EMPLOYMENT TRIBUNALS

Claimant: Miss Sharon Pegg

Respondent: Ms Lisa Blissett

Heard at: Manchester **On:** 11 December 2020

Before: Employment Judge Grundy
(sitting alone)

REPRESENTATION:

Claimant: In person
Respondent: Represented by Mr J Munro Consultant

Covid-19 statement.

This hearing has taken place on a remote basis by CVP platform in accordance with the Presidential Practice Direction on remote hearings and open justice and in accordance with Rule 46 ET (CRP) Regs 2013 and the Guidance issued on 14th September 2020.

JUDGMENT

The judgment of the Tribunal is as follows:

1. It is declared that the claimant's employment is continuing and no dismissal has taken place.

2. The claimant's claim for unfair dismissal fails and is dismissed.

3. The claimant's claim for notice pay fails and is dismissed.

4. The claimant's claim in respect of holiday pay fails and is dismissed.

5. The claimant's claim in respect of unauthorised deduction from wages under s13 Employment Rights Act 1996 succeeds. The respondent shall pay to the

claimant £28.38 in respect of the period between 2 March and 26 March 2020, and £133.47 in respect of the period between 27 March and 10 July 2020.

6. The total award is therefore £161.85.

REASONS

1. These reasons are provided pursuant to the request of the claimant made on 11 January 2021, outside the 14 day period due she asserts to problems with the mail not being delivered in December 2020. The Tribunal gave an extempore oral judgment on the day of the hearing explaining its reasons for the decision. The claimant's claims arise in the eye of the storm of the pandemic and relate to her employment at the Melville public house, Stretford, Manchester.

CLAIMS AND ISSUES

2. The claimant's claims arise out of her employment as part of the staff, she claims as Assistant Manager, of the Melville public house. On 16 May 2020, she claimed unfair dismissal, notice pay, holiday pay and arrears of pay.

3. The tribunal identified the issues with the parties at the outset of the hearing:-

i. Has the claimant's employment ended?

ii. If so when?

iii. If the claimant was dismissed was she unfairly dismissed?

iv. If she was dismissed was that for a reason of redundancy?

v. Or was she constructively unfairly dismissed?

vi. Was there a fundamental breach of contract on the part of the respondent?

vii. Did the employers' breach of contract cause the claimant to resign?

viii. Was there an affirmation of the contract by the claimant?

ix. Was the dismissal unfair taking into account section 98(4) ERA 1996.

x. In relation to the money claim issues, these related to a continuing partial loss during furlough if established, a continuing loss depending on the end of employment if established, arrears of pay and whether the claimant was entitled to a holiday pay if the employment had ended and if so what amounts.

CONDUCT OF THE HEARING AND EVIDENCE AND WITNESSES

4. The hearing was conducted as a CVP remote hearing over remote video platform. The Tribunal heard evidence from the claimant, Ms Sharon Pegg and the respondent Ms Lisa Blissett and from Michelle Winn and Rebecca Johnson on behalf of the respondent. There were other signed statements without declarations of truth in the 148 page bundle pages 110- 120.

5. The Tribunal had available and read 2 bundles of documentary evidence containing 92 pages (respondent) and 148 pages (claimant). Both sides made oral submissions at the conclusion of the evidence.

FINDINGS OF FACT

6. The Tribunal has not found it necessary to determine all allegations of fact that were litigated before it, however the Tribunal has made findings on those matters about which it considers it is necessary to determine in order to give a full and reasoned judgment on the issues in the case.

7. The claimant commenced employment with the predecessors of the respondent on 20 October 2009. She asserted in the ET1 her employment ended on 14 April 2020 and her claim was then properly in time having been brought on 16 May 2020. Various other dates for the ending of the employment have subsequently been postulated including 7 July 2020 when the claimant was removed as the Facebook " admin" and from the works" whats app staff group. These events took place at the outset of the pandemic in lockdown 1 and during the on-going global pandemic when pubs could re- open.

8. The respondent took over at the Melville public house on 2 March 2020 and became the landlady. The pub is located in Stretford, Manchester and is a Joseph Holt house. This was a matter of weeks before national lockdown 1 was announced on 23 March 2020. The claimant had worked for other landlords for 11 years at the pub as Assistant manager, although the respondent believed her to be "shift leader" as she worked 12 hours a week. The claimant raised that she was underpaid for the first few weeks by the respondent. The respondent accepted that if the claimant was underpaid she would pay her. The figure asserted by the claimant to the Tribunal for underpayment in the early weeks was £28.38, undisputed by the respondent. This was therefore the award made to the claimant by consent for that period of arrears of pay.

9. Following the national lockdown announced on 23 March 2020 all public houses had to close, causing acute and extreme hardship to hospitality businesses. The claimant was upset by comments on social media by Miss Blissett suggesting she was trying to sort out matters but the claimant could "fill your boots'. The Tribunal did not consider this was said with malice, in uncertain times the respondent was in a difficult position having recently moved to the public house and having at this stage to deal with the chopping and changing off the furlough system when that came into being and not knowing what to do, before it was even announced and the respondent was trying to make sense of an unprecedented situation.

10. At first, employees were offered their P 45 by the respondent, on the advice of her accountant and one employee did take a P45 at the beginning of the pandemic lockdown. The claimant did not accept her P 45 at the outset of the lockdown, at the end of March nor in April. She was not dismissed on 14 April 2020 this is due to her actions following that date. The accountant's letter is at 117.

11. There was a staff meeting on 23 June 2020 some time after the date on which the claimant asserts she was dismissed, but which was attended by the staff and the claimant. The claimant accepted her furlough payment when it came through after 14 April, albeit that came through late due to problems for the respondent as she had only recently taken over the pub. Manifestly the claimant was still employed then.

12. The claimant did not seek to pick up her P 45 at the June staff meeting. The claimant continued to accept furlough payments and they were accepted until 10 July 2020 albeit paid later than the original system had proposed payments and causing distress and anguish. This was paid to her because the claimant continued in employment.

13. The claimant also attended "flow training" after the staff meeting, the context of the flow training was to learn Covid secure hospitality within the industry this had come about in a hurry, in the context of "the eat out to help out scheme" which was launched in the summer of 2020. The claimant was therefore active at this time to suggest her employment was continuing.

14. The claimant asserts that she was offered shifts that would not be her usual shifts. She asserted that the respondent "put me on shifts I couldn't do" and that that amounted to breach of contract. The respondent accepted that she had offered the claimant more hours within the shifts offered but she had not maliciously offered shifts that the claimant could not do. The Tribunal finds she was not able to offer the claimant the usual shifts (week days/evenings in the week) but the claimant was offered more hours than most and at the weekend when the pub would expect most trade and the respondent made the offer of more shifts to help the claimant. The respondent was trying to be fair to all her employees in the extreme circumstances of the summer of 2020. In any event furlough could continue at this time for employees not returning.

15. The claimant had remained on furlough till July in any event. Miss Blissett asked in the "whats app" group if anyone "*wud prefer to stay on furlough for the time being as there will be no set shifts everyone who returns to work needs to b flexible".* The time was no doubt stressful to Miss Blissett and the claimant had been suffering from shingles and also anxiety and depression. The claimant was feeling affronted, from the whats app and messages it seems Miss Blissett was desperately trying to get the business up and running again.

16. The claimant had sent a grievance to the respondent, which dated back to the April situation regarding the P45 s offered and rescinded. (99) The claimant did not attend a telephone meeting, which Miss Blissett had set up in late May in order to deal with the outstanding grievance of the claimant dating back to the

April situation when matters were very uncertain. The claimant did not attend "on advice", but the respondent wanted to sort things out and regarded the grievance as concluded, not unreasonably through the correspondence and the claimant's conduct which had appeared to show she wished to return to work. In response to a request to deal with the grievance by telephone, the claimant responded with " *I'm waiting for a formal invitation. thanks Sharon*".

17. The Whats app messages at 64-65 of the Respondent's bundle in July 2020 show the respondent asking the claimant, "*would you like to be on next weeks rota?"* and " *Let me know when you are ready to return*." The respondent was proposing furlough could remain if employees were not returning.

18. By mid July 2020 the claimant was filing "fitness for work" certificates in relation to employment. So far as those are concerned the claimant presented "fitness certificates" through from 10 July which had validity until 31 January 2021. At page 76 of her bundle 2/7/20- 16/7/20 "you are not fit for work" because of "mixed anxiety and depressive disorder."

19. The respondent removed the claimant from the admin of the works facebook on 7 July (A93) and from the staff whats app group on 7 October (A94) but the claimant had indicated she was not fit for work and had not said she wanted to be added to the rota at any time later. This did not constitute a dismissal in the context of the fitness certificates and the claimant's stance regarding the rota. The claimant did not receive furlough for August but she was not then fit for work per the certificates so would have to go down the statutory sickness pay route. There is no letter of resignation, nor social media message, nor words spoken by the claimant to infer she had left her job. The respondent asserted she is still employed and the Tribunal so finds.

20. The respondent had not fundamentally breached the claimant's contract by demotion, the claimant was working 12 hours a week pre lockdown and on the text of the former manager- Danny Chambers at 131- the assistant manager when he had left was Stephanie Thickett **not** the claimant. The miscommunication as the respondent describes it is attributable to the office set up and it seems the failure to pay wages at the appropriate rate of pay was down to that changeover of the proprietor. The respondent at no time intimated that she would not pay at the appropriate rate, nor did she seek to dispute arrears. The claimant did not resign because of it at any time.

21. The evidence of the claimant was that she should be paid at the rate of £9/ hour. The evidence from the Griffin at page 88 appears to be the best evidence as to that matter, in respect of the rate of pay at £9 / hour. The claimant received payment based on £8.21 / hour as at page 87. The calculations given to the Tribunal in respect of the 15 weeks underpayment accepted by the Tribunal were to the effect that the claimant should have received £1006.47 but received £873, leaving a deficit of £133.47 over the 15 week period- 27 March to 10 July 2020.

THE LAW

22. The Tribunal has had regard to the common law in respect of whether the claimant's employment was brought to an end whether by resignation or dismissal. There is no concept of " self- dismissal".

23. The law in respect of redundancy dismissals is irrelevant as it is clear ultimately there was not a redundancy situation being alleged by the claimant.

24. In respect of constructive unfair dismissal the Tribunal considered the following:-

25. Did the claimant terminate her contract of employment in circumstances in which she was entitled to do so by reason of the employer's conduct under section 95(1)(c) of the Employment Rights Act 1996?

26. Did the respondent commit a fundamental breach of contract?

27. Was the respondent's fundamental breach of contract the effective cause of the claimant's resignation?What was the reason or principal reason for the dismissal?

28. If the claimant is found to have been constructively dismissed, was the claimant dismissed for a potentially fair reason falling within section 98(1) or (2) of the Employment Rights Act 1996?

29. If so, has the respondent acted reasonably in dismissing the employee for that reason under section 98(4) of the Employment Rights Act 1996?

30. The law on constructive dismissal states at section 95(1)(c) ERA 1996, states that there is a dismissal when the employee terminates the contract with or without notice in circumstances that he or she is entitled to terminate it without notice by reason of the employer's conduct. In **Western Excavating ECC Limited v Sharpe [1978] ICR 221** the Court of Appeal ruled that the employer's conduct which gives rise to a constructive dismissal must involve a repudiatory breach of contract. As Lord Denning MR put it, "If the employer is guilty of conduct which is a significant breach going to the root of the contract of employment or which shows that the employer no longer intends to be bound by one or more of the essential terms of the contract, then the employee is entitled to treat himself as discharged from any further performance. If he does so, and he terminates the contract by reason of the employer's conduct he is constructively dismissed. In order to claim constructive dismissal the claimant must establish (1) a fundamental breach of contract on the part of the employer, (2) that the employer's breach caused the employee to resign, and (3) that the employee did not delay too long before resigning, thus affirming the contract and losing the right to claim constructive dismissal.

31. Further the Tribunal considered sections 13 and s23 of the Employment Rights Act 1996 in respect of the unlawful deduction of wages claims.

SUBMISSIONS

36. Both parties made oral submissions at the conclusion of the hearing.

CONCLUSIONS

37. The Tribunal applied the law to its findings of fact after consideration of all of the evidence, re- reading the notes of oral evidence and witness statements and the submissions. The Tribunal reached the following conclusions. The claimant did not establish on a balance of probabilities that there has been a dismissal. The ET1 referenced dismissal in April this was plainly overtaken by the furlough scheme and the claimant affirmed her contract by acceptance of her employer seeking the financial assistance for her under the scheme and by attending a staff meeting on 23rd June 2020 and the " flow training" and in discussions regarding the shift patterns on the return to work.

38. The Tribunal concludes that there was no articulation of words of termination on either side at any time. There were no express words of resignation by the claimant nor could it be implied from her conduct. After the alleged April dismissal the claimant affirmed the contract by her conduct in returning to the staff meeting and accepting furlough payments until July 2020. Thereafter she submitted the fitness to work certificates, which ran beyond the Tribunal hearing date.

39. In concluding that the employment was continuing it was not necessary for the Tribunal to consider the section 98 in detail however as the claimant asserted constructive unfair dismissal effectively in July 2020 the Tribunal considered that the respondent was not in fundamental breach of contract by means of the communications on social media and removal from the Facebook admin and the whats app staff group whilst the claimant was plainly off sick.

40. The claimant was not demoted and the shift patterns offered did not place the respondent in fundamental breach of contract because the alternative was to remain furloughed at that time.

41. Further the payment of wages at the wrong rate of pay was an administrative error, which the respondent was following up and was willing to make amends to the claimant and expressed this quite clearly to the Tribunal. In any event the claimant did not articulate to the Tribunal or the respondent that these matters caused her to resign on a particular date. The claim form had of course relied on an April dismissal date, which was not a date upon which the claimant's employment ended.

42. In the circumstances the claimant has not made out that she resigned due to a repudiatory breach of contract by the respondent. She is at the date of this hearing still employed by the respondent. There has been no articulation of resignation or dismissal by either side at this juncture.

43. The amount of £133.47 was agreed between the parties and this calculation arose from the deduction of the paid amount of furlough from the correct amount which should have been paid over 15 weeks of £9 / hour for 12 hour weeks.

44. Tribunal considered that other than the unlawful deductions claims as the claimant continued in employment her other claims had to fail.

Employment Judge Grundy
Date 1.4. 21

JUDGMENT AND REASONS SENT TO THE PARTIES ON
1 April 2021

FOR THE TRIBUNAL OFFICE