



# EMPLOYMENT TRIBUNALS

**Claimant:** Mrs Louise Kitson

**Respondent:** Chadwell St Mary Day Nursery Limited

**Heard at:** East London Hearing Centre (by telephone)

**On:** 22 February 2021

**Before:** Employment Judge Barrett

## Representation

**Claimant:** In person

**Respondent:** Mr Kuldeep Chehal, Peninsula Face2Face Consultant

# RESERVED JUDGMENT

The judgment of the Tribunal is that: -

1. The Respondent did not make unauthorised deductions from the Claimant's wages. The Claimant's claim for unauthorised deductions fails and is dismissed.
2. The Respondent did not breach the Claimant's employment contract. The Claimant's claim for breach of contract fails and is dismissed.

# REASONS

*This has been a remote hearing, which has not been objected to by the parties. The form of remote hearing was by telephone. A face-to-face hearing was not held, because it was not practicable, and all issues could be determined in a remote hearing.*

## Introduction

1. The Claimant, Mrs Louise Kitson, worked for the Respondent, Chadwell St Mary Day Nursery Ltd, from 24 February 2020. She resigned by email of 26 May 2020 and her last day of work was 28 May 2020. On 23 July 2020 she presented an ET1 form bringing a claim for arrears of pay.
2. The Respondent says it was contractually entitled to withhold pay from the Claimant under lay-off and recoupment provisions in her employment contract.

## The hearing

3. The hearing was conducted by telephone on 22 February 2020. The Claimant represented herself. The Respondent was represented by Mr Kuldeep Chehal, Peninsula Face2Face Consultant.
4. The Tribunal was provided with an agreed bundle of evidence numbering 89 pages. At the outset of the hearing the parties agreed the sums the Claimant had earned in respect of hours worked, sick pay and holiday pay and the sums she had been paid were correctly set out by the Respondent at p.89 of the bundle.
5. The issues between the parties were:
  - 5.1. Whether the Respondent was contractually entitled to place the Claimant on lay-off and reduce her salary during that time; and
  - 5.2. Whether the Respondent was contractually entitled to make deductions from the Claimant's pay in respect of money alleged to have been overpaid by mistake.
6. The Claimant gave evidence on her own behalf. Mrs Anne-Marie Paul, Director of the Respondent, gave evidence on behalf of the Respondent.
7. The Claimant declined to make a closing submission, having clearly set out her case in her evidence. Mr Chehal made a concise and helpful closing submission for the Respondent.

## Findings of fact

### The Claimant starting work for the Respondent

8. The Respondent is a company which operates four nurseries in Essex. Mrs Paul is the founder and owner of the company as well as the director.
9. The Claimant interviewed for the role of Nursery Practitioner with the Respondent in late January 2020. She interviewed well and was offered the role, to commence from 24 February 2020. She was to work 40 hours per week for a gross annual salary of £18,250.
10. The Claimant was provided with a Statement of Main Terms of Employment, which she signed and returned to the Respondent (this was the Claimant's evidence, although the signed copy was not in the bundle). The Statement of Main Terms of Employment provided, just under the heading, that:

**'This Statement, together with the Employee Handbook, forms part of your Contract of Employment (except where the contrary is expressly stated) and sets out particulars of the main terms on which Chadwell St Mary Day Nursery Ltd - Hornchurch, 156 Suttons Avenue, Hornchurch, Essex. RM12 4LY employs Louise Kitson.'**

11. The Statement of Main Terms of Employment further provided:

**'DEDUCTIONS**

**The Company reserves the right to deduct any outstanding monies due to the Company from your pay or, on termination of employment, from your final pay. This includes any previous error or overpayment, holiday or time off in lieu taken but not yet accrued, the costs of damages or losses attributable to your negligence, cash shortages from the till, the cost of personal calls on Company telephone or mobile telephones, and any other monies due to the Company during the course of your employment. Where you have entered into a training agreement with the Company, any outstanding costs detailed in the agreement will be deducted from your final pay.**

...

**EMPLOYEE HANDBOOK**

**A copy of the Employee Handbook can be located in the Staff Room for you to make reference to when needed.'**

12. The Employee Handbook was indeed located in the Staff Room, in a file placed on a work surface. However, the Claimant was not shown it and did not look for it and so did not read it at the time when she commenced employment.

13. The Employee Handbook contained a clause which stipulated:

**'SHORTAGE OF WORK**

**If there is a temporary shortage of work for any reason, we will try to maintain your continuity of employment even if this necessitates placing you on short time working, or alternatively, lay off. If you are placed on short time working, your pay will be reduced according to time actually worked. If you are placed on lay off, you will receive no pay other than statutory guarantee pay.'**

14. The Employee Handbook also provided that sickness absence would be paid at the Statutory Sick Pay ('SSP') rate.

*Pay for February to March 2020*

15. The Respondent's pay month run from the 21<sup>st</sup> of the month to the 20<sup>th</sup> of the following month, with a payroll cut-off on the 10<sup>th</sup> of the month.

16. The Claimant was absent due to illness on 16 to 23 March 2020. As her absence commenced after the payroll cut off day, she was paid her full salary from 24 February to 20 March (£1,450.64 gross). She accepts this meant the Respondent was entitled to deduct the difference between SSP and her full salary in respect of 16 to 20 March 2020 in her next month's pay.

*Covid-19 lockdown*

17. From mid-March 2020, Mrs Paul and other staff at the Respondent became increasingly concerned that a national lockdown would have a drastic effect on the business. Even prior to the national lockdown, many families decided to stop sending their children and the nurseries were quieter than usual.

18. On 19 March 2020, Mrs Paul held a staff meeting. The Claimant, who was off sick, attended via Face Time. The notes of the meeting record that Mrs Paul stated:

**'With the current situation the company has no option other than to implement our short term lay off clause. This can be found in your Employee Handbook and as from today all employees are on short term lay off. This currently means that you're entitled to guarantee pay during lay off or short-time working. The maximum you can get is £30 a day for 5 days in any 3-month period - so a maximum of £150.'**

19. The Claimant did not receive the notes of the meeting until they were disclosed for the purposes of these proceedings. She does not recall there being a reference to a lay-off clause or the Employee Handbook during the meeting. On balance I find it likely that a reference was made but it did not strike the Claimant as so significant as the news that she might not be required to attend work, and so with the passage of time she has forgotten it.

20. During the meeting, Mrs Paul went on to offer that the Respondent would guarantee full pay for March, April and May in exchange for staff undertaking to remain in the Respondent's employment for a period of two years. Her reasoning was that she wanted to maintain continuity for the children in her care when they returned to the nursery.

21. On 20 March 2020, the Government announced the Coronavirus Job Retention Scheme ('CJRS'), under which employers could furlough staff and recoup 80% of their wages from the Treasury. Mrs Paul decided to take advantage of the scheme to pay any employees she laid off 80% of their usual salary. She also decided to offer her staff full pay in exchange for remaining in employment for one year. This was reduced from two years, because the Respondent would only be required to top up the additional 20% of salary.

22. On 22 March 2020, Mrs Paul sent the Claimant a letter by email which stated:

**'It is with regret that following the Government's announcement on the 20th March 2020, the company must notify you that you are being laid off in accordance with your contract, with effect from 23rd March 2020. Whilst we must maintain a level of staffing, we have decided to manage this via rotation, we are proposing your rotation will be as follows:**

<b>Week 1 -</b>	<b>Furloughed</b>
<b>Week 2 -</b>	<b>Work available</b>
<b>Week 3 -</b>	<b>Furloughed</b>
<b>Week 4-</b>	<b>Work available</b>
<b>Week 5 -</b>	<b>Furloughed</b>
<b>Week 6-</b>	<b>Work available</b>

**Please note the above is subject to change dependant on business needs from time to time. We will continue to update you as required.**

You will be entitled to a Statutory Guarantee Pay (SGP) in accordance with statutory provisions during your lay off week(s). SGP is payable in respect of a maximum of 5 workless days in any rolling period of 3 calendar months. Employees who normally work fewer than 5 days per week will be entitled to correspondingly fewer days SGP.

We would like to assure you that you have not been dismissed and that you are required to continue to make yourself available for work should we contact you to advise you that work is available. We are doing everything we possibly can to rectify the situation and will keep you informed of developments and notify you as soon as you are required to return to work.

I appreciate this is an unsettled time for our employees, however, please rest assured that we are doing all we can to ensure you have access to the best options. As you may be entitled to benefits, this letter should be taken to the Benefits Agency as proof that you have been placed on unpaid leave.

That being said, under the Coronavirus Job Retention Scheme, all UK employers will be able to access support to continue paying part of their employees' salary for those employees that would otherwise have been laid off during this crisis. This means HMRC will reimburse 80% of furloughed workers wage costs, up to a cap of £2,500 per month. In light of this, and following the recommendations, I am confident that you will receive this funding during your leave week(s). Although given this, we may need to change your status to ensure you are entitled to this payment we will continue to monitor the situation as necessary and keep you up to date.

If you have any queries about the contents of this letter, please contact me.'

23. On the same day, Mrs Paul sent the Claimant a second letter offering to pay her full contractual pay in April, May and June (with further payments to be reviewed) if she agreed that the 20% top up component would be repaid by her in the event her employment terminated within 12 months.

24. On 23 March 2020, the lockdown commenced, and nurseries were closed to all but the children of keyworkers. Mrs Paul took the decision to shut three of her nurseries and keep one, centrally located, nursery open to look after the children who were still attending.

#### Events in April 2020

25. On 3 April 2020, the Respondent's Area Manager sent an email to staff, including the Claimant, with a message from Mrs Paul which stated:

'I am writing to update you on your current employment status, as you are aware you received a lay off letter on 22nd of March giving you formal notice of our discussion on 19th March.

Firstly I would like to thank those of you who have been working to provide a service for key workers and to thank in advance those of you who will be coming into work, I do realise it is a very stressful time for all of us.

Following the Government's guidance you will be furloughed if there is no work available for you for a minimum of three weeks. You would still be expected to be available to attend work if requested during any furloughed time. If you are requested to work your furlough status would cease and then resume again if no work was available for you.

For clarity it is the company who decides if an employee is furloughed not an employee.

When I spoke to everyone I said we would be looking to ensure everyone would work the same amount of time but due to the qualification and guidance of furlough this will not be possible, so some of you will work while others may not work at all during this time. The decision as to who works will be dependent on the needs of the families and the nursery.'

26. On 19 April 2020, the Claimant emailed the Respondent's Area Manager to say:

'With regards to the loan agreement of 20%, I appreciate the offer but I am going to decline it and just take the 80%.'

27. She received a reply the next day saying:

'Thank you for confirming you are declining the agreement to top up your salary to 100% during this time.

Unfortunately I cannot confirm anything regarding the furlough payments as the Government have only just opened the portal and the situation is very fluid.

I can confirm for the hours you will work or annual leave that may be allocated you will be paid your regular hourly rate.'

#### Pay for March to April 2020

28. The Respondent did apply for furlough funding under the CJRS in respect of the Claimant.

29. For the pay month 21 March to 20 April 2020, the Claimant was paid SSP for 21-23 March 2020 and 80% of her ordinary salary for the remainder of the month, less the money deducted in respect of overpaid sickness absence. The total gross payment was £936.53.

30. The Claimant was not required to attend work until the week commencing 27 April 2020, during which she worked 32 hours.

#### Events in May 2020

31. In early May 2020, the Respondent realised there was a possibility that the Claimant was not eligible for furlough funding under the CJRS because the date she was added to the Respondent's payroll (20 March 2020) was later than the then-applicable cut-off date.

32. The Area Manager emailed the Claimant on 7 May 2020 as follows:

'I hope you are keeping well at this time. I am writing to inform you that you may have been overpaid this month.

This has arisen because you were paid some monies as a furlough payment and when I have submitted the claim it seems you may not be entitled to this from me as a company as you were not on our payroll on the 28th February, although as you were an employee working for me I assumed you would qualify.

I have applied for the furlough monies for you and if they are paid by the government then you will be able to retain the monies paid and will continue to receive furlough payments where you qualify. If however the government rejects my claim on your behalf then you will need to repay the monies paid in good faith to you and would not receive any further furlough payments.

If the claim on your behalf is rejected you can approach your previous employer and ask if they will apply on your behalf. I should have an answer by the end of next week and will let you know as soon as I do.'

33. The Claimant was understandably distressed by this news. She telephoned the HMRC herself, and it was confirmed to her that she was not eligible for furlough funding due to the date she was added to the Respondent's payroll. She made inquiries of her previous employer but was told that they were not able to furlough her as she had left their employment prior to 28 February 2020.

34. The Respondent's Area Manager emailed the Claimant again on 15 May 2020 to explain that although HMRC had in fact that week paid the money applied for on the Claimant's behalf, because the Respondent knew she was not eligible the money would have to be returned. She added:

**'Unfortunately as the monies paid to you were paid in error they will need to be repaid but I am willing to look at a payment arrangement once you are back to full time work and in the meantime if your previous employer will not furlough you will need to claim benefits and explain that the money paid was paid in error so hopefully they will backdate your claim. I am happy to help with any information that they may require.'**

35. By email of 18 May 2020, the Respondent stated that there had been an overpayment in the sum of £521.09, being the net amount the Claimant had been paid in respect of furlough money less the £150 she was entitled to as a statutory guarantee payment.

36. The Claimant instructed solicitors who wrote to the Respondent on 19 May 2020 contending that she was due her full contractual salary, irrespective of whether the Respondent received furlough money on her behalf.

37. No further efforts were made on either side to agree a repayment plan.

Pay for April to May 2020

38. In respect of the pay month 21 April to 20 May 2020, the Respondent considered the Claimant was only entitled to be paid for the 32 hours worked at the end of April in the sum of £280.64 gross. As this was less than the £521.09 the Respondent thought had been overpaid in the previous month, nil payment was made into the Claimant's bank account. The Respondent did not communicate with the Claimant to explain why nil payment had been made.

The Claimant's resignation

39. The Claimant was not required to attend work until 26 May 2020. On that day, the Respondent's Area Manager circulated the Employment Handbook and other policies to staff by email. This was the first time the Claimant saw the Handbook including the lay-off clause.

40. On the evening of the same day, the Claimant resigned by email, which stated:

**'Please accept this email as my notice of resignation I will be leaving Abbs cross day nursery on the 29.05.2020.**

**You will also be given this in writing tomorrow.**

**Please forward my p45 to my home address'**

41. The Claimant worked for 19.5 hours over the period 26 to 28 May 2020. Although her resignation email stated her last day would be 29 May 2020, in fact her last day at work was 28 May 2020.

Pay for May to June 2020

42. The Respondent did not make any payment to the Claimant in respect of the pay month 21 May to 20 June 2020, because it considered the money she still owed in respect of the alleged overpayment in April exceeded the amount due to her for hours worked in May and accrued holiday pay.

**The law**

Incorporation of contractual terms

43. A statutory written statement of an employee's terms and conditions of employment is not a contract of employment but it is persuasive evidence of the terms of the employment contract agreed between the parties: *Edwards v Chesterfield Royal Hospital NHS Foundation Trust* [2012] 2 AC 22 at §28.

44. There is no requirement for all the terms of an employment contract to be contained in a single document. The parties to an employment contract may agree to incorporate into that contract terms from other sources, including workplace policies such as a staff handbook. Whether or not such terms have been incorporated is a matter of law.

45. In *Hussein v Mallenash Ltd* EAT/53/96, the EAT held that a statutory statement including the following phrase:

**'This statement, sets out the main particulars of the terms and conditions which, in conjunction with the Grievance and Disciplinary Procedure and any working arrangements, form the Contract of Employment between the Company and yourself.'**

was sufficient to give the terms of the disciplinary policy contractual effect, having been expressly incorporated by reference.

46. See also, by way of example, *Edwards v Chesterfield Royal Hospital NHS Foundation Trust* at §2 where the contract of employment incorporated the terms of a letter to the employee which referred to the Trust's terms of employment, "*copies of which could be seen at the medical personnel office*".

47. Not all the provisions of a document expressly incorporated by reference will necessarily form part of the employment contract. The Tribunal must further consider whether the provision in question is 'apt' to be incorporated as a contractual term: *Alexander v Standard Telephones & Cables Ltd (No.2)* [1991] IRLR 286 at §31. A non-exhaustive list of factors that are relevant to determining whether a provision is apt for incorporation (set out in *Hussain v Surrey and Sussex Healthcare NHS Trust* [2012] CLY 1528 at §168) are:

- 47.1. The importance of the provision to the contractual working relationship between the employer and the employee and its relationship to the contractual arrangements between them;
- 47.2. The level of detail prescribed by the provision;
- 47.3. The certainty of what the provision requires;



- 47.4. The context of the provision: a provision included amongst other provisions that are contractual is itself more likely to have been intended to have contractual status than one included among other provisions which provide guidance;
- 47.5. Whether the provision is workable, or would be if it were taken to have contractual status.

Unauthorised deductions from wages

48. Part 2, Ss.13 to 27B of the Employment Rights Act 1996 Act ('ERA') set out the statutory basis for a claim of unauthorised deduction from wages.

49. An employer shall not make a deduction from wages of a worker employed by him, which are properly payable to the worker, unless the deduction is required or authorised to be made: by virtue of a statutory provision; a relevant provision of the worker's contract; or the worker has previously signified in writing his agreement or consent to the making of the deduction. Any agreement or consent authorising the deduction from wages to be made must be entered into before the event giving rise to the deduction.

50. A worker's right not to suffer an unauthorised deduction does not apply to a deduction from a worker's wages made by the employer where the purpose of the deduction is the reimbursement of the employer in respect of an overpayment of wages.

51. 'Wages' for the purposes of Part II ERA is widely defined. It includes any fee, bonus, commission, holiday pay or other emolument referable to employment, and to statutory sick pay.

**The parties' cases**

52. The Claimant agreed that the Respondent's calculations were correct but disputed that the Respondent was contractually entitled to reduce her pay. Her case was that the lay-off provision in the Employee Handbook did not form part of her employment contract, and therefore she was entitled to full pay throughout her employment with the Respondent, other than for the days she was off sick.

53. The Respondent submitted that the lay-off provision in the Employee Handbook was incorporated into the contract of employment and the Respondent was therefore entitled to reduce the Claimant's pay. Further, the money paid in respect of furlough in the April wage was paid by mistake, and the Respondent was contractually entitled to recoup that money from the Claimant.

**Conclusions**

54. The first question to address is whether the lay-off clause in the Employee Handbook was incorporated into the Claimant's contract of employment. I conclude that it was, for the following reasons:

- 54.1. The Claimant's statutory Statement of Main Terms of Employment expressly incorporated the provisions of the Employee Handbook by reference, namely by the words "*This Statement, together with the Employee Handbook, forms part of your Contract of Employment*". This

wording is similar to that held by the EAT to amount to express incorporation in *Hussein v Mallenash Ltd*.

54.2. Although the Claimant was not given a copy of the Employee Handbook when she started work, her Statement of Main Terms of Employment told her where to find it and it was accessible to her in the staff room.

54.3. The lay-off clause itself (set out at paragraph 13 above) is apt to be incorporated as a contractual term. The provision is important to the contractual working relationship between the parties. Its wording is sufficiently clear and detailed for its effects to be certain and workable.

55. Next, was the Respondent contractually entitled by virtue of the lay-off clause to pay the Claimant less than her full salary from 24 March 2020 (the day after her SSP ceased)? Was the lay-off clause 'a relevant provision of the worker's contract' for the purposes of s.13 ERA?

55.1. The clause provided that the Respondent was entitled to put the Claimant on short-time working or lay-off "*if there is a temporary shortage of work for any reason*".

55.2. There was a temporary shortage of work due to the Covid-19 pandemic and the national lockdown.

55.3. Therefore, the Respondent was entitled to reduce the Claimant's pay under the provisions of the clause: to the level of statutory guarantee pay while she was laid off, and otherwise for the time actually worked.

55.4. This was a 'a relevant provision of the worker's contract' for the purposes of s.13 ERA, such that deductions made under it were authorised.

56. The next issue is whether the Respondent was authorised under the terms of the Claimant's employment contract to make deductions in order to recoup the money paid to the Claimant in April 2020 in respect of the furlough scheme.

56.1. It is not disputed by the Claimant that the Respondent was contractually entitled to deduct money from her pay in respect of a "*previous error or overpayment*" under the 'Deductions' clause in her Statement of Main Terms of Employment.

56.2. The question is whether the furlough money paid to the properly fell to be recouped under this provision. I conclude that it did, as the payment was made in error; the error being the Respondent's mistaken belief that it was entitled to claim on the Claimant's behalf under the CJRS.

57. On the Respondent's calculations at p.89 of the bundle, which the parties agreed to be correct, the amount of the overpayment in error exceeded the deductions made from the Claimant's pay in May and June 2020. Therefore, all the deductions

were authorised under a relevant provision of the Claimant's contract and there has been no breach of contract.

**Employment Judge Barrett**  
**Date: 25 February 2021**