EMPLOYMENT TRIBUNALS

Claimant: Mr M Williams

Respondent: Counterline Ltd

Heard at: Manchester (by CVP) **On:** 1 February 2021

Before: Employment Judge Slater

REPRESENTATION:

Claimant: In person
Respondent: Ms J Platt, solicitor

JUDGMENT

The judgment of the Tribunal is that:

1. The complaint of unauthorised deduction from wages in relation to the period 23 to 27 March 2020 is not well-founded.

2. The respondent was not entitled to require the claimant to take accrued leave to the end of June 2020 to the extent it was not possible for the claimant to take it in the period 12-30 June 2020 inclusive.

3. The respondent made unauthorised deductions from wages by failing to pay the claimant the full amount due for holiday pay, and the respondent is ordered to pay to the claimant the gross sum of £70.57, being the total gross amount unlawfully deducted.

4. The Tribunal has no jurisdiction to make an award for compensation for time spent bringing a claim or for distress caused, although an application for a preparation time order could be made following this judgment, as explained to the claimant.

REASONS

Claims and Issues

1. This was a claim about unauthorised deductions from wages relating to a period in respect of which the claimant received Statutory Sick Pay (SSP) but asserted that he was on furlough and entitled to 80% of pay and about the amount of holiday pay the claimant received during a period on furlough and at the end of his employment.

2. We had a lengthy discussion at the start of the hearing about the complaints and I clarified with the parties that the issues of principle I needed to consider were as follows:

2.1. Whether, in relation to the period 24 to 27 March 2020 the claimant was entitled only to SSP or whether he was entitled to 80% of normal pay (being the amount paid during time spent on furlough).

2.2. Whether the respondent had incorrectly set off holiday carried forward from the 2019 holiday year against 2020 holiday entitlement.

2.3. Whether the respondent was entitled to require the claimant to take as holiday periods when the claimant was on furlough and, if the respondent had the contractual right to do so, whether the respondent exercised that right in accordance with the contractual term.

3. I informed the parties that I would deal with these matters of principle first, then I would consider, after discussion with the parties, whether there had been any unauthorised deduction from wages and, if so, of what amount.

The Evidence

4. I heard evidence from the claimant and from Mr Simon Dutton, Finance Director, for the respondent. Mr Dutton had prepared a witness statement. The claimant had not prepared a witness statement, but we agreed to treat a document dated 9 November 2020 headed “Declaration of Claim” which had been written by the claimant and was included in the bundle of documents, as the claimant’s witness statement.

5. I had an electronic bundle of documents. In addition, during the course of the hearing, the claimant emailed a photograph of part of the holiday pay clause of his signed contract. The other part of this clause had been included in the bundle.

The Facts

6. The claimant had a contract of employment in writing with the respondent. I was not given a full copy of the signed version; however, it was agreed between the parties, after the claimant sent a photograph of the holiday pay clause in his signed contract, that the holiday pay clause was identical to that contained in the pro forma copy of the contract which had been included in the electronic bundle. The relevant part of the holiday pay clause is as follows:

> "The company may require you to take all or part of any outstanding holiday entitlement and reserves the right not to provide you with advance notice of this requirement."

7. The claimant agrees that the contract also provided for statutory sick pay only to be paid during sick leave.

8. On 18 March 2020, the claimant notified the respondent that he had to self-isolate for 14 days due to having coronavirus symptoms. He was paid statutory sick pay. The last day of isolation would have been 31 March.

9. From 30 March 2020 the claimant was paid at 80% of normal pay, although during 30-31 March 2020 he was still in a period of self-isolation. I find, on the basis of evidence from Mr Dutton, that furlough payments were not claimed in respect of the claimant for the week of 23-27 March 2020.

10. Mr Dutton says he understands from Mr Shillcock, the claimant's manager, that Mr Shillcock told the claimant verbally at the end of March that he was being furloughed following his period of self-certified sick leave. The claimant said he did not recall this. On the basis of the claimant's evidence, I find that the claimant was not told before 30 March that he was being placed on furlough. The claimant knew, however, from work colleagues that the site had closed on 23 March in accordance with the national lockdown due to the coronavirus pandemic.

11. On 15 April 2020, HMRC issued new guidelines which said that employees' agreement in writing had to be obtained for employees to be placed on furlough. Previously the guidance had suggested that employees just needed to be told that they were being placed on furlough.

12. In accordance with these new guidelines, on 18 April 2020, the respondent sent a generic letter to all employees advising them that they were on furlough from 24 March 2020 and seeking their written agreement to this. The letter informed employees that the respondent intended to pay them 80% of their normal pay during furlough leave, subject to a cap of £2,500 per month.

13. On 21 April 2020 the claimant signed a letter consenting to being given furlough status.

14. By a letter dated 11 June 2020 to all employees sent by email at 14:31 on that day, employees, including the claimant, were informed that they had to take their holidays which had been accrued to 30 June by 30 June.

15. It is agreed that the claimant had not taken any holidays in 2020 before the furlough period began, other than three days which related to 2019 leave which was carried over. The parties have agreed that the accrual rate of holiday is 4.9 hours per week. On this basis, to the end of June 2020 I calculate that the claimant had accrued 127.4 hours of holiday (26 weeks x 4.9). The claimant worked 38.5 hours per week, 7.7 hours per day. 127.4 hours equated to 3.3 working weeks or three weeks and 11.9 hours, or nearly 16.5 working days. The period 12-30 June inclusive is 13 working days. The claimant earning the National Living Wage which, from April 2020, was £8.72 per hour.

16. On 15 July 2020, the respondent sent the claimant and other employees an email explaining how the payment for holiday pay was calculated.

17. By email dated 30 July 2020 the claimant and other employees were advised that holidays accrued in July must be taken in the next seven days, and holidays accrued into August must be taken on a weekly basis.

18. The claimant was made redundant with effect from 21 August 2020.

19. Payments for holiday pay were made on 16 July, 13 August and 21 August. The respondent accepts that various errors were made in those calculations. The respondent asserts that the errors had been corrected by payments after the termination of the claimant's employment. I dealt with the detail of the payments and the correction, after making and delivering my decisions on the issues of principle. This is set out later in these reasons under the heading “Calculation of amount due”.

The Law

20. The Working Time Regulations 1998 at regulation 15 set out that a worker’s employer may require a worker to take leave to which they are entitled under the Working Time Regulations on particular days by giving notice to the worker in accordance with the provisions set out in paragraph (3) of regulation 15. However, regulation 15(5) states that any right or obligation under the preceding paragraphs in regulation 15 may be varied or excluded by a relevant agreement. A relevant agreement is defined in regulation 2(1) as including an agreement in writing which is legally enforceable as between the worker and his employer.

21. The Coronavirus Job Retention Scheme allowed employers to claim 80% of normal pay of employees placed on furlough. However, the scheme did not itself alter contractual rights between employers and employees. The contract of employment had to be varied by agreement between the employer and employee for the rate of pay to be reduced to 80% of normal pay (subject to the cap which applied).

Conclusions

<u>24-27 March 2020</u>

22. Under the terms of the claimant’s contract, he had a contractual entitlement only to SSP during periods of sick leave.

23. In relation to the period 24-27 March 2020, I conclude that the claimant was on sick leave during this time and was entitled to statutory sick pay during that period. The claimant was paid SSP.

24. The respondent could have chosen to place the claimant on furlough during this week but nothing required the respondent to do so. The claimant was not informed during this period that he was placed on furlough. I conclude that a generic letter issued on 15 April could not change the claimant's contractual entitlement to sick leave/sick pay for the earlier period of 23-27 March 2020.

25. I, therefore, conclude that the claimant remained entitled only to statutory sick pay during that period.

26. I conclude, therefore, that the complaint in relation to this period is not well-founded. There was no unauthorised deduction from wages in respect of that week.

Holiday Pay

27. I turn then to the matter of holiday pay. We did identify an issue as to whether the leave carried over from 2019 had been incorrectly taken into account in calculating the leave for 2020. Provided that the claimant was paid his full holiday entitlement for 2020, the 2019 carried over leave would not have been set against this. This, however, required a detailed examination of the amounts due, which I did with the parties after I had given my decision on the other issues of principle, so I deferred dealing with that particular issue about the carried over leave.

28. I conclude that the contract term, which I quoted earlier, excluded the obligation which would otherwise fall on the respondent under regulation 15 of the Working Time Regulations, to give notice in accordance with regulation 15 for the employee to take leave.

29. In accordance with that contract term, I conclude that the respondent was entitled to require the claimant to take all or part of any outstanding holiday entitlement during the furlough period, to the extent it was possible for the claimant to do so.

30. In respect of any holiday period that was taken during the furlough period, the respondent was required to pay the claimant 100% of his normal rate of pay, but this could be made up of 80% furlough money topped up to 100% by the respondent paying the further 20%.

31. I conclude that the contract term, properly construed, could only entitle the respondent to require the claimant to take holiday within a certain period if it was possible for the claimant to take that holiday in the time stated.

32. I conclude that the respondent was entitled to require the claimant to take holiday accrued in the period to 30 June 2020 by 30 June 2020 to the extent that it was possible to take the accrued leave by that date. The earliest date that leave could be taken was 12 June, since the letter requiring the claimant to take accrued leave was not sent until the afternoon of 11 June. Since the claimant's accrued entitlement to 30 June exceeded the working time in the period 12-30 June, the respondent could not require the claimant to take the excess during the furlough period up to 30 June. The respondent's letter of 11 June and subsequent letters did not require the claimant to take holiday accrued to 30 June which could not be fitted in by 30 June by any later date. I, therefore, conclude that this amount of accrued entitlement remained outstanding at the end of the claimant's employment.

33. I conclude that the respondent, by its letter of 30 July, was entitled to require the claimant to take holiday accrued in July in the seven days following that letter, and holidays accrued in August on a weekly basis, and it was possible for the claimant to do this.

34. I conclude, therefore, that with the exception of the excess of the leave accrued to the end of June over the period 12-30 June the respondent was entitled to require the claimant to take accrued leave prior to 21 August.

35. In respect of annual leave which the respondent required the claimant to take during the furlough period and which could be taken during the furlough period, that amount of time was holiday, rather than normal furlough time, and the claimant was entitled to be paid 100% of normal pay in respect of those periods. This 100% could be made up of 80% furlough pay, which the respondent was receiving from the government under the furlough scheme, with the remaining 20% topped up by the respondent. The claimant was not entitled, as he seems to think, to be paid 80% of furlough pay and 100% normal pay as holiday pay in respect of the same period of time. The claimant's confusion in this respect may have been contributed to by the way the respondent described payments on the payslips, showing the 80% part as "furlough" money and the 20% top up as "holiday" and by the many mistakes the respondent made in calculating what was due. The respondent sought to correct these mistakes by further payments after the claimant's employment had ended.

36. In respect of the excess accrued to the end of June, the claimant was entitled to have been paid in lieu of this on termination of employment.

Calculation of amount due

37. After giving judgment on the principles I calculated the amount due to the claimant in discussion with the parties. The respondent agreed with my calculations. The claimant did not, although he agreed with some of the constituent parts. It appeared to me that the claimant's disagreement related to his belief that he was entitled to both 100% holiday pay and 80% furlough money in respect of the periods the respondent had required him to take during the furlough period, rather than to a disagreement with my calculation.

38. The parties agreed that the amount of accrued leave in the period 1 January to 21 August 2020 was 166.6 hours. The claimant accrued 127.4 hours in the period 1 January to 30 June (26 x 4.9 hours). The claimant worked 7.7 hours per day in the period 12 June to 30 June, or 13 working days, so the number of hours in that period was 100.10. The excess of accrued holiday over the amount of time the claimant was able to take in the period 12-30 June was therefore 127.4 – 100.1 = 27.3 hours. The claimant was entitled to be paid at the rate of 100% for these 27.3 hours at the National Minimum Wage rate of £8.72 per hour. This made a total of £238.06. Because the claimant had received furlough pay for the rest of the period which was designated during the furlough period as being leave, the respondent had to top this up by a further 20% so that the claimant received in total 100% of pay for those weeks of leave. The hours of leave to which this applied was 166.6 – 27.3 = 139.3 hours. 139.3 x 20% x 8.72 = £242.94.

39. I, therefore, calculated that the claimant was entitled to holiday payments in addition to the furlough payments for the relevant periods of £238.06 plus £242.94 = £481.00. The payslips showed a 20% top-up of holiday pay, although there were errors in the initial payments which meant that further payments were also made. The total payments made in respect of the 20% top-up for holiday taken during furlough was as follows. The respondent agreed to leave aside a payment of £9.25 which was made after the termination of employment in doing this calculation. The amounts paid were as follows: £159.57 on 16 July; £24.27 on 13 July; £121.67 on 27 July; and £104.92 on 15 September, making a total of £410.43.

40. The amount due to the claimant was the difference between the amount due of £481 and the amount paid of £410.43, which is £70.57. I conclude that the respondent made an unauthorised deduction from wages of this gross amount and order the respondent to pay this sum to the claimant.

41. I explained to the claimant when discussing the claims and issues, that the Tribunal has no power to award compensation for distress or time spent in bringing a claim, although the Tribunal has power to make a preparation time order in respect of time an unrepresented party spends in preparing a claim, in limited circumstances. I said I would explain this further after making my decision. After giving my decision, I referred the claimant to the Tribunal's power to make a preparation time order in the limited circumstances in rule 76 of the Employment Tribunals Rules of Procedure 2013 which state that a Tribunal may make a costs order or a preparation time order, and shall consider whether to do so, where it considers that:

> "(a) a party (or that party's representative) has acted vexatiously, abusively, disruptively or otherwise unreasonably in either the bringing of the proceedings (or part) or the way that the proceedings (or part) have been conducted; or
>
> (b) any claim or response had no reasonable prospect of success; or
>
> (c) a hearing has been postponed or adjourned on the application of a party made less than 7 days before the date on which the relevant hearing begins."

42. The claimant did not make an application for a preparation time order at this hearing. He may apply for a preparation time order up to 28 days after this judgment is sent to the parties. I apologise that I incorrectly stated the time limit to be 14 days during the hearing.

The judgment and reasons

43. I gave oral judgment and reasons on the day of the hearing. The claimant requested written reasons, which have, therefore, been provided.

Employment Judge Slater

Date: 5 February 2021

JUDGMENT AND REASONS SENT TO THE PARTIES ON

9 February 2021

FOR THE TRIBUNAL OFFICE

THE EMPLOYMENT TRIBUNALS (INTEREST) ORDER 1990

Tribunal case number: **2415712/2020**

Name of case: **Mr M Williams** v **Counterline Ltd**

The Employment Tribunals (Interest) Order 1990 provides that sums of money payable as a result of a judgment of an Employment Tribunal (excluding discrimination or equal pay awards or sums representing costs or expenses), shall carry interest where the sum remains unpaid on a day ("*the calculation day*") 42 days after the day ("*the relevant judgment day*") that the document containing the tribunal's judgment is recorded as having been sent to the parties.

The rate of interest payable is that specified in section 17 of the Judgments Act 1838 on the relevant judgment day. This is known as "the stipulated rate of interest" and the rate applicable in your case is set out below.

The following information in respect of this case is provided by the Secretary of the Tribunals in accordance with the requirements of Article 12 of the Order:-

"the relevant judgment day" is: **9 February 2021**

"the calculation day" is: **10 February 2021**

"the stipulated rate of interest" is: **8%**

For and on Behalf of the Secretary of the Tribunals