EMPLOYMENT TRIBUNALS

Claimant: **Mrs Cecilia D'Arcy**

Respondent: **The English Heritage Trust**

Heard at: **Bristol (by CVP)** **On: 9 March 2022**

Before: **Employment Judge Oliver**

Representation
Claimant: In person
Respondent: Ms Cheng, counsel

RESERVED JUDGMENT

The claim for unauthorised deduction from wages fails and is dismissed

REASONS

1. This is a claim for unauthorised deduction from wages relating to furlough pay.

2. The hearing was conducted by the parties attending by video conference (CVP). It was held in public with the Tribunal sitting in open court in accordance with the Employment Tribunal Rules. It was conducted in that manner because the parties had consented to such a hearing and it was in accordance with rule 46, the *Presidential Guidance on remote hearings and open justice* and the overriding objective to do so.

Issues

3. The issue for determination is whether the wages paid to the claimant during January to April 2021 are less than the wages she should have been paid and, if

so, how much is the claimant owed? The dispute arises from the question of whether the claimant was on furlough.

Evidence

4. There was an agreed bundle of documents, which I have read and taken into account.

5. I had written witness settlements from the claimant and from Mr Thomas Snook. For the respondent I had written statements from Mr Andrew Kennedy (Head of Human Resources and Volunteering), and Mr James Rodliff (Operations Manager at Stonehenge). I heard oral evidence from the claimant, Mr Kennedy and Mr Rodliff.

6. I heard oral submissions from both parties, and considered a written skeleton argument from the respondent.

Facts

7. I have considered all the evidence and submissions, and find the facts necessary to decide the issues in the case.

8. The claim based on allegation that the claimant was or should have been put on furlough under Coronavirus Job Retention Scheme ("CJRS") and received furlough pay between 4 January and 11 April 2021. The claimant contacted Acas on 27 May 2021, and received an early conciliation certificate on 23 June 2021.

9. The claimant has been employed by the respondent since 1 May 2018 as a Historic Property Steward (HPS) and a Stone Circle Experience Host (SCE).

10. The claimant's contract as HPS is a zero hours contract between October and March, which is varied annually to provide for minimum guaranteed hours between April and September/October. She had a minimum of 28.8. hours between 1 April and 16 October 2020, and a minimum of 21.6 hours between 23 April and 6 September 2021. The claimant's contract as SCE is a zero hours contract throughout the entire year. This claim relates to the HPS contract only.

11. The claimant was placed on furlough during the first lockdown for both of her roles. She was sent separate letters for each role on 9 April 2020. The letter about the HPS role said that furlough was backdated from 24 March to 31 May 2020. The letter about the SCE role said that furlough would start on 14 April until 31 May 2020. The claimant received furlough pay for both roles. For the HPS role, this was based on her guaranteed salary (as it was during a period when she had guaranteed hours). She was not sure what she was paid for the SCE role. The respondent's practice at that time was to pay zero hours workers based on their typical anticipated earnings. This was not explained in the letter, which simply referred to 80% of gross basic pay. Furlough was extended and ended for both roles in letters dated 29 May and 18 June 2020.

12. Mr Rodliff sent an email to all zero hours contract staff in September 2020. This gave some information about resourcing, and said "*on our current estimates there is likely to be very few shifts available to our staff on zero hours contracts*

from 1st November through the winter."

13. The claimant was sent three letters on 6 November 2020 which placed her on furlough during the second lockdown. The letters all have the same content, and refer to furlough between 11 November and 2 December 2020. One letter does not specify the relevant roles, one refers to the HPS role, and the third to the SCE role. All letters say that "80% of gross basic pay" will be paid. The claimant was then sent an email on the same date which clarified that there had been a system error, and she was not being furloughed in her SCE role.

14. During the second lockdown, furloughed employees on zero hours contracts were only paid based on shifts they were actually rostered to have worked during the furlough period. Mr Kennedy explained in evidence that they had to change their approach as they could not afford to pay all zero hours staff based on expected earnings. He thought at the time this was the right thing to do. The alternative was paying employees based on the hours worked during the same period the previous year. This would result in furloughed employees being paid more than those who were still working but only for a few shifts, and he thought this could not be right. Zero hours workers were therefore paid 80% of gross basic pay for the hours they were actually scheduled on the rosta to work.

15. The Stonehenge site closed again at the end of December 2020, and the third lockdown started on 4 January 2021. The evidence from Mr Kennedy, which I accept, is that only zero hours contract workers who were already scheduled to work during this period would be placed on furlough. All other zero hours contract workers would simply not be given any shifts.

16. On 18 December 2020, the Head of Historic Properties, Stonehenge, sent an email to all staff explaining that they intended to use the furlough scheme for the majority of salaried operational staff. On 19 December 2020, Mr Rodliff sent an email to zero hours staff at Stonehenge (including the claimant) about these partial re-furlough plans. This explained there was a mixture of furlough arrangements across site teams, and "*this means there will currently be no hours scheduled for cover by zero hours staff in January. I wanted to write to you and be clear so you know what to expect*". The email went on to say there may be absences that require cover. Mr Rodliff explained in evidence that some zero hours workers did end up scheduled to work for some hours in January 2021, due to sickness absences and for safety on site.

17. Mr Rodliff sent an email to the Stonehenge employees on 5 January 2021, after the announcement of the third lockdown. This stated, "*In regards to what this means to staff, the latest information I have received is that we have now have permission to start furloughing people all those with scheduled hours for January. This means if you had scheduled hours (either contracted hours or zero hours shifts scheduled through Planday) we are planning on placing you on furlough from 4th January to the end of the month so we are able to claim these hours back from the government support scheme*."

18. The claimant was sent a further letter about furlough on 8 January 2021. This letter was in the same format as previous furlough letters. It stated, "*To safeguard the charity's financial position and the preservation of jobs over the medium term, it is necessary for us to take a number of short-term actions as*

critical preventative measures. This includes the furloughing of a proportion of our workforce, as with last year, and your role is included in this." The letter did not specify which role it related to.

19. The proposed terms were furlough between 4 January and 1 April 2021 inclusive "*for 100% of your contracted hours*". On pay, the letter stated, "*During this furloughed period, you will receive 80% of your gross basic pay for the hours that you are furloughed and this will be paid in the normal way, subject to the usual deductions*." If the claimant did not object by 12pm on 15 January, she was deemed to consent to furlough as set out in the letter. This is the same approach as in the previous furlough letters.

20. The claimant was sent a further letter on 21 January 2021, saying that furlough would end from 1 March. Again, it did not specify which role. On 9 February 2021 the claimant was sent a further letter which extended furlough. This did refer to the SCE role, stating "*Following our recent internal communications and conversations with line management, you will have been told that it is necessary for us to ask you to extend your current furlough period in your role of Stone Circle Experience Host to 23 March 2021*." The claimant was sent a further letter on 29 March 2021 extending furlough until 11 April, which again did not specify which role it applied to.

21. The evidence from Mr Rodliff, which I accept, is that the claimant did not have any scheduled rostered hours in her HPS role for January 2021. This meant she was not furloughed from this role. She was furloughed from the SCE role because already rostered for a few shifts. This is a discrete area of scheduling which is planned far in advance. The claimant accepts that she had not been scheduled for any rostered shifts for the HPS role. She was also not aware of any rostered shifts in her SCE role. I accept that the claimant may not have known that she had some scheduled SCE shifts, because staff were notified of their rostered shifts closer to the time.

22. The claimant complained that she was not being paid correctly during furlough, as did a number of other employees. She submitted a grievance on 15 February 2021 which said the respondent had failed to follow government guidelines in relation to paying staff on zero hours contracts. There was some delay in responding to the grievance, as the respondent was considering its position generally in relation to furlough pay for zero hours workers and taking legal advice. The claimant chased for a response in March.

23. Mr Kennedy provided a grievance outcome on 1 April 2021. This found that furlough pay for the claimant's SCE role since November 2020 had been calculated incorrectly. She should have been paid what she was in the habit of receiving, not simply pay for rostered hours. The claimant received back pay for the relevant period. The grievance did not uphold her complaint about her HPS role, on the basis that they had made a decision not to furlough those on zero hours contracts with no rostered hours.

24. Mr Kennedy explained in his evidence that the mistake in calculating furlough pay for zero hours employees was corrected for everyone. This was after obtaining detailed legal advice. He sent a letter to the claimant on 12 April 2021, which stated, "*From November, we should have taken either the amount that you*

received in the same month in the 19/20 tax year, or the monthly average of the amount that you received in that tax year, whichever was higher. However, you only received furlough pay based on your contractual or rostered pay during this period. I am really sorry about this mistake."

25. The claimant emailed HR in response to this letter, asking for confirmation that the part of the grievance which had not been upheld was overturned. She received a reply which said, "*For the period of time you were furloughed in each role you will be paid the correct amount as per the Government guidelines. This is either the mirror of what you were paid in the same month the year before or the average of your earnings in that role for the year before*." The claimant took this to mean she would be paid this for furlough in her HPS role, and did not appeal the grievance outcome. When she did not receive furlough pay for the HPS role, she raised the issue further with both Mr Rodliff and Mr Kennedy. She met with Mr Kennedy in May and June. He confirmed that she had been stood down from her HPS role, and so was not put on furlough in that role.

26. The claimant's colleague Mr Snook provide a written statement, which confirms he was placed on furlough from his HPS role between January and March 2021. He says he was rostered for four shifts in early January, and was told on 31 December not to come to work and that he would be paid. He was not paid for the rest of furlough, but later received back pay based on the higher of earnings in the equivalent month in the 19/20 tax year or the monthly average during that tax year.

Applicable law

27. **Deduction from wages**. The applicable law is section 13 of the Employment Rights Act 1996 ("ERA"). There will be a deduction from wages where the total amount of wages paid to a worker on any occasion are less than the total amount properly payable to the worker on that occasion.

28. "Properly payable" means a legal entitlement. This is not necessarily a contractual entitlement, but generally the tribunal will be looking for terms in the contract in relation to wages.

29. Tribunals do have jurisdiction to construe the terms of the contract for this purpose. Ordinary rules of construction apply to the interpretation of written employment contracts. Guidance was given on interpretation of written contracts in ***Investors Compensation Scheme v West Bromwich Building Society*** [1998] 1WLR 896. Words should be given their ordinary meaning, and "*Interpretation is the ascertainment of the meaning which the document would convey to a reasonable person having all the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of the contract.*" (Lord Hoffman).

30. **CJRS**. The Coronavirus Job Retention Scheme was introduced in March 2020. It allowed employers to place employees on "furlough" and not provide work. If this was done in accordance with the relevant rules, HMRC would provide a grant to the employer of up to 80% of the employee's usual pay, capped at £2,500 per month. The details of the scheme changed number of times before it ended on 30 September 2021. It was possible to place

employees on zero hours contracts on furlough, even though the employer had the alternative option of simply not providing them with any work.

31. The legal framework for the CJRS, including how to calculate furlough pay, was set out in various Treasury Directions. The Treasury Direction of 12 November 2020 covered the period from 1 November 2020 to 31 January 2021, and the amending Treasury Direction of 25 January 2021 covered the period from 1 February to 30 April 2021.

32. The Treasury Directions set out rules on how to calculate reference salary for employees who were not paid fixed rate, such as variable shifts under a zero hours contract. There were different calculation periods depending on when the employee started work. For employees on the payroll before 19 March 2020, the reference salary was the greater of: (a) the average monthly amount payable to the employee in the tax year 2019-20, and (b) the amount earned by the employee in the corresponding calendar period the previous year (paragraphs 14.1 and 14.2 of the November Treasury Direction). For claims from March 2021 on, the corresponding calendar period was that in 2019 (amending Treasury Direction paragraphs 5.1 and 5.2).

Conclusions

33. The period between March 2020 and April 2021 was a very difficult one for all employers. There was a series of intermittent "lockdowns" in order to control the spread of Covid-19, and wide-ranging controls on the movement and behaviour of people throughout the UK during much of the rest of the time. This was particularly difficult for organisations such as the respondent, which were legally required to close for some periods and had reduced visitor numbers throughout this time. It was also very difficult for employees like the claimant, who were concerned about their jobs and whether they would be paid.

34. Government announcements about the applicable rules were made on short notice, often on a Friday or even at the weekend, and employers had to implement changes quickly. The CJRS was accompanied by government guidance that changed regularly. Often the Treasury Directions, which set out the legal rules, were not published until some time after the law had already changed.

35. The CJRS was widely regarded as a valuable scheme which enabled employers to retain their employees rather than making them redundant when there was no work for them to do. There are two important aspects of the scheme that are relevant in this case.

a. Firstly, the CJRS did not regulate the employer-employee relationship. It set rules under which an employer could reclaim sums from HMRC that it had paid to employees who were put on furlough. The employer still needed to agree furlough terms with employees. This involved agreeing a variation to their contract and what they would be paid. The employer could put employees on "furlough" on any terms that could be agreed. There was no legal rule that employees were <u>entitled</u> to be paid in accordance with the calculations under the CJRS. However, the employer could only <u>reclaim</u> payments from HMRC if they had made

payments in accordance with the required calculations.

b. Secondly, there was no obligation to put employees on furlough. The CJRS could be used for all types of employees, including those on zero hours contracts. However, an employer could choose not to use the scheme. There was also no obligation to treat all employees the same. It could choose to deal with some or all of its employees in accordance with their existing contracts of employment. For zero hours contract workers, this meant the employer could choose not to give them any work in accordance with their contract.

36. The key issue for me to decide is whether the letter to the claimant of 8 January 2021 placed her on furlough from her HPS role. I find that it did not, for the following reasons.

37. The claimant's position is that she was placed on furlough in her HPS role from January 2021 onwards. She says she was not "stood down" from any role. She says that the respondent failed to follow government guidelines, and chose to only use scheduled shifts for both placing people on furlough and calculating furlough pay.

38. The respondent's position is that the case is quite simple – the claimant was not in fact placed on furlough from the HPS role between January and April 2021, and so has no claim for furlough pay.

39. I start with the issue of whether the respondent intended the claimant to be placed on furlough in her HPS role for this period. I find that it did not. I accept the respondent's evidence that the claimant was placed on furlough in her SCE role because she already had some scheduled rostered shifts, but not in her HPS role because she did not have any scheduled rostered shifts. This was the respondent's approach to zero hours contract workers at the time, and consistent with the evidence from Mr Snook. It is shown by the email from Mr Rodliff of 5 January 2021, which says they will start furloughing people with "scheduled hours" from January. The letter which was sent to the claimant on 8 January 2021 placing her on furlough 2021 could have been expressed more clearly – it did not specify the role, and did not explain the basis for placing her on furlough because she had some SCE rostered shifts. It was a generic letter. Nevertheless, this does not undermine the respondent's clear evidence about its intentions at the time. I find that, from the respondent's point of view, the claimant was not placed on furlough in her HPS role.

40. The respondent's case is that this would be the end of the matter – the claimant was not in fact placed on furlough by the respondent in the HPS role. I do not agree that the issue is that simple. Although the respondent may have intended one thing, it is still necessary to consider objectively what was actually agreed. It is possible that the letter of 8 January 2021, properly interpreted, created a contractual agreement between the parties that the claimant would be placed on furlough from her HPS role - even if this is not what the respondent intended to do.

41. I have considered the terms of the 8 January 2021 letter in light of the background knowledge of the parties at the time. The letter refers to "your role",

and does not specify whether it applies to the HPS role, SCE role, or both. During the first and second periods of furlough, the claimant was sent separate letters for each role. The claimant says she assumed this letter related to her HPS role, as this was her main job at the respondent. However, this was not a reasonable assumption, in light of the way furlough for each role had been communicated to her before. She had also been sent the communications from Mr Rodliff in December 2020 and January 2021. The first email explains that there will not be scheduled hours for zero hours staff in January. The second email says that staff with scheduled hours (including scheduled zero hours shifts) will be furloughed. The claimant was aware that she did not have any scheduled hours for her HPS role in January. This background knowledge is relevant to whether it was reasonable to interpret the 8 January letter as placing her on furlough for her HPS role.

42. Taking into account the background, I find that the letter of 8 January 2021 is not to be interpreted as placing the claimant on furlough from her HPS role. The letter is ambiguous. It is a generic letter which fails to specify which of the claimant's roles is affected. The respondent did not explain clearly to the claimant at the time what was happening with each of her roles. I can understand why the claimant found the situation confusing. However, this is not sufficient to create a contractual agreement relating to the HPS role.

43. For the avoidance of doubt, I also find that there was no obligation on employers to place zero hours contract workers on furlough at this time. It is a common misconception that employees were entitled to be placed on furlough if it was available. As noted above, this is incorrect. The CJRS could be used for zero hours workers, but employers could instead choose not to provide these workers with any shifts in accordance with their contract.

44. The respondent's initial mistake about how to calculate furlough pay had the unfortunate effect that some zero hours workers who had a few rostered shifts in January 2021 ended up on furlough and were paid throughout based on previous years' earnings, while those who happened to have no rostered shifts were paid nothing. The respondent's original intention was to pay only for the rostered shifts, which they saw as a fair approach. However, they rightly corrected this once they obtained further advice on the calculations required under the CJRS. I can understand why the claimant felt this was unfair. However, the respondent was legally entitled to place some zero hours contract workers on furlough in this way, but not others including the claimant.

45. For the reasons explained above, I find that the claimant was not entitled to be placed on furlough from her HPS role between January and April 2021, she did not have a contractual agreement to this effect, and she was not in fact placed on furlough for this role by the respondent between these dates. This means that her claim for deduction from wages fails and is dismissed.

46. By way of concluding remarks, I note that this was a confusing time for both employers and employees. The claimant (along with others) had correctly challenged the respondent's calculations of furlough pay for variable and zero hours workers under the CJRS. The respondent had corrected this and provided back pay once it obtained further legal advice and fully understood the rules. It is regrettable that the letter of 8 January 2021 did not specify that the claimant was

being furloughed from her SCE role but not her HPS role. It is understandable why the claimant found this confusing and may have thought it related to her HPS role. It is also understandable why the generic letter failed to explain this to the claimant, given the pressures the respondent was operating under at the time. Both parties confirmed at the end of the hearing that they are continuing to work together successfully, and I do not criticise either party for the fact this issue was brought before the Tribunal.

Employment Judge
Date: 18 March 2022 (amended 27 October 2022)

Amended Judgment sent to the Parties: 28 October 2022

FOR THE TRIBUNAL OFFICE