EMPLOYMENT TRIBUNALS

Claimant: Miss Emma Napper

Respondent: Cassa Consultancy Ltd

Heard at: Birmingham

On: 26th January 2022

Before: Employment Judge Knowles

Representation:

Claimant: **Miss Emma Napper**

Respondents: **Non attendance**

JUDGMENT

1. The Tribunal determined to hear the case in the absence of the respondent.

2. The claimant's claim of unlawful deductions is well founded and she is awarded £813.27 being the gross sum due.

3. The claimant's complaint for failure to be provided a written statement of employment particulars is well founded and she is awarded £683.90.

REASONS

Claims and Issues

4. By claim form dated 24th August 2021 the claimant brought a complaint of unlawful deductions of wages in relation to not being paid furlough pay from 1st May 2021 to 23rd May 2021.

5. In its response, the respondent denied that the claimant was due furlough pay having returned to work on the first week of May and subsequently handing her notice in.

6. The issues for the Tribunal to consider were firstly whether the claimant was an employee of the respondent or a worker within the definitions in the Employment Rights Act 1996. If the claimant was an employee or a worker, to issues to be determined were:

   6.1 What date did her employment come to an end?

   6.2 Were the claims presented in time?

   6.3 When did the claimant return to work after furlough leave?

   6.4 What was the claimant entitled to be paid in May 2021 and was she paid this amount?

6.5 Did the respondent make an authorised deduction from wages by not paying furlough pay for May 2021?

6.6 If the claimant was an employee and succeeded in another claim and the Tribunal found that she had not been provided with a written statement of employment particulars, should the Tribunal award additional compensation of 2 or 4 weeks pay under section 38 Employment Act 2002?

Procedure, documents and evidence heard

7. The respondent failed to attend or be represented at the hearing. The Tribunal considered the correspondence sent to the respondent in advance of the hearing, namely a letter dated 11 December 2021 confirming that a Legal Officer had directed that the hearing would take place in person at Centre City Tower in Birmingham on 26 January 2022 10am.

8. Mr Adrian Sarin, the name of the respondents contact as given on the ET3 response form, was telephoned by the Tribunals clerk. Although Mr Sarin stated that he thought the hearing was taking place online, although it was noted that he was not making efforts to join online.

9. Mr Sarin confirmed that the correspondence dated 11 December 2021 had been received. Mr Sarin stated that the manager dealing with the matter was ill with COVID-19. The Tribunal considered that no correspondence had been received from the respondent following the ET3 response form. The respondent had not notified the Tribunal of any difficulties in attending on 26 January 2022 due to illness or otherwise. The respondent was given the option of delaying the start of the hearing for 30 minutes in order to send a representative otherwise the hearing would proceed in their absence. No representative for the respondent arrived.

10. The Tribunal noted that except for the ET3 response form, the respondent had not sent in any documentation or correspondence to the Tribunal. Having considered the information available, being satisfied that the respondent had been notified that the hearing was taking place in person on 26 January 2022, having made reasonable enquiries into the respondent's absence, with no application to postpone from the respondent, and applying the overriding objective, under Rule 47 of the Employment Tribunal Rules the Tribunal proceeded with the hearing in the absence of the respondent.

11. The Tribunal considered the ET1, ET3, and claimant witness statement with accompanying evidence of WhatsApp messages, letter, email and wage slips. The claimant gave evidence under oath and confirmed that the witness statement, all accompanying evidence and Schedule of Loss had been emailed to the respondent in advance. This was confirmed by the email on the Tribunal papers dated 26 October 2021.

12. The Respondent had not sent in any documents or statements to be considered by the Tribunal.

Facts

13. Within the ET3 the respondent confirmed acceptance of the dates of employment given by the claimant (18.10.2019 to 29.05.2021). The respondent accepted the job description given by the claimant (Supervisor).

14. The claimant worked as a Supervisor in the Rugby Hotel and was required to carry out the hours set on a weekly basis. There was no agreement that she could send someone to work in her place.

15. The respondent did not complete section 5 the ET3. The Tribunal considered the pay slips dated 7 May 2021 and 7 June 2021 and finds that the claimants rate of pay was £9.77 per hour.

16. The claimant gave evidence that she had not been given a contract of employment or any written statement of her terms of employment by the respondent. The Tribunal accepts the

claimant's evidence that she was not at any point given a written statement of her terms of employment.

17. The claimant gave evidence that she had always worked full time for the respondent, working 35 hours per week and often more. The claimants' hours were set in a weekly rota. The claimant's evidence was that she was not on a zero-hour contract; she had not been given any written contract at all and had always worked at least 35 hours per week.

18. On 26 March 2020 a national lock down was announced due to COVID-19.

19. The claimant received an email dated 3 April 2020 from Carl Davidson (CD), Operations Manager of The Rugby Hotel where she worked, confirming that the hotel was closed following government guidance and that the respondent would process her as a furloughed worker to pay up to 80% of her wages.

20. The claimant was paid furlough pay back dated to 26 March 2020.

21. The claimant received a letter sent to all staff dated 29 June 2020 from CD, stating that staff would not receive furlough pay after 31 July 2020, after which they would revert to "casual staff and therefore paid of the hours worked each month". The letter stated that "hours will not return to normal for some time".

22. The claimant started working at the hotel again from 1 August 2020. The claimant gave evidence that her hours were the same as before at 35 hours per week and in fact more. The claimant did not have rotas for this period.

23. The claimant received a WhatsApp group chat from CD on 1 November 2020 stating that the hotel would be closed from 5 November and all staff would be back on furlough from the week beginning 9 November 2020.

24. On 26 November, the claimant received a WhatsApp group message from CD, stating the country was going into national lockdown and they "will continue to be on the furlough scheme until further notice".

25. The claimant received a WhatsApp group message on 5 January 2021 confirming she "will not be required to return to work at this time, you will remain on furlough with an anticipated return to work date of March/April".

26. The claimant received a WhatsApp group message on 7 February 2021 from CD asking staff to confirm if they were returning to work. The claimant replied to say she "was definitely coming back".to which CD replied "Great, thanks Emma".

27. The country remained in lockdown and was under a roadmap to recovery under which hotels could not reopen before 17 May 2021. Once restrictions were lifted on 17 May 2021 the hotel reopened. The claimant received a WhatsApp on Thursday 20 May (the diary was checked and satisfied this was 2021) stating "so it's looking like a return to work from next week for Emma and a return to work the following week for Debbie, bookings are still dribbling in but not very fast also I've given front desk a little training guide ready first returns rota will be sent out tomorrow afternoon".

28. The claimant returned to work on 26 May 2021. I considered the rota showing the hours worked by the claimant. The claimant confirmed that no earlier rota had been sent out since they went back on to furlough in November 2020.

29. On her return to work the claimant handed in her notice by letter to CD. She gave 1 weeks' notice. She did not have a copy of the letter at the Tribunal explaining that she had not kept a copy.

30. The claimants last day of employment was 29 May 2021. She left the hotel on 30 May 2021 have completed a sleepover shift the night before.

31. The claimant received a pay slip on 7 June 2021 which the Tribunal considered. The pay slips show the pay for the previous month. The pay slip dated 7 June 2021 showed that she was paid £207.61 for 21.25 hours during May 2021 and the £20 sleep over bonus. The pay slip did not detail, as the pay slip date 7 May 2021 had done, that the claimant received any furlough pay during the period for which it covered. The pay slip did not show that the claimant received any furlough pay from 1 May 2021 to 23 May 2021.

32. The claimant queried this with CD when she received her pay slip. CD told her he did not know why she had not received furlough pay and to contact Adrian Sarin (AS), which she did. The claimant spoke to AS who said she had been taken off the furlough scheme. The claimant explained that she was employed until 29 May 2021 and should have received the furlough pay. AS said, he would speak to payroll, but the claimant heard nothing further.

33. Within the ET3 the respondent states that "CD informed the claimant at the end of April 2020 that the hotel would be re-opening in May 2021, and she would be required to return to work on the same basis prior to furlough (i.e., working variable hours as business requires as per her zero hours contract"). The respondent has not sent any evidence in support of this. The only evidence the Tribunal has seen in relation to the return to work is a WhatsApp from 20 May confirming the claimants "return to work from next week for Emma" and the rota for the week commencing 24 May 2021. It is accepted that the claimant was notified on 20 May that she would be returning the following week, which she did.

34. Within the ET3 the respondent states that the claimant returned to work on the first week of May and subsequently handed her notice in. The Tribunal considered the government guidance at that time that hotels could not and did not reopen until 17 May 2021. There was no evidence presented to the Tribunal to show that the claimant had returned to work prior to 26 May 2021. As the claimant was only required to give 1 weeks' notice, the Tribunal finds that the claimant did hand in her notice on her return to work on 26 May 2021 rather than the beginning of May as contended by the Respondent. It was noted that the R accepted in the ET3 the claimant's employment dates.

Law

Employment and worker status

35. An "employee" is defined by section 230(1) Employment Rights Act 1996 (ERA) as being "*an individual who has entered into or works under (or, where the employment has ceased, worked under) a contract of employment." "Contract of employment"* is defined as meaning a contract of service or apprenticeship. Whether an individual works under a contract of service is determined according to various tests established by case law. A tribunal must consider relevant factors in considering whether someone is an employee. An irreducible minimum to be an employee will involve control, mutuality of obligation and personal performance, but other relevant factors will also need to be considered.

36. A "worker" is defined by section 230(3) ERA as being "*an individual who has entered into or works under (or, where the employment has ceased, worked under) – (a) a contract of employment, or (b) any other contract, whether express or implied and (if it is express) whether oral or in writing, whereby the individual undertakes to do or perform personally any work or services for another party to the contract whose status is not be virtue of the contract that of a client or customer of any profession or business undertaking carried on by the individual"*

Unauthorised deduction from wages

37. S.13(1) of the Employment Rights Act 1996 provides that 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 the worker's contract or the worker has previously signified in writing their agreement or consent to the making of the deduction. An employee has a right to complain to an Employment Tribunal of an unlawful deduction of wages pursuant to section 23 of the Employment Right Act 1996.

38. A claim about an unauthorised deduction from wages must be presented to an employment tribunal within 3 months beginning with the date of payment of the wages from which the

deduction was made, with an extension for early conciliation if notification was made to ACAS within the primary time limit, unless it was not reasonably practicable to present it within that period and the Tribunal considers it was presented within a reasonable after that.

Section 38 Employment Act 2002

39. Where a Tribunal finds in favour of an employee in a complaint of unlawful deductions from wages, and the Tribunal finds that the employer has failed to provide the employee with a written statement of employment particulars, the Tribunal must award the employee an additional two weeks' pay, unless there are exceptional circumstances which would make that unjust or inequitable, and may, if it considers it just and equitable in all the circumstances, order the employer to pay an additional four weeks' pay.

Conclusions

40. The claimant can only claim unauthorised deductions from wages if she was an employee or worker. She can only claim an additional award under section 38 Employment Act 2002 if she was an employee.

41. All employees are workers, but not all workers are employees. The claimant worked as a Supervisor for the respondent at the Rugby Hotel. The claimant had to do the work herself. She took instructions from CD. The respondent has not disputed that the claimant was an employee and agreed with the job description provided by the claimant. Having regard to all the circumstances, the Tribunal concludes that the claimant was an employee.

42. The parties accepted that the claimants employment ended on 29 May 2021. The last payment of wages including furlough pay were payable to the claimant no earlier than 31st May 2021. The claimant notified ACAS under the Early Conciliation Procedure on 29 June 2021 and the ACAS Early Conciliation Certificate was issued on 10 August 2021. The claim was presented on 24 August 2021 and were presented in time.

43. The Tribunals find that the claimant was employed until 29 May 2021 and should have been paid furlough pay from 1 May to 23 May 2021 when she was not working due to the closure of the hotel up to the point when she then returned to work in the week commencing 24 May 2021.

44. The respondent failed to provide any evidence that furlough pay was not claimed for the Claimant. Further, the respondent failed to provide any evidence that the claimant was on a zero-hour contract and therefore even if no furlough pay was claimed, the Tribunal finds that the respondent was due to pay the claimant for the period 1 May to 23 May 2021 in any event.

45. The Tribunal finds that the claimant was entitled to be paid £1,040.88 for the period 1st May to 29 May 2021 when her employment ended. The claimant was only paid the sum of £207.61 for 21.25 hours and the £20 sleep over bonus, a total of £227.60. The sum of £813.27 gross for furlough pay was unpaid for the 3-week period from 1st May to 23 May 2021. This is calculated on the basis of one week furlough pay being paid to the claimant of £271.09 x 3 weeks.

46. The Tribunal finds that the respondent made unauthorised deductions of £813.27 gross wages in total in respect for wages as furlough pay for 1st May to 23 May 2021 and orders the respondent to pay the sum of £813.27 to the claimant.

47. The claimant has succeeded in her claim. An award of additional pay under s.38 of the Employment Act 2002 for failure to provide a written statement of employment particulars, is therefore possible.

48. The Tribunal finds that the claimant was an employee of the respondent, she was entitled under s.1 Employment Rights Act 1996 to a written statement of employment particulars. The Tribunal finds that the claimant was never given a statement of employment particulars and as the respondent has not put forward any evidence of exceptional circumstances, in accordance with s.38 of Employment Act 2002 the Tribunal orders the respondent to pay an additional two

weeks pay. This has been calculated as a weeks' pay based on the claimants 35 hours per week at £9.77 per hour, 2 x £341.95 = £683.90.

Employment Judge Knowles

Judgement and Reasons

21 February 2022

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