



# EMPLOYMENT TRIBUNALS

**Claimant:** Mrs A Madzharoglu

**Respondent:** Yasero Limited

**Heard at:** London South Employment Tribunal (by CVP) **On:** 17 June 2022

**Before:** Employment Judge T Perry

## **Representation**

Claimant: Ms J Arbeo

Respondent: Ms Y Aray (Company Secretary)

# JUDGMENT

The Claimant's claim for unlawful deduction from wages fails and is dismissed.

# REASONS

## **Claim and issues**

1. The Claimant brings a claim for unlawful deduction from wages in respect of furlough pay for the period from April to December 2020. Whether the failure to pay wages was an unlawful deduction is the central issue in the case.

## **Evidence**

2. A Turkish language interpreter was provided for the Claimant.
3. The Claimant provided the Tribunal with: a 37 page word document entitled "(Documents & Evidence)"; a word document entitled "Type of Claim – UDW"; an exchange of WhatsApp messages with the Respondent's director, Mr Ermis, in both Turkish and English; the Claimant's bank statements; the Claimant's forms for universal credit showing reductions made by an employer; and the Claimant's fraud report dated 28 September 2020.

4. The Respondent provided the Tribunal with a statement for Mr Serdal Ermis dated 16 June 2022 with attached to this a letter from the Respondent' accountants and payslips for the Claimant.
5. At the start of the hearing, it was apparent that Mr Ermis was not in attendance. I was originally told that he could attend on around 30 minutes' notice. Ms Aray had notified the Tribunal that morning that she needed to take her child to a medical appointment and would need to leave at 12pm and would be unlikely to return before 3pm. The Claimant confirmed that she also had to leave around 12pm to make a flight taking off at 4pm.
6. The parties agreed that they did not want to postpone the hearing and a decision was made to commence the hearing in the hope that the proceedings could be completed within the constraints imposed by the parties' various other commitments.
7. The Claimant gave evidence under affirmation. The Claimant did not have a witness statement. Ms Arbeo had initially suggested using pages 3 and 4 of the (Documents & Evidence) word document as a witness statement. However, the Claimant did not have this to hand and so was examined in chief regarding the matters raised in that document. Ms Aray had limited cross examination for the Claimant.
8. Once it came time for Mr Ermis to be called, Ms Aray informed the Tribunal that Mr Ermis was unable to attend before around 3pm because he was dealing with an emergency in the restaurant which had required a member of staff to be taken to the Accident and Emergency room at King's hospital, just over the road from the Respondent's premises. The significance of the Claimant being unable to cross examine Mr Ermis was explained to Ms Aray. No application to postpone the hearing was made. Ms Aray herself gave evidence under oath on some of the matters contained in Mr Ermis' statement based on her knowledge as company secretary.
9. Due to the shortened length of the hearing, the parties were allowed 7 days to make closing submissions in writing. It was highlighted to Ms Aray that any application to list a further half day hearing to allow Mr Ermis to attend to give evidence would also need to be made within that timeframe and would need to be supported by medical evidence regarding the emergency. Brief written submissions were provided by both parties.

#### **Findings of fact**

10. The Claimant started work in November 2018. The Claimant was not provided with a statement of terms.

11. The payslips provided suggest that the Claimant was working 69.34 hours per month. The Claimant was paid monthly in cash. The rate of pay shown in the payslips was initially the national minimum wage of £7.83. However, after April 2019 the payslips show the rate of pay failed to increase to £8.21 an hour in line with the increasing national minimum wage. There was no claim before the Tribunal in relation to this matter.
12. The Claimant says that she worked 50 hours per week from 7am to 5pm over five days. The Claimant says she was paid £7 per hour. The Respondent confirmed that the Respondent did have time sheets for the Claimant but that they had not thought to provide those to the Tribunal. When the Claimant was asked why she accepted payslips showing her working part time, the Claimant said that she had come to the UK on her own not knowing much about the regulations and that she trusted her employer.
13. I find as a fact on the balance of probabilities based of the evidence before me that the Claimant was working 50 hours a week. I accept the Claimant's evidence as to why she accepted wage slips showing different hours. I consider that if the Respondent had time sheets showing the Claimant working fewer hours, they should have been provided to the Tribunal. I find it unusual that someone classified as a casual worker would have a sequence of payslips showing exactly the same number of hours worked each month. This suggests the Respondent's version of the Claimant's working hours is incorrect.
14. The Claimant went on holiday to Turkey on 14 March 2020. The Claimant was last paid salary on 30 March 2020.
15. Due to the Coronavirus pandemic, the Claimant's return flight was cancelled and she remained in Turkey until 27 July 2020. I accept the Claimant's evidence that the flights back to the UK were both very limited in number and that the Claimant considered them expensive to afford in circumstances where she was receiving no pay.
16. The Claimant and Mr Ermis exchanged WhatsApp messages whilst they were both in Turkey. On 30 March 2020 Mr Ermis told the Claimant "Don't come. I'm here too." The Claimant asked Mr Ermis if "you will apply for 80% of the salaries." Mr Ermis replied later "I'll take care of it even if it's a little bit, of course something will go away / we'll sort out your rent"
17. Mr Ermis returned to the UK during April 2020.
18. On 1 June 2020 the Claimant messaged Mr Ermis to ask "I wonder if there is any progress with regard to government grants." Mr Ermis replied "You will receive a

document at your address / If you are not in the UK I guess you won't get help. You should be here but I'm still getting it checked." The Claimant disputed this stating that her boyfriend in Turkey was receiving furlough pay and saying that citizens advice wanted to query the furlough process on the Claimant's behalf.

19. The Respondent submitted a claim for furlough pay for the Claimant but did not pay this money out to her. I accept Ms Aray's evidence that the Respondent did not know whether it was entitled to claim furlough pay for the Claimant and made a claim whilst also submitting enquiries as to whether this was the correct approach.
20. On 18 June 2020 the Claimant confirmed to Mr Ermis that she was coming back in July once her passport was renewed.
21. I do not find that the Claimant started work with Corner Café in July 2020. I accept the Claimant's evidence over that in Mr Ermis's statement, which was not able to be challenged in cross examination. Ms Aray had no personal evidence to give on this point.
22. Having returned to the UK on 27 July 2020, on 2 August 2020 the Claimant said that she wanted to come and see Mr Ermis that day.
23. On 6 August 2020 the Claimant met with Mr Ermis. In this meeting, the Claimant asked if she could get her unpaid furlough pay and told Mr Ermis that she did not want to work for him any more. The Claimant asked for a p45 and her payslips.
24. On 24 August 2020 Mr Ermis messaged the Claimant to confirm "you will get money."
25. The Claimant submitted a claim for universal credit. The records of the application for Universal Credit show that the government considered that the Claimant was receiving sums from her employer from 8 August 2020 to 9 November 2020. I find as a fact that the Claimant received no such sums.
26. The Claimant raised concerns with HRMC on 28 September 2020 alleging that "I still have not receive any Furlough payment. I have seen to boss about this and he said he would give me my money, but he still did not deposit my money in my account. He has not been giving my Payslip since March. I asked him for my P45, P60 documents, but he did not repond. Because I think my Furlough continues I applied for Universal Credit to pay my rent because did not, and the message received today included Earnings reported by my previous employer 463, 85 Pound. This is a completely lie because I haven't worked there since March 15th. If you need any further information please contact with me Kings Regards Ayshen Madzharoglu." It went on to state "When I went

to shop the boss gave me an empty paper and he said wants to help me. I have write down in Turkish; was in Turkey and I stuck there because that time was lockdown and was not any flight. I have signed that documents then the boss said, his accountant will translate and apply furlough again for me. When I am texting to him he never responds to my text and just spends time .He made me a victim. Please find out what he is doing illegally.”

27. The Claimant went through ACAS early conciliation between 24 and 25 November 2020 before submitting her claim via form ET1 on 30 November 2020.

28. In February 2021 the amounts claimed for the Claimant’s furlough pay were repaid by the Respondent to the UK Government.

### **The Law**

29. Section 13(1) of the Employment Rights Act 1996 provides that an employer shall not make a deduction from wages of a worker employed by him unless the deduction is required or authorised to be made by virtue of a statutory provision or a relevant provision of the worker's contract or the worker has previously signified in writing his agreement or consent to the making of the deduction. An employee has a right to complain to an Employment Tribunal of an unlawful deduction from wages pursuant to Section 23 of the Employment Rights Act 1996.

30. A failure to pay furlough pay is a failure to pay wages and can engage the provisions of section 13 and 23 of the Employment Rights Act 1996.

31. A claim about an unauthorised deduction from wages must be presented to an employment tribunal within 3 months beginning with the date of payment of the wages from which the deduction was made, with an extension for early conciliation if notification was made to ACAS within the primary time limit, unless it was not reasonably practicable to present it within that period and the Tribunal considers it was presented within a reasonable period after that. Reasonably practicable’ has a similar meaning to ‘reasonably feasible’.

32. Subject to an express contractual provision to the contrary, an employee or worker is entitled to be paid if they are “ready and willing to work” **Beveridge v KLM UK Ltd** [2000] IRLR 765, EAT.

33. There has been little judicial analysis of what the phrase 'ready and willing to work' actually means and it is difficult to extract clear principles from the few cases that do exist.

34. In **Burns v Santander UK plc** [2011] IRLR 639, EAT, the EAT held that a worker who is ready and willing to perform his contract but is unable to do so by reason of sickness or injury or other unavoidable impediment is entitled to claim his wages, but is not entitled to do so where the impediment is avoidable.

35. In **North West Anglia NHS Foundation Trust v Gregg** [2019] IRLR 570 Coulson LJ considered the meaning of 'ready, willing and able' to work and suggested the following propositions as uncontroversial:

(a) If an employee does not work, he or she has to show that they were ready, willing and able to perform that work if they wish to avoid a deduction of their pay.

(b) If he or she was ready and willing to work, and the inability to work was the result of a third-party decision or external constraint, any deduction of pay may be unlawful. It all depends on the circumstances.

...

(d) By contrast, an inability to work due to an 'unavoidable impediment' (Lord Brightman in *Miles v Wakefield*) or which was 'involuntary' (Lord Oliver in *Miles v Wakefield*) may render the deduction of pay unlawful.

## **Conclusions**

36. It is clear to me that the Claimant's employment ended on 6 August 2020 by reason of her resignation when she said she did not want to work for the Respondent any more. Alternatively, the Claimant was clearly not "ready and willing to work" after 6 August 2020 and therefore did not have the right to be paid for this period. Whilst, I am uncomfortable about the fact that the Claimant failed to receive full amounts of Universal Credit potentially because of the actions of the Respondent, that appears a matter between the Claimant and the UK government. It is not a matter that this Tribunal can remedy. The claim in respect of deductions in respect of the period after 6 August 2020 thereafter fails and is dismissed.

37. The claim in respect of the period before 6 August 2020 is harder to decide. There was no clear agreement to put the Claimant on furlough. The messages between the parties were vague and overall suggested that the Claimant was not on furlough. It appears the Claimant signed a retrospective document regarding her whereabouts and entitlement to furlough at the meeting on 6 August 2020. However, I am not satisfied that before the Claimant's employment ended and/or she made it clear that she was not ready and willing to work that there was an agreement to furlough the

Claimant such that she did not need to be ready and willing to work in order to be paid.

38. The question is then whether the Claimant was ready and willing to work before 6 August 2020 but was prevented from working by some external impediment. There is little by way of judicial guidance or decided cases in this area. I have found this a difficult decision to reach. On the one hand, absent the pandemic the Claimant would undoubtedly have returned to work at the end of March 2020. The Claimant being in Turkey during the early stages of the Coronavirus pandemic is not a situation that the Claimant played any blameworthy part in causing. I am conscious of the Claimant's limited means and the fact that returning to the UK would have been both difficult and potentially expensive. However, on balance and based on the evidence before me, I consider that, whilst it would likely have been expensive for the Claimant to return from Turkey, the pandemic did not amount to an external impediment such that the Claimant can be said to have been ready and willing to work before 6 August 2020. In reaching this decision I took into account that the Claimant's partner was receiving furlough pay so she had access to some funds. International travel whilst restricted during this period was possible as shown by Mr Ermis returning to the UK in April 2020. I also note that the Claimant's passport expired whilst she was in Turkey, which delayed her return to the UK. Whilst this is not entirely the Claimant's fault nor was it an inescapable part of the pandemic. Probably most importantly, once the Claimant returned to the UK on 27 July 2020 she did not attend work until 6 August 2020. I take judicial notice that the requirement to isolate on return to the UK from Turkey did not apply in July 2020. In those circumstances I do not feel able to say that the pandemic was the sole reason for the Claimant being unable to return from Turkey and present herself as ready for work earlier than she did. Accordingly, I do not find that the Claimant was ready and willing to work and therefore I find that there was no entitlement to pay and no deduction from wages. This claim is dismissed.

39. Even if there was a period earlier than July when the Claimant was prevented from returning to the UK solely by the pandemic, there is a jurisdictional issue under Section 23 Employment Rights Act 1996 in relation to any such deductions. Any claim could only be in time if there were a deduction related to wages for the first week of August (which would have been payable at the end of August and therefore in time). Deductions for earlier periods would require an extension of time to be within the Tribunal's jurisdiction. In circumstances where the Claimant was in contact with the Citizens Advice Bureau from June and was receiving advice on contesting the failure to pay furlough pay (which her WhatsApp messages show that she was), I consider that it would have been reasonably practicable for the Claimant to submit a claim in respect of earlier deductions in June 2020. It is likely that CAB advised the Claimant

on time limits. Alternatively, the Claimant could have made her own enquiries regarding time limits. Accordingly, the Tribunal has no jurisdiction to hear any claim limited to such earlier period.

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Employment Judge T Perry

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Date 30 June 2022