RM

EMPLOYMENT TRIBUNALS

Claimants: **1. Janice Irwin**
2. Weininger Irwin

Respondent: **Ilford Sports Club Limited**

Heard at: **East London Hearing Centre (by CVP)**

On: **14 September 2023**

Before: **Employment Judge Sugarman**
Members: **Ms A Berry**
Ms J Forecast

Representation
Claimant: Ms Godwins - Employment Consultant
Respondent: Mr Henry – Professional Representative, Croner

REMEDY JUDGMENT

First Claimant

1. The Respondent shall pay the First Claimant £673.50 net in respect of unlawful deductions from wages due for the period 1-19 August 2020.

2. The Respondent shall pay the First Claimant the sum of £1,662.10 net in respect of unpaid notice pay.

3. The Respondent shall pay the First Claimant the sum of £854.79 net as compensation for the failure to pay for accrued but untaken holiday on termination under the Working Time Regulations 1998.

4. The Respondent shall pay the First Claimant the sum of £2,893.95 as a basic award for unfair dismissal.

5. The Respondent shall pay the First Claimant the sum of £2,009.85 as a compensatory award for unfair dismissal.

6. The Respondent shall pay the First Claimant the sum of £771.72 in respect of the failure to provide a statement of employment particulars under s38 of the Employment Act 2002.

7. As such, in total, the Respondent shall pay to the First Claimant the sum of £8,865.91 net.

Second Claimant

8. The Respondent shall pay the Second Claimant £507.52 net in respect of unlawful deductions from wages due for the period 1-19 August 2020.

9. The Respondent shall pay the Second Claimant the sum of £1,261.85 net in respect of unpaid notice pay.

10. The Respondent shall pay the Second Claimant the sum of £648.95 net as compensation for the failure to pay for accrued but untaken holiday on termination under the Working Time Regulations 1998.

11. The Respondent shall pay the Second Claimant the sum of £2,011.05 as a basic award for unfair dismissal.

12. The Respondent shall pay the Second Claimant the sum of £1,514.54 as a compensatory award for unfair dismissal.

13. The Respondent shall pay the Second Claimant the sum of £536.28 in respect of the failure to provide a statement of employment particulars under s38 of the Employment Act 2002.

14. As such, in total, the Respondent shall pay to the Second Claimant the sum of £6,480.19 net.

REASONS

Background

1. We upheld some of the Claimants' claims in our Liability Judgment dated 5 June 2023 and the case returned for a Remedy Hearing on 14 September 2023. The parties were unable to agree on a number of points of principle, as well as basic facts such as how pay ought to be calculated.

2. The parties did not adduce any further evidence, documentary or from witnesses, for the remedy hearing and were content to rely on the documents already provided to the Tribunal at the liability stage, and oral submissions. We had ordered the Claimants to file and serve Updated Schedules of Loss by 30 June and the Respondent's to prepare Counter Schedules by 14 July 2023. That Order was not complied with. On 31 August 2023, the Claimants sent Updated Schedules to the Respondent, but not the Tribunal. The Respondent

prepared Counter Schedules and forwarded all of the documents to the Tribunal on 6 September, together with a first instance decision (**Atkinson v ITC Compliance** 1405998/2020).

3. We indicated that we would hear from the parties on the points of principle and then allow them time to see if they could agree the figures thereafter. However, having delivered a decision on the points of principle, Ms Godwins said that she did not wish to attempt to agree the figures with Mr Henry but rather requested the Tribunal perform the calculations and deliver a judgment with reasons in writing. We reserved in order to carry out the calculations and now issue this Judgment with written reasons.

Claimants' Pay

4. We made findings in our liability judgment that:

    a. There was an agreement between the parties that the Claimants together would be paid £30,000 to manage the club, a task for which there were unspecified hours. It was up to them how they divided up the hours required to do so week by week;

    b. Although it was not possible to determine a specific number of hours worked by each Claimant each week, we concluded that they worked on average 75 hours per week between them;

    c. In an average month therefore, they received an average of £7.69 per hour: (£30,000 / 52) / 75;

    d. The minimum wage from April 2020 was £8.72 per hour;

    e. At some point, it had been agreed that the £30,000 would be paid as follows: £17,600 to the First Claimant (59%) and £12,400 (41%) to the Second Claimant. In practice though, the money was not paid into their accounts in those sums as payment was far more complicated. As a married couple, the Claimants treated the money coming into their accounts from various sources as their joint money. Nevertheless, in terms of their tax liability, the payments were still attributed in the aforementioned way, with Mrs Irwin being entitled to the greater sum.

5. Approaching their work jointly, as the parties did and as we concluded was appropriate in the unusual circumstances of this case given the nature of the agreement, had they been paid lawfully for the 75 hours of work they carried out on average, their *joint* weekly contractual pay from April 2020, as modified by the National Minimum Wage ("NMW") provisions, ought to have been £654 (£8.72 x 75). Per annum, that would be £34,008 gross rather than the £30,000 they were paid.

6. One way to attribute sums to each Claimant, which is necessary for the purposes of calculating their compensation, was simply to split the joint sum in two, as the Claimants suggested we do. Another was to follow the agreement the parties seemingly had (with 59% of the total sum being paid to Mrs Irwin

and 41% to Mr Irwin). We preferred to the latter approach which accords with the agreement and practice of the parties whilst they were employed, even if it bears little resemblance to the work actually done by each within the joint enterprise. In any event, it should not make a difference, or a significant difference, to the overall sums awarded.

7. As such, had they been working after April 2020 and paid in accordance with the split between the two of them that had seemingly been agreed and in accordance with the NMW provisions, their contractual pay ought to have been divided as follows:

    a. Mrs Irwin: £385.86 per week gross (59% of £654). We calculate this to be £332.42 per week net;

    b. Mr Irwin: £268.14 per week gross (41% of £654). We calculate this to be £252.37 per week net.

8. We have calculated net pay on the assumption that they both were basic rate taxpayers and, given the pandemic, were not generating significant other income. In any event, we were not invited to calculate net pay in a different way.

9. We remind ourselves however that from March 2020, the Claimants were not working as they had been "furloughed". During their period of furlough, the Claimants were paid as follows:

    a. Mrs Irwin: £270.77 per week gross / £248.13 net (these figures are apparent from her May 2020 payslip and are adopted in the Respondent's Counter Schedule;

    b. Mr Irwin: £190.77 per gross / £186.98 net (apparent from his June 2020 payslip and adopted in the Respondent's Counter Schedule).

Unlawful Deductions: 1– 19 August 2020

10. The Claimants were not paid during this period. They were on furlough. Mr Henry submitted the award ought to be based on their furlough pay. Ms Godwins submitted that the furlough pay they had been receiving ought to be uplifted and we should calculate it as 80% of the figures we have identified in paragraph 7 above. We disagree.

11. The figures in paragraph 7 are the rates we find the Claimants should have been paid *if working an average number of hours* i.e. their (modified) full contractual pay in an average month. We were presented with no evidence about what the parties did or did not agree about the terms of furlough when the Claimants were furloughed and not working. There was no claim for unlawful deduction from wages in the period March – August other than arising from a contention that the Claimants were not paid the national minimum wage in this period, a contention we rejected because the Claimants were not doing any work and as such the NMW provisions did not apply. We conclude that we ought to calculate the deductions in this period on the basis of their furlough pay as set out above.

12. We therefore calculate the losses as follows:

    a. Mrs Irwin: (£270.77 / 7) x 19 = £734.95 gross or (£248.13 / 7) x 19 = £673.50 net;

    b. Mr Irwin (£190.77/7 x 19) = £517.80 gross or (£186.98/7) x 19 = £507.52 net.

13. We award the net figures. The Respondent is responsible for paying the appropriate tax and national insurance contributions in addition.

Notice Pay

14. The Claimants were given notice but then were not paid during their notice period. We upheld their claim for unlawful deductions from wages.

15. Ms Godwins submitted that their losses ought to be awarded on the basis of their full contractual rate (as modified by the NMW) because of the provisions of s88/89 of the Employment Rights Act 1996 and the Employment Rights Act 1996 (Coronavirus – Calculation of a Week's Pay) Regulations 2020 ("the Week's Pay Regulations"). She relied on Regulation 3(1)(b):

> *3.—(1) These Regulations prescribe the manner in which the amount of a week's pay is to be calculated in the case of an employee who is, or has been, furloughed ("E"), subject to paragraph (2), where—…*
>
> > *(b) E is entitled to payment pursuant to section 88 or 89 of the Act as a result of a notice to terminate E's contract of employment given on or after the date on which E became furloughed, for the calculation of that payment under Part 9 of the Act,*

16. Unfortunately, that is where her submissions stopped and it was not clear which parts of the statutory provisions the Claimants relied upon. We went on to consider Regulation 8 which defines the meaning of a week's pay for employees who have no normal working hours (such as the Claimants):

> *(1) This regulation applies where E's working hours fell within the description in section 224(1) of the Act (no normal working hours for employee under employee's contract of employment) on the relevant date.*
>
> *(2) The amount of a week's pay is the amount of E's average weekly remuneration in the relevant period.*
>
> *(3) For the purposes of the calculation of E's average weekly remuneration—*
>
> > *(a) subject to sub-paragraphs (c) and (d) the "relevant period" means the period of twelve weeks ending—*

(i) where the calculation date is the last day of a week, with that week;
(ii) otherwise, with the last complete week before the calculation date,

(b) where E is furloughed for any part of the relevant period, the amount of E's weekly remuneration attributable to being furloughed is the amount that would have been payable to E in accordance with the Coronavirus Job Retention Scheme if—

(i) the amount was calculated in relation to E's reference salary;
(ii) for that purpose the full amount of E's reference salary had been used, and
(iii) the Scheme cap did not apply

(c) in relation to any part of the relevant period during which E is not furloughed, no account is to be taken of a week in which no remuneration was payable by the employer to E, and

(d) where sub-paragraph (c) applies, remuneration in earlier weeks, is to be taken into account so as to bring up to twelve the number of weeks of which account is taken.

(4) For the purposes of paragraph (3)(b)—

(a) "reference salary" has the meaning given in the Coronavirus Job Retention Scheme, and

(b) "Scheme cap" means the amount of £2,500 per month (or the appropriate pro-rata) specified in relation to qualifying costs in the Coronavirus Job Retention Scheme. This regulation is subject to regulations 9 and 10.

17. In the relevant Treasury Direction setting out the Coronavirus Job Retention Scheme (dated 25 June 2020), "reference salary" for employees who are not fixed rate employees (such as the Claimants) is defined (in paragraph 20) as the greater of (i) the average monthly amount paid to the employee in the tax year 2019 – 2020 and (ii) the amount earned by the employee in the corresponding calendar period the previous year.

18. The effect of these provisions is that for those who do not have normal working hours such as the Claimants, for the purposes of calculating statutory notice pay, a week's pay is calculated according to the "reference salary" for claiming furlough pay under the CJRS, taking the full amount of the reference salary and without regard to the cap imposed by the scheme.

19. These provisions do not apply if contractual notice is greater than statutory notice (s87(4) ERA 1996). However, it is accepted here that the Claimants are entitled to statutory notice, no greater, and so the provisions apply.

20. Mr Henry sought to rely on a first instance decision in **Atkinson v ITC Compliance** (Case No: 1405998/2020) to argue that notice should be at the furlough rate of pay. However, that was a case where contractual notice was greater than statutory notice, thus s87(4) applied. Indeed, the Tribunal make that very point in paragraph 10, suggesting that a different outcome would have been likely had they been considering statutory notice. In those circumstances, it is not clear why Mr Henry was relying on the case.

21. In this case, the Claimants' full contractual pay in the 19-20 tax year was £30,000 collectively, although we found above it has to be modified because it was less that the national minimum wage.

22. We therefore calculate the notice pay on the full contractual sums, as modified to comply with the NMW, as follows:

    a. Mrs Irwin: (5 x £385.86) = £1,929.30 gross or (5 x £332.42) = £1,662.10 net;

    b. Mr Irwin 5 x £268.14 = £1,340.70 gross, or 5 x 252.37 = £1,261.85 net

23. We again order the Respondent to pay the net sums and it will have to account for the tax and national insurance payments in addition.

Unfair Dismissal

Basic award

24. The definition of a week's pay is similarly modified for employees on furlough, as it is for notice pay, this time by Regulation 3(1)(e) of the Week's Pay Regulations. Thus, the basic award is not calculated using furlough pay but (NMW modified) contractual pay.

25. It is agreed they are entitled to 7.5 weeks pay (5 years x 1.5).

26. We therefore award:

    a. Mrs Irwin: 5 x 1.5 x £385.86 = £2,893.95;

    b. Mr Irwin: 5 x 1.5 x £268.14 = £2,011.05.

Compensatory Award

27. Mr Henry argued that our Liability Judgment meant that the Claimants' employment would have finally terminated by 15 October 2020, with notice having been given 5 weeks earlier, and the compensatory should run to that date only. That submission appeared to wholly ignore paragraphs 222-8 of our liability reasons, in particular 228, in which we make clear that consultation

would have concluded in mid-October, at which point notice would have been issued. As such, the compensatory award ought to run from 23 September 2020 (because prior to that date they have already been compensated by the award of full notice pay) to 19 November 2020 (5 weeks after 15 October 2020 when they would have been issued with notice had the Respondent acted fairly).

28. Ms Godwins argued that the calculation of pay in this period ought not to be at furlough rate but at "full" pay (as modified by the NMW), even though the Claimants would have been on furlough during this period. She said this is because of Regulation 3(1)(e) of the Week's Pay Regulations. She did not take the submission further. The difficult with that arguments is that Regulation 3(1)(e) together with Regulation 8 simply modifies the meaning of "a week's pay". That is relevant for the basic award and for calculating the statutory upper limit for the compensatory award, both of which refer to "a week's pay".

29. However, the compensatory award itself is based on what is "just and equitable in all the circumstances having regard to the loss sustained by the complainant in consequence of the dismissal…" (s124). It does not refer to a "week's pay". We consider it just and equitable to award the Claimants what they would have received during this period had they not been unfairly dismissed, namely their furlough pay. As such, we award:

    a. Mrs Irwin: 8.1 weeks x £248.13 = £2,009.85;

    b. Mr Irwin: 8.1 weeks x £190.77 = £1,514.54

Holiday Pay

30. The Respondent accepted that the Claimants were each owed 18 days pay and conceded that this should be based on full contractual pay rather than furlough pay. Therefore, we award:

    a. Mrs Irwin: (£385.86/7) x 18 days = £992.21 gross or (£332.42/7) x 18 = £854.79 net;

    b. Mr Irwin: (£268.14/7) x 18 days = £689.50 gross or (£252.37/7) x 18 = £648.95 net.

31. Again, we award the net sums and the Respondent will have to account for tax and national insurance.

Section 38 Employment Act 2002 Claim

32. The Respondent, despite its Counter Schedule, accepted that this is to be based on gross pay.

33. Under s38(6), a "week's pay" is to be calculated in accordance with the provisions of Chapter 2 of Part 14 of the Employment Rights Act 1996 (which includes s224). This is not one of the statutory rights caught by the Week's Pay Regulations. As such, pay is to be calculated in the normal way, taking average

pay for the 12 weeks prior to the calculation date. In this case, that means furlough pay rather than full contractual pay.

34. We therefore award under this head:

    a. Mrs Irwin: 2 x £385.86 = £771.72

    b. Mr Irwin: 2 x £268.14 = £536.28

35. The total net figures payable to each Claimant are set out in the judgment above.

Employment Judge Sugarman

15 September 2023