



EMPLOYMENT TRIBUNALS

Claimant: Miss Ward

Respondent: Chariet Limited t/a Crown Spa Hotel

Heard at: Leeds (by CVP) **On:** 4 March 2021

Before: Employment Judge Buckley

Appearances

For the claimant: Mr. Haines (consultant)

For the respondent: Miss V Ward (lay representative)

This has been a remote hearing, which has not been objected to by the parties. The form of remote hearing was V: (Video). A face to face hearing was not held because it was not practicable and no-one requested the same and all the issues could be determined in a remote hearing.

RESERVED JUDGMENT

Unlawful deductions (furlough pay)

1. The claim for unlawful deductions from wages (furlough pay) SUCCEEDS.
2. The respondent shall pay the claimant the sum of **£1239.56** gross.

Unlawful deductions (holiday pay)

3. The claim for unlawful deductions from wages (holiday pay) SUCCEEDS.
4. The respondent shall pay the claimant the sum of **£145.28** gross.

REASONS

Claims and Issues

1. The claimant claims:
 - a. Unlawful deductions from her pay while furloughed.
 - b. Unlawful deductions from her holiday pay. The claimant claims in her ET1 that her holiday pay should have been calculated on the basis of the average 52 week calculation method. Whilst the calculations

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in the schedule of loss refer only to the underpayment in the May payment, it is clear that she is claiming for the entire period from 1 April 2020 (when the relevant law changed) and this was the basis on which the respondent dealt with the claim (see para 8 of Mr. Farooq's statement).

2. The issues were agreed at the start of the hearing to be as follows:
 - a. What wages were properly payable to the claimant during the period of furlough?
 - b. What wages were properly payable for holiday pay?
3. During the hearing it became apparent that I would have to consider the following subsidiary issues:
 - a. How should the wages 'properly payable' be calculated during the period of furlough?
 - b. If the claimant's pay during furlough should properly have included an amount for overtime, should this be based on overtime pay in March 2019, in the corresponding month in 2019 or an average of overtime pay in the tax year 2019/2020?
 - c. When determining how much to award the claimant, what account should be taken of holiday pay paid during furlough, in circumstances where the claimant had not received notice that she was required to take holiday during the furlough period?
 - d. What was a week's pay for the purposes of calculating the amount due for holiday pay?

Findings of fact

4. I heard evidence from the claimant and from Mr. Farooq, Group Commercial Manager. In my view, both witnesses gave consistent evidence and appeared to be doing their best to give an accurate reflection of events. There was little, if any, dispute on the relevant facts.
5. The claimant started work for the claimant on 23 August 2018. The claimant's role is described in her contract as a customer service advisor. She worked at the Crown Spa Hotel, Scarborough. She started on a temporary contract, but moved on to a permanent contract in November 2018.
6. Her offer letter states:

Your basic minimum hours of work per week will be 24 hours excluding breaks and will normally be spread over 5 days. You are required to be flexible with regard to this adapt to the demands placed on the business and are subject to the statutory regulations and the employee handbook. The hours stated here will be used to calculate holiday pay and other entitlements. If you work hourly and work less or more than the normal hour of work agreed above then you will be paid for the actual hours worked. You will be expected to work such additional hours as are necessary for the proper performance of your duties. You will have your working week planned by Kyle Wood.

7. The relevant parts of the contract state:

Your wage is £7.88 per hour payable by bank transfer at monthly intervals in arrears...

Your basic minimum normal hours of work per week will be 24 hours excluding breaks and will normally be spread over 5 days. You are required to be flexible and are subject to the statutory regulations and the employee handbook. The hours stated here will be used to calculate holiday pay and other entitlements. If you work hourly and work less or more than the normal hour of work agreed above then you will be paid for the actual hours worked. Any hours worked greater than the above agreed hours in any week must have prior approval with your head of department, prior to working them or payment may not be authorised. You will be expected to work such additional hours as are necessary for the proper performance of your duties.

...

Any hours worked in excess of your normal working hours will be paid at your normal rate of pay.

...

Your annual holiday entitlement is the minimum statutory Working Time Regulations 1998 statutory annual holiday entitlement (presently 28 days) paid holiday each Holiday Year which runs from 1st April to 31st March. This holiday entitlement is inclusive of public and bank holidays... Holiday pay is paid at normal basic rate.

...

In the holiday year, you will be deemed to take Working Time Holiday before non-Working Time Holiday.

...

The company can tell you when you are to take some of your holiday entitlement. The company must give you notice twice as long as the amount of holiday they want you to take.

8. The claimant began working on the health clinic reception. Almost from the start of her employment with the respondent she also began working on the spa clinic reception. Once she had started working in the spa reception too, she worked regular shifts in both departments every week, starting at regular times. The time she started and finished work depended on which shift she was given – for example in the spa the shifts were 9am-5pm or 10am-6pm. The actual hours that she worked in a week sometimes varied, but she always worked shifts in both those departments and so worked in the region of 40 hours a week. She also sometimes worked overtime in the administrative department.
9. The claimant's shifts were notified to her through a rota prepared by the respondent that was given to staff between two weeks and a month in advance. Although 'clocking in' records were provided in the bundle, the system did not always work and therefore they are not always a correct record of the hours worked.
10. Any holiday pay that the claimant received during her employment was paid on the basis of a 24 hour working week, split over 6 days, so that for a day's holiday the claimant was paid for 4.8 hours.
11. At the relevant date the claimant was earning £8.26 per hour, although her holiday pay from April 2020 was calculated on the basis of a hourly rate of £8.72 per hour.
12. The claimant was notified that she was being placed on furlough by letter dated 25 March 2020. The letter states:

Re: Period of furlough leave

...

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As you are aware, the impact that the current situation is having on our business, which is as a business in the hospitality sector, the Government has enforced our closure as a result of its social distancing measures. We are therefore unable to offer work to you for the time being.

The Government recently announced measures to assist businesses in the same situation as ours, which includes placing employees on 'furlough' through the Job Retention Scheme. Furlough is a period of leave. I am notifying you that you are being placed on furlough leave with effect from 23rd March 2020 and this will apply until you receive further instruction from us. Currently, we anticipate that you will be on leave until 31st May 2020.

The Government has confirmed it will provide grants to businesses to cover 80% of wage costs to a maximum of £2,500 per person per month, therefore, during the period of leave, you will receive 80% of your salary package subject to the maximum stated.

I have attached two copies of this letter. Please confirm your agreement to being placed on this period of leave by signing both copies where indicated below and returning one to me by 31st March 2020. If you don't return it, you'll automatically be furloughed.

13. The letter was accompanied by a document entitled 'Furlough Agreement' which consisted of a box for the employee's name, signature and the date. The claimant signed and returned this agreement on 3 April 2020. She also informed the respondent on the same date that she had moved house and gave them her new address.
14. The respondent calculated the claimant's pay during furlough leave on the basis of 80% of the amount she would have received if she had worked 24 hours a week.
15. When the claimant received her payslip for April 2020 she emailed the respondent's admin manager at the hotel, Janine Stevens, and asked if she could check the calculation of the furlough pay. She stated that she worked different hours depending on what was needed and therefore according to the government website she should have been paid 80% of the amount she earned in the same month last year or an average of her earnings over the last 12 months. The claimant included a link to the government guidance for employees ('Check if your employer can use the Coronavirus Job Retention Scheme').
16. Ms Stevens's initial response by email dated 29 April was that they had paid on the basis of contracted hours, but that she would seek advice. The outcome of this discussion was that on 11 May Ms Stevens confirmed that the respondent would pay the extra wages for April on the basis of the claimant's earnings in April 2019. The claimant queried whether this would be backdated for March. On 19 May Ms Stevens stated that there would be no extra wages from March, because there was no guidance at the time on how furlough was to be dealt with and they had taken the most reasonable option to work out the contracted hours that would have been worked. She then states 'After that time of course, guidance was displayed on HMRC website of which we have corrected your pay to relate.'
17. The claimant's new address does not seem to have made its way into the

respondent's records, probably because of the number of staff on furlough. The respondent sent a further letter to the claimant at her former address on 20 May 2020. It stated:

...

As you know, you are currently a furloughed worker in accordance with the Government's Job Retention Scheme that was put in place to assist businesses who have been impacted by the coronavirus. This allows us to obtain a grant to cover 80% of our wage costs during this challenging time.

We are also looking ahead to the time when we are able to get back to work on a more normal basis and to assist us in maintaining our operations when the restrictions begin to be lifted, we require you to use some of your holiday entitlement during furlough. We thank you for your continued support in these difficult times.

To this end we require you to take all outstanding holidays which as of the end of May 2020 is **23.26 hours** of annual leave and during your furlough period this **will** include any Bank Holidays which fall during this period...Annual leave does not interrupt furlough, which will continue.

You have agreed to a reduction to 80% pay during furlough, however, payment for annual leave will be at your normal pay due to legal requirements.

18. As this letter was sent to the claimant's former address, she did not receive it.

19. Ms Stevens emailed again in relation to wages on 22 May to inform the claimant that there would not, after all, be any 'top up' of wages. The reason she gave was that the claimant did not have a flexible salary and was on a contract, and the respondent would only pay based on that.

20. The claimant put in a grievance on 13 June. There is an internal email dated 19 June, in which Ms Stevens states that she has agreed with David Chambers and Vicky Riley that the respondent will pay the additional amounts for furlough pay from April onwards, but not for March as there was no guidance at that time. This was not communicated to the claimant at the time and no payment was made.

21. There is also a screenshot of a 'chat' between HMRC webchat and the respondent which includes the following from HMRC:

...it was decided that the furlough claim would be based on actual amounts earned last year not on contracted hrs, because some people will work a lot of overtime just to make ends meet

It is possible to amend your claims backdated to when they first went on furlough...

22. On 7 July the claimant had an online meeting with Sean Brady from the respondent to discuss the grievance. He said that he would investigate.

23. Mr. Farooq stated in evidence that he considered the grievance on 22 July and decided that the claimant was not entitled to be paid for any past overtime. His reasoning is as follows:

12 ...The Claimant worked on a contract for 24 hours a week and that there were no zero hours contracts as this was not something we had ever done.

13. The Government guidelines provided that furlough covered up to 80% of pay capped at £2,500 per month under three categories, a) salaried, b) contracted hours and c) variable hours (zero hour/casual workers).

14. The Claimant fell under the category of a contracted employee where the employer has an obligation to pay her 24 hours every week.

15. If during normal circumstances as per demands of the business additional hours are needed, then she was paid at her normal rate. However, there is not a contractual obligation for overtime to be provided every week/month. The contract states that any hours over and above the agreed hours must be approved by the head of department.

16. This is clearly highlighted in the article below (halfway through the article under the heading of "Are Overtime, Bonuses and Commissions included in this Gross figure?").
<https://www.cronertaxwise.com/community/coronavirus-covid-19-furloughed-employees/>

17. Therefore, any overtime that was previously worked and paid for is not part of a "contractual obligation" and the employer should only pay 80% of the contracted hours.

18. Therefore, based on the above information the Claimant is considered a contracted employee and thus under the scheme rules she has been paid correctly 80% of her contracted hours and any overtime previously paid is not a contractual obligation.

24. The claimant has not received the pay or been informed of the outcome of her grievance.

25. The claimant's furlough was extended until 31 August 2020 by letter dated 5 August 2020, but her employment was terminated on the grounds of redundancy with effect from 14 August 2020.

26. The claimant's gross pay in March – May 2020 while on furlough is broken down in the email from Janine Stevens at p 101 of the bundle as follows:

Gross March

26/02/20 up to and including 25/03/20 (Furlough effective from 23/03/20 – 25/03/20)

Hours 106.83 + 15 Hol days = 121.83

Furlough for 3 days (of usual working days) = 6 hours x ROP 8.26 = 49.56 / 80 = £39.65

Gross April

9 hours from 26/03/20 – 31/03/20 = 74.34 / 80 = 49.47

24 hours from 01/04/20 – 07/04/20 = 198.24 / 80 = 158.592

24 hours from 08/04/20 – 15/04/20 = 198.24 / 80 = 158.592

24 hours from 16/04/20 – 23/04/20 = 198.24 / 80 = 158.592

24 hours from 24/04/20 – 30/04/20 = 198.24 / 80 = 158.592

TOT = £683.84

Gross May

24 hours from 01/05/20 – 07/05/20 = 198.24 / 80 = 158.592

24 hours from 08/05/20 – 15/05/20 = 198.24 / 80 = 158.592

24 hours from 16/05/20 – 23/05/20 = 198.24 / 80 = 158.592

24 hours from 24/05/20 – 31/05/20 = 198.24 / 80 = 158.592

24 x 4 x 8.26 TOT = 792.96 / 80 634.37

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- TOT holiday owing per month = 23.26 hol hours x new rop 8.72 = 202.84 / 80 = 162.28
- 634.37 furlough - 162.28 holiday = 472.10 + 202.84 full holiday amount = 674.94”

27. There are no breakdowns for June, July and August, but assuming that the respondent continued to deduct 80% of the holiday pay and the claimant's hourly rate remained at 8.26 an hour, the breakdown of the gross payments made to the claimant seems to be as follows:

Gross June

Holiday pay = **£125.54** = 14.4 hours = 3 days (paid at 8.72 per hour)

Wages = **£539.23**

Calculated as follows:

Before 80% of holiday pay (100.432) deducted = £639.66

639.66 before 20% deducted = £799.575

Gross July

Holiday pay = **£111.87** = 12.829 hours = 2.67 days

Wages = **£730.94**

Calculated as follows:

Before 80% of holiday pay (89.496) deducted = £820.436

820.436 before 20% deducted = £1025.55

Gross August

Holiday pay = **£127.20** = 14.58 hours = 3.03 days

Wages = **£424.70**

Calculated as follows:

Before 80% of holiday pay (101.76) deducted = £526.46

526.46 before 20% deducted = £658.07 (equivalent to approx. 3 weeks)

28. The payslips for 2019 show that the claimant's gross pay in the corresponding calendar periods in 2019 were:

March 2019

Full month = £1227.47

Amount referable to 3 days out of a 5 day week = £283.26/5 x 2 = **£113.30**

April 2019

£1238.39

May 2019

£1057.28

June 2019

£812.38

July 2019

£1433.94

August 2019

Full month = £1192.74 = £275.25 per week.

3 weeks (the equivalent period for which she was paid in August 2020) =

£825.75

29. The claimant's P60 for 2019-2020 shows that her annual pay for 2019/2020 was £13657.47 gross, which equates to an average of £1,138.12 per month.

Legal Background

The right not to suffer unauthorised deductions

30. Part II of the Employment Rights Act 1996 deals with claims for unlawful deduction from wages. Section 13 states:

(1) Right not to suffer unauthorised deductions

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 but not constituting "wages" within the meaning of this Part is not to be subject to a deduction at the instance of the employer.

The Coronavirus Job Retention Scheme

31. The statutory basis for the Coronavirus Job Retention Scheme (CJRS) is s 76 of the Coronavirus Act 2020, which provides the Treasury with the power to direct HMRC's functions in relation to Covid-19. Directions made by the Treasury under s 76 have legal force and the HMRC is bound to follow them. They are a form of legislation and can be amended or superseded by new directions.
32. The CJRS applicable to the relevant period was first set out in the Schedule to the Treasury direction made on 15 April 2020 (the 15 April direction). It was replaced by a scheme set out in the Schedule to a further direction on 20 May 2020 (the 20 May direction). The 20 May direction provides that the 15 April direction 'continues to have effect but is modified so that the scheme to which it relates is that set out in the Schedule to this direction'. This scheme (subject to minor amendments set out in part 1 of the schedule to the direction made on 25 June 2020), applies to the period from 1 March 2020 to 30 June 2020. I refer to it in this decision as 'the March CJRS'.
33. The scheme which applies from 1 July 2020 is set out in part 2 of the schedule to the direction issued on 25 June 2020 applies from 1 July 2020 until after the end of the claimant's employment. I refer to it in this decision as 'the July CJRS'.
34. The Government have also issued numerous pieces of guidance which have been updated multiple times. Guidance can be persuasive when interpreting legislation, but the language of the Treasury Direction, as a form of legislation, will prevail if there is inconsistency between the two. I have therefore focussed in this decision on the wording in the CJRS scheme set out in the Treasury Directions, rather than on the wording in the various iterations of guidance.

35. The relevant sections of the March CJRS and the July CJRS are set out in an annex to this decision.

Holiday pay

36. The Working Time Regulations 1998 entitle the worker to be paid in respect of any period of annual leave to which he or she is entitled under reg 13, and additional annual leave under reg 13A, at the rate of a week's pay in respect of each week of leave. The rate of a week's pay is to be calculated by reference to ss 221 to 224 of the ERA 1996, subject to modifications in reg 16(3).
37. With effect from 6 April 2020, the Employment Rights (Employment Particulars and Paid Annual Leave) (Amendment) Regulations 2018 SI 2018/1378 reg 10 amends WTR SI 1998/1833 reg 16 to provide for modifications of ERA 1996 ss 221-224, to the effect that where a worker has variable pay or hours, the reference period of 12 weeks becomes 52 weeks.
38. In accordance with with **Dudley MBC v Willetts** [2018] 31 and **East of England Ambulance Service NHS Trust v Neil Flowers and others** [2019] EWCA Civ 947 under the Working Time Directive 'normal remuneration' must be maintained in respect of the four week period of annual leave guaranteed by article 7 and overtime (whether compulsory, non-guaranteed or voluntary) will form part of normal remuneration if usually paid and regular across time. As set out in para 66 of **Bear Scotland v Fulton and another** [2015] ICR 221 this can be achieved by reading the following italicised words into the reg 16(3)(d) of the WTD to give full effect to the directive:
- (d) as if the references to sections 227 and 228 did not apply and, *in the case of the entitlement under regulation 13, sections 223(3) and 234 do not apply.*"
39. In relation to the remaining 8 days leave, which is additional leave under reg 13A, this does not apply.
40. An employer is entitled under reg 15(2) to require an employee to take annual leave by giving notice, but the notice must specify the days on which leave is to be taken.

Discussion and conclusions

Holiday pay

41. The claimant claims that her holiday pay from April 2020 should have been calculated on a different basis. Although the ET1 and the breakdown of claim state that the claimant was due 0.969231 weeks, it is clear from the documents in the bundle including her grievance that this is the amount that she says was due in May, and does not include the amounts due in June, July and August, which as set out under 'Claims and issues' above, also form part of her claim.

42. The employment contract provides that the claimant will take Working Time Holiday first, which I construe as a reference to the reg 13 four weeks (as there is no additional contractual holiday). Any holiday paid in this period, which did not exceed four weeks, will therefore be reg 13 leave.
43. Under the claimant's contract, holiday pay is calculated on the basis of 24 hours per week, however in accordance with Dudley MBC v Willetts [2018] 31 and East of England Ambulance Service NHS Trust v Neil Flowers and others [2019] EWCA Civ 947 under the Working Time Directive normal remuneration must be maintained in respect of the four week period of annual leave guaranteed by article 7 and overtime (whether compulsory, non-guaranteed or voluntary) will form part of normal remuneration if usually paid and regular across time.
44. On the facts in this case I find that the pattern of work, though voluntary, extends for a sufficient period of time on a regular and recurring basis to justify the description 'normal' and that it is sufficiently regular and settled for payments in respect of it to amount to 'normal remuneration'.
45. The calculation of holiday pay should therefore include the overtime worked. The claimant therefore has variable hours and the calculation of a weeks pay is based on a 52 week reference period due to the regulations introduced in April 2020. To simplify matters slightly, and as the claimant was on furlough from 23 March 2020, I have used the gross annual pay for 2019-2020 which is £13,675.47, which gives a weekly rate of £262.99, and a daily rate of £52.60.
46. I have calculated the number of days holiday paid in the relevant period to be 13.55 (see para 28 above). The overall amount of holiday properly payable was $13.55 \times £52.60 = £712.73$. The claimant was paid £567.45 for holiday pay during the relevant period. I find that there was an unlawful deduction of £145.28 and the claim for unlawful deductions (holiday pay) succeeds.

Pay during furlough

47. The CJRS provides the circumstances in which an employer can make a claim from HMRC. It does not automatically vary the employment contract between an employer and an employee. Without an agreed variation an employee would, in general, still be entitled to be paid in full during furlough.
48. In order for a claim to be made under the March CJRS an employer must have an agreement with the employee which specifies the main terms and conditions upon which the employee will cease all work in relation to their employment, and this agreement must either be in writing or be confirmed to the employee in writing and must be incorporated (expressly or impliedly) in the employee's contract (para 6.7). The July CJRS contains a similar requirement (para 13).
49. The letter to the claimant dated 25 March 2020 appears to be this agreement. It states:

The Government recently announced measures to assist businesses in the same situation as ours, which includes placing employees on 'furlough' through the Job Retention Scheme. Furlough is a period of leave. I am notifying you that you are being placed on furlough leave with effect from 23rd March 2020 and this will apply until you receive further instruction from us. Currently, we anticipate that you will be on leave until 31st May 2020.

The Government has confirmed it will provide grants to businesses to cover 80% of wage costs to a maximum of £2,500 per person per month, therefore, during the period of leave, you will receive 80% of your salary package subject to the maximum stated.

50. Although the letter does not expressly state that the terms of the agreement are incorporated into the claimant's contract of employment, I find that this is implied, because the letter, which asks the claimant to agree in writing to major variations to her contractual terms including a 20% reduction in pay and an agreement to cease work.
51. This letter sets out that the claimant is being placed on furlough 'through the Job Retention Scheme'. Further the letter sets out that the government has confirmed that it will provide grants to businesses to cover 80% of wage costs and 'therefore' the claimant will receive 80% of her salary package. I find that the effect of this express linkage to the CJRS is that the claimant's 'salary package' was to be calculated in accordance with the method to be set out in the CJRS, i.e. that the claimant was entitled to 80% of her 'reference salary' to be defined in the relevant CJRS. I find that this amounted to a variation of the terms of the claimant's contract, agreed to by the claimant when she signed and returned the attached form.
52. This conclusion is supported by para 7.1(b) of the March CJRS which provides that an employer is only entitled to claim under the CJRS if the employee is being paid an amount equal to at least 80% of the employee's reference salary. The effect of para 16.2 of the July CJRS is the same, although expressed in more complex terms due to the introduction of flexible furlough. A contractual term that the claimant's pay would be calculated in accordance with the CJRS would, in my view, have to be implied for the purposes of business efficacy, because an agreement to pay any lesser amount would have deprived the respondent of the opportunity to claim under the scheme.
53. This conclusion is further supported by Mr. Farooq's evidence that the respondent had calculated the amount payable in accordance with its interpretation of the CJRS.
54. On this basis, I find that the amount properly payable to the claimant under her contract during furlough was 80% of her reference salary, calculated in accordance with the March CJRS from 23 March to the end of June, and the July CJRS from 1 July to the date of termination.
55. The claimant is not a fixed rate employee as defined in para 7.6 of the March CJRS or para 19.1 of the July CJRS. She is not entitled to be paid an annual salary, nor can it be said that the basic hours worked in a salary period 'do not normally vary according to business... considerations'.

56. Therefore the claimant's reference salary, in accordance with para 7.2 of the March CJRS and para 20.1 of the July CJRS, is the greater of-

(a) the average monthly (or daily or other appropriate pro-rata) amount paid/payable 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/the amount earned by the employee in the corresponding calendar period in the previous year.

57. Under para 7.3 of the March CJRS the calculation of an employee's reference salary for the purposes of paragraphs 7.2 must not include anything which is not regular salary or wages. 'Regular' means so much of the amount of salary or wages as cannot vary according to a relevant matter except where the variation in amount arises from a non-discretionary payment. A 'non-discretionary payment' under para 7.19 includes a payment in respect of overtime if, inter alia, a legally enforceable agreement prescribes the method of calculating the amount of wages or salary payable in respect of the payment. Similar provisions exist in the July CJRS (see para 21.2 and 21.4).

58. Although not necessary for the purposes of this judgment, given my finding that the claimant was not a fixed rate employee, these provisions also apply to the calculation of the reference salary for fixed rate employees.

59. The claimant's overtime falls within this definition. The method of calculating the amount of wages payable for overtime is specified in her contract. The overtime worked should therefore be included when calculating her reference salary.

60. The relevant figures, of which the greater should be used, are:

Corresponding calendar period in 2019:

March 2019

£113.30

April 2019

£1238.39

May 2019

£1057.28

June 2019

£812.38

July 2019

£1433.94

August 2019

£825.75

Average for 2019-2020

£13657.47 gross = **£1,138.12 per month/£262.64 per week**

61. Taking the greater of those figures for each month, I find that the reference salaries for the months in 2020 are therefore:

March 2020: £113.30

April 2020: £1,238.39

May 2020: £1,138.12

June 2020: £1,138.12

July 2020: £1,433.94

August 2020: £825.75

TOTAL = £5,887.62

62. Ignoring any holiday pay, the claimant should therefore have been paid 80% x 5612.37 = **£4,710.09**

63. Although the respondent purported to give notice requiring the claimant to take annual leave during furlough, this was sent to the claimant's old address. Further the letter did not satisfy the requirements of regulation 15(2) because it did not specify the days on which leave must be taken.

64. The claimant argues that the failure to give proper notice means that the payments made to her for annual leave during furlough should not be taken into account when calculating how much she is owed.

65. I do not accept that this is the correct approach. I have to determine whether the claimant has been paid less than was properly payable during the furlough period. It is appropriate to assess the furlough pay only in relation to the periods to which it is referable. I must therefore discount the periods for which the claimant was paid holiday.

66. To do this, I have deducted 80% of the holiday pay properly payable for the entire period from the total furlough amount: 80% x £712.73 = **£570.18**

67. The total amount properly payable for salary during the furlough period is therefore: **£4,139.92**

68. The total amount that the claimant received in this periods, excluding holiday pay was:

March 2020 – £39.65

April 2020 - £693.84

May 2020 – £472.10

June 2020 – £539.23

July 2020 – £730.84

August 2020 – £424.70

TOTAL = £2900.36

69. The unlawful deduction therefore amounts to 4,139.92 – 2900.36 = **£1239.56.36**. On this basis the claimant's claim for unlawful deductions (furlough pay) succeeds.

ANNEX: Relevant provisions of the CJRS

70. The March CJRS contains the following relevant provisions:

Purpose of scheme

2.1 The purpose of CJRS is to provide for payments to be made to employers on a claim made in respect of them incurring costs of employment in respect of furloughed employees arising from the health, social and economic emergency in the United Kingdom resulting from coronavirus and coronavirus disease.

2.2 Integral to the purpose of CJRS is that the amounts paid to an employer pursuant to a claim under CJRS are only made by way of reimbursement of the expenditure described in paragraph 8.1 incurred or to be incurred by the employer in respect of the employee to which the claim relates.

Furloughed employees

6.1 An employee is a furloughed employee if-

- (a) the employee has been instructed by the employer to cease all work in relation to their employment,
- (b) the period for which the employee has ceased (or will have ceased) all work for the employer is 21 calendar days or more, and
- (c) the instruction is given by reason of circumstances arising as a result of coronavirus or coronavirus disease.

6.7 An employee has been instructed by the employer to cease all work in relation to their employment only if-

- (a) the employer and employee have agreed that the employee will cease all work in relation to their employment (such agreement may be made by means of a collective agreement between the employer and a trade union),
- (b) the agreement (including a collective agreement)-
 - (i) specifies the main terms and conditions upon which the employee will cease all work in relation to their employment,
 - (ii) is incorporated (expressly or impliedly) in the employee's contract, and
 - (iii) is made in writing or confirmed in writing by the employer (such agreement or confirmation may be in an electronic form such as an email), and

(c) the agreement (including a collective agreement) or confirmation is retained by the employer until at least 30 June 2025.

...

Qualifying costs – further conditions

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.

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.

7.3 The following must not be included in the calculation of an employee's reference salary for the purposes of paragraphs 7.2 and 7.7-

(a) benefits in kind;

(b) anything provided or made available in lieu of a cash payment otherwise payable to the employee (including salary sacrifice schemes);

(c) anything which is not regular salary or wages.

7.4 In paragraph 7.3(c) "regular" in relation to salary or wages means so much of the amount of the salary or wages as-

(a) cannot vary according to a relevant matter except where the variation in the amount arises from a non-discretionary payment (see paragraph 7.19), and

(b) arises from a legally enforceable agreement, understanding, scheme, transaction or series of transactions.

7.5 For the purposes of paragraph 7.4(a), the following are relevant matters-

(a) the performance of or any part of any business of the employer or any business of a person connected with the employer;

(b) the contribution made by the employee to the performance of, or any part of any business;

- (c) the performance by the employee of any duties of the employment;
- (d) any similar considerations or otherwise payable at the discretion of the employer or any other person (such as a gratuity).

7.6 A person is a fixed rate employee if-

- (a) the person is an employee or treated as an employee for the purposes of CJRS by virtue of paragraph 13.3(a) (member of a limited liability partnership),
- (b) the person is entitled under their contract to be paid an annual salary,
- (c) the person is entitled under their contract to be paid that salary in respect of a number of hours in a year whether those hours are specified in or ascertained in accordance with their contract (“the basic hours”),
- (d) the person is not entitled under their contract to a payment in respect of the basic hours other than an annual salary,
- (e) the person is entitled under their contract to be paid, where practicable and regardless of the number of hours actually worked in a particular week or month in equal weekly, multiple of weeks or monthly instalments (“the salary period”), and
- (f) the basic hours worked in a salary period do not normally vary according to business, economic or agricultural seasonal considerations.

7.7 The reference salary of a fixed rate employee is the amount payable to the employee in the latest salary period ending on or before 19 March 2020 (but disregarding anything which is not regular salary or wages as described in paragraph 7.3).

7.8 In paragraph 7.6 “contract” means a legally enforceable agreement as described in paragraph 7.4(b).

...

7.19 A variation in an amount of wages or salary arises from a non-discretionary payment only if-

- (a) the payment-
 - (i) is in respect of overtime, fees, commissions or a piece rate,
 - (ii) is made in recognition of the employee undertaking additional or exceptional responsibilities,
 - (iii) is made in recognition of the circumstances in which the employee undertakes the employee’s duties or time when they are undertaken, or
 - (iv) is made in recognition of other matters similar to those described in paragraph 7.19(a)(i) to (iii), and
- (b) a legally enforceable agreement, understanding, scheme, transaction or series of transactions prescribe the method of calculating the amount of wages or salary payable in respect of the payment (whether or not that method involves the exercise of discretion by the employer or a person connected with the employer).

71. The July CJRS contains the following relevant provisions:

Purpose of CJRS

2.1 The purpose of CJRS is to provide for payments to be made to employers on a claim made in respect of them incurring costs of employment in respect of employees who are within the scope of CJRS arising from the health, social and economic emergency in the United Kingdom resulting from coronavirus and coronavirus disease.

2.2 Integral to the purpose of CJRS is that the amounts paid to an employer pursuant to a CJRS claim are used by the employer to continue the employment of employees in respect of whom the CJRS claim is made whose employment activities have been adversely affected by the coronavirus and coronavirus disease or the measures taken to prevent or limit its further transmission.

...

Provision in respect of CJRS for the period beginning on 1 July 2020 and ending on 31 October 2020

Entitlement to make a CJRS claim

7 A CJRS claim may be made by a qualifying employer in respect of an employee who is a flexibly-furloughed employee in a CJRS claim period.

...

Flexibly-furloughed employees

10.1 An employee is a flexibly-furloughed employee in a CJRS claim period if:

- (a) the employee is a qualifying employee for the purposes of CJRS,
- (b) the employee has been instructed by the employer
 - (i) to do no work in relation to their employment during a CJRS claim period, or
 - (ii) not to work the full amount of the employee's usual hours in relation to their employment during a CJRS claim period,
- (c) the employee
 - (i) does no work in relation to their employment during the CJRS claim period, or
 - (ii) does not work the full amount of the employee's usual hours in relation to their employment during the CJRS claim period,
- (d) the instruction is given by reason of circumstances arising as a result of coronavirus or coronavirus disease or measures taken to prevent or limit its further transmission, and
- (e) there is an agreement in accordance with paragraph 13 having effect for the period covered by the CJRS claim period.

...

Agreement between employer and employee

13 An agreement is in accordance with this paragraph if:

- (a) the employer and employee have agreed (such agreement may be made by means of a collective agreement between the employer and a trade union) that

- (i) the employee will do no work in relation to their employment, or
 - (ii) the employee will not work the full amount of the employee's usual hours in relation to their employment,
- (b) the agreement (including a collective agreement) specifies the main terms and conditions upon which the employee
- (i) will do no work in relation to their employment, or
 - (ii) will not work the full amount of the employee's usual hours in relation to their employment,
- (c) the agreement (including a collective agreement)
- (i) is made before the beginning of the period to which the CJRS claim relates (but may subsequently be varied to reflect any variation agreed between the employer and employee during the period to which the CJRS claim relates),
 - (ii) is incorporated (expressly or impliedly) in the employee's contract, and
 - (iii) is made in writing or confirmed in writing by the employer (such agreement or confirmation may be in an electronic form such as an email), and
- (d) the agreement (including a collective agreement) or confirmation is retained by the employer until at least 30 June 2025.

...

Qualifying costs

16.1 The costs of employment in respect of which an employer may make a CJRS claim are costs which:

- (a) relate to an employee who is a flexibly-furloughed employee for the CJRS claim period,
- (b) relate to the payment of earnings to the employee during that period, and
- (c) meet the condition in paragraph 16.2 in relation to the employee's furloughed hours occurring in the CJRS claim period.

16.2 The condition referred to in paragraph 16.1(c) is that the amount payable to the employee in relation to the employee's furloughed hours occurring in the CJRS claim period is an amount equal to or more than an amount determined in accordance with:

- (a) the formula set out in paragraph 16.3, or
- (b) if the amount payable to the employee in relation to the employee's furloughed hours occurring in the CJRS claim period is less than the amount determined in accordance with the formula set out paragraph 16.3, the formula set out in paragraph 16.4.

...

16.5 For the purposes of paragraphs 16.3 and 16.4:

- (a) A is
 - (i) £2500 if the CJRS claim period covers the whole of the CJRS calendar month to which the CJRS claim relates, or

(ii) if the CJRS claim period is for a period that does not cover the whole of the CJRS calendar month to which the claim relates, the appropriate pro-rata

(b) B is the amount which is 80% of the employee's reference salary attributable to the CJRS claim period of the CJRS claim

...

16.9 The condition in paragraph 16.2 is not met if the amount payable in respect of the employee is not paid to the employee.

Simplification of a CJRS claim allowable where an employee does no work in a CJRS claim period

17.1 Where an employee does no work in a CJRS claim period, paragraph 16.2 may be applied as if the condition in that paragraph required the amount payable to the employee in respect of the CJRS claim period to be an amount equal to or more than an amount determined in accordance with:

(a) the amount A (see paragraph 16.5(a)), or

(b) the amount B (see paragraph 16.5(b)) if the amount payable in respect of the CJRS claim period is less than the amount A.

17.2 Where paragraph 16.2 is applied as described in paragraph 17.1, the provision made by Part 2 of this Schedule (in particular, paragraphs 16.5 to 16.8, 30 and 31.1 to 31.4) must be construed accordingly.

Reference salary

18 The reference salary of an employee must be determined in accordance with:

(a) paragraphs 19.1 to 19.8 and 21.1 to 21.7 if the employee is a fixed rate employee, and

(b) paragraphs 20.1 and 20.2 and 21.1 to 21.7 if the employee is not a fixed rate employee.

Reference salary - fixed rate employees

19.1 A person is a fixed rate employee if:

(a) the person is

(i) an employee, or

(ii) treated as an employee for the purposes of CJRS by virtue of paragraph 41.3(a) (member of a limited liability partnership),

(b) the person is entitled under their contract to be paid an annual salary,

(c) the person is entitled under their contract to be paid that salary in respect of a number of hours in a year whether those hours are specified in or ascertained in accordance with their contract ("the basic hours"),

(d) the person is not entitled under their contract to a payment in respect of the basic hours other than an annual salary,

(e) the person is entitled under their contract to be paid, where practicable and regardless of the number of hours actually worked in a particular week or month in equal weekly, multiple of weeks or monthly instalments, and

(f) the basic hours worked in a salary period do not normally vary according to business, economic or agricultural seasonal considerations.

19.2 The reference salary of a fixed rate employee is the amount payable to the employee in the latest salary period ending on or before 19 March 2020 (but disregarding anything which is not regular salary or wages as described in paragraph 21.1).

19.3 In paragraph 19.1, “contract” means a legally enforceable agreement as described in paragraph 21.2(b).

...

Reference salary - employees other than fixed rate employees

20.1 In relation to an employee who is not 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 41.3(a) (member of a limited liability partnership) is the greater of:

(a) the average monthly (or daily or other appropriate pro-rata) amount payable to the employee in the period comprising the tax year 2019-20 (or, if less, the period of employment) before the period of furlough began, and

(b) the amount earned by the employee in the corresponding calendar period in the previous year.

20.2 The period of time by reference to which an employee’s reference salary is determined in accordance with paragraph 20.1 must be treated as the salary period by reference to which the employee’s reference salary is determined for the purposes of paragraphs 16.6 to 16.8.

Reference salary - general provisions

21.1 The following must not be included in the calculation of an employee’s reference salary for the purposes of paragraphs 19.2 and 20.1:

(a) benefits in kind

(b) anything provided or made available in lieu of a cash payment otherwise payable to the employee (including salary sacrifice schemes)

(c) anything which is not regular salary or wages.

21.2 In paragraph 21.1(c) “regular” in relation to salary or wages means so much of the amount of the salary or wages as:

(a) cannot vary according to a relevant matter except where the variation in the amount arises from a non-discretionary payment (see paragraph 21.4), and

(b) arises from a legally enforceable agreement, understanding, scheme, transaction or series of transactions.

21.3 For the purposes of paragraph 21.2(a), the following are relevant matters:

(a) the performance of or any part of any business of the employer or any business of a person connected with the employer;

(b) the contribution made by the employee to the performance of, or any part of any business;

(c) the performance by the employee of any duties of the employment;

(d) any similar considerations or otherwise payable at the discretion of the employer or any other person (such as a gratuity).

21.4 A variation in an amount of wages or salary arises from a non-discretionary payment only if:

(a) the payment

(i) is in respect of overtime, fees, commissions or a piece rate,

(ii) is made in recognition of the employee undertaking additional or exceptional responsibilities,

(iii) is made in recognition of the circumstances in which the employee undertakes the employee's duties or time when they are undertaken, or

(iv) is made in recognition of other matters similar to those described in paragraph 21.4(a)(i) to

(iii), and

(b) a legally enforceable agreement, understanding, scheme, transaction or series of transactions prescribe the method of calculating the amount of wages or salary payable in respect of the payment (whether or not that method involves the exercise of discretion by the employer or a person connected with the employer).

Employment Judge Buckley

Date 19 March 2021

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.

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