EMPLOYMENT TRIBUNALS

Claimant: **Mrs D Afriye**

Respondent: **EPayMe Limited**

HELD AT: **Watford (by Cloud Video Platform)** **ON:** **16 February 2022**

BEFORE: Employment Judge French

REPRESENTATION:

Claimant:	**In person**
Respondent:	**Ms Laura Walsh, General Manager**

JUDGMENT having been sent to the parties on 4 March 2022 and written reasons having been requested on 7 March 2022 in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided:

REASONS

Introduction

1. This is a claim brought by the claimant by way of a claim form issued 11 September 2020 for unpaid wages through the furlough scheme. In her claim form the claimant also made a claim for holiday pay. However, at the outset of the hearing she confirmed that the holiday pay aspect had been resolved with the respondent and paid and that she was therefore no longer pursuing that claim. This is therefore dismissed on withdrawal by the claimant and I have dealt with the outstanding furlough pay only.
2. In its response dated 30 October the respondent denies the claim for unauthorised deduction from wages and says that they were unable to pay furlough pay because

the claimant did not agree to the same or complete the required documentation to process it.

Evidence

3. In terms of the evidence, I had sight an agreed bundle consisting of 18 documents which runs to 176 pages. The bundle is unpaginated and simply numbers each document at the top of the page and therefore where references are made to the documents in my Judgment I refer to the document number rather than the page number.

4. I heard from the claimant herself and I heard from Ms Laura Walsh on behalf of the respondent who is the general manager of the respondent company. I should say that I have read the bundle in full and I have heard submissions from both parties.

Issues

5. At the outset of the hearing I agreed with the parties that the following issues needed to be decided:

   (1) What was the contractual entitlement to pay?

   (2) What steps were taken to put the claimant on furlough and when?

   (3) Was there a variation to the contract with regards to the furlough agreement?

   (4) What sums were properly payable to the claimant under the contractual entitlement, assignment or later furlough agreement?

Fact finding

6. The claimant was employed by the respondent as an agency worker from 11 December 2019 in her capacity as supply teacher in the education setting. The respondent accepts that they were the employer of the claimant with assignments being allocated to her via other agencies. At the time of her employment the assignment was via Reeson Education and it is with them that the claimant had her initial job interview. She was however subsequently referred to EPayMe Limited who acted as her employer and distributed payroll.

7. Document 12 of the bundle is the contract between the parties and is dated 11 December 2019. Clause 3 of that contract deals with payment between the parties. Specifically, Clause 3.2 provides that the claimant will be paid the national minimum wage for actual hours worked. In her evidence the claimant accepted that the pay arrangement was for actual hours worked as reflected in her contract. She was initially assigned to work three days per week with an average of seven hours per day but from 17 January 2020 had been asked to work four days a week. She accepts that her pay was entirely reflective of the hours she worked and although it was a regular monthly payment by virtue of set hours within the school setting, she was only ever paid for completed hours. There are other clauses relating to a non-guaranteed bonus and a guaranteed payment based on minimum number of hours to be provided by the respondent through assignments. This is a yearly amount of 336 hours for which there is no suggestion that they have not complied over that period.

8. The claimant also had an agency agreement with Reeson which provided for hourly rates on similar terms as per Clause 5 of document 13 in the bundle.

9. In March 2020 the UK was impacted by the Covid-19 pandemic and national lockdowns. As a result of that, the claimant was told by the agency Reeson that they would be terminating her contract immediately. This was in accordance with Clause 9.1 of their contract with the claimant. Clause 11 of document 12, namely the claimant's contract with the respondent provides that termination of an assignment, for example the one with Reeson, does not terminate her employment with them. She therefore remained employed by them at that time and at the time of her claim the claimant was in fact still employed by them.

10. On the evidence before me, I find that there was no contractual obligation for the respondent to continue to pay the claimant when the assignment was terminated. This is as per the claimant's own evidence regarding her pay being hourly and Clause 3.2 of the employment contract.

11. I now turn to whether a separate agreement was reached between the parties regarding furlough. On 29 April 2020, having made its own enquiries as to whether the claimant was eligible for the furlough scheme, the respondent sent the claimant an email at 12:42 at document 5 of the bundle advising the claimant that she was eligible for the scheme. It is stated that she would need to give consideration to whether the furlough scheme was suitable for her and provide signed agreement by return. The email gave a deadline of 4:30pm the same day to confirm whether or not she agreed the same. This was clearly a very short period of time for a response and the claimant submits that it was unreasonable.

12. The respondent asserts that they had to set a tight deadline due to the volume of the applications that they were having to process. In that regard I heard evidence that they employ some 2500 members of staff and estimate that 980 furlough applications were dealt with. This was at an unprecedented time where the company had to make their own reductions on staff members as well as experiencing reduced staff due to sickness from Covid-19. The respondent states that five members of staff were dealing with the workload in that time.

13. The claimant did not see the email on the date it was sent. She said that her daughter was ill for a period of two weeks on or around 25 April and quite understandably that was her focus and her priority. I find that the claimant didn't in fact see the email until 19 May as was evidenced by the fact that she replied to the same indicating a deadline of 4:30pm that day in the mistaken belief that the email had been sent on the day that she saw it rather than some weeks prior. By that time, she did state that her daughter was better but still a focus for her as she was underweight and not eating well. On seeing the email on 19 May the claimant tried to complete the form sent to her but was unable to do so and advised the respondent of this. Ms Walsh confirmed in evidence that the reason that the link did not work was because it had expired as it was past the deadline.

14. The claimant contends that although she did not submit the signed form until 19 May this was still adequate time for the respondent to have made a claim through the furlough scheme which had not closed for applications until 10 June. There was therefore sufficient time to process the application in that time. The respondent accepts that the scheme itself did not close until 10 June. However, by the time the claimant returned the form on 19 May the original scheme had been changed by the government and as a result a company decision had been made that they would no longer process any further furlough claims on that basis.

15. It is understood that when furlough was initially offered to the claimant it was on the basis that the government also covered employment costs of national insurance and pension. However this changed on the respondent's understanding at the beginning of May meaning that they would no longer meet the employer's costs. To pay furlough would have therefore been at their cost with regard to that aspect.

16. Ms Walsh gave evidence that the respondent did go to what she calls the supply chain, namely the recruitment agency and the school itself to see if they would be willing to meet these costs but they were not. In the circumstances with no obligation on the employer to participate in the furlough scheme the decision was taken not to. The claimant's claim was therefore not processed on that basis on 19 May or thereafter and I find that this was the reason for not processing the claim.

The Law

17. The claimant must bring a claim under the jurisdiction of the Employment Tribunal. There is no freestanding authority under the furlough regulations which allows the claimant to bring a claim in respect of that legislation. The claimant therefore brings a claim of unlawful deduction of wages ie under Part II of the Employment Rights Act 1996. For these purposes it is accepted that the claimant was an employee of the respondent.

18. The general prohibition and deductions are set out in section 13(1) of the Employment Rights Act and it states "*an employer shall not make a deduction from wages of a worker employed by them."* Section 27(1) defines wages as "*any sums payable to the worker in connection with his employment and includes any fee, bonus, commission, holiday pay or other amount referable to the employment.* Section 13(3) of the Act states that "*where the total amount of wages paid on any occasion by an employer to a worker employed by him is less than the total amount of wages properly payable by the worker on that occasion after deductions, the amount of the deficiency shall be treated for the purposes of this part as a deduction made by the employer from the worker's wage on that occasion."*

19. In order to decide what is properly payable the Tribunal has to decide what the contractual agreement is between the claimant and the respondent and the approach to determining this is the same approach as adopted by the civil courts in contractual claims. I have also had regard to the treasury direction dated 15 April 2020 under section 71 and 76 of the Coronavirus Act being the relevant direction in place at the time of the discussions between the parties and it is that direction that deals effectively with the furlough scheme.

Conclusions

20. I find that in relation to the contractual obligation of the respondent to pay the employer this was as per Clause 3 of document 12 namely the claimant would be paid for hours actually worked. This was accepted and agreed by the claimant. Therefore at the point of her assignment being terminated in March 2020 the claimant did not work any hours and as such was not contractually entitled to pay. I therefore find that there is no unlawful deduction of wages based on her contract of employment.

21. I turn to whether there was an amendment to her contract with regards to the furlough scheme. In that regard all parties accepted that the employer was not obliged to pay furlough and it was a scheme that was put in place to prevent large

scale redundancies and loss of employment. The scheme was an agreement between the parties to amend the contract of employment and the employee would need to have agreed to being placed on the scheme. This separately allowed the employer to recover 80% of the employee's wages from the scheme.

22. I find that the respondent enquired as to whether or not the claimant would be eligible and found that she was. As a result they did offer a variation to her contract of employment by way of email dated 29 April requiring her to accept the changes by 4:30pm that day if she wished to. The claimant did not see that email and therefore failed to do so. The respondent therefore proceeded on the basis that she had not accepted the variation and did not make a claim under the scheme for her.

23. Due to the fact that the claimant had not accepted the scheme at the time it was offered, the respondent had no existing claim for her under the furlough scheme. By the time the claimant did respond, in an ever changing position as a result of the ongoing pandemic, the government had withdrawn the employer's contributions. As a result of this the respondent had decided it was no longer financially viable for them to offer the scheme to employees.

24. The claimant asserted that the scheme didn't close until 10 June and therefore at the time she submitted her documentation and agreement to the scheme on 19 May there was still adequate time for a submission to have been made. This is correct. The scheme under which the employer could claim back from the government did not close until 10 June. However, by this point, the terms under which the furlough scheme was originally offered had changed and as a result the employer had taken its own decision that they would no longer be processing any more claims. Although they could have done so because the scheme had not closed, due to the changes this would have been at a cost to them and they decided that this was not financially viable. Ultimately, there was no obligation on the employer to take part in that scheme.

25. Although a very short deadline was given to the claimant to accept the scheme, I do not find that this was unreasonable given the challenges that the respondent and indeed many businesses were facing at the time. In addition, although I cannot speculate as to whether the claim would have been processed had it been submitted one or two days past the deadline, the claimant did not agree to the scheme until some three weeks later and therefore a significant period of time had elapsed. By this time the original scheme had changed and as a result the company were no longer willing to offer this. The furlough claim therefore was not processed.

26. While I do appreciate that the claimant's daughter was in ill health and that was of course a focus for her, her pay would have likely been of significant importance to her also and I consider that she should have been proactive in discovering what her position was. Although she did not see the email there was information available and widely broadcast.

27. I therefore do not find that there was an agreement to vary the claimant's contract of employment to accept furlough pay as she did not accept the variation when offered, and by the time that she did accept it was past the company's deadline and had been withdrawn. As such furlough pay was not properly payable within the definition of section 13 of the Employment Rights Act.

28. For those reasons I do not find that there was an unauthorised deduction from wages and the claimant's claim is therefore dismissed.

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Employment Judge French

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Date: 28 April 2022

REASONS SENT TO THE PARTIES ON

29 April 2022

FOR THE TRIBUNAL OFFICE