



EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4111655/2021

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Held via Cloud Video Platform (CVP) on 20 June 2022

Employment Judge B Campbell

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Mr J Foley

**Claimant
in Person**

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Thirsty Kirsty Limited

**Respondent
Represented by:
Ms K Grant -
Director**

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JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The judgment of the tribunal is that:

1. The respondent did not underpay the claimant during the period of his furlough and that claim is dismissed;
- 25 2. The tribunal has no jurisdiction to determine the claimant's complaint that pension contributions were not made on his behalf, and that claim is dismissed; and
3. The respondent did not pay the claimant for the equivalent of 11.1 hours of accrued annual leave on the termination of his employment, and it is ordered
30 **to pay him the sum of £96.79 in respect of that entitlement.**

REASONS

Background

1. This claim arose out of the claimant's employment by the respondent company, which operates the Oxford Bar in Edinburgh. The claimant was a

member of bar staff there, working flexible hours. He alleged that he was underpaid for a period of furlough under the UK government's Coronavirus Job Retention Scheme (CJRS). **But the respondent** did not pay **the full** amount in **employer pension contributions** into an occupational **pension** scheme in that period, and that on the termination of his employment **he was** entitled to payment in relation to accrued annual leave. The respondent resisted **the claims**.

2. The hearing took place by CVP. Occasional technical difficulties were experienced but it was possible to hear the necessary evidence and conclude the hearing.

3. Both parties submitted their own productions and, where relevant, those are referred to below in the findings of fact.

4. Evidence was heard from the claimant and Ms Grant, who is a director of the respondent and the manager of the premises where the claimant worked. Both were found to be credible and generally reliable in the provision of their evidence. It was clear that both had enjoyed a good working relationship for the duration of the claimant's employment. The issues in this claim related more to how the law, including the provisions of the CJRS, should be applied to the factual situation which arose, and which in itself was largely not in dispute.

5. At the outset of the hearing it was explained that the employment tribunal has no jurisdiction to make a finding that an employer has not made necessary payments into an occupational pension scheme on behalf of an employer, or issue any orders pursuant to such a finding. In any event there was no evidence before the tribunal on this matter. Accordingly, it was explained that this complaint which he had raised in his claim form would not be determined by the tribunal.

Issues

The following issues had to be decided:

1. In placing the claimant on furlough between 27 March and 18 June 2020, did the respondent pay the claimant less than he was entitled to and therefore either make unlawful deductions from his pay contrary to section 13 of the Employment Rights Act 1996 ('ERA') and/or breach his contract of employment;
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2. if so, by how much was the claimant paid short net of any statutory deductions which would have been made?
3. Was the claimant entitled to accrue annual leave whilst engaged by the respondent?
- 10 4. if so, how much annual leave had he accrued at the date of termination of his employment on 18 June 2020?
5. What is the value of any such accrued leave net of any statutory deductions?
The parties agreed that the claimant had not taken, or been paid for, any annual leave during his period of employment with the respondent and had
15 received no payment in relation to accrued holidays on termination of his employment.

Relevant law

6. By virtue of section 13 ERA a worker is entitled not to have unauthorised deductions made from their wages. Therefore, subject to specific exceptions
20 provided for in that part of the Act, there will have been an unauthorised deduction if the worker is paid less than they have earned, depending on how their earnings are calculated, or not paid at all for their work. The date of the deduction is deemed to be either the day when less is paid to them than they have earned, or when they would normally have been paid but were not. A
25 complaint can be made about a series of deductions if the situation is repeated.
7. Examples of lawful deductions would include PAYE income tax properly deducted or a sum which the worker had explicitly consented to having deducted in advance by writing. Section 14(1) ERA expressly states that an

employer may recover a previous overpayment from a worker's wages, and this will not be treated as an unlawful deduction.

18. A worker who has suffered one or more unlawful deductions from their wages may submit a claim to the employment tribunal under section 23 ERA
- 5 19. There are detailed requirements as to the timing of complaints to ensure that a tribunal can determine them. In short, if a claim is about a single deduction, the claim process (initiated by way of commencement of Early Conciliation through ACAS) must begin within three months of the date the deduction was made. If the claim is about a series of deductions, the same steps must be
10 taken within three months of the last deduction in the series.
10. Whether or not deductions form part of a series is for an employment tribunal to consider and decide, based on factors such as the nature of each deduction and the frequency, or any pattern, of deductions. A potential series of deductions will be broken by a three month period in which none are made.
15 This may mean that the earlier complaints are out of time and that the tribunal is therefore unable to grant any remedy in respect of them.
11. Separately, it will be a fundamental aspect of any employee's contract of employment that they are paid for the work they perform. That will be at a set rate, whether hourly, weekly, annually or so on, or be calculated according to the work done, if an employee is not paid for work done the employer will be
20 in fundamental breach of the contract.
12. Under the Working Time Regulations 1998 ('WTR') each worker is entitled to a minimum amount of annual leave. For a full time worker that entitlement is 28 days per year. The employer can decide when a holiday reference period
25 will begin and end, provided that period is a full 12 months. If the employer does not designate a holiday year then by default it will begin on each anniversary of the worker's service commencement date.
13. Employees generally can request when to use their leave, and they must be paid at their normal rate in full for leave days taken. However, within reason
30 and subject to conditions, an employer can refuse a holiday request for a

given date or dates, or dictate that workers should use their accrued leave on given dates. Workers should not agree to receive payment instead of taking leave as a rule, but at the point when their service ends they are entitled to be paid for any accrued leave not taken at the same rate. The right to be paid for accrued holidays on termination of employment and the method of their calculation are set out in Regulation 14(2) and (3) of WTR. If a worker does not receive the pay they are due they can submit a claim to the employment tribunal under Regulation 30. If a tribunal rules in their favour it can award the equivalent of the leave in monetary terms.

10 14. Every employee is entitled to be paid the National Minimum Wage by their employer. It is calculated as an hourly rate which can then be applied pro rata as need be to other arrangements for pay. It typically increases each year at the beginning of April. The rate was as follows in the years of relevance to this claim (the following figures being for adults aged 25 and over and therefore applicable to the claimant):

- 15 a. April 2019 - £8.21; and
- b. April 2020 - £8.72.

The Government Coronavirus Job Retention Scheme (CJRS)

15 15. As a response to the Covid-19 pandemic and in an attempt to help
20 businesses, the UK government introduced the scheme on 20 March 2020. It has gone through a number of variations since its implementation. The substantive rules, and any changes to them, have been published by way of Treasury Directions issued by the UK Chancellor to HMRC. The first was on 15 April 2020 and a later Direction was issued on 20 May 2020, largely to
35 clarify aspects of the original scheme.

16. Before 1 July 2020, employees could be on furlough and receive furlough pay or undertake paid work, but not a combination of the two. Further, as set out in paragraph 6.1 of the first Treasury Direction, to be eligible for furlough pay an employee had to be carrying out no work by reason of the Covid-19
30 pandemic for a minimum of 21 days continuously. Thus, furlough pay could

only be made for blocks of three weeks or more when no work was being done.

17. The furlough scheme 'was amended from July 2020 onwards, including to allow 'flexible furlough' to be utilised. That meant that employees could work, and be paid as normal, for certain hours and remain on furlough, receiving furlough pay, for the remainder of their working time. However, it is only the above described first iteration of the CJRS which applied to the time period relevant to this claim.
18. The maximum amount of pay claimable for each employee depends on whether they have 'normal working hours' or not and also whether they have 'fixed wages*. For an employee without either, the scheme rules required the employer to calculate their average hours and pay. For an employee such as the claimant who had served less than a year before being placed on furlough, the reference salary was their average pay since their commencement date - paragraph 7.2 of the first Treasury Direction.
19. Importantly, the introduction of the CJRS did not directly alter existing contractual relationships between employers and their employees or workers. The scheme only creates relationships between the government and the employers who apply for payments.

20 Findings of fact

20. The following findings are made such as they are relevant to the above issues to be determined.
21. The claimant was an employee of the respondent between the dates of 18 May 2019 and 18 June 2020. He worked as a member of bar staff at the Oxford Bar in Edinburgh, owned by the respondent. The manager of the bar is Ms Grant.
22. The claimant worked variable hours. He tended to be asked on a weekly basis to work certain hours. In some weeks that could represent over 40 hours and in others it could be as low as five hours, or in some cases no hours at all. When working he did not cover any particular shifts and he did not work for

the same amount of time in each shift when he did work. Ms Grant would offer certain hours to him and he would accept or agree them. The arrangement suited both parties. As such it was very flexible.

23. In this respect the claimant was different from the other bar staff employed by the respondent, who were engaged on fixed weekly hours.
24. The claimant was latterly paid at the rate of £8.50 per hour.
25. The claimant had calculated that during his period of employment he had worked 1.044 hours, or an average of 23.77 hours per week. He calculated these figures from his weekly payslips. The respondent accepted those figures to be accurate.
26. As a result of the Covid-19 pandemic the respondent, like many similar establishments, required to close its doors to the public for a period. The respondent placed its employees, including the claimant, on furlough under the CJRS on 27 March 2020.
27. The claimant was paid the sum of £54.40 gross per week for each of the eight weeks he was on furlough. The respondent calculated this figure as being the value of one eight-hour shift, paid at the rate of £8.50 per hour, and then reduced to 80% which was believed to be the maximum claimable under the CJRS. This was the decision of Ms Grant. She wished to pay the claimant something whilst the premises were closed and saw the alternative as paying the claimant nothing, as she could not offer him any work and therefore he had no right to pay.
28. The respondent does not adopt any particular dates as marking the beginning and end of its annual leave year.
29. The claimant did not request or take any paid annual leave during his period of employment with the respondent. He was not paid anything in respect of accrued holidays on termination of his employment. Ms Grant believed that he was not entitled to any annual leave. The claimant never raised the matter until after his employment ended.

Discussion and decision

Furlough Pay

30. The claimant calculated that the respondent should have paid him a sum for each week of his furlough period equivalent to 80% of his average earnings since his commencement date of 18 May 2019. This was more than the sum of £54.40 he received.
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31. The rules of the CJRS were created by way of a series of Directions made by the UK Treasury Department, under powers given by the Coronavirus Act 2020. The first Treasury Direction was issued on 15 April 2020 and applies to claims by employers for reimbursement of furlough pay made before 22 May 2020. The second Treasury Direction, which effectively replaced the first Treasury Direction, was issued on 22 May 2020. Subsequent Treasury Directions were issued to amend and extend the scheme, but those came after the end of the claimant's employment and are not relevant to this claim.
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32. Fundamentally, the CJRS created a process whereby employers could claim back from the UK government certain payments made to employees who could not work because of the effects of the Covid-29 pandemic. Various types of condition had to be met in order for payments to be legitimately reimbursed. Those included that the employer was PAYE registered, that the employee was genuinely not working and that the amounts claimed related to the correct type of pay and not other matters.
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33. The way that the CJRS worked was that employers required to pay their employees and then claim sums back under the scheme. So, for example, paragraph 8 of the first Treasury Direction is entitled *Expenditure to be reimbursed*' and sets out a mechanism for employers to use in order to claim back sums paid to employees. CJRS payments were not made directly from the government to employees, and nor did the government confirm in advance of a given employer paying an employee that some or all of those earnings would be reimbursed.
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34. The CJRS did not create a free-standing right for any employee to receive any particular sums as furlough pay. The CJRS did not give any right to an employee to the effect that their employer was obliged to place them on furlough, or as to any pay they would receive if not working during the Covid-
5 19 pandemic, or to apply for any particular sum as furlough pay in relation to them. The scheme left it open to employers to place employees on furlough, or not, and for furloughed employees it set conditions and maximum claimable amounts for any pay to those employees which could be reimbursed. As between the employer and the employee the situation would be governed on
10 the basis of the terms of their contract and employment law generally.
35. in particular, for employees such as the claimant with no guaranteed hours of work, the CJRS did not dictate that they should receive furlough pay when not working, and did not create a right to receive furlough pay of any particular amount. Again, the situation would be ruled by the contract and the law
15 generally. The effect of the CJRS was essentially restricted to determining which types of payment which an employer made to those employees could be recovered from the government, and the upper financial limit on those payments
36. Therefore, the calculation undertaken by the claimant had the effect of
20 determining the maximum amount that the respondent could have claimed in respect of his pay under the CJRS, had it chosen him to pay that amount (or more). It did not however oblige the respondent to either pay him that amount or claim it back under the scheme.
37. The respondent was free under the terms of the claimant's contract of
25 employment not to offer him work from week to week, and not to have to pay him when that occurred. The respondent voluntarily chose to pay the claimant the equivalent of one shift per week between 27 March and 18 June 2020. He had no right to that payment, or any other sum, under his contract of employment, the law generally or the terms of the CJRS.

38. In sight of the above the decision of the tribunal is that the claim in respect of forlough pay, whether expressed as unpaid wages or breach of contract, does not succeed.

Holiday pay

5 39. The claimant was entitled to accrue and take annual leave as an employee of the respondent. As confirmed by the WTR, he was entitled to be paid for accrued holidays at the point of termination of his employment.

40. As the respondent did not adopt a holiday year, his reference year defaults to the year beginning with the anniversary of his date of commencement of
10 employment - 18 May.

41. It follows that the claimant is entitled to payment for whatever holidays accrued between 18 May and 18 June 2020.

42. The minimum period of annual leave provided in the WTR is 28 days or 5.6 weeks per annum for a full time employee.

15 43. The figure of 35 hours per week is taken to represent a full time employee of the respondent, based on the hours worked by other employees. Their annual holiday entitlement in hours is therefore $35 \times 5.6 = 196$ hours.

44. Based on the above the claimant's own entitlement would be 133 hours per annum. This is because he worked 68% of the weekly hours of a full time
20 employee, on average.

45. For the period between 18 May and 18 June 2020 he accrued one twelfth of that amount, namely 11.1 hours. This is the amount for which he is entitled to be paid at his full rate.

46. As the National Minimum Wage applying from April 2020 was £8.72, the
55 claimant is entitled to payment at that rate and not the lower rate of £8.50 which he was being paid, producing a gross figure of £96.79.

47. As he would have fallen below the weekly lower earnings limit for National Insurance purposes, and also within the personal allowance limit for Income Tax, no deductions are made from that award.

Employment Judge: B Campbell
Date of Judgment: 19 July 2022
Entered in register: 22 July 2022
and copied to parties