EMPLOYMENT TRIBUNALS

Claimant:
Ms M Ogbonna

Respondent:
Brook Street (UK) Ltd

Heard at: London South (via CVP) **On:** 4 January 2023

Before: Employment Judge Fredericks
Non-Legal Member Lindsay
Non-Legal Member Beeston

Appearances
For the claimant: In person
For the respondent: Ms A Beech (Council)

RESERVED JUDGMENT

1. The Respondent made an unlawful deduction from the claimant's wages in March 2020 but no award follows because the deduction was fully paid in May 2020.

2. The claimant's claim that she should have been placed on the Coronavirus Job Retention Scheme, and that a failure to do so has resulted in a series of unlawful deductions from wages, is not well founded and is dismissed.

REASONS

Introduction

1. The claimant represented herself at the hearing and gave evidence in support of her own case. The respondent was represented by Ms Beech, a barrister. The respondent presented evidence from Mr M Heggaton, Head of Region at the respondent. We also had access to an updated bundle which ran to 254 pages and a supplementary bundle which ran to 18 pages. References to the page numbers in this judgment are references to the *updated bundle* unless otherwise indicated.

2. The claimant's claim documents advance several claims. At a case management hearing before Employment Judge Wright, the claims were discussed and clarified, giving rise to the following list:

   2.1. a contention that she should have been placed on furlough;

   2.2. detriment following making a protected disclosure through ACAS;

2.3. indirect age discrimination;

2.4. unlawful deduction from wages (a sum of £200 which she said should have been paid in March 2020).

3. EJ Wright's case summary and orders were at pages 50 to 58. EJ Wright confirmed with the claimant that she was not bringing claims for equal pay or unfair dismissal. EJ Wright made deposit orders (pages 59 to 63) in respect of *"the claimant's allegations or arguments of a detriment due to having made a protected disclosure and for indirect discrimination based upon the protected characteristic of age"*. The deposit order was varied through reconsideration to reduce the amounts to be paid but, nevertheless, the deposits were not paid on time and those heads of claim were struck out. The claimant was in the process of appealing those strike outs at the time of this hearing.

4. This meant that we were required to determine the claimant's claim for unauthorised deduction from wages and her contention that she should have been placed on the CJRS scheme. Counsel for the respondent, Ms Beech, suggested that this latter contention had been rejected by EJ Wright at the preliminary hearing. In our view, the claim had been identified by EJ Wright, who had told the claimant that there was no right to be placed on the CJRS. However, the claim was not withdrawn and was not articulated as being caught by the deposit order. We therefore heard the complaint and the claimant was permitted to ask the respondent witnesses about the respondent's process for placing employees and workers on to the CJRS.

5. Our decision was reserved due to time constraints. The decision outlined above and reasoned below is the unanimous decision of us all.

The issues

6. We had a discussion about the issues at the outset of the hearing. The claimant appeared to accept that there was no legislation which directed the respondent to places her on to the CJRS when the scheme was launched, although she repeated the tenor of her (now struck out) claim that the manner in which the respondent used CJRS was discriminatory. Given that it was common ground that there was no stand-alone 'right to furlough', this issue was not taken forward by the Tribunal for consideration.

7. However, the claimant was of the view that an agreement had been reached for her to be placed on to the CJRS, which was later reneged upon. This did not appear to us to be a claim which had been advanced, or at least not discussed, in front of EJ Wright. However, we were content to allow the claimant to explore this issue with the respondent's witness because the argument had been dealt with by Ms Beech's skeleton argument and the respondent did not object when the issue was discussed.

8. In terms of the wages due for March 2020, which the parties agreed were paid in May 2020, the claimant asserted that she should be entitled to interest and late fees for that sum. She accepts that the principal wages were paid, but claims an additional £200 for interest and inconvenience for the delay When I explained that was not something the Tribunal could award, she said that the deduction was on-going to the

extent that there was a breach of the terms of the CJRS when she was not placed upon it, and that she was claiming £350 per week which she would have received on furlough. In this way, a portion of the deductions claim advanced at the hearing was dependent upon the claimant establishing that she should have been placed on to the CJRS.

9. Consequently, the issues were:-

   9.1. Was the respondent contractually required to place the claimant on to the CJRS? If so, has a failure to do so caused an on-going unlawful deduction from wages?

   9.2. If not, was the respondent required to pay the claimant during the 'lockdown' period when the claimant was unable to work on client sites? Was any failure to pay in this period an unlawful deduction?

   9.3. Is the claimant entitled to the benefit of a declaration that she suffered an unlawful deduction from wages in March 2020, noting that the monies said to be deducted were paid, late, in May 2020?

The facts

10. The relevant facts as we find them on the balance of probabilities is set out below. Ultimately, the relevant findings that we have made appear brief in comparison to the detail offered by the claimant in her documents and in her arguments. This is not because we have taken anything the claimant has said lightly or ignored her views; this is merely a reflection on what we consider to be clear findings, mostly on the undisputed documents, which is quite usual with claims as narrow as this claim has become.

11. The claimant is employed by the respondent as a 'temporary employee'. The respondent is an employment business, supplying workers to client businesses in the form of short, medium, and long-term assignments. The claimant worked for the respondent from April to September 2018, and then again from 21 February 2020. The contract from the claimant's 2018 employment was provided at pages 113 to 119. The respondent asserted in the Grounds of Resistance that the clauses contained therein applied to the claimant's 2020 employment, and the claimant did not take exception to this. Indeed, the claimant was cross examined about that document and questions were put to the respondent's witness about it, too. We accept that the terms of this document was intended by the parties to cover the re-employment of the claimant and that it therefore did so.

12. The contract between the parties therefore contained the relevant clauses outlined below. Where only part of the clauses are quoted, it is because the claimant's claims only relate to that part of the clause:-

   12.1. "Assignment" – *"the period during which you are assigned to provide services to the Client".*

   12.2. "Client" – *"The customer organisation to whom you are assigned to work"*.

12.3. Clause 1.7 – *"You agree that* [the respondent] *or the Client may terminate an Assignment at any time without prior notice or liability. Termination of an Assignment is not termination of your employment"*.

12.4. Clause 3.1 – "*Whilst on Assignment, you will be entitled to be paid for the hours that you work…"* [our underline for emphasis].

12.5. Clause 3.2 – *"Payment will be made weekly in arrears directly into your bank account subject to deduction of tax and national insurance in respect of hours worked in the preceding week. You have no entitlement to pay in respect of any period when you are not on assignment"* [our underline for emphasis].

12.6. Clause 3.4 – *"For the purposes of the Employment Rights Act 1996, sections 13-27, you agree that* [the respondent] *may deduct from your remuneration any sums due from you to* [the respondent] *including, without limitation, your pension contributions (if any), any overpayments, loans or advances made to you by* [the respondent], *non-returned* [respondent] *property (including PPE), and any overpayment of holiday pay"*.

12.7. Clause 5.1 – *"*[The respondent] *will, at all times, use its reasonable endeavours to allocate you to suitable Assignments… Your actual hours of work will vary according to the requirements of the Client…*

12.8. *There is no entitlement to any particular number of hours of work on Assignment in any period shorter than 12 months…"*

12.9. Clause 5.2 – *"…*[The respondent] *does not guarantee that there will always be a suitable Assignment to which you can be allocated and there may be periods when no work is available for you. In these circumstances,* [the respondent] *has no obligation to pay you when you are not carrying out work or not on Assignment*".

13. The claimant completed an assignment at a Lexus car dealership on 29 February 2020, and five shifts at Campus Living between 29 February 2020 and 16 March 2020. She completed a shift at the car dealership again on 23 March 2020. The claimant says, and we accept, that this was intended to be a 14 day assignment. However, with the on-set of the 'stay at home' guidance in response to the Covid-19 pandemic, the dealership told the claimant that she should not attend and was no longer required.

14. The claimant was understandably anxious to discover how the pandemic would affect her working, and it is apparent that there was some discussion about whether the claimant should be claiming statutory sick pay during this early period as she could not work due to Covid. Between 26 and 28 March 2020 he claimant exchanged e-mails with Katie Wright and Rocio Navarro of the respondent about sick pay and the impending launch of CJRS (pages 143 to 149).

15. It is apparent that the parties were not yet clear what the CJRS will mean for those in the claimant's position. At 11:54am on 26 March 2020, Mr Navarro wrote:

> *"Legislation has passed today but we still have no guidelines sent to the business as of yet however, you cannot claim sick (isolation SSP) and the*

> *gov work scheme at the same time to my knowledge as SSP is strictly for sickness or isolation purposes not if you are working because there is no work available. Bit of a hard one and we are just as in the dark about everything also".*

16. We consider that, from 24 March 2020, the claimant was not working because there was no work available. Her planned 14 day assignment had been terminated by the Client. In his evidence, Mr Heggaton explained, unchallenged, that the commercial side of the business, where the claimant worked with Lexus, reduced fairly swiftly over March 2020. He described the work as disappearing almost completely. He said that much more work became available on the public sector side of the business, with some offices or businesses such as Campus Living, staying open needing additional cleaning resource and the launch of projects such as 'test and trace'.

17. The claimant e-mailed Mr Navarro again on the evening of 26 March 2020 to outline how the CJRS was proposed to work, with the government paying employers a grant which was then to pay employee salaries. Mr Navarro replied on the following day, noting that Campus Living remained open and would likely have shifts. He sent the claimant a letter outlining that she was an essential worker if required by Campus Living. He also said *"these guidelines are not clear on agency workers that in some cases like yourself you are not in full time employment with the same employer and the one company that you have worked at the most is still open"*.

18. The claimant was due to get paid for activities from the previous week, including for holiday claimed to compensate for the ending of the previous assignment. This was not paid as anticipated on 27 March 2020, and the claimant chased for this on the same morning (page 153). On the same morning, the claimant first raises that she considers that she should benefit from the CJRS. In an e-mail to Mr Navarro, she wrote –

> *"From what I can gather, I cannot claim the two* [SSP and CJRS] *however the reason why I am not working is due to cancelled contracts not because there is no work available and this is the point of the job retention scheme.*
>
> 1. *Week one Campus Living suddenly dried up.*
> 2. *Week 2 Lexus, in the middle of a contract and then it ended.*
> 3. *Week 3 I noticed another week of work on the system for Lexus but that too was cancelled.*
>
> *Therefore it is not the non availability of work but rather the fact that the work was cancelled. From my own research agency workers are covered for the retention scheme as salary is calculated as an average over 3 years with payment of a furloughed salary made as per the norm, weekly".*

19. Page 157 to 163 show a somewhat circular back and forth took place throughout 27 March 2020 where the claimant asserts that she should benefit from some means of being paid where shifts are cancelled due to the pandemic, and the respondent's Mr Navarro replies to the effect that he has not received clear guidance but that the claimant is still able to work on assignments. At 3.54pm on 27 March 2020, the claimant asks the respondent to confirm that she will be paid SSP for the previous

week, and to confirm that she will either receive SSP or furlough pay from 24 March 2020 onwards (page 164).

20. On 28 March 2020, the claimant asserts a claim to CJRS by sending through her worked hours to Ms Wright, explaining that she is sending an e-mail because the respondent's system has not allowed her to claim 'furlough' hours. She claimed for one day of working at Lexus, with the rest of the days in the week's period being claimed at *"1 DAY PRO RATA FURLOUGH SALARY according to government guidelines"* (pages 166 to 168). She is told in reply that the respondent can only presently pay for the hours actually worked (page 169).

21. The claimant sent another similar e-mail a week later on 4 April 2020, claiming furlough for the previous two weeks (pages 172 to 176). She also expressed an understanding that some of the respondent's other employees and agency workers had been informed that they would benefit from CJRS. On 6 April 2020, Ms Wright replied (page 177) to advise that the claimant's information was incorrect but that she would clarify with business leaders. In the meantime, she advised: *"please note that we cannot currently agree to furlough a temp worker should they request to be furloughed. Furloughing is the choice and option of an employer only".* On the same day, the claimant responded (page 178) and admitted that she was *"aware that the furlough scheme needs to be agreed by both parties (employer and employee)"*.

22. Mr Heggaton was able to provide evidence about decisions made at the respondent about who should be placed on the CJRS. We accept his evidence on this point as fact because it is the only evidence we have about those decisions, it was not challenged by the claimant, and it seems to us to be inherently more likely than not to be true. He explained that the respondent's motivation was informed by the needs of its clients. He said that some employees were on long term assignments with clients, and that those clients did not wish to lose the employees when their businesses were closed. Mr Heggaton contrasted this with clients who offered short term assignments, such as those chosen by the claimant, because these clients did not have such an interest in *who* was actually doing the work – or because the clients did not want to take on any cost in respect of the employees.

23. These principles were distilled into the respondent's CJRS policy, outlined on page 33, and explained by Mr Heggaton. He said that all of these circumstances must be met for an employee who worked on assignments to be placed on the CJRS:

    23.1. The temporary employee had been employed on a long-term assignment (where long-term is around or more than 12 months) that was on-going at the point of 'lockdown';

    23.2. The client agreed to pay the respondent's invoices in respect of the employees until the respondent received money from the CJRS;

    23.3. The temporary employee agreed to be placed on to the CJRS; and

    23.4. The temporary employee was eligible for CJRS.

24. We find as a fact that the claimant did not meet the criteria under this policy to be placed on to the CJRS. She had not been on a long-term assignment. Neither of the two clients had agreed to pay for work not completed by the claimant pending the respondent receiving CJRS.

25. On 11 April 2020, the respondent sent a list of vacancies expressed to *"start ASAP"* paying £12.73 per hour, across North London, West London and South East London (page 180). The claimant received the opportunities because she replied on 13 April asking six questions about the roles. In evidence, the respondent admitted that these questions were not responded to. It is clear to us, though, that the claimant chose not to pursue or accept any of these opportunities offered to her.

26. On 15 April 2020, the claimant submitted a complaint to the respondent about not being placed on to the CJRS (page 181 to 182). Ms Wright and the claimant continued to disagree about the claimant's being placed on CJRS. The respondent's position was that it would work with the claimant to find alternative assignments (presumably because it had applied its policy to the claimant's short-term worker profile). On 20 April 2020, Mr Heggaton wrote to the claimant to explain that no parts of her complaint would be upheld (page 187). The claimant replied to disagree with this outcome and assert that the respondent's decisions in relation to the CJRS were discriminatory because it cannot prove it adhered to equality laws. Any further correspondence between the parties is in the same vein and the positions were entrenched throughout the litigation to this hearing.

27. On 11 May 2020, the claimant advised the respondent that she had still not been paid for the day's work on 23 March 2020 at Lexus (page 200). The claimant is told on 12 May 2020 that the monies should be received that week (page 202). The parties agree that this payment, the only pay outstanding from March 2020, was then paid in May 2020.

The law

28. The *Coronavirus Act 2020 Functions or Her Majesty's Revenue and Customs (Coronavirus Job Retention Scheme) Direction* was made on 15 April 2020. That set out the directions for how the CJRS would operate, and the mechanism by which funds would be released. Paragraph 6 relates to 'furloughed employees'. Relevantly:-

    28.1. Paragraph 6.1 – *"An employee is a furloughed employee if:*

        (a) The employee has been instructed by the employer to cease all work in relation to their employment';

    28.2. Paragraph 6.7 – *"An employee has been instructed by the employer to cease all work in relation to their employment only if the employer and employee have agreed in writing (which may be in electronic form such as an email) that the employee will cease all work in relation to their employment.*

29. It is clear that the employee cannot force a position where they are placed on to the CJRS. The Direction requires there to be a joint process where the parties agree to

the operation of the CJRS in respect of that particular employment. Importantly, the scheme makes clear that the employer must instruct the employee to cease work.

30. *Section 23(1)(a) Employment Rights Act* 1996 allows an employee to present a complaint to the Employment Tribunal that they have suffered an unlawful deduction from wages. *Section 24* of the same Act requires the Tribunal to make a declaration where it finds such a complaint to be well-founded, and to order that any deduction is paid. *Section 24(2)* also allows the Tribunal to order the respondent to pay the worker *"such amount as the tribunal considers appropriate in all the circumstances to compensate the worker for any financial loss sustained by [them] which is attributable to the matter complained of*".

31. An employer is unable to deduct from the wages of a worker employed unless this is authorised by statute or contract, or where the worker has previously agreed to the deduction in writing (*section 13(1) Employment Rights Act 1996)*. Wages must be 'properly payable' to count as a deduction (*section 13(3)*). Determining whether wages claimed are 'properly payable' requires the tribunal to consider the circumstances of the case and what the contract of employment means for those circumstances (*Agarwal v Cardiff University and anor [2019] ICR 433 CA; Delaney v Staples (t/a De Montfort Recruitment) [1991[ICR 331 CA)*.

32. Naturally, the work must be completed for the wages to fall due and become properly payable. In *Hussman Manufacturing Ltd v Weir [1998] IRLR 288 EAT*, Mr Weir brought a claim alleging unlawful deduction when his shifts were altered lawfully (though under protest), which led to a reduction in his earnings because he was moved to day shifts which did not carry the premium he used to earn. The EAT held that the fact that a lawful change or circumstance might have a negative impact on the economic situation of the employee affected does not mean that there has been an unlawful deduction from wages. The wages 'properly payable' to Mr Weir on his new shift pattern were the same as the others on his pattern; he was not entitled to keep his shift premium once he was not working shifts which attracted a premium.

Discussion and conclusions

33. There is no right for an employee to unilaterally determine that they would be placed on the CJRS. The rules of the CJRS make clear that there must be agreement between the employer and employee. In this case, the respondent never agreed for the claimant to be placed on to the CJRS and never instructed her to cease work. On the contrary, it has said plainly and repeatedly that it did not agree for the claimant to be placed on to the CJRS and the claimant never was placed on to the CJRS. To the extent that the claimant still claims that she was entitled to be placed on to the scheme, and that the failure to be placed on to the scheme has resulted in an unlawful deduction from wages, we can only consider that the claim must fail. The law is clear.

34. We have, for completeness, considered whether the claimant might have been due wages by some other route through her engagement by the respondent. We could find none. The contract between the parties is clear. The claimant would only get paid for work done on assignment. Assignments could be cancelled at any time. The claimant would not get paid for any period not working, including upon cancellation.

There is no contractual right for the claimant, on her case, to be paid for the period complained of where she did not work. No wages are properly payable, under the contract of employment between the parties, when the claimant is not working on assignment.

35. It is equally apparent to us that the claimant had the ability to take work through the respondent during this period but that she did not do so. The claimant does not complain that the respondent failed to procure work for her, or to use reasonable endeavours to do so. In any event, we are satisfied that the respondent did all it could to find assignments for the claimant – as it must do to itself survive. The respondent cannot be criticised if the claimant did not accept them because they were not deemed suitable.

36. This leaves only the late payment for 23 March 2020. In our view, the respondent should have paid the claimant for this working day in the week following its completion. We have not seen any evidence that wages being paid are contingent upon a particular process being completed to make the respondent aware of hours worked. We are satisfied that the claimant informed the respondent of the work she had done by e-mail. The claimant was not paid as expected on 27 March 2020 and she was required to chase the respondent to pay her. Payment did not come until almost two months later. Although rectified monetarily, the passing of pay periods without payment being made constitutes, in our view, an unlawful deduction from wages. The claimant is entitled to a declaration that she has suffered an unlawful deduction from wages in March 2020.

37. The claimant is not entitled to any monetary award. We cannot discern any financial loss suffered by the claimant as a result of the period of time where the day's pay was withheld. The claimant has asked for interest and payment for inconvenience. She has not evidenced financial loss. We do not consider that *section 24(2)* allows us to order the respondent to pay money to cover the matters the claimant requests. In any event, even if it did, we do not consider that the claimant's demands are appropriate in all the circumstances given that (1) the money was paid very soon after proceedings were instigated, and (2) it is unsurprising that there was some confusion about hours worked by employees at the respondent at the time in question.

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Employment Judge Fredericks
Date: 30 March 2023

Sent to the parties on
Date: 4 April 2023