



EMPLOYMENT TRIBUNALS

Claimant

Respondent

v

Mr James Joseph

Premium Coaches Ltd

Heard at: London South Employment Tribunal

On: 30 September 2021

Before: EJ Webster

Appearances

For the Claimant:

In person

For the Respondent:

Mr Robbins (Director)

JUDGMENT

1. I do not uphold the claimant's claims for unauthorised deduction from wages and/or breach of contract in respect of his unpaid holiday pay.
2. I do not uphold the claimant's claims for unauthorised deduction from wages and/or breach of contract in respect of unpaid wages.

REASONS

The Hearing

1. This case was heard in conjunction with another individual's (Mr Lasetta) similar claims against the same respondent. I was provided with various documents by the parties though there was no bundle provided. Mr Robbins provided a witness statement on behalf of the respondent.
2. When discussing the facts and evidence of the case, the claimant and Mr Robbins remained under oath for the duration of the hearing so I took all

information provided to me as evidence. Both parties were given the opportunity to question each other and challenge evidence.

3. Oral reasons were provided at the hearing and the claimant has asked for written reasons.

The Claims

4. By a claim form dated 24 August 2020 the claimant brought claims in respect of unpaid holiday pay for one day on 11 March 2020, one day of unpaid wages on 16 March 2020 and a shortfall in his furlough payment entitlements of £31.
5. The claimant was employed as driver from 14 December 2018 until 18 September 2020. I was not given a reason for the termination of his employment and it was not relevant to the case I was deciding.
6. The Claimant was meant to be paid the March payments in his March pay on 30 March 2020. The ACAS Early Conciliation process commenced on 25 June and lasted until 25 July. The Claimant's ET1 was accepted by the tribunal on 24 August 2020.
7. In March 2020, the drivers at the respondent were told to take any accrued but untaken holiday because it could not be carried over from March to April when the next holiday year started. In addition, this was the month that the Covid pandemic struck and the country went into lockdown.
8. The respondent accepted that the claimant was owed 1 day of holiday for this month. They accept that there was a severe delay in paying that money to the claimant.
9. The respondent also accepted that it owed the claimant for 14 hours of work on 16 March 2020 and that there was a severe delay in paying it to the claimant.
10. However they state that these payments were made to the claimant as evidenced by the pay-slip dated September 2020. I was provided with that payslip which shows that the claimant received £912 in respect of 9.5 days' holiday pay. This was, according to the respondent, the 1 day that they owed him from 11 March and 8.5 days accrued but untaken holiday that he had accrued between 1 April 2020 and his termination date. When broken down this amounts to 9.5 days holiday calculated on the basis of 8 worked hours at £12 an hour. This is what the claimant's contract states was the rate of pay for holiday pay. I saw a copy of this contract and this was not disputed by the claimant.
11. The same pay-slip also records that the claimant was paid for 32 hours at £12 an hour receiving a total of £384. The respondent states that this was in respect of a payment for the 14 hours they owed him for 16 March 2020 plus a good will payment because it had been so delayed. The claimant stated that he could not believe that they would make such a good will payment and did not trust that this payment reflected what he was owed.

12. I accept in the absence of any evidence from the claimant that he was owed the £382 in respect of anything else, that this money was intended to pay the claimant in respect of 16 March 2020.
13. The claimant did not dispute that he had received the monies as set out in the September pay-slip though there was some question as to when he had received the full amount. He nevertheless accepts that he had received all the amounts that were set out in the pay-slip even if they were not paid on 30 September 2020.
14. With regard to the payments made to the claimant in May 2020, I accept the respondent's evidence that the claimant was paid by reference to his earnings at the same time the year before. The respondent stated, and I accept, that this was done in accordance with the furlough scheme guidance which stated that an individual who earned different amounts in any month, should be paid by reference to the same month during the tax year before. I accept Mr Robbins' evidence that the payments he received in May 2020 (£2,419.65) were slightly greater than 80% of the May 2019 salary payment. Unfortunately I was not provided with a pay-slip for that month though I accept Mr Robbin's evidence in this regard and the claimant did not challenge it or provide me with a pay-slip that suggested he had earned more in May 2019 than now being relied upon by the respondent. I further find that the respondent was using the correct 2019 figures as reference because in the following month, June 2020, he received the maximum of £2,500 presumably because the figure he had earned in June 2019 was greater than that which he had earned in May 2019.
15. The claimant states that he was entitled to be paid 80% of the maximum payment of £2,500 because he had earned that much in several months when working for the respondent. He stated that there was therefore a shortfall of £31.99. I find that the claimant was mistaken in believing that he was entitled to the cap of £2,500 in every month under the furlough scheme.

The Law

16. The Coronavirus Act 2020 Functions of Her Majesty's Revenue and Customs (Coronavirus Job Retention Scheme) Direction states as follows:

Rule 7.1 Costs of employment meet the conditions in this paragraph if-

- (a) they relate to the payment of earnings to an employee during a period in which the employee is furloughed, and
- (b) the employee is being paid-
 - (i) £2500 or more per month (or, if the employee is paid daily or on some other periodic basis, the appropriate pro-rata), or
 - (ii) where the employee is being paid less than the amounts set out in paragraph 7.1(b)(i), the employee is being paid an amount equal to at least 80% of the employee's reference salary.

Rule 7.2 Except in relation to a fixed rate employee, the reference salary of an employee or a person treated as an employee for the purposes of CJRS by virtue of paragraph 13.3(a) (member of a limited liability partnership) is the greater of-

- (a) the average monthly (or daily or other appropriate pro-rata) amount paid to the employee for the period comprising the tax year 2019-20 (or, if less, the period of employment) before the period of furlough began, and
- (b) the actual amount paid to the employee in the corresponding calendar period in the previous year.

17. s13 Employment Rights Act 1996

(1) An employer shall not make a deduction from wages of a worker employed by him unless—

(a) the deduction is required or authorised to be made by virtue of a statutory provision or a relevant provision of the worker's contract, or

(b) the worker has previously signified in writing his agreement or consent to the making of the deduction.

(2) In this section "relevant provision", in relation to a worker's contract, means a provision of the contract comprised—

(a) in one or more written terms of the contract of which the employer has given the worker a copy on an occasion prior to the employer making the deduction in question, or

(b) in one or more terms of the contract (whether express or implied and, if express, whether oral or in writing) the existence and effect, or combined effect, of which in relation to the worker the employer has notified to the worker in writing on such an occasion.

(3) Where the total amount of wages paid on any occasion by an employer to a worker employed by him is less than the total amount of the wages properly payable by him to the worker on that occasion (after deductions), the amount of the deficiency shall be treated for the purposes of this Part as a deduction made by the employer from the worker's wages on that occasion.

(4) Subsection (3) does not apply in so far as the deficiency is attributable to an error of any description on the part of the employer affecting the computation by him of the gross amount of the wages properly payable by him to the worker on that occasion.

(5) For the purposes of this section a relevant provision of a worker's contract having effect by virtue of a variation of the contract does not operate to authorise the making of a deduction on account of any conduct of the worker, or any other event occurring, before the variation took effect.

(6) For the purposes of this section an agreement or consent signified by a worker does not operate to authorise the making of a deduction on account of any conduct of the worker, or any other event occurring, before the agreement or consent was signified.

(7) This section does not affect any other statutory provision by virtue of which a sum payable to a worker by his employer.

18. The claimant's contract of employment confirmed that he was entitled to 20 days' annual leave plus 8 days' bank holidays. This is commensurate with the allowance of 5.6 weeks proscribed by Working Time Regulations 1998.

Conclusions

19. The claimant's claim was issued before his employment terminated. I therefore only have jurisdiction to consider this matter under the Employment Rights Act 1996 as an unauthorised deduction from wages claim as opposed to a breach of contract claim. S7 of The Extension of Jurisdiction Regulations 1994. states that a breach of contract claim can only be brought by a claimant once their employment has terminated.

20. I find that the claimant has been paid in respect of all the monies owed to him. It was not in dispute that the claimant received all of the monies set out in the September 2020 pay-slip albeit that after I had given oral judgment the claimant told me that he had not received the entire payment in September, he did confirm that he had received two amounts that added up to the full amount set out in the September pay-slip.

21. I am satisfied that those payments included payment in respect of his 1 day holiday pay from 11 May 2020 and his unpaid shift on 16 May 2020. Whilst I accept that these payments were made late, the claimant has now been paid correctly and therefore I do not uphold his claim as he has been paid in respect of any unpaid wages.

22. With regard to the shortfall in furlough pay, I find that there was no shortfall and that the claimant was paid appropriately within the Direction to HMRC pursuant to the Corona Virus Act 2020 known as the furlough scheme as it was at the relevant time. His pay was calculated according to his earnings the year before. There was therefore no deduction of £31.99 in May 2020 from his earnings.

Employment Judge Webster

Date: 1 October 2021