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Coronavirus Job Retention Scheme: First Instance Employment Tribunal Decisions

As we come close to one year since the Coronavirus Job Retention Scheme ("CJRS") was announced, we are now starting to see some first instance Employment Tribunal judgements being published from claims regarding furlough and the scheme.

It is important to note that these are first instance decisions and, as such, are not binding. However, it is encouraging to know that our previous advice regarding these issues follow what these Employment Judges have decided.

Nutt v Meggitt Aerospace Ltd

The Claimant was a contract manager employed by the Respondent. She was made redundant on the 31st July 2020 and claimed that she should have received furlough pay for July 2020. Therefore, she claimed the Respondent made an unlawful deduction from her wages.

The Claimant had been furloughed from 3rd April 2020 until the termination of her employment, receiving 80% of her normal monthly salary in accordance with the CJRS. The Respondent agreed to top up to 100% pay for all employees for the first three weeks of furlough. It also did not apply the £2,500 monthly cap. This meant that the Claimant was on full pay but furloughed for the three-week period 6th-24th April 2020.

The Respondent's pay date was the 15th of each month (or the nearest working day beforehand) and its employees are paid two weeks in arrears and two weeks in hand. Due to the differences between the Respondent's payroll dates and the CJRS claim periods, this meant that CJRS was calculated one month in arrears and created an anomaly in the monthly pay received by employees.

The Respondent resolved this anomaly by means of a "furlough pay offset" which was clearly stated on employees' payslips. Therefore, the Claimant was paid her basic pay each month (approx. £2,875) and her 80% furlough pay from the previous month (approx. £2,300). There was then a 'furlough pay offset' for the previous month to avoid any double accounting (a minus figure of £2,875).

The Claimant's final pay/payslip records show that because she worked no actual hours for the month of August, she received no basic pay. She did, however, receive her 80% furlough for the previous month and also the 'furlough pay offset' for the previous month. This, therefore, left a net shortfall.

The Claimant, therefore, sought the sum of her July furlough payment of £2,300.

The Respondent argued that they had clearly explained the operation of the scheme in written correspondence to the Claimant and had kept her informed of any potential changes to the scheme.

The Employment Judge found that the Respondent had explained the way the scheme would operate at the outset and they clearly explained how the "furlough pay offset" would work. The Judge also found that the Respondent made it explicitly clear as to why the Claimant was not entitled to the July furlough payment and it was clear the Claimant was paid the correct amount on the termination of her employment.

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It was concluded that there was no deduction from wages and, therefore, the Claimant's claim failed. This case shows the importance of having clear written correspondence with furloughed workers kept on file to show the agreements that were in place in order to be able to defend against these types of claims.

Houston v RSR Porscha UK Ltd

The Claimant in this case made claims of unfair dismissal, wrongful dismissal (for failure to pay notice pay), unlawful deduction from wages for arrears of pay, and holiday pay. He also claimed that he was owed a redundancy payment from the Respondent.

The Claimant was a vehicle technician employed by the Respondent from 5th January 2015 to 26th May 2020 and was verbally informed that he would be made redundant. The Employment Judge found that the Claimant had been continually employed by a series of companies and transferred under the TUPE Regulations to each of those businesses. This was despite the Respondent arguing that was not the case and that the date of termination was 31st March 2020, and he had not transferred under TUPE to each company. This, of course, affected whether the Claimant could claim unfair dismissal and redundancy pay as the Respondent contended that the Claimant was under two years' service.

The Respondent's position was that the Claimant's dismissal was necessary because the Respondent's business was affected by the COVID-19 pandemic, and the Respondent could not access the CJRS.

The Respondent explained that it could not access the CJRS because the Claimant had not been on its payroll for long enough.

The Employment Judge accepted that because the Respondent's accountant had failed to put the Claimant on the PAYE scheme in time, the Claimant could not be placed on the CJRS.

However, the Respondent gave no warning of impending redundancies before the day on which the Claimant was made redundant and did not provide any evidence of how the selection pool for redundancy was chosen. Further, given that the Respondent dismissed the Claimant without notice of an impending redundancy situation, the Employment Judge found that no consultation occurred and there was no alternative employment considered.

The Employment Judge also made findings that the date of dismissal was 26th May 2020 (not 31st March 2020), that the Claimant had been continuously employed for 5 years and that he was unfairly dismissed by reason of redundancy. His claims for holiday pay, arrears of pay and failure to pay notice pay also succeeded.

The Claimant was awarded a total of £12,320.31.

This case highlights the importance of going through a fair redundancy procedure even in circumstances where the closure of the business or the downturn in work is due to the COVID-19 pandemic.

Ferguson v Tuck Inn Café Ltd

The Claimant was employed as a Counter Assistant at the Tuck Inn Café in Doncaster and brought a claim in the Employment Tribunal for arrears of pay.

The Claimant worked in the café from around 2003 and it changed hands in 2009 to owners who then, in 2018, placed the business into the Respondent limited company. At the beginning of lockdown in the UK, Tuesday, 24th March 2020, the café was required to shut.

The Claimant was told by the Respondent that she would be furloughed but she received no pay from the Respondent. After numerous attempts to contact them she secured alternative employment which started 26th August 2020, resigning with immediate effect that day.

The Respondent disputed the claim, stating that they applied under the CJRS but were not granted an award due to technical reasons which they did not explain in their response.

The Claimant never received a letter or an agreement in writing concerning furlough and the Respondent simply did not pay her and did not contact her.

On 16th May 2020, the Claimant contacted the Respondent again and she was told that she would not get paid because she was not registered for PAYE purposes.

On 22nd April 2020 she then received a tax code from HMRC having never received one before. The Claimant telephoned HMRC to ask why and was told that there was no record of her being in work until 21st February 2020. However, the Respondent was now submitting to HMRC that she was employed and being paid.

The café re-opened on 4th July 2020. The Claimant asked the Respondent if she could return to work beforehand but received a message stating due to their lack of money and because of her health, it would be best if she stayed at home. They employed someone to replace her. Nonetheless, the Claimant was not dismissed by the Respondent.

HMRC told the Claimant that the Respondent continued to maintain they were paying the Claimant until 20th August 2020. They notified HMRC that they wished to withdraw the submissions of pay made concerning the Claimant. To this day, the Claimant has not received a P45 from the Respondent.

This Claimant was also paid in cash and never received a payslip. It was found during the course of proceedings that between 2008 and February 2020, the Respondent (and its predecessor) failed to submit the Claimant's pay details to HMRC.

Although pay details were submitted from February 2020 onwards, it appears that this was done retrospectively for the purposes of a claim under the CJRS and could well have been the "technical issue" preventing the Respondent from being able to claim under the CJRS!

Unsurprisingly, the Claimant's claim for arrears of pay was successful and highlights the need to make clear in writing that an individual's employment has been terminated.