



EMPLOYMENT TRIBUNALS

Claimant: Miss T Hudson

Respondent: Education Staffing Link Ltd

Heard at: Birmingham by hybrid hearing

On: 6 January 2022
Reserved to 18 February 2022

Before: Employment Judge Hindmarch

For Claimant: in person

For Respondent: Mr J Dakin – Managing Director

JUDGMENT

The claim for unlawful deductions from wages is out of time, the Claimant has not shown it was not reasonably practicable to present in time and I have decided not to allow an extension

REASONS

1. This claim for furlough pay came before me for hearing on 6 January 2022. I heard the evidence and submissions but due to time pressures had to reserve my decision making to 18 February 2022. The Claimant was a litigant in person assisted by her brother Mr Hughes, and the Respondent was represented by its Managing Director Mr Dakin. The Claimant attended the hearing centre and myself and the Respondent attended by use of Cloud Video Platform, the hearing thus being a hybrid one.
2. By an ET1 filed on 20 July 2021, the Claimant sought a payment of furlough pay of approximately £2,500. The period of ACAS early conciliation was 8 July 2021 to 9 July 2021. The claim form did not set out the period in which it was said furlough pay should have been paid.
3. By an ET3 filed on 17 August 2021 the Respondent argued that the Claimant had not consented to furlough leave and no pay was due.
4. I heard evidence from the Claimant, from Mr Dakin and from Ms Lucy Clifford, Chief Operating Officer for the Respondent. I had some documents from the Respondent described as “additional information” including a timeline and

“ESL’s email documentary evidence”. At the outset of the hearing the Claimant also furnished me with documents that she wished to rely on.

5. At the start of her evidence, the Claimant indicated that she was claiming furlough pay for the period of the first COVID-19 lockdown in March 2020 through to August 2020. Given the date of presentation of the ET1 the claim was therefore potentially out of time. The Claimant told me she had believed that the Respondent was paying furlough pay into her bank account and during March to August 2020 she was busy as a single parent educating her 7 year old daughter. It was not until January 2021 that she realised she had not in fact been paid for the March to August 2020 period. She said that she then wanted to sort things out amicably with the Respondent hence the delay in bringing her claim. I will deal with the time point later in this decision and having set out the factual timeline of events.
6. The Respondent is a supply teaching agency which the Claimant joined in 1997.
7. The Claimant worked for the Respondent for over 20 years as a supply teacher. At the time of the hearing she was still on the Respondent’s payroll although had not carried out any work since late 2019.
8. On 20 March 2020 the Government announced the Coronavirus Job Retention Scheme.
9. On 25 March 2020 the Respondent emailed the Claimant. The email was headed “COVID-19 Update 3 – IMPORTANT REPLY NEEDED”. The email stated:

“Following a recent series of emails we are still awaiting clarity from HMRC who we are able to define as a ‘furloughed worker’.

In order for our limited team to complete preparatory work we need your help. If you do qualify as a ‘furloughed worker’ ESL will require your written agreement to be designated as a ‘furloughed worker’ in order for you to receive reduced payment in line with the scheme. Unfortunately we do not have the resources to remind you or chase you up for answers and **in the event that you do not respond you will not qualify** so please respond accordingly as soon as possible.

Please cut and paste the following statement into an email:

I am a registered member of Education Staffing Link Limited. Should I qualify to be a ‘furloughed worker’ I am in agreement to this change in my employment status”.

10. On 27 March 2020 the Respondent again emailed the Claimant encouraging a response and stating:

“should you qualify for furlough and should agree to it we will notify you in writing that you are on furlough (sic)”

11. On 1 April 2020 the Claimant emailed the Respondent taking the wording from 25 March 2020 email and agreeing that “should I qualify to be a ‘furloughed worker’ I am in agreement to this change in my employment status”.

12. On 1 April 2020 the Respondent emailed the Claimant stating:

“We will be in a further position to write to you within the next five days to identify team members who are eligible and those who regrettably are not”.

13. On 3 April 2020 The Respondent wrote to the Claimant as follows:

“This email will be difficult to read; it’s been hard to write. I send this email to you with a heavy heart.

Having now completed analysis, I am forced to conclude that I am unable to designate you as a furloughed worker. My interpretation is as outlined in Update 5 dated 1st April 2020.

My approach is unchanged, I will define all eligible team members as on Furlough. Should clarity on the eligibility guidance change I will be very happy to re-visit.

By now, you may conclude that I am not entirely comfortable with this outcome. The very nature of the work that we do results in periods of time when team members are not assigned, and as a consequence are not eligible.

14. On 7 April 2020 the Respondent wrote to the Claimant as follows:

“We continue to monitor guidance with regards the Coronavirus Job Retention Scheme, and have identified a small change in wording with regards employees eligible for furloughing which may have a significant impact for you”

It then included a link to the gov.uk website.

It then explained he was seeking advice from the Recruitment Employment Confederation and from HMRC and would provide a further update when it could.

15. On 14 April 2020 the Respondent wrote again to the Claimant. In short, it indicated it was still seeking clarity on eligibility.

16. On 20 April 2020 the Respondent wrote again to the Claimant:

“This morning at 10:13am, I was finally able to speak to Sam at HMRC who has given us the clarity that we require to confirm that you are eligible for furlough”.

It stated further correspondence would follow.

17. Later that day the Respondent sent an email to the Claimant:

“You are receiving this update because we have identified you are eligible to be designated as a furlough worker. You will shortly receive an individual email confirming this employment status, an agreement and an indication of the payment we will pay.

We are working really hard to ensure that the information we share is accurate; your patience is appreciated”

18. On 21 April 2021 the Respondent sent an email to the Claimant headed “Furlough Leave – Confirmation of Financial Arrangements” and with an attachment “Hudson Tanya Furlough Letter dated 20 April 20”. The email stated:

“This email has an attachment. You need to open, read, review and act. You need to copy the agreement from the attachment, paste it into the body of an email, add your name (in type form) and date at the appropriate section”.

The attachment was a letter to the Claimant seeking her consent to be placed on furlough leave. In bold type it stated:

“AGREEMENT PLEASE COPY THIS AGREEMENT INTO A NEW EMAIL ADD YOUR NAME AND DATE AND RETURN TO (email address) ESL THE ECHEME WITHOUT A SIGNED WRITTEN AGREEMENT”

19. The Claimant accepts she received the above mentioned email. She said that because it was entitled “Confirmation of Financial Arrangements” she believed it to be confirmation of the furlough leave arrangements and she did not open or action the attachment.

20. On 23 April 2020 the Claimant received an email from the Respondent thanking her for returning the signed agreement.

21. The Claimant told me she was registered as a supply teacher with 4 agencies including the Respondent. During the period March to August 2020 she was not working, but rather stayed at home, home-schooling her young daughter. During this time she had some financial support from her brother and also

received payments from other agencies. She says she received emails from “payroll support” which she believed were emails confirming payments from the Respondent. Under questioning she accepted however that payroll information from the Respondent would not normally come from such emails, but rather through entering a e-portal.

22. On 27 April 2020 there was a telephone call between the Claimant and Ms Clifford. I was shown a call log evidencing that Ms Clifford called the Claimant and the call lasted some 10 minutes. Ms Clifford’s account was that she made the call as the Claimant had not returned the agreement sent to her on 21 April 2020. She says she asked the Claimant why it had not been returned and explained the Respondent could not make any payments to her without it. Ms Clifford said the Claimant, having not worked for the Respondent since October 2019, was concerned about her eligibility for the scheme and about the possibility of having to repay any monies claimed.

23. The Claimant stated she could not recall Ms Clifford telling her she had not signed the agreement but if she had done so, her response would have been that she had already agreed to the scheme in March 2020. She felt the Respondent should have chased matters up with her in writing.

24. The Claimant told me that she discovered in January 2021 that she had not in fact been paid by the Respondent.

25. On 22 February 2021 the Claimant telephoned Ms Clifford raising concerns about her furlough pay.

26. On 23 February 2021 the Claimant emailed Ms Clifford setting those concerns out in writing. In the email the Claimant said that from the receipt of the email dated 20 April 2020 stating she was “eligible to be designated as a furlough worker” and the subsequent email of 23 April 2020 thanking her for returning the agreement, she believed everything had been agreed.

27. She went on:

“It all came to light when I was looking through payment slips and discovered my last payment slip for ESL was January 2020. I’ve had a small amount of furlough pay from an agency but presumed this was ESL. Had I known, I would have chased it sooner!

... its money I can’t afford to be without and desperately need to support my daughter and I because I’m not working”

28. On 5 March 2021 the Claimant emailed Mr Dakin. She asked for details of the Respondent’s grievance procedure.

29. On 8 March 2020 Ms Clifford emailed the Claimant stating that she had reviewed the March and April 2020 paperwork and believed the Claimant did

not sign the agreement sent to her by the Respondent on 21 April 2020 and had therefore not been included on the Respondent's furlough claim.

30. On 29 March 2021 the Claimant emailed Mr Dakin. She explained:

"You are aware that I am a single parent, full time homeschooling my daughter, with a full curriculum sent from a very progressive school without live lessons".

She explained how stressful this had been for her.

31. She set out that she had signed the agreement in March 2020. She then had received the email of 3 April 2020 and believed she may be ineligible. The email of 7 April 2020 suggested she may in fact be eligible and the 20 April 2020 email in her view confirmed this.

32. Ms Clifford heard the grievance on 14 May 2021. Her decision letter was dated 20 May 2021. She accepted the introduction of the furlough scheme had caused initial confusion. She stated that all staff who might be eligible were asked to complete the 31 March 2020 written agreement, albeit at that time the Respondent was still exploring eligibility. She pointed out the Claimant had not actioned the 21 April 2020 agreement and the 23 April 2020 email was sent in error.

33. The Claimant appealed that decision by email to Mr Dakin on 28 May 2021.

34. An appeal hearing took place on 15 June 2021. Mr Dakin sent his decision to the Claimant by email on 29 June 2021. He did not uphold the grievance.

THE LAW AND CONCLUSIONS

35. The claim for furlough pay is effectively a claim for unlawful deduction from wages for the period March to August 2020.

36. Under s13 which provides

"(2) ...an [employment tribunal] shall not consider a complaint under this section unless it is presented before the end of the period of three months beginning with -

- i. In the case of a complaint relating to a deduction by the employer, the date of payment if the wages from which the deduction was made

(3) where a complaint is brought under this section in respect of –

(a) A series of deductions or payment, the references in subsection (2) to the deduction or payment are to the last deduction or payment in the series...

(4) where the [employment tribunal] is satisfied that it was not reasonably practicable for a complaint under this section to be presented before the end of the relevant period of three months, the tribunal may consider the complaint if it is presented within such further period as the tribunal considers reasonable”.

37. Turning firstly to the issue of the claim being, on the face of it, out of time. Given the period in question being March to August 2020, then the last deduction in the series was, on the most generous view, 31 August 2020. The time limit for presenting the claim was three months and the claim should have been presented by 29 November 2020. The Claimant says she did not realise she had not been paid until January 2021. The reasons she gives for this is that she was very busy home-schooling her daughter and she believed that email alerts from another agency she was registered with were (mistakenly) from the Respondent showing payments being made. It is highly questionable that she could have been so mistaken. She accepted that she did not usually receive emails alerts from the Respondent about pay in the way she describes and, given her evidence about having a limited income, one might have reasonably expected her to check her bank account.
38. If the Claimant is to be believed that she did not discover the missing monies until January 2021, she did not act swiftly thereafter in presenting her claim. She did not contact Ms Clifford about the monies until 22 February 2021, about a month after the discovery. She then commenced a grievance process. The outcome was confirmed to her on 29 June 2021. She then delayed in going to ACAS for early conciliation on 8 July 2021, and early conciliation having ended on 9 July 2021 she did not present her claim until 20 July 2021. The claim is plainly out of time. Even were it the case it was not reasonably practicable to present until then (as the Claimant alleges) the missing monies were known to her in January 2021, she did not then present within such further period as was reasonable, delaying another six months or so.
39. If I am wrong on the time point I turn now to the substantive claim. I accept that when the Coronavirus Job Retention Scheme was first launched there was confusion about who was and was not eligible to be placed on furlough leave, and that a prudent employer was wise to check eligibility. It is clear from the timeline that the Respondent was keen to utilize the scheme where possible but was itself confused about eligibility initially.
40. The Claimant believes she had consented to the scheme by the sending of her email of 1 April 2020. However, this was sent in response to the Respondent's email of 27 March 2020 "should you qualify, and should you agree to it, we will notify you in writing that you are on furlough". Plainly the Respondent was confirming that once its eligibility investigations were conducted, further written

correspondence was to be expected. The email sent to the Claimant on 21 April 2021 could not have been plainer about what action was required by the Claimant. She needed to “open, read, review and act”. She did not. I understand that an email was mistakenly sent to the Claimant by the Respondent on 23 April 2020 thanking her for returning the signed agreement, but the Claimant would have known that was a mistake as she knew she had not signed or returned the agreement.

41. The Claimant cannot have reasonably thought her email of 3 April 2020 formed a previous agreement. This is because she was told to expect a notification in writing and, when she did receive this, she did not action it.
42. In my judgment therefore, the Claimant did not consent to be placed on furlough and was not therefore entitled to furlough pay.

Employment Judge **Hindmarch**

Date: 21 February 2022