Case No: 1805825/2020
Code V

EMPLOYMENT TRIBUNALS

Claimant: Mr S Halliwell

Respondent: F & H Coffee Ltd

Heard at: Leeds (by CVP) **On:** 3 December 2020

Before: Employment Judge Parkin

Representation:

Claimant: In person

Respondent: Response not presented; no attendance or representation at hearing

JUDGMENT

The Judgment of the Tribunal is that:

1) The proper name of the respondent, which was the claimant's employer, is F & H Coffee Ltd;

2) The claimant's unfair dismissal claim is dismissed upon withdrawal by him;

3) The claimant's redundancy payment claim is dismissed upon withdrawal by him;

4) The claimant was dismissed by the respondent in breach of contract in respect of his notice entitlement and the respondent is ordered to pay him damages for breach of contract in the sum of £480.64 gross;

5) In breach of contract, the respondent failed to reimburse the claimant the sum of £37.00 expenses incurred by him on the

respondent's behalf and the respondent is ordered to pay him the sum of £37.00;

6) The respondent made unlawful deductions from the wages of the claimant in the following sums:

i) outstanding holiday pay accrued by 18 March 2020: £941.38 gross;
ii) outstanding wages as at 18 March 2020 £1,283.70 gross;
iii) outstanding holiday pay/compensation for accrued paid annual leave at date of termination of employment, 24 June 2020: £520.79 gross; and
iv) outstanding wages under the furlough arrangement for April to May 2020 in the sum of £1,701.38 gross.

Accordingly, the respondent is ordered to pay the claimant the total sum of £4,447.25 gross. No award of compensation pursuant to section 24(2) of the Employment Rights Act 1996 is made.

7) Finally, the Tribunal does not make any award in respect of deductions from the claimant's wages in respect of National Insurance Contributions and tax payments deducted by the respondent from his gross wages, which the respondent is obliged to account for to HMRC.

REASONS

1. The proceedings

This was a hearing held by CVP video hearing (denoted by code V in the Case Number above). To the extent that the Tribunal's reasons and the figures in the award above vary slightly from those announced in giving judgment orally, the reasons below are the Tribunal's final reasons and the figures above are the final figures.

2. By his ET1 claim presented on 3 October 2020, the claimant claimed unfair dismissal, a redundancy payment, notice pay, outstanding holiday pay and arrears of wages and other payments arising from his employment and the termination of his employment by the respondent. He set out that he had been employed as manager of the Leeds branch of the respondent coffee house company from 29 July 2019 until 2020. Although he gave the date 21 March 2020 for the end of his employment, it was apparent from the content of his form that he was saying he had been subject to the furlough scheme from March onwards for some months before the termination of his employment. He identified more closely the monetary claims he made, also contending that the respondent had made deductions from his pay for pension provision and for National insurance contributions and tax paid by him but had never accounted for those payments to HMRC on his behalf.

3. The claim was listed at service for this video hearing by Notice of Claim and Hearing to the parties dated 15 October 2020. At the same time, the claimant received a letter warning that his unfair dismissal and redundancy payment claims could be struck out for lack of continuous service. The respondent's 28-day time limit to present its ET3 response and any grounds of resistance was 12 November 2020 but no response was presented or extension applied for.

4. In the notice of hearing, the Tribunal erroneously set a timetable of case management orders inconsistent with the date of hearing, since it required the parties to disclose copy documents to one other by 10 December 2020 and agree the contents of the bundle of documents by 23 December 2020, ahead of exchange of witness statements on 7 January 2021, all these dates being after the listed hearing. Nonetheless, the claimant had prepared carefully for the hearing and lodged an extensive set of documents by way of scans and email attachments with the Tribunal on the morning of hearing comprising supporting witnesses' statements, copy payslips from the respondent, bank statements, correspondence to and from the respondent including the claimant's main grievance letter and the respondent's reply and scanned copies of texts or WhatsApp communications. The claimant had copied his email to Mr Darren Hughes of the respondent as well.

5. <u>The hearing</u>

There was no attendance by or representation for the respondent at the hearing. At the start, the Tribunal raised the identity of the claimant's employer with him since there appeared to be different trading and company names. The claimant explained that the name of the employer in his contract of employment and which had initially made wage payments by bank transfer to him was F & H Coffee Limited, "sometimes referred to as Fitzwilliam and Hughes by my boss". The Tribunal had noted that the Companies House register showed the company name as "F & H Coffee Limited" but did not consider that the spelling of "and" in full word form In the proceedings rather than the ampersand symbol amounted to an error in the company name invalidating service of the Notice of Claim. The claimant withdrew his claims of unfair dismissal and for a redundancy payment, acknowledging that he had insufficient service for those claims.

6. Although the Tribunal would have been able to issue a judgment under Rule 21 of its rules of procedure in view of the lack of response, it did not consider it appropriate to do so but wished to hear the claimant's evidence about the operation of furlough in his case and the eventual termination of his employment. The Tribunal took time to read documents before hearing the claimant's oral evidence; over the lunch adjournment, he also provided a copy of the respondent's email dated 24 June 2020 which formally terminated his employment, again sending a copy to the respondent. He read the statement attached to his ET1 claim and also a later "claim and breakdown" document which brought matters more up to date. The Tribunal put questions to him and was entirely satisfied that he was a straightforward and reliable witness giving accurate evidence of matters very personal to him, particularly concerning late and non-payment of wages by the respondent and lack of contact from the respondent.

7. The issues

It was for the claimant to prove on the balance of probabilities his claim of breach of contract entitling him to damages representing his notice period wages and reimbursement of the expenses he had paid, together with those of unlawful deduction from wages which overlapped with unpaid holiday pay or compensation for accrued paid annual leave he did not have the opportunity to take.

8. The facts

Accordingly, from the oral and documentary evidence, the Tribunal made the following findings of key facts on the balance of probabilities

8.1 The claimant, who had experience of coffee shops and management, was appointed by the respondent to manage its Leeds outlet with effect from 29 July 2020. The coffee shop was an outlet within managed office space in the city centre, obviously catering primarily to office workers. He managed two other employees.

8.2 The respondent limited company had a number of coffee shop outlets in the North of England, being based in Sheffield. It also called itself variously Fitzwilliam and Hughes and Fitzwilliam and Hughes Spaces Leeds. Its main Director and the person who dealt mainly with the claimant was Darren Hughes.

8.3 The claimant was provided with a long, formal contract of employment annexing a short statement of particulars of the main terms and conditions, which identified the respondent F & H Coffee Ltd as his employer. The key elements were his salary at £25,000.00 per annum, paid monthly, with payment to be made on the 5th of the month and with a cut-off date of the previous 21st, and a week's notice of termination of employment to be given by the employer after the end of the 3-month probationary period or (under the main contract, statutory minimum notice). The annual salary meant a weekly salary of £480.77 gross.

8.4 From the outset, like other employees, he was consistently subjected to late or partial payment of salary by the respondent which caused him financial difficulties on a regular basis, especially in the payment of his rent. Payments were made by bank transfer into his account by the respondent, for instance £700.00 on 14 January 2020, £350.00 on 24 February 2020, £1678.08 on 5 March 2020 (from bank statements) but he regularly had to chase Darren Hughes for payment.

8.5 Like other businesses, by mid-March 2020, the respondent was facing great business uncertainty as the country was already within the early stages of dealing with the Covid-19 pandemic.

8.6 Accordingly, on 18 March 2020 the claimant received instructions from Darren Hughes to close the Leeds branch with the unilateral notification that all employees were being put on unpaid leave but holding out the prospect that the respondent would seek to access the Government furlough scheme which had

then been proposed. That scheme was formally announced on about 19 March 2020.

8.7 The respondent applied to join the furlough scheme, apparently successfully in the first place and on 6 April 2020, it wrote to employees including the claimant:

> "I am writing to confirm that all staff are now furloughed (backdated) until such time as we are legally allowed to reopen. I registered the company for the employee retention scheme and as soon as I have more information I will let people know.
> If anyone has any objections to this or does not wish to be furloughed please let me know before the end of today…"

8.8 The claimant understood that the employees were being put onto the furlough scheme on a backdated basis back to 18 March 2020 and that he would not be attending work but receiving a furlough payment of 80% of his basic wage until the easing of the initial lockdown and resumption of active work. Since this was preferable to continued unpaid leave or termination of employment, he agreed to that arrangement and eventually received payments for March and April at about the rate of 80% basic pay.

8.9 By 18 March 2020, payments to him were already in arrears since there was outstanding ordinary pay from late February to 18 March in the total sum of £1283.70 gross and outstanding holiday pay (or entitlement to paid annual leave days which he had accrued but not yet had the opportunity to take as leave) amounting to £941.38 gross. He was also owed reimbursement for £37 expenses he had incurred on behalf of the respondent, with supporting receipts left for the respondent by him in the Leeds till. These three figures were later admitted by the respondent in its response to the claimant's grievance letter.

8.10 Contact and feedback from the respondent was sparse but the claimant and other employees were notified that there were difficulties with the respondent accessing the furlough scheme especially when it tried to participate in the extended or flexible scheme in place from July 2020 onwards.

8.11 On 8 June 2020, the claimant received payment in the sum of £2569.90, which he understood to be the furlough payments for March and April 2020, recorded on a payslip dated 5 May 2020 reflecting the pay period 22 March to 21 April 2020 in the sum of £3302.80 gross, £2569.90 net (which was very close to 80% of 2 months' gross wages). This time, the bank transfer payment was described as "I Ltd t/as Fitzw, Furlough salary", in the bank statement.

8.12 The claimant received no further furlough payments whether covering later May or June 2020, despite also receiving a payslip dated 5 June 2020, purporting to cover the period 22 April 2020 to 21 May 2020, referring to earnings of £1701.38 gross and £1460.46 net (again close to 80% of a month's gross wages).

8.13 The claimant's employment was terminated by email dated 24 June 2020 from the respondent Indicating that it was still making efforts to pursue the furlough scheme up to 22 June 2020:

> "Employment with Fitzwilliam and Hughes Spaces

> Following a review with the Spaces teams in Sheffield and Leeds it is apparent that despite some easing of the lockdowns the tenants of spaces are continuing to work from home for the foreseeable future. This means that there is virtually no sustainability or prospect of reopening the site for some time to come. To this end we are terminating all staff at Spaces Leeds and Sheffield and your employment has now ended. As you are aware all staff were put on unpaid furlough leave from 1 March. We will continue to try and access the furlough retention scheme to cover the aspects of the current period up to the 22nd of June, but be aware we are experiencing the same problem we had last time and this may take time to resolve. We will also forward all relevant documents in the post.
>
> We have updated HMRC reports to show that no payments have been made for June 2020 and this will again be amended hopefully once the furlough process is resolved.
>
> In the meantime I'd like to thank you for your efforts you have put in over the short time you were employed and wish you every success for the future
>
> Best regards Darren"

8.14 The respondent was stating that it had unilaterally reverted to the position of placing the employees on "unpaid furlough" from the beginning of March. It gave no notice of termination or payment in lieu of notice and no further payments were made by the respondent to the claimant.

8.15 The claimant' own inquiries with HMRC revealed that although the respondent had been making deductions from his pay for pension in the Nest Auto Enrolment scheme, no record of this was shown. Likewise, the claimant had employee National Insurance Contribution (NIC) and tax deductions made from his gross pay and was concerned that no account of such deductions had been made by the respondent to HMRC. He was very aware that other employees both at Leeds and other outlets were in a very similar position and feeling let down by the respondent. He raised a detailed formal grievance by letter dated 23 July 2020 which complained about the lack of tax records in his name showing PAYE contributions made by him and the respondent and the nest pension contributions and about the sums outstanding to him in wages, holiday pay and expenses.

8.16 The claimant explained that he had taken advice from both HMRC and ACAS about his employment rights during the furlough, that he was aware he accrued holiday pay entitlement during that time and had been advised by HMRC that he would not have to repay any furlough payment made to him. He reminded the respondent that Darren Hughes had earlier agreed to pay £250 compensation for the inconvenience and extra costs the claimant had incurred through repeated late payments of his wages.

8.17 Darren Hughes of the respondent replied to him in late July or early August 2020. He said it was entitled to offset the furlough payments for March and April made to the claimant from what it owed him. He wrote that when the respondent

had applied to join the further furlough scheme in July, it had been refused and then told that it had not been entitled to participate in the original furlough scheme because it had "…moved Fitzwilliam and Hughes into a new company in January 2020 in line with our plans for the business… This means you were not Furloughed and simply placed on unpaid leave since March 2020 as per our email". He did acknowledge sums outstanding to the claimant as:

Hours worked Up to being placed in unpaid leave in March £1,283.70;
11 days holiday £941.38;
Notice 1 week £427.90;
Outstanding expenses £37
Total £2,689.98

He promised to make payment of the sum outstanding to the claimant in August 2020 (calculated at only £120. 08 after deducting the furlough payment made previously) and to provide a full statement of Nest pension payments by 24 August 2020 but there was no formal contact from the respondent thereafter, no statement as to pension and no further payment made.

9. <u>The Law</u>

To those facts, the Tribunal applied the law. The starting point is that contracts of employment which give rise to the entitlement to pay are a matter of contract: based upon an agreement between the parties, employer and employee, although it is recognised that those two parties rarely have the same bargaining power. Many forms of employment protection have been established by Parliament over the years to ensure that employers deal properly and in accordance with minimum contractual entitlements with their employees. In short, employers will not be acting lawfully if they act on a unilateral basis. The statutory provisions dealing with the relevant employment protection rights are set out in the Employment Tribunals Act 1996, at Section 3 read with the Employment Tribunals Extension of Jurisdiction (England & Wales) Order 1994 for the notice pay claim, Part II of the Employment Rights Act 1996, particularly at Sections 13, 14, 23 and 24, for the unlawful deduction from wages claims, and, alongside them, the Working Time Regulations 1998, in particular Regulations 13 to 14 and 30 in respective holiday pay/accrued paid annual leave claims. The Tribunal had regard to its overriding objective at Rule 2 of the Employment Tribunals Rules of Procedure 2013 to deal with cases fairly and justly.

10. The Covid-19 pandemic has caused 2020 to be an exceptional year in terms of employment with the Chancellor of the Exchequer announcing his Coronavirus Job Retention Scheme in March. However, that scheme is not a statutory arrangement but gives direction and guidance from the Government making arrangements for employers to receive reimbursement or advanced payment from the Treasury covering 80% of the normal wages of eligible employees and workers put on furlough with their agreement given the exceptional circumstances of the virus and national lockdown. The original scheme announced on about 19 March 2020 was to cover the months of March, April and May and was soon extended to cover June 2020 with a further scheme and greater flexibility introduced from July 2020 onwards. The original scheme involved employees not working or attending for work but still receiving the reduced 80% payment (unless the employer topped that up to full wages). There

was no entitlement for an employee to be placed on furlough; it needed to be specifically agreed between the employer and employee and the provisions of the scheme were such that only the employer had direct dealings with HMRC. Strictly, the effect on the individual contract of employment between employer and employee was an agreed variation of the contract whereby the employee received just the 80% wages (up to a limit of £2,500.00 per month, unless the employer paid in full) and the employee was not merely not required to work but required not to do so. All other existing employment protection rights continued unchanged.

11. Conclusion

Whilst the claimant (like many others) may not have felt he had much alternative, the Tribunal concluded that the proper interpretation of the facts was that he had agreed a variation of his contract of employment: to be put on furlough backdated to about 18 March 2020 when this was offered to him by his employer, the respondent, in early April 2020. He did not challenge the respondent's letter of 6 April 2020 and the variation is evidenced by the payments to the claimant eventually of 80% furlough wages for March and April, albeit only paid in June 2020 and apparently by a related company of the respondent. The arrangements between the respondent and HMRC did not involve the claimant and the Tribunal concluded that if the respondent was later refused participation in the follow-up furlough scheme (or even had its status in relation to the initial furlough scheme altered retrospectively because of HMRC concerns about the position of the respondent or its related company) that did not undermine the contractual variation reached with the claimant. Just as the respondent was not entitled unilaterally to put the claimant on “unpaid furlough”, nor was it entitled without notice or explanation to change the claimant’s employer at some uncertain date. The Tribunal firmly concluded that the respondent, which remained the claimant’s employer, was not entitled to claw back the 80% furlough payments made to the claimant in these circumstances.

12. Much later, when the claimant received the email of 24 June 2020, th respondent dismissed him summarily with no notice or pay in lieu; another clear breach of contract was established since he was entitled to a week’s notice of termination; his employment terminated upon receipt by him of the email that day (not on 22 June). In its response to the claimant’s grievance, the respondent agreed almost the exact sum of notice claimed by the claimant (who had claimed £427.90, a net calculation); the Tribunal made the award gross at the weekly gross pay of £480.77. The respondent also agreed the outstanding expenses. That left the claimant to prove the balance of his claims, namely holiday pay (strictly Regulation 14 compensation for accrued paid annual leave he had not had the opportunity to take as leave), which still accrued during the furlough period in the sum of £520.79 and the final furlough payment for May 2020, in the sum of £1701.38 gross which was evidenced by the payslip provided to the claimant by the respondent but never paid. The Tribunal concluded without hesitation that the claimant, who showed himself throughout as methodical and reasonable, proved these outstanding amounts as well. He did not pursue a claim for compensation under Section 24(2) of the ERA 1996.

13. Damages for breach of contract in respect of notice pay are now to be awarded gross, not net after deduction of tax and national insurance. The Tribunal does not deal with the employee NIC, tax and pension concerns raised about the respondent by the claimant, since it appears that were lawful deductions from wages which the respondent was entitled to make but was then also obliged to account for the sums deducted to HMRC and the pension scheme. Since the claimant is still seeking to resolve those matters with HMRC, it is appropriate to make the awards in respect of wages and holiday pay in the gross sums as well.

Employment Judge Parkin

Date: 7 December 2020