EMPLOYMENT TRIBUNALS (SCOTLAND)

Case Nos: 4104996/2020, 4104994/2020, 4104970/2020

Public Final Hearing held in Aberdeen by CVP on 1 February 2022

Employment Judge Tinnion

Mr. James Morrison	**1st Claimant Represented by Mr McLaughlin (Solicitor)**
Mr. Malcolm MacDonald	**2nd Claimant Represented by Mr McLaughlin (Solicitor)**
Mr. Sean Hanlon	**3rd Claimant Represented by Mr McLaughlin (Solicitor)**
Orion Engineering Services Ltd.	**Respondent Represented by Mr. Macrae (Officer)**

RESERVED JUDGMENT

1. The Claimants' claims against the Respondent for unlawful deductions from wages under s.13 of the Employment Rights Act 1996 for wages for the period 27 April 2020 – 26 May 2020 are well-founded.

2. The Respondent shall pay the sum of £1,724.44 to Claimant Mr. James Morrison.

3. The Respondent shall pay the sum of £1,724.44 to Claimant Mr. Malcolm MacDonald.

4. The Respondent shall pay the sum of £1,724.44 to Claimant Mr. Sean Hanlon.

REASONS

Claims

1. By three ET1s presented on 21 September 2020, Claimants James Morrison (**Mr. Morrison**), Malcolm MacDonald (**Mr. MacDonald**) and Sean Hanlon (**Mr Hanlon**) each asserted a substantively identical unlawful deduction from wages claim against the Respondent under s.13 of the Employment Rights Act 1996 on the basis that (i) they were workers for the Respondent in early 2020 (all three accepted they were not employees) (ii) following the onset of the Covid-19 pandemic, in March 2020 they (and others) had agreed with the Respondent to be furloughed and paid the appropriate pay while on furlough (iii) in the period 23 March – 26 April 2020, they were on furlough and paid their correct furlough pay (this fact is not in dispute) (iv) in the period 27 April 2020 – 26 May 2020 they remained on furlough, were not told by the Respondent that they were no longer on furlough, and were therefore still entitled to be paid the appropriate furlough pay for that period (v) the Respondent has not paid them any furlough pay for this later period (another fact not in dispute).

2. In its ET3s in response, the Respondent asserted a substantively identical defence to the claims. Summarising: each Claimant was requested to return to work and declined (date/means/identity of requestor not pleaded); each Claimant was advised that their assignment was terminated with effect from 26 April 2020 in line with their contract terms (date/means/identity of terminator not pleaded); no payment is made to agency workers like the Claimants when no work is carried out (other than in the non-applicable cases of sickness leave, maternity leave, etc); no work was carried out the Claimants during the period in dispute, hence they are not entitled to be paid for that

period. The Respondent's representative confirmed that quantum (subject to liability) is not in dispute.

Evidence

3. The final hearing was held on 1 February 2022. All three Claimants gave evidence, which went largely unchallenged except in respect of the phone calls they received in April 2020. The Respondent called three witnesses: Monica Gajda, Neil Grant, and Gary Watt. All 6 witnesses had prepared witnesses statements which they relied upon. All 6 witnesses sought to assist the Tribunal by giving their honest recollection of events in their oral evidence, although the Tribunal does not accept each witness had an equally good recollection (the Tribunal queries how reliable Mr. Grant's recollection is of his phone conversations with Mr. MacDonald and Mr. Morrison on 23 April 2020). The utility of the Respondent's witness statements was undermined by the fact that the relevant parts of the narrative (the second and third pages) were identical, with no attempt to distinguish between those parts of the narrative with which the witness was directly familiar and those parts where the witness was stating what they understood and had been told by others.

4. The other evidence in the case consisted of (i) an Agreed Statement of Facts (ii) documentary evidence consisting of two productions (one 138 pages long, the second 4 pages long) (references in square brackets below are to the relevant page(s) of those productions).

5. At the outset, the Tribunal informed the parties' representatives that if they wished to rely upon a document in the productions they must refer to that document in the course of witness evidence. The Tribunal also informed the Respondent's representative (who was not a lawyer) of his duty to challenge any factual evidence given by the Claimants which the Respondent disputes, and also his duty to put the Respondent's factual case to them.

Findings of fact

6. The Tribunal makes the following findings of fact, including those in its Discussion/Conclusions section, on the balance of probabilities.

7. The Respondent provides agency workers to end-users. In 2020, one of its end-user clients was Forsyths Limited (**Forsyths**). Through the Respondent's agency service, Mr. Morrison commenced work for Forsyths on 6 January 2020, and Mr. MacDonald and Mr. Hanlon for Forsyths on 3 February 2020.

8. In January and February 2020, Gary Watt (Respondent Operations Manager) issued identical written terms and conditions of engagement for Mr. Hanlon, Mr. MacDonald and Mr. Morrison [84-91] [92-99] [100-106].

9. Although none of the Claimants signed those documents, all three accept that those documents were legally binding and contained the original terms and conditions of their agency worker contract with the Respondent at the time.

10. Suffice to say, those documents did not anticipate the Coronavirus epidemic. The Claimants' representative accepted that none of the terms in those documents gave the Claimants any right to pay when the Respondent wanted them to work and they did not work.

11. In March 2020, the impact of the Coronavirus epidemic began to roll out in the UK. Although the facts at this point are not entirely clear, the Tribunal finds that what most likely happened on the balance of probability was as follows:

    a. on 24 March 2020, Ewan Morrison (of Forsyths) sent the Claimants (and other agency workers) home, advising them Forsyths worksite was now closed due to Covid. Forsyths originally had no need for the Claimants (or other agency workers) and suggested to the Respondent that their contracts be terminated;

    b. once the Respondent was able to satisfy itself and Forsyths that it was able to take advantage of the Coronavirus Job Retention Scheme (ie, the CJRS was not limited to workers having employee status), Forsyth and

the Respondent agreed to put the Claimants (and other agency workers) on furlough rather than terminate their hire;

c. in March or April 2020 on a date unknown, the Claimants (and other agency workers working for Forsyths) reached an agreement with the Respondent – which appears to be largely unevidenced, no relevant contemporaneous contracts or documentation having been put before the Tribunal – on terms that they agreed to be put temporarily on the CJRS furlough, and while on furlough the Respondent agreed to continue to pay them 80% of their basic wages;

d. the Respondent did not put in place any contractual or written basis addressing precisely how and when those temporary furlough/pay arrangements would come to an end, or could be brought to an end by either party – had that been done (and the Tribunal accepts it is always much easier to consider these matters with the benefit of 20/20 hindsight), it is unlikely the Claimants' claims would have reached an Employment Tribunal.

12. Pursuant to that agreement, the Respondents put all three Claimants (and other agency workers working for Forsyths) on temporary CJRS furlough. It is not in dispute that all three Claimants were temporarily on the CJRS furlough until 23 April 2020 (the precise start date is immaterial), and subsequently paid the correct wages for this initial furlough period by the Respondent.

April 2020 telephone calls

13. By the second half of April 2020, Forsyths wanted the Claimants (and the Respondent's other agency workers) back onsite working for it.

14. To that end, the Respondent made a series of telephone calls to the Claimants. Precisely what was said on those calls is a matter of dispute. The Respondent did not prepare a script for those calls, which would have assisted by evidencing what the Respondent had intended its callers to say. The Respondent made no record of its call(s) to Mr. Hanlon at all (although that matters less because the content of that call is largely not in dispute), and made only a record of a

voicemail message it left for Mr. MacDonald on 23 April 2020 at 11:20 [117], not a record of any actual conversation. There is a fuller record of what was said to Mr. McDonald in April 2020 [117].

15. On 23 April 2020, Respondent representative Monika Gajda telephoned Mr. Hanlon. She asked him if he could return to Forsyth. Mr. Hanlon told her this would breach Government guidelines as he would have to live in someone else's houses which is where their accommodation was on Buckie. After he said this Ms. Gajda did not tell Mr. Hanlon he was no longer on furlough, nor did she tell him his entitlement to furlough pay would now cease. The Tribunal finds, on balance, that these two matters were not so obvious they need not be said to him. After the phone call, neither Ms. Gajda nor any other Respondent representative sent any written communication to Mr. Hanlon in April 2020 telling him he was no longer on furlough and no longer entitled to furlough pay. Although Mr. Hanlon had refused to go back to work, the Tribunal finds that at the time Mr. Hanlon subjectively and reasonably believed he was still on furlough and entitled to furlough pay, put bluntly because Ms. Gajda had not told him otherwise on their call.

16. On 23 April 2020, Respondent representative Neil Grant called Mr. Morrison twice – the first call lasted just under 4 minutes, the second just under 7 minutes. In the first call, Mr. Grant asked Mr. Morrison if he could return to work on Monday, 27th April. Mr. Morrison did not say no – he replied that as they were still in lockdown he could not get digs at Buckie but could stay at his daughter's place in Inverness and commute every day. Mr. Grant said he was not sure about that, and would call him back. Mr. Grant then made internal inquiries at the Respondent, where it was agreed this was too long a daily commute. Mr. Grant called Mr. Morrison back, and told him it was too far for him to be travelling before and after an 11-hour shift each day. After he said this, Mr. Grant did not tell Mr. Morrison he was no longer on furlough, nor did he tell him his entitlement to furlough pay would now cease. Mr. Grant did not tell Mr. Morrison his engagement was terminated, nor did he tell him that he would be issued with a P45. At no point during either call did Mr. Morrison tell Mr. Grant that he would not return to work – that issue was effectively left hanging, with the only resolution

reached that the Respondent would not accept Mr. Morrison returning to work if that required him to commute every day from Inverness. The Respondent's file note of their conversation on 23rd April [117] states: "*Spoke to James to ask if it [sic] would be available to return to work to Forsyths on Monday, working nightshift. He will check if accommodation [ ] travel is available, but provided it is, he will return*." the Tribunal finds that at the time of their calls Mr. Morison subjectively and reasonably believed he was still on furlough and entitled to furlough pay because Mr. Grant had not told him otherwise. After the two phone calls, neither Mr. Grant nor any other Respondent representative sent any written communication to Mr. Morrison in April 2020 telling him he was no longer on furlough and no longer entitled to furlough pay.

17. On 23 April 2020, Mr. Grant called Mr. MacDonald. Mr. Grant asked him to go back to work on site with Forsyths. Mr. MacDonald replied there was going to be problems with accommodation and travel because lockdown was still in effect. During their call, Mr. Grant did not tell Mr. MacDonald he was no longer on furlough, nor did he tell him his entitlement to furlough pay would now cease. Mr. Grant did not tell Mr. Morrison his engagement was terminated, nor did he tell him he would be issued with a P45. The Respondent's file for Mr. MacDonald has the following file note for 23rd April [117]: "*Left v/m to check if available to restart with Forsyths on Monday morning*." After the phone call, neither Mr. Grant nor any other Respondent representative sent any written communication to Mr. MacDonald in April 2020 telling him he was no longer on furlough and no longer entitled to furlough pay.

18. By identically worded letters sent to Mr. Hanlon [118-119], Mr. Morrison [120-121] and Mr. MacDonald [not produced but agreed sent] dated 4 May 2020 headed "*Agreement to Furlough*", the Respondent set out what it stated was its agreement with them to implement and take advantage of the CJRS by placing them on furlough. That letter (stated in relevant part):

> "*We can only use the [CJRS] to pay agency workers who agree to be furloughed. The minimum period of time that any employee/agency worker can be furloughed for is three weeks. We will seek to furlough you for periods that reflect the pay that you would have received under an assignment, but*

we are not under any obligation to furlough you and the decision to do so or extend any period of furlough will rest exclusively with us.

1. *We agree that from 24th March 2020 you shall be put on furlough. This means you cannot do any work for us. We will normally expect you to be on furlough for at least three weeks, as that is the minimum period which will allow us to reclaim 80% of your basic salary from HMRC …*
2. *…*
3. *During the period that you are on furlough you are not on an assignment. You agree that for the period that you are on furlough we will pay you in accordance with the [CJRS] and this means: 80% of your basic pay …*
4. *…*
5. *…*
6. *…*
7. *Your period of furlough shall end on the earliest of the following events:*
    a. *the [CJRS] ending;*
    b. *either you or us ceasing to be eligible for funding under that scheme; or*
    c. *us deciding to cancel furlough leave and asking you back to work.*
8. *… In order for us to qualify to use the Scheme to pay you while you are on furlough, you cannot do any work for or on behalf of Forsyths Limited*

I agree to being placed on furlough under the [CJRS]. I consent to the temporary changes to my terms and conditions of employment including the reduction in my remuneration.

We would be grateful if you could confirm that you agree to these temporary measures by email to [ ] as soon as possible.

If you have any questions, please contact Gary Watt

Yours sincerely,

For and on behalf of Orion Engineering Services Limited"

[G Watt handwritten signature] – Operations Manager"

19. As Mr. Watt had requested, by email to the Respondent on 4 May 2020 at 17:03 Mr. Morrison replied: "*Hi Eileen in response to your email I agree to furlough. Thanks and keep safe*" [137].

20. By email on 4 May 2020 at 19:02, Mr Halon replied: "*That's fine with me, glad it's finally happening, thanks*" [136].

21. By email on 5 May 2020 at 09:49, Mr. MacDonald replied: "*I agree to these temporary measures*" [135].

22. Each of the Claimants received the 4 May 2020 letter, read it, and subjectively – and in the Tribunal's judgment, reasonably – understood they were still on temporary CJRS furlough and still entitled to 80% of their basic salary so long as they remained on furlough. Nothing in the letter is inconsistent with that understanding. Nothing in the letter notified the Claimants their own temporary CJRS furlough arrangements had come to an end (either on, before or after 23 April 2020) or that they were no longer entitled to 80% pay while on furlough.

23. None of the Respondent's witnesses addressed in their witness statements (drafted in identical terms) or oral evidence what happened after the 4 May 2020 letter was sent to the Claimants. The Tribunal infers that nothing material of note happened in the period up to 26 May 2020.

24. It is an agreed fact that the Respondent has not paid any wage to any Claimant for the period 27 April 2020 – 26 May 2020.

Issues

25. First, did the Respondent enter into a legally binding agreement with each Claimant on terms whereby they agreed to be put on temporary CJRS furlough and the Respondent agreed to pay them 80% of their basic salary while they remained on furlough?

26. Second, if they did, was each Claimant put on temporary CJRS furlough in March 2020?

27. Third, did each Claimant remain on temporary CJRS furlough during the period 27 April 2020 – 26 May 2020 (Claimants' case) or did the Respondent remove each Claimant from furlough (Respondent's case), and if it did, how and when did it do so?

28. Fourth, if each Claimant remained on temporary CJRS furlough during the period 27 April 2020 – 26 May 2020, have they been paid some or all of their wages for that period, and if yes, what wage and for what period?

29. Fifth, if not, was any deduction (applying s.13(3) of the Employment Rights Act 1996) in each Claimant's wages for the period 27 April 2020 – 26 May 2020 permitted under s.13(1)(a) or s.13(1)(b) of that Act?

Discussion / Conclusions

30. First, it is a fact – and not in dispute - that in March or April 2020 the Respondent did enter into a legally binding agreement with each Claimant on terms whereby they agreed to be put on temporary CJRS furlough and the Respondent agreed to pay them 80% of their basic salary while they remained on furlough.

31. Second, it is a fact – and not in dispute - that, consistent with that agreement, the Respondent did put each of the Claimants, with their consent, on temporary CJRS furlough, and the Respondent did subsequently pay each of those Claimants their 80% basic salary while on furlough for the period 23 March 2020 – 23 April 2020.

32. Third, the Tribunal finds that each of the Claimants did remain on temporary CJRS furlough during the period 27 April 2020 – 26 May 2020. The Respondent did not remove any of the Claimants from furlough either before, on or (at any relevant time) after 23 April 2020. If the Respondent had removed or decided to remove one (or more) of the Claimant's temporary CJRS furlough leave arrangements such that they would no longer be on furlough and no longer entitled to furlough pay:

    a. the Tribunal would expect there to be contemporaneous documentary evidence clearly showing the Respondent made that decision at the time – in this case, the Tribunal is not satisfied by the evidence to which it was referred that this decision was made at the time;

    b. the Tribunal would expect the Respondent to have told the Claimants that they were removed (or being removed) from furlough in clear, unambiguous in the phone calls in April 2020 – this was not done;

c. the Tribunal would expect the Respondent to have notified the Claimants in writing shortly after the April 2020 phone calls that they were no longer on furlough and would no longer receive furlough pay – that was not done; and

d. the Tribunal would not have expected the Respondent to send each of the Claimants the 4 May 2020 letter, which subjectively gave each Claimant - and the Tribunal finds would give any reasonable reader in their position - the clear impression and reasonable understanding that they remained on temporary CJRS furlough at the time.

33. Fourth, it is a fact – and not in dispute - that none of the Claimants have been paid any wages for any part of the period 27 April 2020 – 26 May 2020.

34. Fifth, the aforesaid deduction was not required or authorised to be made by virtue of any statutory provision. The Respondent did not plead or suggest otherwise in closing submissions.

35. Sixth, the aforesaid deduction was not required or authorised to be made by virtue of a relevant provision of any of the Claimant's contracts.

36. Seventh, none of the Claimants previously signified in writing their agreement or consent to the making of the aforesaid deduction.

37. The Tribunal considers that no great issue of law or principle arises in this case. In order to remove the Claimants from temporary CJRS furlough, and thereby their entitlement to an 80% wage while on furlough, all the Respondent had to do was tell the Claimants in clear terms on a timely basis that it was doing so (no reason need be given, nor was the Claimants' consent required at the time). Had that been done (and been adequately evidenced at the final hearing in the event of dispute), the outcome of this case would likely have been different.

Employment Judge **A Tinnion**

Date of Judgement **3 February 2022**

Date sent to parties **4 February 2022**