



EMPLOYMENT TRIBUNALS

Claimant

Respondent

- | | | |
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| 1. Mrs L Farrow | v | Chesterton Community College |
| 2. Mrs J Harnwell | | |

Heard at: Cambridge
Before: Employment Judge Ord

On: 21 and 22 April 2022

Appearances

For the Claimants: Ms Farrow – represented herself
Mrs Harnwell resented by Mr R Harnwell, lay representative

For the Respondent: Ms C Duffy, Counsel

RESERVED JUDGMENT

1. The claimants' claims that they suffered unlawful deductions from their wages are not well founded and the claims are dismissed,

REASONS

Background

1. Each of the claimants brought claims for unlawful deductions from wages relating to cancelled examinations, cancelled during the coronavirus pandemic. Each of the claimants work as examination invigilators and Ms Farrow also carried out work relating to examination administration and preparation.
2. The respondent denied all the claimants' claims. The respondent says that the claimants were casual workers, as defined in s.230(3)(B) of the Employment Rights Act 1996.

The issues

3. The issues for determination at the hearing were as follows:
 - 3.1 What was the status of the claimants? The claimants say that they were employees of the respondent; the respondent says that they were casual workers.

- 3.2 What sums, if any, are due to the claimants in respect of examinations that were cancelled in 2020?

The hearing

4. Each claimant gave evidence and on behalf of the respondent evidence was called from Tracy Sendall. Reference was made to a bundle of documents and each side was given the opportunity to make closing arguments.

The facts

5. Based on the evidence I have heard the facts of this case are found to be as follows:
- 5.1 The history of each case (all are to be heard together at a case management hearing on 14 December 2021) is as follows.
6. Mrs Harnwell
- 6.1 The claimant had carried out work from time to time relating to examinations at the respondent's college since 7 May 2009 on a series of short term contracts.
- 6.2 The claimant says that she had been continuously employed since that date.
- 6.3 The claimant carried out work relating to the invigilation of practical and oral examinations and was contacted by the respondent for her availability in the period 9 March 2020 to 4 May 2020.
- 6.4 The claimant responded with confirmation of her availability.
- 6.5 In March 2020 the claimant was sent a list of dates for GCSE examinations between 11 May and 19 June 2020. The email stated that "If you confirm these slots we will be depending on you so please treat them as carved in stone".
- 6.6 On 17 and 18 March 2020 dates were finalised.
- 6.7 On 19 March 2020 the respondent wrote to the claimant confirming that all examinations scheduled in the period March to June 2020 had been cancelled due to the coronavirus pandemic.
- 6.8 The claimant sought confirmation of the respondent's position regarding payment for the cancelled days.

- 6.9 On 6 April 2020 the respondent confirmed that no payment would be made. After further exchanges of emails this was repeated on the 7 May 2020.
 - 6.10 The claimant presented a grievance on 19 May 2020 which was rejected on 3 June 2020.
 - 6.11 On 15 June 2020 the claimant appealed this decision to the Chair of Governors. That appeal was rejected on 29 June 2020.
 - 6.12 The claimant began early conciliation through Acas on 22 June 2020. The certificate is dated 30 July 2020.
 - 6.13 The claimant presented her claim to the tribunal on 28 August 2020 claiming unlawful deductions from wages.
7. 3313391/20 Mrs Farrow
- 7.1 The claimant says she has been continuously employed by the respondent since 15 April 2013 lately as a "Exams Assistant and Senior Invigilator".
 - 7.2 On the timetable of events up to 19 March 2020 is the same as for Ms Harnwell.
 - 7.3 The claimant was told on 1 April 2020, following an enquiry, that no payment would be made for the work that had been cancelled.
 - 7.4 On 8 May 2020, following an enquiry on the same date, the claimant was told that furlough was not available.
 - 7.5 The claimant raised a grievance on 29 September 2020 which was rejected on 15 October 2020.
 - 7.6 The claimant appealed that decision on 20 October 2020, which appeal was rejected.
 - 7.7 The claimant began early conciliation on 29 September 2020 and her certificate is dated 14 October 2020.
 - 7.8 On 9 November 2020 the claimant presented her claim form to the tribunal claiming unlawful deductions from wages.
8. The respondent's position;
9. In each case the respondent says that the claimant is a casual worker and does not have continuity of employment as alleged.
 10. The Respondent says that during the entire period since each of the claimants was first engaged by the respondent:
 - 10.1 There was no obligation on the respondent to offer work;

- 10.2 There was no obligation on the claimant's to accept work;
- 10.3 Neither claimant had any regular or fixed hours of work or pattern of work as well as no guarantee of work;
- 10.4 Neither claimant was subject to the respondent's internal procedures.
- 10.5 Neither claimant is entitled to bring a claim for unlawful deduction from wages as they were not contractually entitled to receive any pay.

The law

11. Under s.13 of the Employment Rights Act 1996:-

- “(1) An employer shall not make a deduction from wages of a worker employed by him unless—
 - (a) the deduction is required or authorised to be made by virtue of a statutory provision or a relevant provision of the worker's contract, or
 - (b) the worker has previously signified in writing his agreement or consent to the making of the deduction.”

12. S.27 of the Act:

“27 Meaning of “wages” etc.

- (1) In this Part “wages”, in relation to a worker, means any sums payable to the worker in connection with his employment”

13. S.230(1) of the Act:-

230 Employees, workers etc

- (1) 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.

14. In s.230(3):-

- “(3) In this Act “worker” means an individual who has entered into or works under ...
 - (a) a contract of employment, or
 - (b) any other contract, whether express or implied and (if it is express) or business undertaking carried on by the individual.”

15. In deciding what any worker is contractually entitled to receive by way of wages, the tribunal should follow the process adopted by the Civil Courts in contractual actions – Greg May (Carpet Fitters and Contractors) Ltd v Dring

[1990] ICR 188 (EAT), ie, on the ordinary principles of common law and contract, what s the total amount of wages that was properly payable to the worker on the relevant occasion.

16. Determining what wages are “properly payable” requires a consideration of all the relevant terms of the contract (Camden Primary Care Trust v Atchoe [2007] EWCA Civ 714) Court of Appeal).
17. The payment in question must be capable of quantification of what constitutes wages properly payable under s.13(3) of the Employment Rights Act 1996 – In Coors Brewers Ltd v Adcock and others [2007] ICR 983, the Court of Appeal held that the claimants could not rely on sums that were incapable of quantification or where there was no date on which the claimants could say the employer had made an unlawful deduction of a quantified amount from their wages.

The facts

18. In substantial part the facts of these matter are not in dispute.
19. Each of the claimants was engaged from time to time by the respondent in the carrying out of work relating to examinations at the respondent’s premises.
20. In Ms Farrow’s case this included work relating to exam preparation. Both claimants acted as invigilators for examinations from time to time.
21. In each academic year the respondent would contact a number of individuals, of which the claimants were two.
22. The respondent advises each person contacted when examinations (and mock examinations) were intended to be held and asking each person to identify their availability.
23. Thereafter, each individual would receive a confirmation of the days when they would be required to carry out work.
24. On 12 March 2020 the respondent’s examination officer wrote to the two claimants and a number of others with a list of dates (“slots”) for mock examinations, along with GCSE examinations for the forthcoming months.
25. The recipients were asked to confirm that “the assignments work for you” with a request to “confirm or amend as necessary”.
26. For each session the examination officer had added one extra person to each slot “in case of unforeseen circumstances”.
27. The email stated that if the individual confirmed the slots the respondent would be “depending on [them]so please treat them as carved in stone!”.

28. It also stated that people had “explained they may be called at short notice to auditions, but apart from emergency please treat your acceptance as a promise”.
29. On 17 March a number of those contacted had not replied and in a chasing email the exams officer stated that “If you need to adjust your booking it does take a bit of shifting so it helps to know you’ve consulted your timetable and put it in your diaries please”.
30. There was in fact no record of any reply from Ms Farrow. She told me that this was because she had verbally agreed her dates of availability with the exams officer and I accept that evidence.
31. Ms Harnwell’s email reply on 17 March stated that the slots “look fine” and said that she “may be available 20, 21, 22 May depending on travel restrictions and if you need me”.
32. At this time the covid 19 pandemic was beginning to have substantial impact on life in the UK.
33. During March 2020 schools, universities and colleges were in part shut down so that no in person teaching was taking place.
34. On 18 March 2020 all GCSE examinations for that academic year were cancelled. The claimants and others were told that they would not be needed as no examinations would be held.
35. Following that cancellation each claimant had sought payment from the respondent for their cancelled work which was denied by the respondent.
36. As regards Ms Harnwell, she also advised respondent on 3 April 2020 that according to websites she had reviewed where employers receive public funding, employees were to be paid in the unusual fashion.
37. Ms Sendall replied on behalf of the respondent on 6 April stating that as the respondent was not 100% grant funded they did not have funds to pay for cancelled examinations.
38. On 8 April Ms Harnwell asked to be furloughed. This was rejected by Ms Sendall on the basis that the claimant’s role was a casual external role and so she did not qualify for furlough.
39. It is against that factual background that the claimants bring their claims.

Conclusions

40. Applying the facts found to the relevant law I have reached the following conclusions.

41. Neither of the claimants were permanent employees of the respondent throughout the periods between the various assignments they carried out.
42. The respondent was under no obligation to offer either claimant work and nor was either claimant obliged to accept any offer of work.
43. Any days work which the claimants were to carry out was to be arranged between themselves and the respondent from time to time depending on need and availability.
44. Although the respondent referred to dates to be treated as “carved in stone” this is in cases where invigilation had to take place on specific dates when examinations were to be held.
45. There was still flexibility in part in the system as a combination was made in the event of people being called for audition or in the case of other short notice unavailability. Extra invigilators were booked for slots to cover such eventualities.
46. Both claimants confirmed to me that if they were for any reason unavailable for a booked “slot” they would not be paid for any such day. Further that the number of hours to be worked and the payments they were to receive for the cancelled work were not known.
47. Each claimant had in fact simply claimed to be due as unlawful deductions the amounts they had been paid in the previous year on the basis that they “expected” their earnings in 2020 to be “approximately” the same (as in 2019).
48. Accordingly, the claimants work for the respondent was as a casual worker (Limb B under s.230(3) of the Employment Rights Act 1996). They worked as and when required and as agreed. There was no obligation for the respondent to offer work or for the claimant to accept work. Each claimant was to be paid for the work they actually carried out.
49. To the extent that there was a “promise” or that the dates were “set in stone”, this was I find no more than an expectation that the respondent and the claimants would not, without good cause, withdraw the offer of work or fail to carry out the work they had agreed to do on the days agreed. This was particularly important for the respondent as last minute cancellations would render the conduct of the respondent’s examinations difficult.
50. The booking of extra invigilators was a form of “insurance” against the fact that some invigilators might not be available on a particular day.
51. I note that each claimant has been paid in full for all work which they have carried out including preparation for and invigilating at rearranged examinations.
52. Each claimant has subsequently carried out work for the respondent for which they have been paid.

53. The claimants directed me to “Guidance” and “Advice” issued by DPM (a Payroll and Human Resources Provider to Education Establishments) regarding furloughing and paying casual staff impacted by the covid pandemic.
54. However, such advice and guidance are no more than that and are not statements of law.
55. The claimants would have been entitled to payment at the agreed rates, for work they actually carried out.
56. They have been paid in full for all such work, the claims they make are for work that was not done.
57. The agreement between the parties was that each claimant was holding herself available on agreed dates to carry out anticipated work. That work could however be cancelled by each claimant for good cause or by the respondent for good cause.
58. Each claimant accepted that if for any reason they did not work any day they would not (as they accepted before me) expect to be paid, including in the event of sickness or other non-availability.
59. The claimants have not been able to properly quantify the claims they make in any event. They have simply assumed, without demonstrating any calculation or methodology behind that assumption, and without any information that would enable me to test whether the assumption was correct, that they would earn the same as they did the previous year. There was no basis for that assumption.
60. The work that the claimants were intending to do for the respondent which the respondent was intending that the claimants should carry out was cancelled due to the coronavirus pandemic.
61. The availability of work for each claimant and the availability of each claimant to carry out the work, was dependant on the examinations themselves taking place. If for any reason they did not take place then there was no obligation, I find, to pay the claimants for work not done.
62. Although some guidance suggested that persons in the position of the claimants could (or should) be paid, there is no legal obligation on the respondent to do so.
63. Thus in summary:
 - 63.1 The claimants were casual workers engaged from time to time by the respondent to carry out work personally.
 - 63.2 They were not employees throughout the period as alleged, there was no obligation on the respondent to offer them work nor on either claimant to accept work.

- 63.3 The complaints brought lack any sufficient precision to enable the claim to proceed for unlawful deduction from wages in any event.
64. For the above reason the complaints fail and they are struck out.

Employment Judge Ord

Date: 3 October 2022

Sent to the parties on: 4 October 2022

For the Tribunal Office