EMPLOYMENT TRIBUNALS

Claimant: **Zoe Ashwell**

Respondent 1: **WH Pubs Ltd**
Respondent 2: **WHCRIC Ltd**

Heard at: **London South via CVP On: 08/02/2022**

Before: **Employment Judge Krepski**

Representation:
Claimant: **In person**

Respondent: **Sophie Forrest – HR Consultant**

RESERVED JUDGMENT

It is the judgment of the Tribunal that the Claimant's complaint in respect of unauthorised deduction from wages under the Employment Rights Act 1996 in relation to:

1. Holiday pay; and
2. Unpaid wages ("furlough payment"),

is dismissed.

REASONS

Issues

1. Many of the facts of this case were not in dispute between the parties.

2. It was not disputed that the Claimant was an employee of the Respondent and worked at a public house. She began working in May of 2019 and her employment ended in April 2021. Whilst her employment in March 2020 was on a somewhat casual basis, she later changed to a 40-hour, full-time contract in September 2020, at which point she was to be paid £1600 per month.

3. It was also not disputed that the Respondent availed itself of the Coronavirus Job Retention Scheme ("CJRS") which allowed it to "furlough" some of its employees, i.e. require them (at least initially) to abstain from working, in return for a proportion of their salary, which the employer could claim back from HMRC. The Claimant was furloughed in March 2020 and again between November 2020 and March 2021.

4. The Claimant raised no complaint over the amount she was paid in respect of the first instance of furlough, namely around March 2020. This, she accepts, was to be 80% of an average of her pay, since her working hours were, at the time, variable and averaged around 14 hours a week.

5. It became clear, in the course of the hearing, that the basis of the Claimant's claim in respect of her unpaid wages was that, at the time of her "second furlough" in late 2020 and early 2021, she should have been paid 80% of her new salary, £1600 per month.

6. As such, her claim was for the difference between what she received from the Respondent (which was based on what she was paid in the first furlough period) and what she believes she was owed (80% of her new salary).

7. The Claimant also asserted she had not been paid for 5 days of untaken holiday at the time her employment ended.

Evidence

8. I heard evidence from both the Claimant and the Respondent's representative.

9. The Claimant also provided screenshots of email exchanges between her and those working for the Respondent.

10. Unfortunately, neither party was able to provide me with a copy of the Claimant's contract of employment, the precise dates of her being put on "furlough", or any agreement in respect of her being put on furlough.

11. Additionally, neither party was able, during the hearing, to point to the operation of the CJRS and whether or not the Respondent had applied it correctly other than a bare assertion being made to that effect by the Respondent's representative.

12. The Respondent's position, however, is best set out in an email screenshot provided by the Claimant entitled "*Wages and Furlough queries*". In that email, there is the following text from the Respondent to the Claimant:

> "*[This] is the response from […] our 3rd party Independent Wages Bureau […]: The furlough calculations have been applied correctly as the employee has been on FPS in March 2020. Any further changes in contracts are not taken into consideration i.e. the furlough is not recalculated because of the change in the contract.*"

Discussion

13. The CJRS, as indicated above, gives direction and guidance from the Government to employers, informing them how they could receive reimbursement for covering 80% of the wages of eligible employees put on furlough.

14. The original scheme began in March 2020 and was due to last several months, before further additions to the scheme (which added greater flexibility) were introduced from July 2020 onwards.

15. The scheme introduced the concept of a "reference day" for determining an employee's "reference salary", which is detailed in the "*Further Treasury Direction made on 13 November 2020 under Sections 71 and 76 of the Coronavirus Act 2020*" which would have been in operation at the time of the Claimant's second furlough.

16. In essence, where an employee was employed and placed on furlough in March 2020, that employee's reference day became 19th March 2020 and the calculation of reference salary and "usual hours" is based around that day.

17. The reference day, once set, does not change. As such, an employee may have received an increase in pay and/or an increase in hours (as in the present case), between the first and second furlough, but the reference day would remain as at the first furlough. The employee's reference pay and hours would also based on the previous furlough calculations.

18. I find that this accords with what was said on the Respondent's behalf in the email described at paragraph 12 of this judgment. The Claimant, having been furloughed in March 2020, would have had her reference pay in late 2020 and early 2021 based on the calculation made in March 2020.

Conclusion

19. In the absence of any written agreement indicating what the parties agreed the Respondent would be paid whilst on furlough, I am asked to infer what was agreed between the parties.

20. I find that the parties implicitly agreed that the Respondent would pay the Claimant whatever sum it would be entitled to claim under the CJRS.

21. Indeed, the Claimant's put her case on the basis that she should have been paid 80% of her new salary at the time of the second furlough, as per the CJRS.

22. I find, however, that the Claimant has not successfully shown that she *was* entitled to 80% of her new salary. Indeed, it appears more likely to me that the Respondent's calculations in respect of the operation of the CJRS are correct.

23. Accordingly, the Claimant has failed to show that there has been an unauthorised deduction from her wages in respect of her salary, and so this aspect of her claim must fail.

24. Additionally, since the Claimant conceded in evidence that she had, in fact, received her holiday pay, this aspect of her claim must also fail.

Note

25. There was initial confusion as to who the correct Respondent was. In the absence of documentary evidence to the contrary, and a payslip showing the employer as "WH Pubs Ltd", I find that the first respondent was the Claimant's employer. References in this judgment to the "Respondent" are to the first respondent. In such circumstances, any claim against the second respondent is also dismissed.

07/03/2022
Employment Judge Krepski