



EMPLOYMENT TRIBUNALS

Claimant: Mr A Uddin
Respondent: The Spinning Wheel Restaurant Limited
Heard at: London South Hearing Centre
On: 31 January 2022
Before: Employment Judge McLaren

Representation

Claimant: Ms. E Godwins, Advocate
Respondent: Mr. S Miah, Operations Director

JUDGMENT

The claimant's complaint that there was an unlawful deduction from wages is not well founded. This means the claim does not succeed.

REASONS

Final Hearing

1. This was a remote hearing by video conference call. A face-to-face hearing was not held because it was not practicable. The parties did not object.
2. I confirmed that I have been provided with a number of documents. These were two separate bundles, one provided by the claimant of 86 pages and one by the respondent of 81 pages. Both parties confirmed that those were all the relevant documents that are required.
3. I heard evidence from the claimant on his own behalf, and from Mr Sufinan Miah on behalf of the respondent. The claimant was assisted by the services of an interpreter. At the outset of the hearing both confirm or understand each other the language is Bangladeshi and the dialect sylhet.

Background

4. The claimant was employed as a porter/cook by the respondent, an Indian restaurant. The restaurant closed from 19 March 2020 until October because of the pandemic. It was not able to offer a take away service. The claimant did not work during this period and received no wages.

The issues

5. The issues had not been agreed between the parties and at the outset of the hearing Ms Godwins, on behalf of the claimant, suggested that it needed to include an issue as to whether the claimant was a worker or employee and whether he had been paid the appropriate national minimum wage. On behalf of the respondent it was confirmed that the claimant was an employee. This had never been disputed.

6. On the issue of national minimum wage, the respondent maintained the claimant had been paid the appropriate national minimum wage rate for the hours worked which Mr Miah thought were generally 32 to 36 hours a week. The claimant believes that he worked nearer to 60 hours a week. After some debate as to whether this matter had been raised in the claim form and whether it had been the subject of an amendment application, on taking instructions Ms Godwins confirmed that this was not an issue.

7. The issues were therefore agreed as set out below.

Unlawful deductions

- (i) The claim is for unlawful deduction of wages pursuant Section 13 of the Employment Rights Act 1996 (ERA). The claim relates to unpaid wages from 19 March 2020 to 30 September 2020, the restaurant reopening at 30% capacity on 1 October.
- (ii) The Tribunal is to determine whether the claimant has suffered such unlawful deduction of wages (considering whether the sums are properly payable,) and, if so, to determine the amount. The claimant says it is £7840

Findings of Fact

Contract terms

8. It was agreed that the claimant had worked for other companies within the group but he had started working for this respondent from December 2019. It was common ground that he was not issued with a written statement of terms of employment at the time this employment started. The respondent's HR advisor prepared a document, but this was not signed by the claimant before lock down occurred in March 2020. I accept that it contains the respondent's standard terms and reflected the agreement it had with the claimant .
9. The agreement is an employment contract and provides that the claimant is

employed to work zero hours a week. It was common ground that the claimant was an employee.

10. It was agreed that the claimant worked more or less the same number of hours each week. Mr Miah explained that the managers were given a budget for staff and gave hours in accordance with the work load and budget. I find that the regularity of the claimant's hours does not negate from the contract terms and I find the claimant was employed on a zero hours contract throughout. There was no obligation to provide any particular hours, although the reality was that the claimant regularly worked the same total number of hours and was paid the same weekly pay. This suited both parties.

Furlough arrangements

11. The respondent had to close on 19 March 2020 because of the pandemic and regulations that prohibited restaurant opening. It was not disputed that the respondent did not provide the claimant or any other employees with a written furlough agreement. The claimant worked no hours from 19 March until the restaurant reopened in October. It was common ground that the claimant was not paid any wages during this period. He did receive electronic payslips which identified the sums set out as furlough and show a figure which is less than the claimant earned most weeks. This figure was not 80% of the claimant's pay and Mr Miah was unable to explain how it had been calculated. He told me that the sums had been done by the payroll company. It certainly did not show that the claimant was being paid hundred percent of his pay.
12. Mr Miah explained that the restaurant was very keen to obtain furlough payments for the staff and look after their welfare as much as they could. There is evidence in the bundle of communication by voicemails, a WhatsApp group and Zoom meetings. Mr Miah described in general terms what was said during these communications. He gave evidence that the staff were told that the respondent was applying for furlough. Once the restaurant received it they would pass this money onto staff and it would be 80% of their pay. Mr Miah was also clear that during these communications staff had been advised to seek professional advice and to share with everyone else anything that they found to be helpful. Mr Miah's evidence was that staff had been told to consider applying for universal credit as one option.
13. The claimant certainly attended some Zoom meetings and he agreed that there had been communication about furlough with him. In his evidence the claimant said that he knew the restaurant was to close on 19 March and all staff were told the restaurant would claim furlough and would update them on progress with HMRC. He was very clear that he had been told that furlough payment would be claimed from the government. The claimant also gave evidence that he had been told that furlough would be 80% from the government but that 20% would be made up by the respondent

14. I asked the claimant what exactly had been said to him and he confirmed that he expected to receive the furlough because the government was paying everybody and so he should also receive it. I find he was clear that furlough was a payment from the state not the employer. He accepted that he did not recall the respondent saying that they would pay the money even if they did not receive the furlough money from the government. I find his evidence was that everybody received furlough money and therefore he should, rather than there being an agreement to pay him regardless of receipt of the monies.
15. The claimant said that he had contacted the restaurant for an update and had been told that furlough money had not been received. This confirms that he understood the money was to come from elsewhere and not the respondent. The claimant disputed Mr Miah's evidence that he had said that he was fine not receiving furlough money and would look into claiming universal credit. The claimant disagreed that he had said that he was only concerned with ensuring that he would still have a job once the restaurant was allowed to open backup.
16. There is a conflict of evidence between the account given by the claimant and that by Mr Miah in three respects. The claimant disputes that he was told to take advice, including applying for universal credit, denies that he was accepting of not receiving furlough money, and stated that the restaurant were going to make the pay up to hundred percent. Mr Miah was involved in the decisions the restaurant was making and the communications process and given the nature of his involvement I find that he is likely to have a clearer recollection and overall picture of what was said.
17. On the balance of probabilities I therefore prefer his evidence and I accept that his account is accurate, that the claimant was told to take advice and consider other options for payment and did at the time indicate he was more concerned with keeping his job then receiving money. I also find that at no time did the respondent indicate that payment would be made up to hundred percent of wages with the respondent paying the balancing 20%. While it is unclear how the furlough money has been calculated on the furlough period payslips, they do not show full wages. I find this confirms there was no intention to pay wages beyond any furlough sum received. .
18. Having heard the evidence from both witnesses, I find there is no conflict of evidence as to the conditionality of the furlough payment. The claimant's view that he should receive the furlough money is based on the belief that everyone got given it. He did not give evidence that he had been told that the respondent would pay the furlough money even if it was not received from the government. This is consistent with the respondent's evidence that they were paying monies only if they received the payment from the government and, when they were unsuccessful, there was no agreement to pay any wages at all. I accept that this was the position that had been communicated to staff and agreed and understood at the time. I also find the claimant accepted this position because he was concerned to have a job when the restaurant reopened.

Application for furlough payments

19. Mr Miah explained that they had made an application to HMRC for furlough pay for the period from March onwards but this had been refused. There was a document at page 61 of the respondent's bundle with a printout from HMRC stating that the respondent was not eligible to make a claim because their records showed that on 19 March 2020 there were no employees on the payroll. Furloughed employees must have been on the employer's PAYE payroll on 19 March 2020 to be eligible for the scheme.
20. Mr Miah explained that they had been in the process of setting up all the appropriate paperwork and had issued payslips and had believed at the relevant time that all the appropriate paperwork had been submitted to HMRC. It was only after they put in the application and as a result of a long telephone call with HMRC they discovered there had been an error. The paperwork had not been registered and this was an HMRC error, but nonetheless led to a refusal of the grant of furlough. Mr Miah also explained that the payslips showing furlough pay had been issued because this was a requirement of the application for this government support. I accept his evidence on this point.
21. The refusal document was exhibited to a letter from the respondent's accountants dated 15 March 2021 which supported Mr Miah's evidence and stated that the company did not qualify for the first furlough scheme and therefore did not pay their employees. The letter explained, as Mr Miah confirmed, that the application for furlough pay for this period was resubmitted to HMRC in November 2020. An email of 16 September 2021 attached a summary of the furlough claim.
22. This email also said "the company made its first claim for furlough as mentioned in the letter 15 March 2021 during second phase of the scheme. This claim was made in November 2020...". It was put to Mr Miah that the respondent had not made an application for furlough until November 2020. It was also put that this was because, while they have been providing payslips, they had not been acting properly and had not registered with HMRC.
23. While the email of 16th September is confusing, and there is no evidence in the bundle identifying the first claim, on the balance of probabilities I find that the respondent did make a claim in March 2020. There was no reason for the respondent not to do so. There was no reason for it to engage in an elaborate charade with its employees, telling them that they had applied and keeping them updated on this had it not in fact done so.
24. I find, that the application was refused and therefore, as the respondent had only agreed to pay staff if they received the money, staff were not paid any money during this period.

Relevant law

Coronavirus Legislation

25. The Coronavirus Act 2020 came into force on 25th March 2020 , Section 76 provided “Majesty’s Revenue and Customs are to have such functions as the Treasury may direct in relation to coronavirus or coronavirus disease”.
26. The explanatory notes expanded on this power and explained
“The Act gives HM Treasury the power to direct HMRC to create new functions in relation to COVID-19. Specifically, it enables HMRC to pay grants to businesses to deliver the Coronavirus Job Retention Scheme. Under this Scheme, employers are able to contact HMRC for a grant to cover most of the wages of people who are not working but are furloughed and kept on payroll. The Scheme will cover 80% of the salary of workers retained, up to a total of £2,500 per month. It will cover the cost of wages backdated to 1st March 2020 and will be open initially for at least three months.

In addition to allowing HMRC to deliver the Job Retention Scheme, it also provides the flexibility for HM Treasury to provide further directions if necessary, as the Government continues to respond to the situation as it develops.”

27. On the 15th of April the “Coronavirus Act 2020 Functions of Her Majesty’s Revenue and Customs (Coronavirus Job Retention Scheme) Direction” specified that
“This direction requires Her Majesty’s Revenue and Customs to be responsible for the payment and management of amounts to be paid under the scheme set out in the Schedule to this direction (the Coronavirus Job Retention Scheme)”
It set out the conditions for eligibility
“3.1 An employer may make a claim for a payment under CJRS if the following condition is met.
3.2 The employer must have a pay as you earn (“PAYE”) scheme registered on HMRC’s real time information system for PAYE on 19 March 2020 (“a qualifying PAYE scheme”).”

28. Originally the date was 28th February, but this was extended to the 19th March. There was concern that the original 28 February date would mean that people who had started work in February, but who, because of payroll dates (for example, where payday is the 15th of the month) or problems or delays with the operation of the payroll, were not actually paid until after 28th February would not be covered. The date also excluded those who started a new job in March. However, the actual requirement was that *‘the employee must have been notified to HMRC through a Real Time Information (RTI) submission notifying payment in respect of that employee on or before 19 March 2020’.*

29. This had the effect of excluding those who had not been paid via a registered payroll before 19 March.

Deductions

30. The statutory prohibitions on deductions from wages are contained in Part II of the Employment Rights Act 1996 (ERA). The general prohibition on deductions is set out in s.13. A right arises where monies have not been paid which are “properly payable”. There must be an actual failure to pay and it must relate to money that is due to the individual.

13.— Right not to suffer unauthorised deductions.

(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.

.....

. (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

Conclusion

31. In applying the relevant law to my findings of fact I conclude as follows. The claimant was employed on a zero hours contract and there was therefore no obligation to provide him with any work during any particular week. When the restaurant was shut, there was therefore no entitlement to any wages even in circumstances where the claimant was willing and able to work.

32. It follows that there was no obligation on the respondent's part to provide any financial support during this period. I have found, however, that the respondent did tell its employees that it would apply for furlough and would pass this money onto staff if it were able to obtain it. This would not be made up to 100%. In the event, while the application was made, it was unsuccessful. As the respondent received no monies no monies were passed onto staff and it had not agreed to self fund this amount.

33. There is therefore no deduction from wages as no wages were properly payable, both because there was no entitlement to be given any work during any particular week and because the agreement to pay 80% of wages during the period the restaurant was shut was conditional upon the respondent receiving furlough pay.

34. For these reasons the claims do not succeed.

Employment Judge McLaren
2nd February 2022