EMPLOYMENT TRIBUNALS

Claimant: **Ms Anita Lucking**

Respondent: **First Greater Western Ltd**

Heard at: **Bristol Employment Tribunal, by CVP.** **On: Wednesday, March 17, 2021**

Before: **Employment Judge Mr. M. Salter**

Representation:
Claimant: Ms. C. Ibbotson, counsel.
Respondent: Ms. S. Crowther Q.C., counsel.

RESERVED JUDGMENT

The Claimant's claims are dismissed.

REASONS

References in square brackets below are unless the context suggests otherwise to the page of the bundle. Those followed by a with a § refer to a paragraph on that page and references that follow a case reference, or a witness' initials, refer to the paragraph number of that authority or witness statement.

References in round brackets are to the paragraph of these reasons or to provide definitions.

INTRODUCTION

1. These are my reasons for the reserved judgment above.

2. The Employment Tribunal is required to maintain a register of all judgments and written reasons. The register must be accessible to the public. It has recently been moved online. All judgments and reasons since February 2017 are now available at: https://www.gov.uk/employment-tribunal-decisions. The Employment Tribunal has no power to refuse to place a judgment or reasons on the online register, or to remove a judgment or reasons from the register once they have been placed there. If you consider

that these documents should be anonymised in any way prior to publication, you will need to apply to the Employment Tribunal for an order to that effect under Rule 50 of the Tribunal's Rules of Procedure. Such an application would need to be copied to all other parties for comment and it would be carefully scrutinised by a judge before deciding whether (and to what extent) anonymity should be granted to a party or a witness.

BACKGROUND

The Claimant's case as formulated in her ET1s

3. The Claimant's complaint is found in two separate ET1's, presented to the tribunal on 19th August 2020 [1]("the First ET1") and on 23rd December 2020 [39]("the Second ET1"):

    a. The First ET1 complains that the Claimant should have been placed on furlough by the Respondent and the Claimant suffered an unlawful deduction from wages;
    b. The Second ET1 complains that having failed to place her on Furlough the claimant was subjected to a further unlawful deduction from wages when the Respondent calculated her annual hours over the course of 52 weeks and not the period the claimant contends she was to for the Respondent, namely 1st May to 31st October each year [51], this resulted in a weekly pay figure of 6.15 hours a week, instead of 20 hours per week she claims.

The Respondent's Response

4. In its Forms ET3 [22 and 55] the Respondent:

    a. denied it had an obligation to pace the claimant in furlough
    b. denied it had incorrectly calculated the Claimant's hours on which she received payment, accordingly she received what was properly payable.

Relevant Procedural History

5. The two claims and responses were ordered to be heard together by Employment Judge Midgely [54].

THE FINAL HEARING

General

6. The matter came before me for Final Hearing. The hearing had a one-day time estimate. The Claimant was represented by Ms. C. Ibbotson of counsel, and the Respondent by Ms. S. Crowther Q.C. of counsel.

Format of Hearing

7. Owing to the enduring public health situation the hearing was conducted via CVP. All parties agreed to this approach and I do not consider that my

ability to assess the evidence and witnesses' credibility was adversely effected in any way by this platform.

The Claims Being Pursued

8. At the outset of the hearing the Respondent asked whether the Claimant was pursing those matters contained in the First ET1 as this claim was not within the Claimant's skeleton argument. Ms Ibbotson confirmed she did not have instructions to withdraw that claim.

DOCUMENTS AND EVIDENCE

Witness Evidence

9. I heard evidence from:

   a. the Claimant;
   b. James Bound on behalf of the Claimant;
   c. Mathew Woodger, the Respondent's Area Revenue Protection Manager ("MW");
   d. Claire White, the Respondent's Head of Employee Relations("CW") and
   e. Lucy McGiveron the Respondent's HR Business Partner (Employee Relations) ("LM").

10. All witnesses gave evidence by way of written witness statements that were read by me in advance of them giving oral evidence. All witnesses were cross-examined.

11. Before giving all evidence all witnesses confirmed that they were alone; that they had unmarked copies of the bundle and witness statements before them and that they had no aide memoirs or other means of assistance to hand.

Bundle

12. To assist me in determining the matter I have before me today an agreed bundle consisting of some [156] pages prepared by the Respondent. Other documents were provided by the Respondent a few minutes before the hearing was due to commence. Ms Ibbotson had not seen these documents and so, before the hearing of evidence, I adjourned the hearing so she could consider these papers. When the hearing recommenced Ms Ibbotson indicated she was content to proceed.

13. The Claimant presented a Schedule of Loss [68] and the Respondent produced its own calculation of what losses the Claimant had suffered if, contrary to its responses, the Claimant's claims were successful. During the course of the hearing the Respondent's figures were agreed.

14. My attention was taken to a number of the documents as part of me hearing submissions and, as discussed with the parties at the outset of the hearing, before commencing their submissions, I have not considered any document or part of a document to which my attention was not drawn. I refer to this bundle by reference to the relevant page number.

SUBMISSIONS

Claimant

15. Ms Ibbotson on behalf of the claimant provided a helpful skeleton argument and so, as it is in writing it is unnecessary to repeat it here. It was noted by Ms Ibbotson that the skeleton argument did not develop a case in relation to the First ET1 and she did not advance any submissions on this claim.

16. The Claimant's primary case is that the express term in the agreement did not reflect the reality of the situation that the Claimant was paid for 20 hours a week over the summer period, or alternatively there is an implied term implied by the conduct of the parties that the Claimant was engaged for 20 hours a week over the summer season.

Respondent

17. The Respondents submissions:

    a. confirmed that no one was suggesting Mr Bound offered the Claimant a contract;
    b. highlighted the Claimant was aware of the express terms of the contract and that she understood those terms;
    c. raised the unsuitability of this matter for the implication of a term into the contract and that there was, in fact, no need, space or gap, for an implied term as the flexible contract was working the way the parties had objectively intended it to work with inherent flexibility.
    d. argued there was nothing in the factual situation of this matter that showed any conflict between the contract term and how the arrangement between the Claimant and Respondent was conducted;
    e. advanced that the claimant was really saying is not that the contract is wrong, really it is not what she wants and wants the tribunal to change it for her;
    f. the basis of the relationship is clear.

MATERIAL FACTS

General Points

18. From the evidence and submissions, I made the following finding of fact. I make my findings after considering all of the evidence before me, taking into account relevant documents where they exist, the accounts given by all the witnesses in evidence, both in their respective statements and in oral testimony. Where it has been necessary to resolve disputes about what happened I have done so on the balance of probabilities taking into account my assessment of the credibility of the witnesses and the consistency of their accounts with the rest of the evidence including the documentary evidence. In this decision I do not address every episode covered by that evidence, or set out all of the evidence, even where it is disputed.

19. Matters on which I make no finding, or do not make a finding to the same level of detail as the evidence presented to me, in accordance with the overriding objective reflect the extent to which I consider that the particular matter assisted me in determining the identified issues. Rather, I have set out my principle findings of fact on the evidence before me that I consider to be necessary in order to fairly determine the claims and the issues to which the parties have asked me to decide.

The Parties and Contract

20. The Claimant is employed by the Respondent, the train company. She is based at the Respondent's Exeter St David's Depot. She is employed as a Part-Time Seasonal Ticket Examiner.

21. The Respondent introduced annualised hours contract that renewed each year, as opposed to a fixed term contract which terminated at the end of the fixed term, in or around 2014 after a dispute with the RMT Union. At this time the Respondent produced Guidance for managers titled "Part Time (Seasonal) Colleagues Guidance Notes" [70] ("the Guidance"):

> *Provisions of the part time (seasonal) contract*
> *The part time (seasonal) contracts state that the colleagues are rostered over 52 weeks to work a total amount of hours averaging at a set number of hours per week.*
>
> *For example a colleague could be rostered over 52 weeks to work a total amount of 780 hours, at an average of 15 hours per week or in*

> *another example a colleague could be rostered over 52 weeks to work a total amount of 260 hours, at an average of 5 hours per week (please see Appendix A for hours per 52 weeks and average weekly hours).*
>
> *It is the line manager's responsibility to manage the hours that have been worked over the 52 week period and ensure that the payroll team are briefed on the arrangements through the provision of timesheets.*
>
> *Note that the 52 week period for part time (seasonal) contracts will start from 1 April each year. If a colleague's start date is after this date, then the annual hours will be pro rata.*

22. In October 2016 Mr Bounds, at the time the Revenue Protection Area Manager, put together a business case for Revenue Seasonal Workers [JB2]. He requested they work for 320 hours between June and September. This was for 20 hours a week.

23. Discussions were had between him and Ms White who explained to him that since 2014 such staff were employed on annual hours contracts.

24. In April 2017 Mr Bounds contacted Ms White to discuss the contract again. He wished the contract to be flexible. Ms White explained again the situation of annualised hours and that employees would only get paid for the hours they worked.

25. Mr Bound was not satisfied with this as he did not want the staff on annualised hours contracts, However he told me in evidence, and I accept, it was for him to put the business case together and HR to work out the contracts and the terms.

26. The Claimant answered an advert seeking workers of 20 hours a week and was told, incorrectly, by Mr Bounds that the employment was for 20 hours a week. She was interviewed by Mr Bounds and offered the role in a telephone call after the interview.

27. No-one goes so far as to say that the Claimant was offered a contract by Mr Bounds or that this was on the basis of 20 hours a week for the summer season only. The Claimant tells me there was no discussion of contract

terms in this call, and it was only later that she received the contractual terms, indeed it was after her training for the role that she received the contract of employment.

28. The Claimant read her contract of employment and signed it. The Claimant has been employed by the Respondent since 8th May 2017.

29. As stated above, as is the Respondent's practise, the Claimant was employed on an annual hours contract that requires her to work for 320 hours per year. This contract was issued despite Mr Bounds' reservations as to the contract. Clause 3 of her contract states:

> *You will have annual contractual hours of 320 hours per annum averaged at 6.15 hours per week. However your weekly hours worked are cumulative towards your annual total hours and payment is only made for the number of actual hours worked each week.*
>
> [93]

30. The Claimant signed this contract and has worked under it for the entirety of her employment. The page she signed stated, in bold:

> *Please confirm your agreement and acceptance of this agreement by signing and dating below on this letter and on the enclosed copy and return one to me at the above address.*

The claimant agrees she understood what this contract meant and the statement above meant.

Annualised Hours

31. Mr Woodgar tells me that the year, for the purposes of annualised hours, runs from 1st January to 31st December, although Ms White says that generally this used to be from 1st April until 31st March [CW5], but was different for the Revenue teams.

32. Hours are allocated by the Respondent contacting its employees and asking what hours they would be available for. The rota's are then filled as a result of what the Respondent is told and they are able to cover. The employees are notified of their hours a week before the rota takes effect.

33. Payment was made in line with the Guidance and on the basis of hours worked.

34. The Claimant tends to fulfil her hours during the May to October period when the Respondent is busiest (especially the months of July to September). The Claimant frequently completed more than 20 hours a week during this season.

35. The Claimant often travels outside of May to October. However, the Claimant did complete substantial additional hours outside of these periods in 2017 89.49; 2018 228.36, and 303.49 in 2019.

36. The Respondent never had any problem with the Claimant compressing her hours into that May to October window and never sought to compel her to undertake work outside of those hours: she was never subject to any disciplinary action for not working outside of that window. Mr Woodger tells me this is because the Respondent was happy for the Claimant to work in that window and were aware this is how the claimant wanted to work, so it did not cause them any concern if, for the first 5 months of the year the Claimant had not competed many (or any) hours. Mr. Bound accepted that the Claimant could not have been disciplined for not working 20 hours a week over the summer, and Ms White agreed that the Respondent "would not bat an eyelid" if the Claimant had not commenced undertaking her hours prior to the summer season, as she only got paid when she worked.

<u>Queries regarding her contract</u>

37. In July 2017 the Claimant raised a query as to her not receiving a "priv card" [97] it was explained to her then that these were only granted to staff who were contractually obliged to work over 15 hours a week. Her contract states that entitlement to any benefits is dependent on her average weekly hours [93 §4].

38. In cross-examination Claimant accepted that any confusion she may have had over the contract was removed by 2017 and that she was happy with the hours she worked.

39. In 2018 she raised a concern over the contract not reflecting what she had applied for and again in 2019 the Claimant queried why, as she worked more than 20 hours a week, she was not considered eligible for a First Group Travel Pass which permits free travel across the Respondent's rail franchises. This pass is limited to those staff who work over 15 hours a week. The Claimant did not qualify for one.

40. Towards the end of 2019 Mr Woodger noticed that the rota template stated that workers such as the Claimant were working 20 hours a week. He tells me, and I accept this was an error caused by using a precedent rota. He corrected this error and every rota since then has reflected what he understands to correct, namely the Claimant is seasonal.

2020 COVID

41. In 2020 the COVID pandemic resulted in the first lockdown and the Respondent had to introduce changes to its working practises to protect its staff, public health whilst ensuring a service was provided for essential workers.

42. Owing to an agreement between the Respondent and Department of Transport, whereby the government provided emergency funding for the rail industry in the form of paying the staff wages, the Respondent was unable to furlough staff [MW8, LM7 119].

43. On 24th March Mr Woodger sent a Teams message to seasonal workers that they would not be required to work until May 2020 [117].

44. Subsequently an agreement was reached between the Respondent and unions that those workers not required to work would be paid their basic salaries.

45. On 1st May 2020 the Respondent had a further Team meeting with its seasonal workers employed in Revenue Protection. These employees were informed they would remain on standby and not be required to work.

46. The Mr Woodger agreed to pay those staff their average weekly hours based on their contracts of employment [MW8]. This was clearly outside the

scope of their contracts of employment that only permitted payment when they worked.

47. During this period the Claimant received payment based on 6.15 hours a week and not the 20 hours she says she was entitled to.

48. When lockdown restrictions were eased in July 2020, the Claimant returned to work on 27th July.

49. The Claimant attended a meeting with Mr Woodger on 9th September 2020 to discuss how the balance of her annual hours would be fulfilled

THE LAW

Statute

50. So far as is relevant the Employment Rights Act 1996 states:

> **13 Right not to suffer unauthorised deductions.**
>
> …
>
> (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.

CONCLUSIONS ON THE ISSUES

General

51. Having regard to the findings of relevant fact, applying the appropriate law, and taking into account the submissions of the parties, I have reached the following conclusions on the issues the parties have asked me to determine.

Findings on the Issues

Claim 1: Unlawful deduction from Wages by not being placed on furlough

52. I have decided that this claim fails. Generally, there is no entitlement to be placed on furlough and, in any event, the Respondent was prevented from furloughing its staff because of the agreement it had with the Department of Transport. The Claimant has failed to establish, on the balance of

probabilities the Respondent was in breach of any legal obligation towards her or that wages were properly payable as a result of any such failure.

Claim 2: Unlawful Deduction from Wages.
What are the terms of the Contract

53. I do not consider, and do not understand it to be the Claimant's case, that Mr Bound offered the claimant a contract for 20 hours a week over the summer period. I therefore must look at the terms of the contract that is in place between the Claimant and Respondent.

54. The express term of the Claimants contract is for 6.15 hours a week. The Claimant says that I should imply a term into that contract that

> *"You will have contracted hours of a minimum of 320 hours between 1 May and 31 October. You may be offered hours outside of this period, but you will not be obliged to work them".*

and so changes the express term to one of 20 hours a week during the summer period and the very nature of the contract itself from an annualised hours one into something else.

55. I decline to do so. The Claimant has failed to satisfy me, on the balance of probabilities, that how the contract worked in practice differed in any way to that which was anticipated by the parties and clearly set out in the express contractual terms agreed between her and the Respondent, and secondly, she has failed to satisfy me that a term needs to be implied into the contract to reflect the intention of the parties.

56. The evidence I have heard is that the Claimant was aware as to what the term was and signed the contract. The Claimant was aware of what her contract stated and fulfilled the terms of that contract over the course of the year and for all the years of her employment.

57. I can see no evidence before me that leads me to believe that the relationship between the Claimant and Respondent is reflected in anything other than the agreement she signed, she worked under and which she was paid in accordance with.

58. The contract is drafted in a loose and flexible way, and that is how it has been put into action: the Claimant was never required to work for six hours each and every week, the Claimant, Mr Woodger and the Respondent were aware how she wished to work and because of the flexibility in the contract and manner they went about rota'ing staff were able to give effect to the Claimant's working pattern whilst remaining within the express terms of the contract, all without any need to discipline the Claimant for failing to work for 6 hours in any particular week of the year.

59. I therefore agree with the submissions made on behalf of the Respondent that there is no scope to imply a term into the contract where the situation is covered by the express term, and find that the relationship is accurately reflected in that agreement.

Was the Claimant paid that which was "properly payable"?

60. In light of the above I consider that on these facts the Claimant received that which was properly payable to her in line with Mr. Woodger's proposal.

Employment Judge Salter
Date: 19 March 2021

Reserved Judgment & Reasons sent to the parties: 23 March 2021

FOR THE TRIBUNAL OFFICE

Notes
Reasons for the judgment having been given orally at the hearing, written reasons will not be provided unless a request was made by either party at the hearing or a written request is presented by either party within 14 days of the sending of this written record of the decision.

Judgments and reasons for the judgments are published, in full, online at www.gov.uk/employment- tribunal-decisions shortly after a copy has been sent to the claimant(s) and respondent(s) in a case.