



EMPLOYMENT TRIBUNALS (SCOTLAND)

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Case No: 4111756/2021

Hearing Held in Edinburgh on 23 February 2022

Employment Judge Jones

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Mrs L Ede

**Claimant
In person**

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PLM Optometrists

**Respondent
Represented by:
Mrs F Adamson**

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JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The respondent is ordered to pay to the claimant the sum of Eight Hundred and Fourteen Pounds and Forty Pence (£814.40) in respect of unauthorised deductions made from her wages.

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REASONS

Introduction

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1. The claimant's claim was initially registered as unfair dismissal and unlawful deduction from wages. The claimant subsequently clarified that she hadn't intended to raise any claim of unfair dismissal as she had obtained alternative employment and had suffered no financial loss as a result of her resignation.
2. A final hearing took place at which the claimant represented herself and the respondent was represented by one of its partners, Mrs Adamson. Both parties produced documentation, much of which was identical.

3. The claimant gave evidence on her own behalf. There was no dispute on the material facts and the claimant was not cross examined. Both parties made brief submissions.

4. The issue in dispute was whether or not the claimant was entitled to be paid for days she worked while on flexible furlough which were not her contracted working days in addition to furlough pay for the days on which she was contracted to work but did not work. The amount the claimant said she was due if her claim was successful was not challenged by the respondent.

10 **Facts**

5. The claimant's contract of employment, which was signed by her on 3 June 2019 provided that she was employed as an Optical Assistant. Her hours of work were Monday and Friday 9am – 5.30pm and Saturday 9am – 12.45pm. She was entitled to a 1 hour paid break for lunch. The contract also provided that the claimant 'may be required to work different and/or additional hours from time to time. The Employee is expected to be flexible and to work such additional hours as are reasonably required to fulfil the responsibilities of their role. Additional hours will be paid at the Employee's normal rate or the Employee will be entitled to time off in lieu.'

6. The claimant was placed on furlough as a result of the pandemic and was paid 80% of her normal pay during that period.

7. The claimant agreed to a change in her hours to Monday and Friday 9-5 and Saturday 9-3. This was agreed by the claimant in a WhatsApp exchange with the respondent on 6 August 2020.

8. The respondent then wrote to the claimant by letter dated 5 February 2021 setting out flexible furlough arrangements. This stated 'We ask you to not to come in to work at all or to work on a part-time basis and this can vary from time to time'. It went on to state 'as you know, you have been on flexible furlough since 5 January 2021. This is regarded as a temporary change to your contract' and 'At the moment you are working zero hours but it may be that we ask you to come in and work some, or all of your hours, under the flexible furlough arrangement.' The letter also

stated 'during this period, you will not receive your normal pay. For contracted hours that you are not working, under the CJRS, the Government will fund and we will pay 80% of your normal wages.'

9. Between 1 March 2021 and 30 June 2021, the claimant worked on
5 Tuesday 2, 9, 30 March between 9-5 and Wednesday 31 March for four
hours, and then Tuesdays 20 and 27 April for eight hours a day,
Tuesday 25 May for 8 hours and Tuesday 1, 8, 15 and 22 June and
Wednesday 2 June all for eight hours a day. During that period she also
worked on some of her contracted days.
10. The claimant's hourly rate was £8.91. She did not earn enough to be
10 eligible to pay tax.
11. The claimant claimed that she was due to be paid a total of 92 hours
which she was not contracted to work at £8.91 per hour which was a
total sum of £814.40. She said that the failure to pay these sums
15 amounted to an unlawful deduction from her wages.
12. The respondent's position was that in terms of the flexible furlough
arrangements, the claimant was only entitled to be paid in respect of the
total number of hours per month worked by her irrespective of the days
on which those hours were worked. It was said that it was not relevant
20 whether the claimant worked on days on which she was contracted to
work. Their position was that in many weeks the claimant did not work
her total contracted hours and therefore was only entitled to be paid at
her normal hourly rate for any hours actually worked and at 80% of her
hourly rate for any remaining hours which she had not worked.
- 25 13. The question for the Tribunal to determine was whether the claimant
during a period of flexible furlough leave was entitled to be paid for work
carried out on days on which she was not contracted to work, even
where she did not work on days where she was contracted to work.

Discussion and decision

- 30 14. The starting point for consideration of whether there has been an
unlawful deduction from a worker's wages is the terms of the contract of
employment between the parties. In particular, it is necessary to

determine what wages are 'properly payable' to a worker in terms of section 13(3) Employment Rights Act 1996. If a worker is of the view that an employer has not paid sums which were properly payable to them, they may present a claim to the Tribunal that an unlawful deduction has been made from their wages in terms of section 13(1) Employment Rights Act 1996.

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15. The Tribunal therefore first analysed the terms of the claimant's contract of employment. That contract set out the hours and days on which the claimant was contracted to work. Although the contract did provide that the claimant may be required to work different hours or days from time to time, the only variation to her contract which was made was in relation to the specific hours she worked on the days she was contractually required to work. The Tribunal therefore considered whether the claimant agreed to any subsequent variation to the terms of her contract in relation to working a specific number of hours a week, rather than on specific days. There was no evidence presented to the Tribunal that she had agreed to vary her contract in such a manner. Indeed the respondent did not seek to argue this, but instead appeared to be of the view that it was the government flexible furlough scheme which permitted them to pay the claimant only for the hours she worked over the course of a month rather than the specific contractual arrangements between the parties.

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16. The Tribunal had sympathy for the position adopted by the respondent. It was clear that they had taken advice from their professional organisation and had sought to do their best to understand the government scheme and how it would operate. The Tribunal also recognizes that the scheme was complex and changed regularly.

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17. However, the issue to be determined is not how the government scheme which was intended to provide support to employers during the pandemic operated, but what were the terms of the claimant's contract of employment at the material time. The claimant was not contracted to work a certain number of hours over the course of a week or a month but a certain number of hours on specific days. There was never any agreement to amend the days on which the claimant worked. The

furlough scheme only operated to amend the claimant's contract of employment in so far as there was agreement between the parties. The claimant agreed to be placed on furlough and receive 80% of her normal pay during that period for days she did not actually work which she was contracted to work. That was a temporary variation to her contract of employment.

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18. The claimant also agreed to work under flexible furlough arrangements. This meant that she was willing to work some or all of her contracted hours, be paid 100% of her normal pay for hours worked, 80% of her normal pay for contractual hours not worked, and 100% of her normal pay for any hours worked in addition to her contractual hours. However, the claimant did not agree to any change to her contractual arrangements in relation to the days on which she would work. The respondent did not ask her to do so. Had the respondent's understanding of the arrangements been correct, then they would have been contractually entitled to require (rather than simply request) that the claimant to work any day of the week when her contract stipulated that she worked on three days only. No request was made of the claimant to agree to such a variation.

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19. Therefore, the claimant was entitled to be paid in terms of the furlough arrangements for her contractual hours, which were Monday and Friday 9am-5pm and Saturday 9-3pm. If she worked on those days, she was entitled to receive her full pay, if she did not work these days or only for some of her hours on those days, she was entitled to be paid at the 80% for those hours not worked. This was a matter of contractual agreement between the parties. Therefore, the claimant was also entitled to be paid for any additional hours she worked on days she was not contracted to work.

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20. Pay for hours worked in addition to her contractual hours was 'properly payable' in terms of section 13 Employment Rights Act 1996. It was a matter for the respondent to arrange the hours on which its staff worked, and in the absence of a variation to the claimant's contract of employment indicating that she was required to work a certain number of hours a week rather than on specific days of the week, the claimant was

entitled to be paid for any hours worked on days on which she was not contracted to work in addition to pay for her contracted days.

21. There was no dispute between the parties in relation to the sums sought by the claimant.
- 5 22. In these circumstances, the respondent made unauthorised deductions from the claimant's wages and is ordered to pay to the claimant the sum of £814.40 in that regard.

10 Employment Judge: Amanda Jones
Date of Judgment: 25 February 2022
Entered in register: 11 March 2022
and copied to parties