EMPLOYMENT TRIBUNALS

Claimant: Miss J Byrne

Respondent: Alderley Day Nursery Limited

Heard at: Manchester **On:** 24 November 2020

Before: Employment Judge Feeney

REPRESENTATION:

Claimant: In person
Respondent: Melanie Hallam, Owner

JUDGMENT

The judgment of the Tribunal is that the claimant's claim of unlawful deduction of wages fails.

REASONS

1. The claimant brought a claim of unlawful deduction of wages/breach of contract in respect of the failure of the respondent to pay her the total amount of furlough pay they had originally claimed.

Witnesses

2. The Tribunal heard from the claimant herself and Ms Melanie Hallam for the respondent.

3. There was an agreed bundle.

Issues

4. The issues to be determined by the Tribunal were as follows:

    1. Did the claimant have standing to bring a claim i.e. was she an employee or a worker?

2. Was she in effect rehired as an employee when her employer agreed to claim furlough payments for her?

3. If so, was she entitled to be paid the full amount of the furlough payment or had she agreed to receive 50% only until her eligibility was confirmed?

4. Had she agreed to this reduction in writing?

Findings of Fact

5. The claimant worked for the respondent for a short period of time. It was agreed that she decided to obtain an alternative job as she was not comfortable with the respondent's Montessori type of nursery provision. The claimant obtained a further job and left the respondent on 13 March 2020.

6. Unfortunately for the claimant the national lockdown was announced on 22 March 2020 and under the furlough scheme announced by the Government the claimant's employer could not claim furlough payment for the claimant, however in the furlough regulations there was a provision for previous employers to make a claim for furlough wages on behalf of an employee who had left if that employee had been employed by them on or before 28 February 2020.

7. As the claimant fulfilled these criteria she approached the respondent on 3 April 2020 and asked them if they would make the furlough claim for her on the basis that she was employed on 28 February 2020. Ms Hallam agreed that she would do this and provided the claimant with a letter dated 3 April 2020 setting out the terms of the furlough scheme. This said:

> "This letter is to inform you as agreed with you in the week commencing 23 March your current position with Alderley Day Nursery Limited is being 'furloughed' effective from 16 March 2020 and until further notice. Furlough is a temporary period of leave to help us deal with the fact that there is no work available for employees at this time due to the COVID-19 situation. You also agree that if our claim for monies under the Coronavirus Job Retention Scheme is rejected, some details of which are below, that you will be laid off if we continue to be able to provide you with work because of this crisis...You will remain employed during the furlough period and your usual contractual terms will apply except as varied in this letter."

8. The letter went on to confirm that if their application was accepted the claimant would receive 80% of her monthly wage for the period of furlough "during which the CJR scheme applies and provided that you remain on furlough".

9. On 4 April 2020 Ms Hallam wrote to the claimant stating:

> "Hi Jade
>
> Unfortunately there was an update brought out by the Government last Friday that stated nurseries could only apply for the JRS for those employees whose salaries are not already covered through the Local Authority funding we receive (for our three and four year olds). We are now expected to reduce our claim by a certain percentage in line with the income we have received from

> the Local Authority, however it is unclear by how much. If we make a claim and later found out it's incorrect the Government will request the money to be returned. Obviously with my existing team members I can reclaim this from their future wages should the need arise, however I would not be able to reclaim this from yourself. Making a claim for yourself now might impact the amount I can claim for other staff which then creates a business cost which I am unwilling to pay on your behalf. The Government has extended the date on payroll to 19 March. Does this mean your current employer can now make the claim? Alternatively, I could put the claim through but hold the money for 6-12 months until I know whether a reclaim will be made against us, or I am open to any other suggestions you might have.
>
> Melanie"

10. The claimant replied on 24 April 2020 and she advised that her current employer could not make the claim. The claimant seemed to believe at that point that Ms Hallam would not pursue the claim, and stated "thank you anyway".

11. On the same day, however, Ms Hallam replied stating:

> "I could submit the claim and offer you 50% now and 50% when we are clear on the process and eligibility and if we don't have to pay anything back. Payroll is run today so I need to know as soon as possible."

12. The claimant agreed to this, saying:

> "When it does become clear, if we do have to pay it back, maybe I could sign an agreement to you to prove I am more than willing to do if needed, but 50% now would be so helpful."

13. It then became apparent that the claimant resumed work with her current employer at the beginning of June and she asked Ms Hallam on 22 June whether she had heard anything about the other 50%. The claimant did receive 50% of the furlough pay for April and May.

14. Ms Hallam replied stating that she believed the scheme was due to end in October but then it would probably take another six months to complete all the checks, but she would let the claimant know if she heard anything. The claimant replied:

> "Oh wow, that seems a while. That's potentially March next year. Could I not sign you an agreement that if anything does need to be paid back that I can pay it to you then or maybe you could hold 20% of both sums until you hear more. Hopefully after the checks they would not claim £1,000 back all at once. It seems so much as they must understand the whole point of the furlough scheme was to help people now. Wouldn't it be the same if someone left work now, they would owe it back to you if the Government did reclaim the money next year. Would you be open into looking at signing some sort of agreement?"

15. Ms Hallam had not replied when the claimant wrote another email on 23 June:

> "Hi Mel,
>
> Just been doing some research and took some advice from CAB on how furlough works. On the Government website it says that if the full 80% has been claimed then the full 80% has to be paid to the employee if the claim has been made whatever the circumstances. If not…I really appreciate everything you've done for me, willing to claim for me over the furlough period, and will forever be thankful, and I know you said you was willing to only put the claim through if you could hold the 50%, it's just £1,000 is a lot of money to be holding at the moment. It's not a small amount and if potentially that isn't going to be paid me until you have the all clear from HMRC that you mentioned the other day, it could be March next year potentially, but the help I need is now and it means so much. I understand why you would feel the need to hold it but £1,000 or whatever the amount claimed, it's been claimed for me and it must be paid to me by law. It means a lot to me. If I've been overpaid it has to be paid back of course, I understand that. I note HMRC will do checks and if something does come back then I would never let you down or I'm sure they would take it from my tax, but today they told me I am entitled to the full 80% and I should send you this email to state this."

16. Ms Hallam replied. She was not happy with the claimant's email and reminded her of the agreement they had made on 14 April and 29 April. She went on to say:

> "Given your email I think it best if I repay the money to HMRC myself and we end out relationship now. You have received a total of £1,085 via the Job Retention Scheme. Your entitlement in April 2020 was £1,063.01 which means I've overpaid you by £21.99 which you can repay me to the following bank account. I will alter our May 2020 claim excluding you and repay this directly back to HMRC so that we are not holding anything back from you or them. Please do not contact me again.
>
> Melanie"

17. The claimant replied, saying:

> "I did make that agreement on those days but I never said I didn't. We agreed you held 50% but not until potentially March next year, which is what you stated on the previous email on Monday. When I have contacted HMRC and Citizens Advice they advised me that if a claim has been made for 80% then the 80% I must receive whatever the circumstances, as the whole point of the Job Retention Scheme is to support now and that 50% cannot be held by the employer. That's all I was asking. I emailed you previously so I had to seek advice as I didn't receive a reply."

18. The claimant also emailed to say that she had checked on HMRC's website and it showed that she had been paid £1,154.40 on 24 April and £1,154.40 on 22 May. She went on to say that she never agreed that it could be at least six months after the Job Retention Scheme had ended.

19. The respondent's accountant confirmed that the amounts for furlough was claimed for April and May and processed, but the May amount was subsequently

repaid to HMRC via a deduction from the overall June furlough claim made by the company.

20. The respondent stated that although at first it appeared a simple proposition that anyone employed on 28 February could be put back on the respondent's "books" and furlough claimed for them, because they were a nursery the situation was somewhat more complicated and on going back through the furlough advice Ms Hallam felt that the payment claimed for the claimant may well be incorrect and was concerned that she would end up out of pocket. She took the view that the guidance only applied if the employee was made redundant or resigned for reasons connected to the COVID-19 pandemic. I did question that this seemed incorrect as the whole point of allowing individuals who had left to claim was that they could have left for any reason, and it was to try and plug a lacuna which would adversely affect people who had simply changed jobs at the wrong time.

The Law

21. The claimant must bring a claim under the jurisdiction of the Employment Tribunal. There is no freestanding authority under the furlough regulations which allows a claimant to bring a claim in respect of that legislation.

22. The claimant therefore brings a claim of unlawful deduction of wages i.e. under Part II of the Employment Rights Act 1996.

Employee/Worker Status

23. Section 230 of the Employment Rights Act 1996 defines an employee as follows:-

> "In this Act "employee" means an individual who has entered into or works under (or where the employment has ceased worked under) a contract of employment.
>
> In this Act a contract of employment means a contract of service or apprenticeship, whether express or implied, and if it is express whether oral or in writing.
>
> In this Act, worker means an individual who has entered into or works under or (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 by virtue of the contract that of a client or customer of any professional business undertaking carried on by the individual".

24. In **Ready Mix Concrete 1968** three questions were set out to be answered in defining a contract of employment.

(a) Did the worker undertake to provide his own work and skill in return for remuneration;

(b) Was there a sufficient degree of control to enable the worker fairly to be called an employee;

(c) Were there any other factors inconsistent with the existence of a contract of employment.

25. Section 233B of the Employment Rights Act 1996 is the same test as section 83 of the Equality Act 2010, substantially. It requires the tribunal to distinguish between a situation where an individual is not an employee but neither are they truly self employed by being in business on their own account.

26. The Supreme Court in **Bates van Winklehof v Clyde & Co LLP [2014] SC** stated:

> "Generally there are three tests to establish if a person is a worker or self-employed:
>
> (a) Is there an express or implied contract to perform work or services?
>
> (b) Is there an express or implied obligation to perform the work or services personally?
>
> (c) Is the worker performing the work or services in the context of running a business where the other party is a client or customer?"

27. In **Byrne Brothers (Formwork) Ltd v Baird [2002] EAT** it was held the intention was clearly to create an intermediate class of protected worker made up from individuals who were not employees but equally were not carrying on a business in their own name.

28. In the recent cases of **Uber v Aslam [2017] EAT and Pimlico Plumbers Limited v Smith [2018]** the main test remains the obligation of personal performance: the obligation "personally to do the work" may be an implied one (**Manku v British School of Motoring Limited [1982] ET**). However, the fact that the individual does not actually perform all of the work personally will not necessarily mean that the contract is not a contract personally to do work. So long as the contracting party performs the essential part of the work he or she is free to assign or delegate other aspects to another person. For example, a solicitor may delegate some of the legal work in a case to an assistant and rely on a secretary to carry out ancillary tasks like typing and posting letters and other documents (**Kelly & Anor v Northern Ireland Housing Executive [1998]**).

Coronavirus Act 2020 – 15 April direction

29. This allowed employers to claim furlough payments for ex employees who had been on their payroll on 28 February 2020 whose current employer could not claim because they had started employment with after that cut-off date. The date was later changed to 19 March 2020 but this is the relevant direction. It does not

cross reference any definitions in the 1996 Act or the Tribunal's contract jurisdiction. However, most commentators assume that the employer in effect rehires the person as an employee for the duration of the furlough. There is no particular mechanism for doing this although the direction does make adjustments for P45s etc.

Unlawful deductions of wages

30. The general prohibition and deductions are set out in section 13(1) of the Employment Rights Act 1996 ("the 1996 Act") which states that:

> "An employer shall not make a deduction from wages of a worker employed by him."

31. However, this does not include deductions authorised to be made by virtue of a statutory provision of contract or where the worker has previously agreed in writing to the making of the deductions (section 13(1)(a) and (b)).

32. Section 27(1) defines wages as "any sums payable to the worker in connection with his employment", and includes any fee, bonus, commission, holiday pay or other emolument referable to the employment. These may be payable under the contract or otherwise, as defined in the case of **New Century Cleaning Company Limited v Church [2000]** Court of Appeal as not extending beyond sums to which the worker has some legal but not necessarily contractual entitlement. A deduction is defined as:

> "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…as a deduction made by the employer from the worker's wages on that occasion." (Section 13(3))

33. In order to decide what is properly payable the Tribunal has to decide what the contractual agreement is between the claimant and the respondent, and the approach to determining this is the same approach as adopted by the Civil Courts in contractual claims (**Greg May (Carpet Fitters and Contractors) Ltd v Dring [1990] EAT**).

34. One example would be where a Tribunal determines that the amount of wages an employee is contractually entitled to has been varied by agreement or there is a flexibility clause in the contract giving the employer the right to do so. In that situation the wages properly payable will be the reduced wages due under the varied contract or the flexibility clause, therefore when the reduced amount is paid there is no deduction, it having been contractually agreed that the wages would be reduced. Of course, it has to be established that that reduction was agreed. Section 13(1) states:

> "An employer must not make a deduction from the wages of a worker 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."

35. In respect of this contractual authorisation, this is defined in section 13(2) as a provision contained in:

(1) One or more written contractual terms of which the employer has given the worker a copy before the deduction is made; or

(2) One or more contractual terms (whether express or implied, and if express whether oral or in writing) whose existence and effect (or combined) the employer has notified to the worker in writing before the deduction is made.

36. In addition, there may be an issue here that a contractual term must be enforceable at common law if it is to authorise a deduction under section 13. This issue has arisen in the context of so-called penalty clauses which are prohibited at common law. In **Cleeve Link Ltd v Bryla [2014] EAT** it was confirmed that a sum deducted under a penalty clause cannot be a lawful deduction under section 13. It rejected the employer's contention that so long as the criteria as set out in section 13 of the 1996 Act was satisfied, the deduction was authorised, and the question of enforceability as a penalty clause was properly the province of the Civil Courts.

37. Finally, it has to be established that the factual basis for the deduction has been met i.e. if a deduction for poor workmanship has been agreed it then has to be established that there actually has been poor workmanship.

Conclusions

Employment Status

38. My initial view was that that the claimant was not an employee or a worker in relation to this respondent. the respondent in their email of 3 April referred to her as remaining employed, however employment/worker status is not determined by the label the parties attach to it but by the application of an extensive body of case law which has emerged from the employment courts over many years and which apply to many types of claims brought under the Employment Rights Act 1996.

39. The claimant was not obliged to undertake any work personally or at all. Ostensibly she was neither a worker nor an employee and has no standing to bring an unlawful deductions claim or breach of contract.

40. However, having considered the 15 April direction and the words used in the respondent's email of 3 April 2020 I find that the claimant was an employee. In effect the respondent agreed to rehire her and the mutual understanding was the claimant would not actually undertake any work just as other employees were not undertaking any work, but their employment status was not undermined by this as it is within the parties' powers to agree that no work will be provided nor any done if this is their choice. Obviously normally it would not be as the employer would not want to be paying for an employee not to work but here the employer can do it due to the furlough payment being made by the Government.

41. However, I find that the claimant agreed in writing to 50% of her furlough payment being retained by the respondent pending clarification of the situation and that if the respondent was entitled to claim for her the balance would be paid once this was clear. She was advised by an email of 4 April that this could be six to 12 months. Accordingly, the claimant agreed to a contractual variation. Therefore, as of

the date of her claim the 50% which was withheld was not properly payable. Further the claimant had agreed in writing to it which was as required for a valid deduction.

42. An issue may arise in respect of the outstanding 50% once the position becomes clear as to whether the furlough payment was legitimate, and no repayment needs to be made. However, it is not clear how this will be determed given the respondent returned the sums to the Government. However, the matter would have to be pursued in another jurisdiction.

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Employment Judge Feeney

Date: 4 January 2021

RESERVED JUDGMENT AND REASONS
SENT TO THE PARTIES ON

8 January 2021

FOR THE TRIBUNAL OFFICE