



EMPLOYMENT TRIBUNALS

Claimant

Respondent

Mr B Shoaei

AND

Amberstone Security Limited

Heard at: London Central

On: 24 January 2022

Before: Employment Judge Coen (Sitting alone)

Representation

For the Claimant: In person

For the Respondent: Mr Richard Hignett, Counsel

RESERVED JUDGMENT

The Judgment of the Tribunal is that:

- (a) the Respondent made unauthorised deductions from the Claimant's wages in respect of: (i) 'furlough' payments made between 21 March 2020 and 28 September 2020 pursuant to the Coronavirus Job Retention Scheme; (ii) holiday pay during the same period; and (iii) notice pay during the same period; and
- (b) the Respondent has failed to comply with the provisions of Regulations 13 and 13A of the Working Time Regulations 1998 by not providing the Claimant with paid holiday during the period from 28 November 2019 to 31 March 2020.

REASONS

Claims and Issues

1. The Claimant was employed by the Respondent as a security officer with effect from 28 November 2019 until the termination of his employment by reason of redundancy on 28 September 2020. From 21 March 2020 the Claimant was placed on furlough pursuant to the Coronavirus Job Retention Scheme ("CJRS") and remained on furlough until termination of his employment on 28 September 2020.

2. The Claimant brought a claim against the Respondent for unauthorised deductions from wages as a result of alleged underpayments in his furlough payments under the CJRS, holiday pay and notice pay during the period of his employment. The Claimant, in bringing his claim, contended that he was a fixed rate employee and that his furlough pay (as well as holiday pay and notice pay) ought to have been calculated on the basis of the fact that he was contracted to work for 54 hours per week, thereby producing a higher sum than that actually received by him. The Claimant further claimed that his furlough payments did not reflect the National Minimum Wage. The Claimant additionally claimed that, despite having requested holiday from the Respondent in March 2020, he did not receive paid holiday (to the value of £626.95) in the holiday year which ran from 1 April 2019 to 31 March 2020. While the Respondent accepted that the Claimant was owed certain sums in respect of holiday pay during the furlough period, the Respondent denied that holiday had been requested in the 2019-2020 holiday year and asserted that holiday could not be carried over into the following leave year.

3. The key issues for determination in the case were:

(a) whether the Claimant's contract of employment, which had initially provided for an arrangement based on flexible hours, had been varied in February 2020 to provide for an arrangement based on fixed hours at a fixed hourly rate;

(b) whether the Claimant's furlough payments under the CJRS ought properly to have been calculated on the basis that he was a fixed rate employee or a non-fixed rate employee and, consequently, whether his

holiday pay and contractual notice pay during the furlough period had been correctly calculated;

(c) whether the Claimant was entitled to payment in respect of holiday requested, but not provided, in the 2019 to 2020 holiday year.

Procedure, Documents and Evidence Heard

4. The case was listed for a short virtual hearing before me which was held remotely by CVP on 24 January 2022. At the hearing, I heard evidence from the Claimant and Mrs Samantha Studley, a Payroll Manager at the Respondent.

5. A substantial bundle of documents was also put before the Tribunal providing detail about matters relating to the case.

Law

6. The legal backdrop to this matter is the CJRS which was introduced at the beginning of the COVID-19 pandemic (on 20 March 2020) to deal with furlough payments to UK employees. The CJRS was intended to avoid redundancies by supporting employers with the payment of wages during the pandemic. The CJRS did not change the employment relationship between employer and employee but allowed an employer to provide an employee with a temporary leave of absence and then recover a proportion of pay from HMRC in respect of that employee. The calculation of pay varies depending on whether an employee is a fixed rate employee or a non-fixed rate employee. Broadly speaking, where an employee is a fixed rate employee, furlough payments are calculated on the basis of wages prior to the commencement of furlough. Where an employee is a non-fixed rate employee, furlough payments are calculated on the basis of the higher of either the same month's earnings from the previous year and average monthly earnings from the 2019-2020 tax year. Where a non-fixed rate employee has been employed for less than a year, it is necessary to take average monthly earnings from the date of commencement of employment until the commencement of furlough.

7. It is important to note that the National Minimum Wage does not apply to furlough payments.

Treasury Directions

8. A number of Treasury Directions were issued by the Chancellor under sections 71 and 76 of the Coronavirus Act 2020. The Treasury Directions formed the basis of Guidance subsequently published by HMRC. I was not taken to the Treasury Directions in the course of the hearing, but they require consideration, being the core source of the legal framework surrounding the CJRS.

9. The first Treasury Direction was made on 15 April 2020 and is known as The Coronavirus Act 2020 Functions of Her Majesty's Revenue and Customs (Coronavirus Job Retention Scheme) Direction (15 April 2020) (the "Treasury Direction"). In the period of time relevant to the Claimant's case, two further Treasury Directions were made (on 22 May 2020 and 25 June 2020) which operated to amend earlier Treasury Directions. No amendments were made to the definition of a fixed rate employee (which is the key definition relevant to the issues to be decided in this case) in the subsequent Treasury Directions. I have summarised below the provisions relating to that definition.

10. The Treasury Direction provides (at paragraph 7.6) as follows:

A person is a fixed rate employee if:

(a) the person is an employee or treated as an employee for the purposes of CJRS by virtue of paragraph 13.3(a) (member of a limited liability partnership);

(b) the person is entitled under their contract to be paid an annual salary;

(c) the person is entitled under their contract to be paid that salary in respect of a number of hours in a year whether those hours are specified in or ascertained in accordance with their contract (“the basic hours”);

(d) the person is not entitled under their contract to a payment in respect of the basic hours other than an annual salary;

(e) the person is entitled under their contract to be paid, where practical and regardless of the number of hours actually worked in a particular week or month in equal weekly, multiple of weeks or monthly instalments (“the salary period”); and

(f) the basic hours worked in a salary period do not normally vary according to business, economic or agricultural seasonal considerations.

11. Paragraph 7.7 provides that 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 (disregarding anything which is not regular salary or wages).

12. Paragraph 7.2 provides for the calculation of a reference salary for employees who are not fixed rate employees with the figure being the greater of:

(a) the average monthly (or daily or other appropriate pro-rata) amount paid to the employee for the period comprising the tax year 2019-20 (or, if less, the period of employment) before the period of furlough began; and

(b) the actual amount paid to the employee in the corresponding calendar period in the previous year.

Guidance

13. Guidance entitled ‘Steps to take before calculating your claim using the Coronavirus Job Retention Scheme) was published on 12 June 2020 and updated on 1 July 2020 (the "Guidance"). Earlier guidance (entitled “Work out 80% of your employees’ wages to claim through the Coronavirus Job Retention Scheme”) first

published on 17 April 2020 was withdrawn, with the hyperlinks to that guidance now leading to the Guidance.

14. It is important to note that the Guidance is not legally binding.
15. The Guidance sets out information about the calculation of furlough pay for fixed rate employees and non-fixed rate employees.
16. The Guidance states as follows:

Before you can calculate how much you can claim from the Coronavirus Job Retention Scheme, you'll need to work out your employee's wages. This includes working out 'your employees' usual hours'

There are 2 different calculations you can use to work out your employee's usual hours, depending on if they work fixed or variable hours. You should work out usual hours for employees who work variable hours, if either your:

- (a) employee is not contracted to a fixed number of hours*
- (b) employee's pay depends on the number of hours they work*

If neither of these apply, you should work out your employee's usual hours for an employee who is contracted for a fixed number of hours.

The employee's working pattern does not have to match their pay period (for example, an employee could be contracted to a fixed 40 hours a week, but then be paid a variable monthly amount because of shift allowances). HMRC will not decline or seek repayment of any grant based solely on the particular choice between fixed or variable approach to calculating usual hours, as long as a reasonable choice is made.

Work out your employee's usual hours for an employee who is contracted for a fixed number of hours and whose pay does not vary according to the number of hours they work

To calculate the number of usual hours for each pay period (or partial pay period):

(a) *Start with the hours your employee was contracted for at the end of the last pay period ending on or before the employee's reference date.*

(b) *Divide by the number of calendar days in the repeating working pattern, including non-working days.*

(c) *Multiply by the number of calendar days in the pay period (or partial pay period) you're claiming for.*

(d) *Round up or down if the result is not a whole number.*

If an employee with fixed hours was on annual leave, off work sick or on family related statutory leave at any time during the last pay period ending on or before the employee's reference date, the usual hours should be calculated as if the employee had not taken that leave.

17. The Guidance provides links to examples of how to work out usual hours for employees who are contracted for a fixed number of hours.

18. The Guidance also provides information about how to work out an employee's usual hours for an employee who works variable hours. It states:

Work out your employee's usual hours for an employee who works variable hours.

Where the pay varies by the amount of time worked, you'll have shown the number of hours worked on your employee's payslips in line with legislation

introduced by BEIS. Employers should identify the hours the employee worked by using pay records, time sheets and other records which show time worked. If these are not available then use other records, such as rotas or work diaries. If these records are not available, employers may use the pay rate to work back from the gross pay.

When you calculate the usual hours, you should include any hours:

(a) of leave for which the employee was paid their full contracted rate (such as annual leave).

(b) worked as 'overtime' but only if the pay for those hours was not discretionary.

19. The Employment Rights Act 1996 (Coronavirus, Calculation of a Week's Pay) Regulations 2020 SI 2020/814 provides that notice pay is to be calculated by taking into account pay received immediately before the employee was put on furlough. The Guidance further provides for notice pay to be calculated in accordance with normal wages.

20. Holiday pay can be received on furlough and must be calculated using the normal rate of pay under the Working Time Regulations 1998 ("WTR").

Holiday Pay

21. The WTR introduced a statutory entitlement to a minimum amount of paid annual leave. The current annual entitlement is 28 days which breaks down as a right under the Working Time Directive 1993 to 20 days' leave and a domestic right to eight days' leave. The combined entitlement is set out at Regulations 13 and 13A of the WTR. A worker whose employment begins part way through a leave year has a pro rata holiday entitlement for that year. The Working Time Directive does not make any provision in respect of carry forward of the 20 days' leave. However, the eight days' WTR leave may be carried forward into the next leave year by agreement between the parties (Regulation 13A(7) of the WTR). Case law

has established that the 20 days' leave under the Working Time Directive 1993 (but not the eight days' leave under the WTR) may be carried forward for reason of sickness or maternity or where a worker did not have an effective opportunity to take their holiday entitlement. In the latter scenario, case law (**Max Planck-Gesellschaft zur Forderung der Wissenschaften eV v Shimizu (C-684/16) EU:C:2018:874** and **Kreuziger v Berlin (C-619/16) EU: C: 2018:872**) requires the employer to show that it provided sufficient information to the worker about the holiday entitlement and the potential loss of untaken entitlement at the end of the leave year. A worker may present a complaint to an Employment Tribunal that his employer refused to permit him to exercise a right to leave under Regulation 13 or 13A of the WTR. Where an Employment Tribunal finds such a complaint well-founded, the Tribunal shall make a declaration to that effect and may award compensation to the worker.

Facts

22. The Claimant commenced employment as a Security Officer with the Respondent on 28 November 2019 pursuant to a written contract of employment issued on 27 November 2019. The Respondent's business provides security officers.

23. The Claimant was initially contracted to work at two retail sites in London but worked at a number of sites in the first months of employment. His rate of pay was between £9 and £10 per hour across all locations and his monthly pay varied. The contract provided for termination on four weeks' notice.

24. The contract further provided as follows:

Hours of Work

Your hours of work are flexible, within a normal range of 30-55 hours per week. Your specific hours are subject to the client requirements and as the needs of the business may require. We will agree specific hours with you

periodically, normally monthly in advance, and you will only be paid for hours worked.

Remuneration

On completion of training, you will be paid the rate applicable to the assignment to which you are allocated. Your rate of pay will vary depending on the assignment and will be underpinned by the National Minimum Wage.

Holiday Year

Our holiday year begins on the 1st of April and ends on the 31st of March each year.

Holiday Entitlement

We identify your personal holiday entitlement in this principal statement. There are other related policies and general conditions regarding holidays in the employee handbook. Your paid annual holiday entitlement is 5.6 working weeks (28 working days for someone working at least 5 shifts per week) during the complete holiday year. Shift workers will receive an entitlement of 5.6 weeks of their normal working week and part-time workers, irregular hours' workers and those who work less than twelve months receive pro-rata entitlements.

Holiday Pay

You do not work fixed or regular hours and/or days of work each week. We therefore base your holiday pay on average basic pay. We calculate your hours over the last twelve weeks. We then pay your holidays based on the average weekly hours you worked.

25. The Employee Handbook provided as follows:

You must take all of your holiday entitlement during the holiday year.

You must use our holiday request procedure to make holiday requests.

By law, we may only consider payment in lieu of untaken holidays when you leave our employment.

26. On 9 February 2020 the Claimant received an SMS message from the Control Room at the Respondent with the following message: "We have Levi Covent Garden Long Acre which we can give you permanently if you like from Monday 10 February onwards? Monday, Tuesday, Wednesday, Thursday, Friday, Saturday 11:00-20:00".

27. The Claimant responded by stating "yes please confirmed thanks". With effect from 10 February 2020 until he was placed on furlough on 21 March 2020, the Claimant worked at the Levi Store in Covent Garden on the basis of 54 hours' work per week for remuneration of £8.21 per hour (being the National Minimum Wage). The Respondent stated that, during that period there were a number of days when the Claimant did not work owing to sickness (for which a sick note was not produced). Information provided in the bundle appears to suggest that there were three days of sick leave in the relevant period (16 February 2020, 23 March 2020 and 24 March 2020).

28. The Claimant was placed on furlough on 21 March 2020 as a result of the COVID-19 lockdown and remained on furlough until 28 September 2020 when his contract was terminated by reason of redundancy. He was paid one week's wages in lieu of notice. The Claimant's effective date of termination was 28 September 2020.

29. The Claimant additionally claimed for holiday pay relating to holiday accrued but not taken in the holiday year which ran from 1 April 2019 to 31 March 2020. At the hearing, the Claimant asserted twice that he had requested to take holiday in March 2020. He said that there was evidence of his request but that it had not been

included in the bundle. The Respondent submitted that the holiday request had not been received. Counsel for the Respondent referred me to the provisions of the employment contract and the employee handbook which provided that all of the holiday was required to be taken in the relevant holiday year and could not be carried over into a subsequent year. I found that the Claimant's evidence as to the holiday request was credible (particularly as he persistently maintained his position during the hearing and it would not have been unusual for him to have requested leave in March so as to avoid losing the entitlement before the year-end). I also consider it plausible that, owing to workplace pressures in the early stages of the COVID-19 pandemic, a request for holiday may inadvertently have been missed by the Respondent, owing to the additional demands created by the pandemic. On balance, therefore, I accept the Claimant's evidence that he requested to take the leave in March 2020 before the end of the holiday year.

Conclusions

30. The Claimant commenced employment on the basis of a contract of employment which provided for the Claimant to do between 30 and 55 hours' work per week on variable rates of pay. In my view, the text message correspondence in early February 2020 amounted to a variation of the employment contract which had the effect that the Claimant would be working, for the foreseeable future, as a security guard at the Levi Store in Covent Garden for a fixed number of hours per week. While the Respondent submitted that the effect of the text message correspondence was to create a different assignment within the original employment contract, my view is that the arrangements set out in the text message correspondence (which were accepted by the Claimant) were sufficiently different, in respect of both the fixed number of hours and the prescribed location, to the terms of the original employment contract, to be incapable of operating within its original terms. To that extent, my decision is that the contract was varied so that the terms of the Claimant's employment were such that he was provided with a fixed number of hours in a certain location with a degree of permanence.

31. The next issue which needs to be determined is whether, in light of the variation of the Claimant's contract of employment, the Claimant fell to be treated as a fixed rate employee or a non-fixed rate employee for the purposes of calculating his furlough pay in accordance with the Treasury Direction and the Guidance.

32. I conclude that the Claimant ought to have been treated as a fixed rate employee for the purposes of calculating his furlough pay. I reach this conclusion for the reasons set out below.

33. The Claimant's contract was varied in February 2020 to fix his working arrangements at a 54 hour week in a fixed location. The revised arrangement was such that the Claimant satisfied all the criteria required for a fixed rate employee pursuant to paragraphs 7.6(a) to 7.6(f) inclusive of the Treasury Direction. In particular, my view is that the effect of the variation to his contract resulted in an entitlement to be paid an annual salary on the basis that his hours of work and the hourly rate of payment were sufficiently certain to enable the calculation of an annual salary.

34. The Guidance further supports the analysis set out above. It defines non-fixed rate employees as those who are either: (a) not contracted to a fixed number of hours; or (b) are paid depending on the number of hours they work. In the circumstances, the Claimant had fixed hours and his pay depended on the number of hours he worked (it being defined on the basis of an hourly rate). Therefore, he did not satisfy the criteria contained in the Guidance applicable to a non-fixed rate employee and ought to have been considered to be a fixed rate employee. In addition, the Guidance refers to an employee's working pattern not having to match their pay period and contemplates an employee being contracted to a fixed 40 hours per week but paid a variable monthly amount because of shift allowances. To that extent, it is clear that the Guidance envisages an employee who is contracted to work for fixed hours being a fixed rate employee.

35. Therefore, the Claimant was entitled to have been furloughed on the basis of being a fixed rate employee. Consequently, his furlough pay, holiday pay during the furlough period, and his notice pay are all required to be recalculated to reflect the requirements for a fixed rate employee and he is required to be compensated accordingly. In doing so, it is necessary to follow the methods of calculation contained in the Treasury Direction and Guidance. Account does not need to be taken of the National Minimum Wage in the context of the furlough payments themselves, but it will need to be considered in respect of holiday pay and notice pay in the furlough period. The periods of sick leave taken in February and March 2020 prior to furlough should not be counted for the purposes of calculating the Claimant's usual hours.

36. I have considered the Claimant's claim in respect of holiday pay in the 2019-2020 holiday year. I find, on the basis of all the evidence provided, that the Claimant requested annual leave in the 2019-2020 holiday year, but was denied his right to take it. To that extent, he is entitled to compensation, being a sum equivalent to the annual leave applicable to the period from 28 November 2019 to 31 March 2020. It is worth noting that had I not upheld the Claimant's claim that he was denied the right to take leave, it would have been open to me to have found, in the alternative, that the Respondent had failed to pay the Claimant in lieu of untaken holiday due on termination of employment under Regulation 14 of the WTR.

37. I expect that the parties will be able to agree the total sum owed by the Respondent to the Claimant (to include consideration of relevant tax and National Insurance Contributions) as a result of this judgment. Should the parties not be able to agree either all or part of the sum, I will deal with the relevant issues at a remedy hearing.

Employment Judge Coen

Dated: 24 February 2022

Judgment and Reasons sent to the parties on:

24/02/2022..

For the Tribunal Office