

THE INDUSTRIAL TRIBUNALS

CASE REF: 18221/20

CLAIMANT: Kathryn McClune

RESPONDENT: FORRME Ltd

JUDGMENT

The unanimous judgment of the tribunal is that:-

The claimant has suffered unauthorised deductions from wages in respect of which the tribunal makes an award in the sum of **£1,066.66** gross.

When proceedings began the respondent was in breach of its duty to provide the claimant with a written statement of employment particulars in respect of which the tribunal makes an award of **£1,384.62**.

CONSTITUTION OF TRIBUNAL

Employment Judge: Employment Judge Bell

Members: Mr I Carroll
Mr A Carlin

APPEARANCES:

The claimant appeared in person. (By Webex)

The respondent did not attend and was not represented.

1. The claimant in her claim complained of unauthorised deductions from wages and failure to provide her with written particulars of employment.
2. No response was presented.
3. The claimant's claim form, papers submitted prior to the substantive hearing in support of her claim and claimant's uncontested sworn testimony have been taken into consideration.

ISSUES

4. The issues for determination by the tribunal were:
 - a. Has the claimant suffered unauthorised deductions from wages?
 - i. What wages were properly due?
 - ii. Was there a deficiency in the amount paid?
 - iii. Can the tribunal determine complaints of ongoing deductions occurring since presentation of the claim?
 - b. When proceedings were commenced was the respondent in breach of its duty to provide the claimant with a written statement of employment particulars?

RELEVANT LAW

5. Under Article 45 of The Employment Rights (Northern Ireland) Order 1996 [ERO] 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 a worker's contract, or the worker has previously signified in writing his consent or agreement to making the deduction. A deficiency in the total amount of wages paid against that properly payable is to be treated as a deduction. Article 55 (4) ERO provides that a tribunal may consider an unlawful deduction complaint presented outside the primary three month time limit where it satisfied that it was not reasonably practicable for it to be presented before the end of the relevant period of three months if presented within such further period as the tribunal considers reasonable.
6. Under Article 33 ERO where an employee begins employment with an employer, the employer shall give to the employee a written statement of particulars of employment as provided therein.
7. Article 27 of The Employment (Northern Ireland) Order 2003, in proceedings before an industrial tribunal in respect of specified jurisdictions which include unauthorised deductions and payments, if the tribunal makes an award to the employee in respect of the claim, and when the proceedings were begun the employer was in breach of his duty to the employee under Article 33 ERO, the tribunal shall increase the award by the minimum amount equal to two week's pay to be paid by the employer to the employee and may, if it considers it just and equitable in all the circumstances, award the higher amount equal to four week's pay instead. The tribunal's duty does not apply if there are exceptional circumstances which would make an award or increase unjust or inequitable.
8. A tribunal has jurisdiction to exercise its discretion to allow a claim that is presented prematurely to be amended so as to permit a claim to be included for which the cause of action arose after the date of presentation of the ET1. A

tribunal in deciding whether to exercise its discretion to allow an amendment of the originating claim presented so as to include a new claim must take account of all the circumstances and balance the relative prejudice to both sides of allowing or refusing the amendment. Guidance given by Mummery J in **Selkent Bus Co v Moore [1996] IRLR 661** identified the types of factor likely to be relevant when carrying out the balancing process, including the nature of the amendment, the applicability of time limits, the timing and manner of the application. Where the amendment raises an entirely new cause of action without causative link to the grounds of complaint set out in the ET1 the tribunal must consider in its balancing exercise amongst other relevant factors, time limits, including whether the new claim is presented in time and if not whether time should be extended.

9. The **Coronavirus Job Retention Scheme** [CJRS/ furlough scheme] was introduced in March 2020 to help employers avoid the need to make redundancies due to the impact of COVID-19. Scheme details were initially sparse but were clarified and evolved under subsequently issued HMRC guidance and Treasury Directions. The scheme allowed employers to claim back a proportion of pay for qualifying employees who consented to being laid off from work on 'furlough' leave. Initially the amount an employer could claim up to the end of July 2020 was 80 % of a furloughed employee's gross pay up to a cap of £2,500.00 gross per month plus employer NICs and the minimum employer auto-enrolment pension contribution, with the grant available to the employer to taper in the months thereafter, but furloughed staff to continue to receive 80 % of their wages, up to the £2,500.00 monthly cap, for the duration of the scheme. For fixed rate employees the reference salary used to calculate recoverable furlough payments was based on the amount payable in the latest salary period which ended on or before 19 March 2020 (minus excluded elements of pay such as benefits provided through salary sacrifice arrangements).

FINDINGS OF FACT

10. The claimant on negotiating terms prior to commencing her employment with the respondent in October 2017 agreed to take a reduced salary of £32,000.00 with a van and fuel for business use only, instead of a salary of £36,000.00 inclusive of travel expenses.
11. On 5 June 2020 the respondent sought the claimant's agreement to being placed on furlough leave under the Coronavirus Job Retention Scheme. The claimant requested clarification from the respondent as to how her van salary sacrifice would be dealt with in relation to pay and offered to return the van to the respondent. The respondent arranged to check the position and come back to the claimant. The claimant in the interim signed and returned to the respondent her written agreement to being placed on furlough leave. No proposal was made to top up the claimant's wages to full pay and claimant understood she would whilst on furlough receive a reduced payment of wages under the Coronavirus Job Retention Scheme.

12. The respondent on 8 June 2020 advised the claimant that the van was outside the Coronavirus Job Retention Scheme and would not be considered in her furlough payment. The respondent also advised the claimant that as the van was not required during the furlough period it had made arrangements to collect it as it had a temporary requirement for its use.
13. In further correspondence on 8 June 2020 the claimant put to the respondent that under www.gov.uk guidance, benefits, including through salary sacrifice schemes, should be paid in addition to wages under the Coronavirus Job Retention Scheme; and COVID-19 was a 'lifestyle change' out of her control which could allow her to opt out of the salary sacrifice arrangement, and confirmed she would like to do so and would return the van the following day.
14. On 9 June 2021 the respondent replied that it could not provide confirmation on the van or salary sacrifice at that time and van was 'surplus' if she were to leave it back, with monthly payments remaining for the respondent.
15. Matters raised by the claimant in response to the respondent included that she did not have a formal contract; did not consider the van to be a benefit in kind; that it was her decision to return the van and this was intended in exchange for her salary sacrifice being included in her salary; she reiterated her belief as to her entitlement in the circumstances to do so; and sought clarification whether the van was in fact required or surplus were she to return it. The respondent disagreed with the claimant's assessment; confirmed the claimant would still have the use of the van and fuel for the purposes of work at the end of furlough; notified the claimant it had a current requirement for use of the van and sought her co-operation to save the respondent the expense of rental and insurance for another van, failing which it confirmed in any event its intention was to collect the van and would return it when the temporary requirement was over.
16. The van was collected by the respondent on 17 June 2020 and not returned to the claimant thereafter.
17. As per itemised pay statements provided to the claimant the respondent thereafter paid her gross pay of:
 - a. £2,548.88 processed on 30 June 2020.
 - b. £2,133.33 processed on 28 July 2020.
 - c. £2,133.33 processed on 26 August 2020.
 - d. £2,133.33 processed on 29 September 2020.
18. The claimant presented her claim to the Office of the Tribunals on 31 August 2020.
19. The claimant in her originating complaint quantified her loss as £333.99 per month being £999.99 up to 5 September 2020 and set out that the final balance owing would depend upon how long she would be left on furlough for. Furlough payments subsequently made to the claimant did not take into account the return of the van. The claimant remained on furlough leave until

termination of her employment by reason of redundancy in October 2020 following which a final payment for salary, redundancy pay and holiday pay of £5488.83 gross was processed on 24 November 2020 and paid to the claimant.

20. The claimant did not at any stage receive from the respondent a written statement of particulars of employment.
21. At hearing the claimant sought a total of £1,583.32 being £240 for her salary sacrifice for June 2020 and £333.33 per month thereafter for July, August, September and October 2020. The claimant did not take legal advice in relation to her claim, believed her claim for ongoing deductions had been validly presented and was unaware of any potential issue until mentioned by the Employment Judge at preliminary hearing on 6 July 2021. The claimant's claim was not contested by the respondent.

CONCLUSIONS

22. The claimant when approached about being placed on furlough leave sought to opt out at that point of her agreed salary sacrifice, intending return of the van to be in exchange for an additional £4000 being included in her salary. Whilst the claimant awaited the respondent's clarification regarding this matter she agreed on 5 June 2020 to be placed on furlough under the CJRS with wages properly payable to be the lower of 80% of the claimant's reference pay applicable in the last pay period before March 2020 or £2,500.00 the financial cap applicable under the CJRS and her contractual terms were temporarily varied accordingly. The claimant's actual reference salary in the last pay period before March 2020 was £32,000.00 p.a. and so wages of £2,133.33 pm gross (being 80% of £2,666.67.00 p.m.) were properly payable to the claimant thereafter whilst remaining on furlough leave.
23. Whilst the respondent sought the claimant's co-operation in returning the van to save it expense it confirmed that it would in any event collect the van from her on 17 June 2020 and then did so without thereafter returning or replacing the non-cash benefit which should otherwise have continued during furlough. The tribunal find the claimant's contractual terms were in the circumstances impliedly varied to the original proposed salary of £36,000.00 p.a. (without non-cash van and fuel benefit) and for furlough wage payments thereafter to be calculated thereon as a notional reference salary (albeit that the additional amount not recoverable under the CJRS). Consequently wages properly payable to the claimant whilst on furlough leave thereafter were £2,400.00 pm gross (being 80% of £3000.00 p.m.).
24. Ongoing anticipated deductions were sought in the originating claim presented albeit those wages not yet fallen due, any deduction yet made, or end total quantifiable. The claimant had not sought legal advice and believed her claim for further deductions to be validly presented and sought at hearing a determination in relation to same now quantified to October 2020. The tribunal on the basis that leave to amend the originating claim is necessary to include same consider this to be a minor amendment application arising from

a cause of action that had not yet occurred at the time of presentation but which arises from entirely the same facts as were particularised in the originating claim and these ongoing deductions already anticipated and raised. Additionally the tribunal is of the view that even if time limits were to be taken into account as a relevant consideration, that in all the circumstances it is appropriate to extend time. In balancing relative prejudices the tribunal considers no prejudice is caused to the respondent, the claim for ongoing deductions was already identified in the originating claim albeit causes of action not yet occurred and no response seeking to resist same was presented by the respondent. The tribunal on balance consider it just to allow amendment of the originating claim to include alleged deductions suffered since presentation, now particularised up to October 2020.

25. The claimant's non-cash benefit was taken back on 17 June 2020 and wages paid to her thereafter in relation to June 2020 exceeded the £2,500.00 cap under the Coronavirus Job Retention Scheme and as such the tribunal is not persuaded that the claimant has suffered an unauthorised deduction in respect thereof.
26. The tribunal is however on balance satisfied that the claimant has suffered unlawful deductions from wages for the months of July, August, September and October 2020 of the difference between wages properly payable (£2,400.00) and wages actually paid (£2,133.33) being £266.67 gross per month, amounting to a total of **£1,066.68**.
27. At the time proceedings were begun the respondent was in breach of its duty under Article 33 ERO to give to the employee a written statement of particulars of employment and in the absence of evidence of exceptional circumstances which would make an award or increase unjust or inequitable the tribunal makes an increased award under Article 27 of The Employment (Northern Ireland) Order 2003 equal to two week's pay calculated on the claimant's varied salary of £36,000.00 p.a., being **£1,384.62** gross.
28. This is a relevant decision for the purposes of the Industrial Tribunals (Interest) Order (Northern Ireland) 1990.

Employment Judge: *Employment Judge Bell*

Date and place of hearing: 12 August 2021, Belfast.

This judgment was entered in the register and issued to the parties on: