



# EMPLOYMENT TRIBUNALS

**Claimant:** Mr H Ustek

**Respondent:** Food Works Turkish Kitchen

**Heard at:** London South Employment Tribunal (hybrid hearing)

**On:** 16 December 2021

**Before:** Employment Judge Abbott

## Representation

Claimant: in person

Respondent: Mr K Akcadag, owner

# RESERVED JUDGMENT

1. The claim for unlawful deduction from wages and/or breach of contract is not well-founded and is dismissed.

# REASONS

## Introduction

1. The Claimant, Mr Haydar Ustek, was employed by the Respondent, Food Works Turkish Restaurant, as a Chef. His employment with the Respondent began on 1 August 2018 and ended in 2020.
2. The Claimant brought a claim for unlawful deduction from wages and/or breach of contract. He argued that he should have been paid 80% of his salary for the period from March until July 2020 under the Coronavirus Job Retention Scheme. The Respondent resisted the Claimant's claim.
3. The case came before the Tribunal for Final Hearing on 16 December 2021. The hearing was listed to be held by video using the CVP platform, and I was present at London South Employment Tribunal in Croydon. In fact, the Respondent's representative and witnesses attended the Tribunal venue in person, while Mr Ustek and a Turkish interpreter, Ms Coverdale, appeared

via video link. I was content that the hearing could fairly proceed in this hybrid set-up. Mr Ustek was able to see the witnesses he was asking questions of, and vice versa.

4. The Claimant appeared in person, accompanied by his wife for support. He gave oral evidence through the interpreter.
5. The Respondent was represented by its owner, Mr Kalendar Akcadag. It called evidence from Mr Kalendar Akcadag (who gave evidence through the interpreter), Mr Sukru Agca and Mr Yilmaz Akcadag.
6. The only papers before the Tribunal were the ET1 Claim Form and ET3 Response Form. There were no witness statements.
7. There was insufficient time for me to deliver an oral judgment on the day and I therefore reserved judgment. I apologise to the parties for the delay in producing this written judgment.

#### Relevant law

8. The Coronavirus Job Retention Scheme (***the Scheme***) was created by a Treasury Direction made on 15 April 2020 under Sections 71 and 76 of the Coronavirus Act 2020. Its purpose was to provide for payments to be made to employers on a claim made in respect of them incurring costs of employment in respect of furloughed employees arising from the health, social and economic emergency in the United Kingdom resulting from coronavirus and coronavirus disease. The Scheme was updated through various Further Treasury Directions on later dates.
9. For present purposes, the important provisions of the Scheme can be found in paragraph 6 of the Treasury Direction:

#### ***Furloughed employees***

*6.1 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 calendar days or more, and*

*(c) the instruction is given by reason of circumstances arising as a result of coronavirus or coronavirus disease.*

*[...]*

*6.7 An employee has been instructed by the employer to cease all work in relation to their employment only if the employer and employee have agreed in writing (which may be in an electronic form such as an email) that the employee will cease all work in relation to their employment.*

10. Under a Further Treasury Direction made on 22 May 2020, it was provided that the agreement between employer and employee may be “*made in*

*writing or confirmed in writing by the employer (such agreement or confirmation may be in an electronic form such as an email)".*

11. In other words, there was no legal right for an employee to be furloughed by their employer. It had to be by agreement in writing (or, under a later iteration of the Scheme rules, confirmed in writing).

#### Findings of fact

12. Much of the oral evidence given by the Claimant and the Respondent's witnesses related to matters that it is unnecessary for me to resolve in order to decide this claim. In particular there was a lot of discussion around whether the Respondent offered to pay any sums of money to the Claimant during the time that the restaurant was closed and what amounts were offered, and whether the Respondent told the Claimant to apply for Universal Credit and if so when. These points are not relevant to the issues I have to decide. I comment no further on them.
13. It was common ground between the parties that the Claimant was employed on a casual basis – in effect on a zero-hours contract. As such, if he was not working (as he was not, at least for the Respondent, between March and July 2020, as was common ground), he was not entitled to be paid by the Respondent unless he was a "furloughed employee" under the Scheme.
14. The key factual question I need to decide is whether there was an agreement between the Claimant and the Respondent, either in writing or confirmed in writing, which would bring the Claimant within the definition of "furloughed employee". Without there being such an agreement, the Claimant's claim must fail because he would have no legal basis to be paid by the Respondent during the period of time that is the subject of his claim.
15. The Claimant was very clear in his evidence that there was no agreement to furlough made in writing or confirmed in writing. His evidence was that he was "left to his own devices". He seems to have assumed that the Respondent was receiving money under the Scheme, and that he was therefore entitled to receive 80% of his salary. This is a misunderstanding on the part of the Claimant as to how the Scheme works.
16. Mr Kalendar Akcadag was equally clear in his evidence on this point. He explained that the Respondent was not entitled to participate in the Scheme, and that he had explained that to the Claimant. He denied furloughing any staff, including the Claimant, and denied receiving any money under the Scheme. None of this was contradicted by the other witnesses. Nor did the Claimant really challenge this fundamental factual point – instead he focused on seeking to argue (without foundation) that the Respondent's witnesses had come to give false evidence.
17. Having heard the evidence, I find as a fact that there was no agreement in writing (or confirmed in writing) between the Claimant and the Respondent that the Claimant would be furloughed. Accordingly, the Claimant was not a "furloughed employee" for the purposes of the Scheme.

Conclusion

18. As the Claimant was not a “furloughed employee” for the purposes of the Scheme, he was not entitled to be paid by the Respondent during the period of time that is the subject of his claim. His claim must fail.
19. Accordingly, the Tribunal concludes that the claim for unlawful deductions from wages and/or breach of contract is not well-founded and is dismissed.

**Employment Judge Abbott**

**Date: 6 February 2022**