EMPLOYMENT TRIBUNALS
London Central Region

Claimant: Mr P Hunter

Respondent: Criterion Hospitality Ltd

Heard CVP
On: 3rd and 4th March 2021

Before: Mr J S Burns

Representation
Claimant: In person
Respondent: Ms L Veale (Counsel)

JUDGMENT

1. To the extent necessary the Claimant is granted leave to amend his claim for arrear pay to include the sum referred to in paragraph 15 of the reasons below.
2. The claims of unfair dismissal, arrear pay and for holiday pay succeed.
3. The claims for notice, a redundancy payment, and under section 189 TULCRA 1992 fail and are dismissed.
4. The Respondent is liable under section 38 Employment Act 2002
5. The Respondent must pay £3825.65 to the Claimant by 18/3/2021.

REASONS

1. This has been a remote hearing. The hearing was conducted using Cloud Video Platform (CVP). It was not practicable to hold a face to face hearing because of the COVID-19 pandemic. There were no technical problems

2. I heard evidence from the Claimant and his witnesses Vanessa Nyandoro, Kishan Brahmbhatt and Wagner Silva, and from the Respondent's witnesses Marc Sandfort and Sandra Nunes. The documents were in an agreed electronic bundle and I was sent a few extra documents during the hearing. I received written final submissions from both sides.

3. The Claimant started working on 3/4/2018 for Alhambra House (London) Ltd which changed its name to Assembly House (London) Hotel Ltd in July 2018. At some point – probably in late 2018 or early 2019 the Claimant's employment was transferred to the Respondent which was called Assembly Hotels Group Ltd until June 2019 when it changed its name to Criterion Hospitality Ltd.

4. On 24/1/2019 the Claimant was promoted to Area Manager and his salary increased to £65000 per year. He was responsible for managing the operation of three hotels namely Victory House Hotel, Assembly Hotel and Indigo Hotel and various serviced apartments in London, which are owned by separate holding companies. His contract provided that he would be entitled to three month's notice of termination.

5. These hotels all shut when the lockdown started in March 2020. In response to this situation the Respondent entered negotiations with the Claimant in April 2020 with a view to adjusting his terms and conditions. There was a team conference call between Mr Sandfort (the

Respondent's Chief Operating Officer) and the Claimant on 7 April 2020 in which it was agreed that the Claimant's pay would be reduced to £48000 per year and he would reduce his days of work from 5 to 4 a week. Mr Sandfort did not mention during that call the proposal that the Claimant's notice entitlement should be reduced to one month.

6. On 10/4/2020 Ms S Nunes the Head of HR sent the Claimant a letter dated 9/4/2020 by way of email attachment. The letter confirmed the salary reduction and also informed the Claimant that his notice entitlement was reduced to one month with immediate effect. The email invited the Claimant to inform Ms Nunes by 14/4/20 if there was any objection, failing which the Respondent would assume the Claimant's agreement.

7. The email was sent at 9.33am an incorrect and non-existent personal address for the Claimant, but also to his work email address Paul.Hunter@criterionhospitality.com .

8. The Claimant denied receiving the email and letter but I find that he did so because page 67 of the bundle indicates that on 10/4/20 at 10.15, the Claimant forwarded it to himself, using his work email address.

9. I accept Mr Sandfort's evidence which is largely supported by the Clamant's own text messages that on 14/4/2020 the Claimant telephoned him to discuss the letter and in particular the notice reduction communicated in it. Mr Sandfort explained the reasons for this and the Claimant said that he accepted the position. He did not revert to Ms Nunes stating any objection.

10. On 11/5/2020 Ms Nunes sent a further email confirming the notice reduction to the Claimant at his work email address which he also received but made no further comment on at the time.

11. I find that the Claimant's contract was effectively varied on 14 April 2020 as regards both his salary and notice entitlement. There was specific oral agreement by the Claimant to a change notified in writing.

12. Between April and August 2020 the Claimant was assigned on a temporary posting to work as Building Manager at Trafford House which contains private residential accommodation operated by the Respondent. This was a temporary post which was created to facilitate the Claimant retaining his active employment rather than being furloughed. It would normally have attracted a salary of only £30000 a year and was not available nor would it have been suitable for the Claimant as a long-term position.

13. In July 2020 the Respondent faced acute business difficulties and a financial crisis. Its lenders and mortgagees insisted that rapid cuts were made. The Respondent made 18 other employees redundant with effect from 31 July 2020. On 13/8/2020 Ms Nunes and another Area manager Mr Zac Pearce summoned the Claimant to a meeting and informed him that he was to be dismissed for redundancy with immediate effect. Mr Sandfort, who was the Claimant's line manager could not attend the meeting as he was busy with other pressing business. There had been no prior warning or consultation with the Claimant about this before dismissing him.

14. The Claimant was paid in his final pay slip the following sums
    - Salary for the period 1-13 August in the sum of £1661.53. This was the correct amount for those days (calculated 9 x £184.62 per day).
    - Notice pay of £5416.66. This was one month calculated at the rate of £65000 per year which was in excess of his contractual entitlement. He was entitled to one month's notice pay at the rate £48000 pa ie £4000. The overpayment which was probably made in error was by the amount of £1416.66 before tax. I estimate tax and national insurance deducted at the rate of 30% which correlates with the figures shown on the final payslip, so the net overpayment was 70% of £1416.66 = ie £991.66, which I regard it as just and equitable to set off against the Claimant's damages under other heads.
    - Redundancy payment of £1076 which was the correct statutory entitlement.

15. The Claimant in his ET1 had claimed arrear salary for the first 13 days of August 2020. That was an invalid claim because he had been paid in full for those days. During the evidence of the Respondent's witness Ms Nunes she stated at one point that the amendment in the Claimant's contractual entitlement from £65K to £48K per year took effect on 14/4/2020 and not 1/4/20. She was quite correct about this having regard to the documents and my findings. When the Claimant heard that evidence he realised that he had been underpaid in April 2020 because he was paid for the whole of that month on the basis that his salary was only £4000 gross per month, whereas the reduction should have taken effect from 14/4 only. The difference in net pay was £388 over the ten working day period. Ms Nunes was given ample opportunity during her evidence to deal with this small point but she readily agreed that the Claimant had been underpaid. It is in the interest of justice to permit the Claimant to amend his claim to include this sum which he is plainly owed.

16. Under his contract the Claimant was entitled to 25 days paid holiday per year (giving an entitlement to the rounded up figure of 16 days in the period 1/1/2020 to 13/8/2020). In addition he was entitled to paid bank holidays, of which there were 5 in the same period. His total holiday entitlement by 13/8/2020 was 21 days. I find on the basis of a document produced by the Respondent (page 62 of the bundle) that he had taken 15 days holiday before dismissal. I accept that of the 4 public holidays in April and May 2020, he in fact worked on only one of them namely 25/5 as part of his 4 days worked that week. In the weeks in which the other public holidays fall in April and May, he worked 4 days but not on the actual public holidays. I accept the Claimant's evidence that the Basildon House Rota (which was part of the documentary evidence) is not a complete record of his work, because he also worked elsewhere for example at Head Office and from home. In addition, there were no complaints at the time from the Respondent that he was not working enough days.

17. After the contract was varied in April 2020 the Claimant had a contractual entitlement to have one day off between Monday and Friday as part of his 4 day a week work pattern and, in addition, paid public holidays. Hence by working four days a week in a week in which there was a public holiday he in fact did not get his full contractual entitlement because he should have had both the normal 4 day a week work pattern day off and the public holiday day off.

18. Hence, I agree that of the five public holidays which fell before 13 August 2020 the Claimant is to be regarded as having had the benefit of and to have taken as such only one, namely New Year's Day, which fell when he was still working 5 days a week. I find that the Claimant on dismissal was due 6 days holiday pay but in fact received no payment for this. He is due 6 x £139.63 (daily net pay) = £837.78 in this regard.

19. I find that there was a genuine redundancy situation in August 2020. The Respondent had a reduced need for an Area Manager of the hotels managed by the Claimant. The hotels had closed in March 2020 (and remain closed at the date of this decision). There were no available alternative vacancies.

20. Although Mr Pearce had the same job title as the Claimant, they had quite separate roles and it would not have made commercial sense to dismiss Mr Pearce whose role continued despite the lockdowns. The Claimant was responsible for the operational and financial performance of the three hotels that were established and operational prior to the lockdown. During 2019 the Respondent had launched a new brand called Zedwell, with three new hotels under construction with a scheduled opening year of 2020. Mr Pearce had been employed to deliver these three hotels from construction to opening. The construction of the hotels continued through 2020. Zac Pearce was paid considerably more than the Claimant and was perceived as having greater experience and enhanced skills needed for the construction phases and the set-up of IT systems and commencement of Zedwell operations. For these reasons, I reject the Claimant's submission that he should have been put into a selection pool with Mr Zac Pearce.

21. Ms Nunes stated that no warning or consultation period was carried out before dismissing the Claimant because she thought it was futile.

22. However the same approach was not taken when the Respondent made other employees redundant in July 2020 for similar reasons. Those other employees were given a redundancy consultation by Zoom meeting. For example, Ms Nyandoro's consultation lasted one week from 10 June to 17th June with the redundancy formally confirmed on 19th June.

23. I was referred to the case Speller v Golden Rose Communications plc [1997] 5 WLUK 88, EAT 1360/96, but in that case there was a need for secrecy to be maintained up to the dismissal date. That was not the case with Mr Hunter. The situation did not justify the way the Claimant was treated.

24. Even though the Respondent was facing a crisis and had to dismiss the Claimant rapidly I find it was procedurally unfair to dispense completely with all warning and consultation. He should have been given at least a brief consultation period. The Claimant was upset and shocked by being dismissed without warning and as a matter which had been decided without any discussion with him.

25. I therefore find that the Claimant was unfairly dismissed.

26. However, I find that had a consultation taken place it would not have made any difference to the outcome save for the fact that the dismissal would have been delayed by two weeks which I regard as the minimum reasonable consultation period in the circumstances.

27. The Claimant is not entitled to a basic award because he has already been paid a redundancy payment. He is entitled as a compensatory award to £350 for loss of statutory rights and two weeks net pay ie 2 x £697.69 = £1395.38 in this regard

28. In his ET1 the Claimant suggested that the Respondent had failed to comply with its obligations under section 188 TULCRA 1992 which provides: "*Where an employer is proposing to dismiss as redundant 20 or more employees at one establishment within a period of 90 days or less, the employer shall consult about the dismissals all the persons who are appropriate representatives of any of the employees who may be affected by the proposed dismissals or may be affected by measures taken in connection with those dismissals".*

29. I accept Ms Nune's evidence about this which was supported by a supplementary spreadsheet and her oral evidence. The Respondent throughout its operation made 18 people redundant on 31/7/20, the Claimant on 13/8/2020, and another person on 20/10/20. This amounted to making 20 people redundant in a 90 day period

30. However, it is clear from Ms Nunes evidence that the idea that the Claimant would have to be dismissed arose at the end of July and was separate from the decision to dismiss the other 18 who were dismissed at the end of July. Had the Claimant been thought to be at risk of redundancy when the other 18 were identified he would have been also dismissed on 31st July. Another separate decision was made in October to dismiss a salesperson. The Respondent response evolved to a changing and worsening situation caused by the lockdowns. It is not shown that at any point in advance the Respondent "proposed" ie formulated a plan, to make 20 people redundant over a 90 day period. I have referred to MSF v Refuge Assurance PLC 2002 ICR 1365 in this regard.

31. I have also considered Seahorse Maritime Ltd v Nautilus International (a TU) UKEAT 0281 16 LA. in which a number of different ships were operated by a single employer. All the ships were regarded as a single establishment. However, in that case the various ships were not each separately operated as distinct parts of the employer's undertaking, and in practice employees were transferred from ship to ship.

32. In the case before me, Zedwell employees who were included in the 18 made redundant by the Respondent on 31 July 2020 were working exclusively at the Zedwell Hotels. The Zedwell Hotels are a separate brand which had their own employees assigned to them and which the Respondent manages as a part of its operation distinct from the hotels which the Claimant managed. Mr Zac Pearce was assigned to the Zedwell hotels and not to the Claimant's hotels and vice versa.

33. The Claimant admitted in his earlier evidence that he did not work at Zedwell but when he became aware of the significance of the point became very reluctant to admit this under cross examination. I find he was not assigned to work at Zedwell. The 20 people made redundant over the 90 day period did not work at a single establishment.

34. Thus, the Respondent did not propose to, nor did it, make 20 or more people redundant during any 90 day period at a single establishment so section 188 did not apply.

35. If I am wrong in so concluding and I should have found there was a breach of section 188, then having regard to the principles in Susie Radin Ltd v GMB [2004] ICR 893, I would have limited the protective award to 2 week's pay as I would have regarded the disruption and strain placed on the Respondent and its HR function of 2020 as exceptional mitigating circumstances.

36. The Respondent failed to provide the Claimant with an updated statement of employment terms and conditions on the TUPE transfer in 2019 (and in particular with a statement of the name of the new employer) as required by section 4 ERA 1996 and this remained the case when the ET proceedings were issued. However, the Claimant was well aware that his new employer was the Respondent, and he received monthly pay-slips bearing its new name. In the circumstances the correct award for this is 2 week's gross pay namely £1846.15

37. In summary, the Claimant is due to be paid £837.78 (holidays) + £1395.38 (two week's net pay as part of his UD compensatory award) + £350 (loss of statutory rights arising from UD) + £388 (short pay for April 2020) + £1846.15 (two week's gross pay under section 38 EA 2010) - £991.66 (notice pay overpayment) = £3825.65. These figures are all net of tax.

J S Burns Employment Judge
London Central
4/3/2021
For Secretary of the Tribunals
Date sent to parties -05/03/2021