18/5/20.

20. The change to the claimant's terms and conditions took effect from the 20/4/20.

## Reasons, Conclusions and Law

21. Mr Ball referred me to the **Treasury Direction dated 25/6/20**, specifically paragraph 19.2. I note this provides 'the reference salary of a fixed rate employee is the amount payable to the employee in the latest salary period ending on or before 19 March (but disregarding anything which is not regular salary or wages as described in paragraph 21.1). However, this is contained in part 2 of the guidance which provides for the provision of CJRS for the period beginning on 1 July 2020 and ending on the 31 October 2020. This is not applicable to this claimant, as the period of claim relates to employment dates up to the 25/6/20. However, see Treasury Direction 1 below where this replicated.

22. I have considered **Treasury Direction 1 dated 15/4/20**, in particular paragraph 6.1 which provides 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 days or more, and
- (c) the instruction is given by reason of circumstances arising as a result of coronavirus or coronavirus disease.

23. Paragraph 6.4 provides 'if an employee was enjoying an unpaid sabbatical or other period of unpaid leave on the 28 February 2020 (relevant day) the period described in paragraph 6.1 (b) does not begin in respect of the employee until the expiry of the period of leave agreed or contemplated at its commencement or, where the duration of the leave was uncertain on the relevant day because its duration is determinable by reference to a particular circumstance, completion of a particular purpose or occurrence of a specified event, the ending of the circumstance, completion of the purpose or occurrence of the event.

24. Paragraph 6.5 provides that 'no claim to CJRS may be made in respect of an unpaid sabbatical or other period of unpaid leave of an employee beginning before or after the 19 March 2020'.

25. The claimant was on a period of unpaid maternity leave at the relevant day, 28/2/20. The period of 21 days in respect of furlough cannot commence in accordance with paragraph 6(1)(b) until the expiry of the period of unpaid leave. It is accepted the claimant was on maternity leave until the 17/4/20, and on unpaid leave. Therefore, furlough could not commence on the 23/3/20 in the claimant's case, in accordance with paragraph 6.4 above.

26. The claimant took a period of paid leave of 20 days accrued from the 2019 leave year, between the dates of 20/4/20 until the 18/5/20. This followed on immediately from her period of unpaid maternity leave. The period of furlough would therefore commence on the 19/5/20, on the basis an employee cannot be on furlough and paid annual leave at the same time.

27. In paragraph 7.7 of Treasury Direction 1, the reference salary of a fixed rate employee 'is the amount payable to the employee in the latest salary period ending on or before 19 March 2020'.

28. Paragraph 7.10 provides that 'in respect of a fixed rate employee, where a period by reference to which the reference salary is determinable (reference salary period) includes a period of unpaid sabbatical or unpaid leave (unpaid period), the reference salary must be determined on the basis of what would have been paid to the employee during the unpaid period if the sabbatical or leave had been granted on the same terms as the employees paid leave during the reference salary period taking account of the matter described in paragraphs 7.13 to 7.15 as are appropriate.'

29. The claimant's last salary period ending on or before the 19/3/20 would have been zero, as she was on unpaid maternity leave. Therefore paragraph 7.10 applies in mandatory language 'the reference salary **must** be determined..on the same terms as the employees paid leave'. It is accepted the claimant had agreed on the 30/1/20 to return to work on part time hours, and this was to take effect from the 20/4/20. However, the claimant on the 19/3/20, if she had been paid leave in accordance with paragraph 7.10, would have been paid based on her full-time salary, as her part time hours did not take effect until the 20/4/20.

30. Therefore, for the purposes of furlough payments, the claimants pay would be based on her previous full-time salary. This covers the period 19/5/20 to the 25/6/20, when the claimant was made redundant.

The period from the 19/5/20 to the 25/6/20 is 29 days, £82.69 x 29 days divided by 100 x 80 =£1918.40.

31. In relation to the change of terms and conditions, there is clear evidence the claimant had accepted this change to commence on the 20/4/20, and I find that the claimant's contract of employment was varied to the part time working hours at this time. There is no suggestion or evidence before me that there were any further discussions concerning the part time hours, and the claimant accepted in evidence they were to commence on the 20/4/20. For reasons outlined above in relation to the rules of the CJRS scheme, this finding does not impact on the calculation of salary for the period of furlough.

32. The holiday taken from 20/4/20 until the 18/5/20, was based on accrued leave from the 2019 holiday year. The claimant is therefore entitled for this to be paid at her full-time rate of employment, as this holiday related to holiday due in 2019 when the claimant worked full time.

The claimant is due 20 days holiday pay for the 20/4/20 to 18/5/20 at the rate of £82.69 per day, a total of £1653.20.

33. Her holiday entitlement for the period 1/1/20 until the 20/4/20 would be based on her full-time working pattern. Her holiday entitlement for the period 20/4/20 until the 25/6/20 would be based on her part time contractual hours.

34. The claimants holiday year runs from 1<sup>st</sup> January until the 31<sup>st</sup> December and under her full-time contract she is entitled to 28 days. There are 111 days between the 1/1/20 and 20/4/20, when her contractual entitlement to leave would change.

28 days x 111 days divided by 365 days gives an entitlement of 8.5 days.

Her pro rata entitlement for leave for the period 1/1/20 until the 20/4/20 of 8.5 days x gross daily pay of £82.69 is £702.87.

35. The claimant's new contractual terms from the 20/4/20 were 20 hours per week. Her entitlement to leave therefore reduced, and should be calculated for the period 21/4/20 to 25/6/20.

On the basis she worked 20 hours and was entitled to 5.6 weeks (28 days), 20 x 5.6 equates to 112 hours holiday entitlement per year.

There are 66 days, or 1584 hours between 21/4/20 and 25/6/20.

112 hours x 1584 hours divided by 365 gives a holiday entitlement of 34.3 hours.

Her pro rata entitlement for leave for the period 21/4/20 to 25/6/20 is 34.3 hours x 10.34 gross hourly pay is £354.66.

36. In relation to the claimant's notice pay, the parties accept **section 86 of the Employment Rights Act (1996)** applies. The claimant would be defined as an employee with normal working hours, in accordance with **section 88 Employment Rights Act (1996)**. Section 88 (1) makes it clear that the 'the contract of employment in force during the period of notice' is relevant in determining the payment to be made in accordance with normal working hours.

37. The calculation date is defined by **section 226 (1) Employment Rights Act (1996)**, which defines the date on which the notice pay should be calculated from as the day immediately preceding the first day of the period of notice required in section 86(1). Therefore, in this case this would be the 24/6/20, the day before notice of redundancy was given.

38. I have found that the claimant's contract was varied on the 20/4/20. Therefore, the contract in force during the period of notice was as agreed on the 20/4/20, based on the claimant's part time salary.

The calculation of the claimant's notice pay is based on 5 weeks at £206.73 gross per week, which is £1033.54.

39. Considering the claimants claim for redundancy pay, **section 162 Employments Rights Act (1996)** defines the amount of redundancy pay a one week's pay for each year of service when the employee was not below the age of 22. The parties have not disputed this, and their schedule of losses are based on a 5-week redundancy payment.

40. **Section 221 (2) Employment Rights Act (1996)** defines the amount which is payable by the employer under the contract of employment in force on the calculation date.

41. **Section 226 (6) Employment Rights Act (1996)** defines the calculation date for redundancy payments as the date on which notice would have been given, had the contract been terminable by notice. Therefore, the calculation date would be the 24/6/20, the day before notice of redundancy was given.

42. Based on the finding that the claimant's contract was varied on the 20/4/20, the redundancy payment is based on the claimant's part time salary which was applicable on the 24/6/20.

The calculation of the claimant's redundancy pay is based on 5 weeks at £206.73 gross per week, which is £1033.54.

## Calculations

### Furlough pay

19/5/20 to the 25/6/20 is 29 days, £82.69 x 29 days divided by 100 x 80 = **£1918.40**.

### Holiday pay

20/4/20 to 18/5/20, 20 days at the rate of £82.69 per day, a total of **£1653.20**.

Pro rata entitlement for leave for the period 1/1/20 until the 20/4/20 of 8.5 days x gross daily pay of £82.69 is **£702.87**.

Pro rata entitlement for leave for the period 21/4/20 to 25/6/20 is 34.3 hours x 10.34 gross hourly pay is **£354.66**.

Total holiday pay due £1653.20+ £702.87+ £354.66 = **£2,710.73**

### Notice pay

5 weeks at £206.73 gross per week, which is **£1033.54**.

### Redundancy pay

5 weeks at £206.73 gross per week, which is **£1033.54**.

### Total payments due £6696.21

The respondent in the schedule of loss and Mrs Hughes in evidence accept the payments for **redundancy pay and notice pay** based on the June payslip were £951.55 respectively, so an **underpayment has been made of £82.10 in respect of each**, based on £1033.54 being due in respect of each.

In respect of holiday pay between January 2020 and June 2020, Mrs Hughes

accepted the April payslip payment of £744.23 represented 9 days holiday pay at the full-time rate. The June payslip contains entries for holiday pay of £686.98 and £171.75. In total payments of £1,602.94 have been made in respect of holiday pay. Total holiday pay due is £2,710.73 - £1,602.94 = **£1,107.79**.

The respondents' calculations for furlough pay were based on the claimant's part time wage. However, Mrs Hughes accepted in evidence, and it was recorded on the respondent's schedule of loss that overpayments had been made in respect of furlough payments based on the respondents' figures. I have found that the claimant should have been paid in accordance with her full-time wage, so there has been an underpayment by the respondent of **£126.50**.

**Total payments already made by the respondent £5,297.72**

**The respondent is required to make an additional payment of £1398.49, which comprises £126.50 furlough pay, £1,107.79 holiday pay, £82.10 notice pay and £82.10 redundancy pay.**

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**Employment Judge Beck**

**I confirm this judgment has been electronically signed**

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**Date: 20/1/22**