EMPLOYMENT TRIBUNALS

Claimant: Mr W Griffiths

Respondent: Coventry School Foundation

Heard at: By CVP at Midlands West Employment Tribunal

On: 10 May 2022

Before: Employment Judge Platt

Representation
Claimant: in person
Respondent: Mr Ball, Head of HR at the Respondent

RESERVED JUDGMENT

The Claimant's claim for unlawful deductions from wages is dismissed.

REASONS

Claims and issues

1. The Claimant's claim was brought pursuant to section 13(1) of the Employment Rights Act 1996. The Claimant claimed that there had been unlawful deductions from wages when the Respondent decided not to furlough him under Coronavirus Job Retention Scheme (the "Scheme") during the period 5 November 2020 and 12 April 2021 when the Respondent's Leisure Centre (where the Claimant worked as a Lifeguard) was closed.

2. The matters for the Tribunal to decide were:

    a) Whether wages were properly payable to the Claimant during the period 5 November 2020 – 12 April 2021 because the Claimant should have been furloughed under the Scheme;
    b) Whether the Respondent had made an unlawful deduction from the Claimant's wages by not paying him during the period 5 November 2020 – 12 April 2021;
    c) If so, what sum the Claimant should be paid?

Procedure

3. At the outset of the Hearing the Tribunal spent some time clarifying the basis of the Claimant's claim.

4. The Tribunal was provided with a Bundle of documents containing 138 pages. Both parties directed the Tribunal to the documents they considered the Tribunal should read. The pleadings, witness statements and pages 75, 79, 83, 92, 107, 127-130 were referenced. The Respondent also provided the Claimant's payslips for August, September, October and November 2020 when requested to do so by the Tribunal.

5. The Tribunal heard witness evidence from the Claimant and Mr Ball for the Respondent. A witness statement was also provided from the Respondent's employee and the Claimant's Line Manager, Mr Beckett. Unusually he provided witness evidence for both parties. It was therefore agreed that his witness statement would be considered by the Tribunal but neither party would cross-examine him.

6. Both parties delivered oral submissions for the Tribunal to consider.

Findings of fact

7. The Claimant has worked for the Respondent for approximately five years on a zero-hours contract. He is entitled to be paid at the rate of the National Minimum Wage - £8.20 at the relevant time increasing to £8.36 from 6 April 2021 - for the hours he worked.

8. The Claimant considers that he is an employee. The Respondent considers him to be a worker. As the Claim is for unlawful deductions it is not necessary for the Tribunal to determine employment status. There was flexibility regarding the hours worked. However, the Claimant usually worked four hours on a Monday and then added other hours to his shifts on an ad hoc basis. He has never been provided with written terms by the Respondent.

9. The Respondent had furloughed the Claimant under the Scheme during March 2020 – July 2020 when the Leisure Centre was closed during the first UK lockdown. During the first UK lockdown the Claimant and all other lifeguards on zero-hours contracts were furloughed under the Scheme. The Claimant was paid two furlough payments for the period covered by the first lockdown.

10. The Respondent's Leisure Centre was closed during 5 November 2020 – 12 April 2021 due to the second lockdown. It was agreed between the parties that the Claimant worked 27.5 hours during the 12-week period before 5 November 2020 and that the period the Leisure Centre was closed between 5 November and 12 April was 22 weeks.

11. The Respondent was unable to confirm how many lifeguards were furloughed during the second lockdown. Mr Beckett thought that everyone had been furloughed at the time but this was incorrect. The Claimant was not furloughed.

12. The Respondent did not notify the Claimant of the position in November 2020 and he assumed that he had been furloughed during the second lockdown as he had been during the first. There was no furlough agreement between the parties. The

Respondent did not send any clear communication around furlough and the Claimant did not seek clarity from HR until 2 March 2021. He did not receive a response and followed up again on 15 April 2021. The Claimant stated this was because there had been a delay in payment during the first lockdown. The Tribunal accepts that this was the Claimant's belief and that his expectation was that he would be furloughed until he received an email from the Respondent's HR Manager at the time (Claire Davis) on 23 April 2021 stating that he was not eligible for furlough.

13. Claire Davis (who is no longer employed by the Respondent and who Mr Ball replaced) did not give evidence to the Tribunal. Mr Ball did not have insight into everything that had happened at the time. Claire Davis set out in her email of 23 April 2021 to the Claimant that staff needed to have worked consistently since the reopening and be scheduled to work during November 2020. Mr Beckett had provided Ms Davis the rota on 4 November 2020 which showed those who had worked during 26 October 2020 and 8 November 2020. He wasn't aware that the Claimant had not worked during that period.

14. The Tribunal finds that the Respondent only furloughed zero-hours staff if they had worked during the two weeks before the second lockdown and if they were scheduled to work in November 2020 (the "Conditions"). The Claimant accepted that he did not work during the two weeks prior to the second lockdown. The Tribunal accepts the Claimant's evidence that he would have worked in November by attending scheduled training in November 2020 had lockdown not been in place.

15. The Respondent did not adduce evidence that the Conditions were applied to staff at the time of the first lockdown and the Tribunal finds that it did not. The Respondent did not seek to argue that it was required to impose the Conditions on zero-hours staff in accordance with any legislative requirement. It was unclear to the Tribunal why the Conditions had been imposed on zero-hours staff. However, it finds that the Conditions were in fact imposed.

Law

16. The relevant law is Section 13(1) of the Employment Rights Act 1996 which prohibits unlawful deductions from wages. Section 13(3) of the Employment Rights Act 1996 sets out that there will be an unlawful deduction if an employer deducts an amount from wages which is properly payable.

17. The Court of Appeal's decision in *New Century Cleaning Co Ltd v Church 2000 IRLR 27* is relevant to the determination of whether wages are properly payable. In that decision, the Court of Appeal held that in order for a payment to fall within the definition of wages properly payable, there must be some legal entitlement to the sum in question.

18. The Scheme was announced by the Chancellor of Exchequer on 20 March 2020. The Scheme was to provide support for employers to enable them to continue employment of employees by paying part of their employees' salaries rather than lay them off. Both the employer and the employee had to agree for the employee to be placed on furlough. The whole purpose of the Scheme was to avoid lay-off of employees because of the effect of the Covid-19 pandemic by providing significant government support to employers. The Scheme ended on 30

September 2021. It is established that employees/workers did not have any freestanding "right" to be furloughed under the Scheme.

19. The fundamental question in this claim is whether the Claimant had a legal entitlement to be furloughed during 5 November 2020 – 12 April 2021 and therefore to be paid 80% of his wages during that period.

Conclusions

20. As a member of staff working under a zero-hours contract the Claimant did not have the right to be provided with any minimum number of hours per week.

21. The Respondent had accepted that during the first lockdown it would use the Scheme for the benefit of those on zero-hours contracts and did so again during the second lockdown. During the second lockdown it added the Conditions (one of which the Claimant met). It was within its rights to do so.

22. As the Claimant articulately conveyed to the Tribunal it seems unfair that the Respondent did not include the Claimant and furlough him during the second lockdown. However, there was no legal obligation requiring it to do so. The Claimant does not seek to rely on any protected characteristic as to why he was treated differently to other staff. The Claimant did accept that he did not meet the condition regarding working during the two weeks prior to the second lockdown. The Claimant's view was that the Respondent's position was unfair and "discriminatory" in the non-legal sense of the word. The Tribunal understands the Claimant's frustration in that regard. However, there was no legal right to be furloughed and given the Claimant was engaged on a zero-hours contract he had no right to any minimum number of guaranteed hours.

23. There is no other basis on which the Tribunal is able to find that wages were properly payable to the Claimant in light of the Court of Appeal's decision in in *New Century Cleaning Co Ltd v Church 2000 IRLR 2*7. The Tribunal has been unable to identify any legal basis for the entitlement asserted by the Claimant. Therefore, the Tribunal is unable to find that wages were properly payable to the Claimant during the period 5 November 2020 – 12 April 2021 pursuant to section 13(3) of the Employment Rights Act 1996.

24. Had the Tribunal been able to find in the Claimant's favour in relation to his substantive claim, it would have made an award for failure to provide the Claimant with written particulars pursuant to Section 1 of the Employment Rights Act 1996. It does not have jurisdiction to make an award under section 38 of the Employment Act 2002 if the substantive claim fails. It is hoped that the Respondent will provide the Claimant (and other staff engaged on zero-hours contracts) with written terms setting out the particulars of his engagement following these proceedings.

25. For the reasons set out above, the Claimant's claim for unlawful deductions from wages is dismissed.

Employment Judge Platt

11 May 2022