EMPLOYMENT TRIBUNALS

Claimants: Mr Carl Stretton

Respondent: Major Recruitment Limited

HELD AT: Manchester **ON:** 1 and 2 February 2022

BEFORE: Judge Miller-Varey (sitting alone)

REPRESENTATION:
Claimants: In person
Respondent: Ms W Creswell (Human Resources Manager of Respondent)

REASONS

1. These are my reasons given orally at the final hearing that took place 1 and 2 February 2022. A written judgement has already been issued to the parties in the following terms:

"1. The Claimant's claim for unlawful deductions of wages under s.13(1) ERA 1996 is not well-founded and is dismissed.

2. The Claimant's claim alleging breach of a contract of employment is not well-founded and is dismissed."

2. These reasons have been prepared at the request of the Claimant.

INTRODUCTION

3. The hearing bundle was prepared by the Respondent and comprises a series of documents, each allocated a number. Unless otherwise stated, references in square brackets are to the document bearing the corresponding number.

4. By a claim issued on 12 September 2020 the Claimant seeks compensation from the Respondent because he was not placed on furlough in March 2020 [16]. The

Respondent resists the claim on the basis that (a) the Claimant was a temporary agency worker on a contract for services (b) the Claimant was injured in February 2020 after which time he did not return to his place of work (where he had been for some months on assignment via the Respondent) and declined other work through the Respondent (c) it was not appropriate to furlough the Claimant because he was not an employee or worker on 1 March 2020 as required under the applicable scheme and (d) it would not have been appropriate to place the Claimant on furlough because the Respondent was no longer supplying labour to the business at which the Claimant had worked, and there was thus no future role for him to return to.

5. Prior to the final hearing, there were two case management conferences. EJ Allen, at the first such hearing, identified the issues to be determined as follows:

(i) Did the respondent make an unlawful deduction from the claimant's wages? The claimant claims that he was entitled to be paid furlough pay for an unknown period from 1 March 2020. Relevant to this issue will be determining what pay, if any, the claimant was entitled to after 19 February 2020.

(ii) Did the respondent breach its contract of employment with the claimant by failing to pay the claimant furlough pay for an unknown period from 1 March 2020?

(iii) Whilst unclear how the claimant will prove his entitlement, the claimant asserts all other employees and agency staff at the client site were paid furlough pay, and he was not. Accordingly, he may be relying upon an alleged breach of the implied term of trust and confidence.

(iv) Did the claimant enter his claim at the Employment Tribunal within the time required? Relevant to this issue will be what was the date of the payment (or last payment) from which such deductions were made and/or what was the effective date of termination? Was it reasonably practicable for the claimant to enter his claim in time and, if not, was his entered in such further period as the Tribunal finds reasonable?

FACTS

6. With the exception of the issue of the sending and receipt of the Claimant's P45 in May 2020, the factual issues are in the main uncontentious

7. The Claimant worked under a written agreement with the Respondent employment agency from around the 11 July 2019 [4]. The Respondent contends that agreement is a contract for services. The particular provisions it relies upon are these:

"2.1 These terms constitute the entire agreement between the Employment Business and the Agency Worker for the supply of services to the Hirer and they shall govern all assignments undertaken by the Agency Worker. However, no contract shall exist between the Employment Business and the Agency Worker between assignments. These terms shall prevail over any other terms put forward by the Agency Worker.

2.2. During an Assignment the Agency Worker will be engaged on a contract for services by the Employment Business on these terms. The avoidance of doubt, the Agency Worker is not an employee of the Employment Business although the employment business is required to make the deductions from the Agency Worker's

pay. These terms shall not give rise to a contract of employment between the Employment Business and the Agency Worker or the Agency Worker and the Hirer. The Agency Worker is supplied as a worker, and is entitled to certain statutory rights as such, but nothing in these terms shall be construed as giving the Agency Worker rights in addition to those provided by statute except where expressly stated.

…

Termination

…

9.5 If the Agency Worker does not report to the Employment Business to notify his/her availability for work for a period of four weeks, the Employment Business will forward his/her P45 to his/her last known address."

8. The Claimant was placed by the Respondent on an assignment with Manpower who in turn placed him with Kuehne and Nagel (K&N). He worked at the latter's premises in Trafford Park, Manchester, as a recycler. Mr Burdakey, a regional manager of the Claimant explained and I accept, that Manpower had the contract with K & N and only when demand was high would Manpower use the Respondent (in what he described as the role of "second tier agency") to source staff.

9. As is acknowledged in the ET3, the assignment commenced on the 30 July 2019. The claimant injured his wrist in February 2020 and although he tried to work on the 19 February, he managed an hour of his shift only and went home [5]. He needed light duties and told the Claimant in an email of 24 February 2020 that a doctor advised that he had repetitive strain injury which would persist if he kept doing that job that gave it to him. He said *"...the only way to not keep getting RSI is to come off the job completely".* The Claimant ultimately requested and received holiday pay only in the weeks ending 1 March, 8 March, 15 March and 22 March. He told the Tribunal he took holiday because he thought they might expire. The holiday was paid having regard to accrued leave. I find he was not on sick leave.

10. I accept what the Claimant told me about his attempt to undertake another assignment from the Respondent at Tufnell's in Oldham on or around 25 March 2020. In the event, the Claimant was there for two or three minutes only because of pain in his wrist. This was not documented by the Respondent and Miss Creswell was correspondingly reluctant to accept that it had taken place. However, Mr Burdakay for the Claimant offered that the absence of documentation may be explained by the shortness of the shift. It is right that no payment was pursued by the Claimant for his attendance at Tufnell's. I accept his evidence that he would not expect Tufnell's to go through what he assumed would be a lot of "hassle" when he was also new, given the circumstances.

11. There was produced before the Tribunal a P45 [1] for the Claimant which records his leaving date as 6 April 2020 and which is dated 21 May 2020 [1]. This did not alter the Respondent's chief submission that the last day of work was 19 February 2020. Miss Creswell explained, and I accept, that the leaving date in the P45 was identified

by reference to the first week after the accrued holiday pay ceased to be paid. This was an automated process whereby the P45 was issued after 6 weeks of inactivity and this was sent to the personal email address of the leaving person. Miss Creswell obtained the P45 before the Tribunal from the Respondent's payroll department. She had not been able to obtain the outgoing email to the Claimant but believed that this would have been written by a member of staff (i.e., not automatically generated).

12. Mr Stretton described variously that the first time that he found out he had been terminated was in July 2020 when he contacted HMRC. He accepted that he had worked elsewhere briefly in October 2020 and had, or obtained, a P45 at that time, or may even have worked on an emergency tax code. He also suggested that the Respondent may have emailed his P45 to a new agency. His evidence was not clear, although I do not find any deliberate attempt to mislead.

13. I find it more likely than not that the P45 was sent to the Claimant on or around 21 May 2020. It is possible that it may not have reached his attention but that is a different question. I will explain why.

14. Despite the absence of the covering email, I accept it was standard process – that dovetails with the agreement which mentions a trigger based on inactivity – albeit a slightly shorter period of 4 weeks (clause 9.5). I reflect too on C's evidence to me which, on first questioning was equivocal about whether he had received it. He later became more certain but his first answer was, I find, the most direct and meaningful.

15. The Claimant became concerned when in July 2020 he met and talked with a former colleague who worked at K & N who had been placed there as a temporary worker by Manpower. That person told the Claimant that every such person from Manpower had been furloughed. The Claimant was candid and open in expressing to the Tribunal that as a result of this single conversation, and knowing that the Respondent and Manpower *"worked together"*, he developed a hunch that all the agency staff placed at K&N by the Repsondent would similarly have been furloughed.

16. I accept this prompted contact in July and August 2020 between the Claimant and HMRC and that is when he commenced contact with the Respondent over the possibility of furlough. This was not granted.

17. I find as a fact that the following was the Respondent's practice in relation to furloughing staff:

(a) In relation to workers placed at K &G via Respondent's contract with Manpower

The Respondent ceased supplying temporary labour to Manpower for placement at K & N on 18 March 2020. No one who the Respondent had placed in that way between 1 March and 18 March, had been paid by reference to the CJR scheme either. Two compelling documents here are (i) the Schedule of payments at the end of the bundle [23] which shows the value and date of the final invoice from the Claimant to Manpower and (ii) the analysis of workers who were assigned to K&N up to 22 March 2020, which had fallen from 4 to 1.

(b) In relation to furlough in general

The Respondent took the position that it would only consider furloughing temporary workers if the client requested this and where there was an opportunity to return to work following any furlough period.

18. This informed the Respondent's refusal to consider applying retrospectively to put the Claimant on furlough.

THE LAW

19. The formulation of the issues identified by EJ Allen requires consideration of the Claim on two alternate legal bases: unauthorised deductions from wages and breach of contract.

A claim for unauthorised deductions

20. A claim for unauthorised deductions from wages under the Employment Rights Act (ERA) 1996 may be brought by an employee or a worker.

21. There is no period of qualifying service. The time limit for such a claim is 3 months beginning with the date of payment of the wages from which the deduction was made with an extension for early conciliation, unless it was not reasonably practicable to present the claim in time and it was presented within such further period as the Tribunal considers reasonable.

22. A claim may only be made in respect of "*wages"* which has a defined meaning: "*any sums payable to the worker in connection with his employment"* (s. 27 ERA 1996). There is a non-exhaustive list of sums that constitute wages. Of greatest obvious analogy with "furlough pay" are statutory sick pay, statutory maternity and paternity pay, adoption pay and parental pay.

23. Case law has established that in order to constitute wages, there needs to be some legal entitlement on the part of the Claimant to the sum in question but this need not be in contract (**New Century Cleaning Co Ltd v Church [2000] IRLR 27**).

A claim for breach of contract

24.To be able to claim damages from the Respondent before the Employment Tribunal for breach of contract, the Claimant needs to demonstrate that he was an employee of the Respondent.

25. Neither party contends that the execution of the written agreement between the parties in July 2019 caused the Claimant to be the employee of the Respondent. As I have found, he undertook a continuous assignment between the end of July 2019 and February 2020 in fulfilment of the Claimant's contract with Manpower. Thereafter, he had a short assignment elsewhere and was offered and declined other assignments.

26. There are two possible ways in which a worker may be classified as an employee:

- The worker can point to the existence of a '*global*' *contract of employment*, which continues to exist during periods when he or she is not working. Such a contract can be implied in circumstances where there is a relationship of such a long-standing nature that, even though work is done on a casual basis or on

assignment, the truth of the matter is that the employer is under a continuing obligation to provide work which the worker is likewise obliged to accept.

- The worker can successfully argue that he or she worked under a *succession of specific, short-term contracts of service*. In other words, and relating it to the Claimant's case, he was an employee of the Respondent when he was on assignment. There is complex case law in this area. Some courts have taken the view that very short-term hirings are incompatible with employee status so that, unless there is a global contract of employment spanning the gaps between jobs, the individual hirings must take the form of contracts for services. A contract for services is not a contract of services. However, on another view, a particular hiring may take the form of a contract of employment and duration is not a decisive factor.

The Coronavirus Job Retention Scheme (CJRS).

27. Section 76 of the Coronavirus Act 2020 provides that HMRC should have such functions as the Treasury may direct with regard to the disease. On 15 April 2020 a Treasury Direction was issued to HMRC setting out the operation of the CJRS scheme. This case relates to the original version of that scheme although it was altered subsequently on a number of occasions.

28. The key parts of relevance to the case are the following paragraphs:

"2.1 The purpose of CJRS is 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.

2.2 Integral to the purpose of CJRS is that the amounts paid to an employer pursuant to a claim under CJRS are only made by way of reimbursement of the expenditure described in paragraph 8.1 incurred or to be incurred by the employer in respect of the employee to which the claim relates.

...

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***

...

Expenditure to be reimbursed

8.1 Subject as follows, on a claim by an employer for a payment under CJRS, the payment may reimburse-

(a) the gross amount of earnings paid or reasonably expected to be paid by the employer to an employee;

(b) any employer national insurance contributions liable to be paid by the employer arising from the payment of the gross amount;

(c) the amount allowable as a CJRS claimable pension contribution.

8.2 The amount to be paid to reimburse the gross amount of earnings must (subject to paragraph 8.6) not exceed the lower of- (a) £2,500 per month, and (b) the amount equal to 80% of the employee's reference salary (see paragraphs 7.1 to 7.15)"

29. It is clear from this that the CJRS scheme for furlough applies between an employer and HMRC. However, the employer's entitlement to reimbursement depends on an agreement in writing for the cessation of work. As between employer and employee (or worker) therefore, rights and obligations continued to be governed by the contract between the parties (and any variation to that contract) as supplemented in any other respect by statute. It is right to say that many employers sought to vary their employees' contracts so as to align them with their right of reimbursement and so reduce the wages payable to 80%.

30. No statute, and certainly not the CJRS, conferred any direct right upon a person to compell their employer to use the scheme, or to automatically receive furlough pay.

31. That conclusion is strengthened by the conclusion of Snowden J (who was then considering the draft guidance) in **The Matter of Carluccio (in administration) [2020] EWHC 886 (Ch)** case at para 32:

"The problem arises because it is quite clear from the Scheme Guidance that the structure of the Scheme is that ***a claim is made by the employer and not the employee, and that the Government will pay any grant monies to the employer and not to the employee. The Scheme Guidance is also explicit that the amount of the grant is to be paid into the employer's bank account and is to be accounted for as income by the employer. As such, any grant monies paid will constitute assets of the company in administration.*** *Under the insolvency legislation, administrators are not free to dispose of the assets of the company in administration as they see fit, but must do so in accordance with the insolvency legislation and, in particular, by making payments in the order of priorities prescribed in that legislation."*

[My emphasis]

CONCLUSIONS

(i) Did the respondent make an unlawful deduction from the claimant's wages? The claimant claims that he was entitled to be paid furlough pay for an unknown period from 1 March 2020. Relevant to this issue will be determining what pay, if any, the claimant was entitled to after 19 February 2020.

32. Having regard to the terms of the CJRS and the effect of the scheme I find it did not have any direct impact on the existing legal relationship and entitlements. It provided the facility for Respondent to seek the grant (which could only be used for wages) but did not oblige the Respondent to do so.

33. So the entitlements of Claimant are those under his existing relationship with the Respondent as varied, if at all, to mirror the furlough scheme payments received (if any) by Respondent from the Treasury.

34. It is perfectly clear that there was no intended or actual variation – neither party asserts that it was even discussed with the Claimant. In fact, that is a cornerstone of his complaint: that the possibility was not explored.

35. The question then is what "wages" within the meaning of the ERA 1996, if any was the Claimant entitled to after February 2020.

36. Whilst payments made to him for assignments and accrued holidays which he gets an agency worker can constitute wages for the purposes of the ERA 1996 (so if they had been wrongly withheld, he could seek them) - the issue returns fundamentally to what entitlements he had.

37. In terms of wages for ERA 1996, all he was entitled to was what was provided under the agreement.

38. I cannot see that there was anything outstanding there. I have found that his last assignment was for Tufnell's. It is not part of his case that he should have been paid for this shift that he agrees lasted 3 minutes. He equally has not identified any other payments that could be wages and had accrued due.

(ii) Did the respondent breach its contract of employment with the claimant by failing to pay the claimant furlough pay for an unknown period from 1 March 2020?

39. The breach of an employment contract can be compensated for with damages. In essence Claimant would be contending that his loss, and therefore the damages, is the "lost" furlough pay.

40. The first element here is the requirement to be satisfied that there existed a contract of employment between the Claimant and the Respondent. Only then could I consider whether there had been a breach.

41. Secondly, of the two means a worker may be classed as an employee I have identified above, I consider for the Claimant's case to succeed, I would need to be satisfied that there was an overarching or global contract of employment between him and the Respondent.

42. I say that because the evidence shows that the assignment with K & N, ended on 24 February 2020 (at the latest - being the date of his email [7] identifying that he would not be able to return to that assignment). That was at the Claimant's instigation because he had injured himself. The assignment did not continue or extend by reference to his injury because he took both accrued but untaken holiday pay and took another assignment, elsewhere, on 24 March 2020 (albeit briefly).

43. Most importantly, the K &N assignment was undertaken and finished before even the CJRS existed. Yes, it was announced on 20 March 2020 and it was subsequently *possible* to make a claim which went back to the 1 March 2020 for employees or agency staff on the payroll on or before 19 March 2020 but as at the time and conclusion of the K & N assignment, the Respondent had no right to seek furlough for him.

44. It follows that even if it might be argued that the specific assignment with K & N was a contract of employment (i.e., whilst the Claimant was at K & N **and I make no positive finding that it was such a contract**), the Respondent cannot have breached any obligation of trust arising from that assignment **not** to claim and pay him furlough money. So, the remedy he seeking for, in essence an amount equal to furlough pay from 1 March 2020, is not available by that route.

45. In terms of any overarching contract between the Claimant and the Respondent, I am not satisfied that there was one. I have taken into account the case law which makes clear that the terms of the written agreement (which the Respondent relies on heavily) are in no way pre-eminent or determinative. I need to look at the whole of the circumstances. Material to that is the relative shortness of his relationship with the Respondent and the fact he went on to be offered and to decline other work. It cannot be said, I think, that Respondent was under a continuing obligation to provide work which the Claimant was likewise obliged to accept. That is not consistent with the practicalities of the arrangement nor reflected in the agreement. The fact the P45 identifies a leaving date in April and was not sent until May 2020 does not change my view about that. The April date reflected that accrued holiday was paid – on the facts I have found – over a period of weeks as the debate over what was owed was reconciled. It does not denote or stand as evidence of continuing global employment or the continuation of any assignment

(iii) Whilst unclear how the claimant will prove his entitlement, the claimant asserts all other employees and agency staff at the client site were paid furlough pay, and he was not. Accordingly, he may be relying upon an alleged breach of the implied term of trust and confidence.

46. I have dealt with this substantially already. The implied term of trust and confidence is a feature of the employer/ employee relationship.

47. To the extent there may be any argument of a similar duty under the terms of his agency agreement with the Respondent (and I am not aware of law that supports that), that is not within the Tribunal's jurisdiction under the Employment Tribunals Extension of Jurisdiction (England and Wales) Order 1994.

(iv) Did the claimant enter his claim at the Employment Tribunal within the time required? Relevant to this issue will be what was the date of the payment (or last payment) from which such deductions were made and/or what was the effective date of termination? Was it reasonably practicable for the claimant to enter his claim in time and, if not, was his entered in such further period as the Tribunal finds reasonable?

48. My primary finding is that no deductions from wages have been established at all i.e., there was no right to be paid an amount equal to furlough. It is accordingly not necessary to consider the question of whether any part of the claim is defeated by limitation.

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Tribunal Judge A Miller-Varey
(acting as an Employment Judge)

22 April 2022

Sent to the parties on:

29 April 2022

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For the Tribunals Office