EMPLOYMENT TRIBUNALS

Claimant: **Mrs Galini Anca White-Sansom**

Respondent: **Atimes 2 Limited t/a The Dragon**

Heard at: **Nottingham**

On: **8 July 2021**

Before: **Employment Judge Phillips (sitting alone)**

Representation
Claimant: **Mrs White-Sansom in person**
Respondent: **Mr Hines of Counsel**

RESERVED JUDGMENT

1. The Claimant being an employee of the Respondent is entitled to bring a claim for unfair dismissal;
2. There being no dismissal, the Claimant's claim for unfair dismissal is not well founded and is dismissed;
3. There being no redundancy, the Claimant is not entitled to redundancy pay and the claim for it is also dismissed; and
4. The Claimant having taken pay in lieu of annual leave has no entitlement to holiday pay. The Claim for holiday pay is therefore dismissed.

REASONS

Background

1. The Claimant presented her claim to the Employment Tribunal on 21 September 2020. She had been employed as the cook at the Respondent's pub, The Dragon since 27 April 2016.

2. The Claimant's case is that she worked a contractual 40 hours per week and during her employment, she was not allowed to take annual leave. On 23 March 2020, she was furloughed until, on her case, she says she was dismissed on 14 August 2020 when her furlough payments ceased. She avers that she was either

dismissed and/or made redundant.

3. The Claimant contends that her dismissal was unfair contrary to Section 94 ERA 96. She therefore seeks payment of notice pay or in the alternative redundancy pay as well as a compensatory award.

4. The Claimant also brings a claim for holiday pay pursuant to the Working Time Regulations 1998 ('WTR 98') for the leave she says she was not entitled to take and additionally or in the alternative a claim for unauthorised deductions from wages pursuant to s13 Employment Rights Act 1996 ('ERA 96'.)

5. The Respondent's case is that the Claimant was employed on a zero hours contract and in August 2020, when the pub was reopening following the relaxation of Covid19 restrictions, the Claimant was invited back to work, although in a different position as a barmaid or server because it was not economically viable for the Respondent to open its kitchen. This was because of the reduced numbers of people the Respondent was able to seat inside its venue owing to social distancing and a reduced opening schedule.

6. The Respondent denies that there has been a dismissal or redundancy; its case is that the Claimant is still employed by it on a zero hours contract, she remains on the company payroll and that the Claimant refused to return to work when invited to do so in August 2020. The Respondent believes that the Claimant was unhappy at being asked to return to work, instead preferring to remain furloughed.

7. The Claimant did not bring a claim for automatic unfair dismissal nor unpaid wages.

Issues

8. In this case the Tribunal has to determine the following issues:
    i. Whether the Claimant was an employee or a worker and the nature of her contractual arrangement with the Respondent;
    ii. Whether there has been a dismissal;
    iii. If so, what was the reason for that dismissal;
    iv. Whether the Respondent acted reasonably and whether its actions fell within the band of reasonable responses; and
    v. Whether the Claimant having not taken holiday is owed holiday pay.

9. The Tribunal also heard evidence on remedy and received submissions on remedy, however given my findings below, it is not necessary to set those out here.

Evidence

10. The Tribunal heard evidence from the Claimant and from Ms Aunit Sandhu, the Manager and Director of the Respondent.

11. Almost 11 months had elapsed since most of the matters in question arose. Generally, the witnesses were able to recall details but in some cases their recollection was not perfect. Largely, this did not present difficulties for the Tribunal when reaching its decision.

12. The Tribunal was conscious that the Claimant's first language was not English. Where appropriate questions which comprised several elements were broken down and put to her separately. I further checked and confirmed with the Claimant that she understood what she was being asked and she declined the need for interpretation. Mindful of this, I remained vigilant throughout the course of the hearing and checked the Claimant's comprehension of matters at appropriate times.

13. Ms Sandhu was a credible witness. She was able to very clearly set out her understanding of matters. Where she did not know an answer she was clear that she did not know and did not venture an explanation which she could not substantiate.

14. The Claimant was not a credible witness. At times she refused to answer very simply questions even when put to her on several occasions and even when instructed to provide an answer by me. She would often deflect in her answers to aspects of her case which were wholly unrelated to the subject matter of the question. In my view, such evasiveness rendered significant questions about the credibility of her evidence.

15. In my findings of fact, the page references I use are those from the final bundle of documents agreed between the parties.

The Law

16. The Tribunal has to examine the contractual relationship between the parties to ascertain whether the Claimant was an employee or worker. The Claimant avers that she was an employee, working 40 hours per week from the time her employment started. The Respondent however contended that the Claimant had a zero hours contract and consequently was a worker.

17. If the Claimant is a worker then she does not have the right to bring a Claim for unfair dismissal as per s94 ERA 96. If however she was an employee then s94 ERA 96 provides that an employee has the right not to be unfairly dismissed.

18. The parties were in agreement that if the Claimant is found to be an employee, she had the requisite length of service as per s108 ERA 96, to bring a claim of unfair dismissal and that she presented her claim in time to the Tribunal.

19. The parties are also in dispute about the very fact of a dismissal. To determine this question, the Tribunal must consider whether there has been a dismissal

pursuant to s95 ERA 96 and also whether this was a redundancy situation as per s139 ERA 96.

20. If I find there has been a dismissal, I must examine whether that dismissal was fair, as per Section 98(1) ERA 96, which provides:
(1) In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show—

(a)the reason (or, if more than one, the principal reason) for the dismissal, and

(b)that it is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.

(2) A reason falls within this subsection if it—

(a)relates to the capability or qualifications of the employee for performing work of the kind which he was employed by the employer to do,

(b)relates to the conduct of the employee,

(c)is that the employee was redundant, or

(d)is that the employee could not continue to work in the position which he held without contravention (either on his part or on that of his employer) of a duty or restriction imposed by or under an enactment.

(3) In subsection (2)(a)—

(a)"capability", in relation to an employee, means his capability assessed by reference to skill, aptitude, health or any other physical or mental quality, and

(b)"qualifications", in relation to an employee, means any degree, diploma or other academic, technical or professional qualification relevant to the position which he held.

(4) Where the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer)—

(a)depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and

(b)shall be determined in accordance with equity and the substantial merits of the case.

21. It is for the Employer to show that the reason for the dismissal is either one of those reasons set out in s98(2) ERA 96 or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.

22. In this case, the Respondent did not advance a reason contrary to its primary case that there had been no dismissal.

23. The Tribunal must then consider whether in terms of process, any dismissal was

fair and apply the band of reasonable responses test. There is a whole swathe of case law, which if appropriate the Tribunal must consider when determining these questions.

24. Turning next to the question of holiday pay, the Tribunal must first assess whether the Claimant is entitled to bring her claim and the basis for so doing. She has the right to seek holiday pay by way of breach of contract if she is no longer employed. She could also seek to bring the claim by way of a claim for unauthorised deduction from wages pursuant to s13 ERA 96. Alternatively she can also bring a claim pursuant to the WTR 98 for the holiday pay which she says she was entitled to but did not receive. The Tribunal will first have to determine the question of whether the Claimant was not allowed to take annual leave and whether consequently she has annual leave owed to her. Once that decision has been reached, the Tribunal can then seek to examine the above routes to an award in more detail.

The Facts

25. The first question to which I attend is of whether the Claimant was an employee or a worker. The parties were opposed on this point as set out above. The evidence, which was not disputed by either party was that the Claimant had worked a 40 hour week since she commenced employment with the Respondent in April 2016.

26. The hours and the days upon which the Claimant worked did not vary. There was no suggestion in the witness evidence or bundle that at any time someone else has completed the Claimant's work for her.

27. When Ms Sandhu gave evidence I enquired as to why she and the Respondent believed that the Claimant was employed on a zero hours contract. She replied that on some occasions the pub might be closed or a Friday might be busy and they'd decide not to open the kitchen. But on further questioning this was a rare occurrence. The Respondent could not produce a copy of the Claimant's employment contract.

28. On any reading of this evidence and with no contractual or documentary evidence, we have a Claimant who worked the same hours every week over almost four years. She did so herself and there is no evidence to suggest someone else could have undertaken the work for her. The Respondent, other than submitting that the arrangement was a causal hours contract, provided no other evidence which suggested that this was anything other than a contract of employment for 40 hours per week. Accordingly, I am bound to find in these circumstances that the Claimant was an employee and is therefore entitled to bring a Claim for unfair dismissal pursuant to s111 ERA 96.

29. Given that finding, I must next examine whether there has been a dismissal within the meaning of s95 ERA 96. Essentially there will be a dismissal if the contract

under which the Claimant is employed is terminated by the Respondent, the Claimant was working on a fixed term contract which has ended or the Claimant herself has terminated the contract.

30. The Tribunal was provided with evidence of the communication between the parties from June 2020 onwards. Prior to this, it was undisputed that the Claimant had been furloughed since March 2020 owing to the first lockdown for Covid19 when the Respondent's pub had to remain closed.

31. The background to the return to work was the end of the first national lockdown and the point at which hospitality venues, including the Respondent's pub, were going to be permitted to reopen. Taking the evidence which was before me chronologically; at some point in June 2020, the evidence shows that the Respondent in discussions with its accountants had considered whether they needed to make the Claimant redundant which can be found at page 19a of the bundle. Ms Sandhu's evidence on this in paragraph 9 of her witness statement is that the Respondent did consider whether it would be financially viable for the kitchen to reopen at the pub at all going forwards. She states, and I accept, that whilst this was considered, the Respondent ultimately did not proceed down this path.

32. The parties agreed that at some point in June 2020, they had a phone call or possibly more than one call. In the call(s) the Claimant's return to work was discussed, the fact that the Kitchen would not be reopening initially was discussed and the Respondent set out that at some point, with looming changes to the furlough scheme, it would not be economically viable for all staff to remain furloughed.

33. On these calls, the parties' evidence differed. The Claimant averred that the phone calls made her concerned that her job was no longer available to her and that the vagueness of the calls is what later led to her wanting everything in writing from the Respondent. By contrast, the Respondent sets out in detail that during these conversations, the Claimant made it clear she wished to remain furloughed until at least the end of August 2020 because of personal issues.

34. The Claimant next provides a couple of text messages she received from a co-worker, Mariano, at page 20 of the bundle, the first of which was received on 1 July 2020. In those messages he relays being sorry to hear that the kitchen would not be reopening at the pub when it finally welcomed customers back. He further suggests that he is sure that the Claimant would be able to find something else in terms of employment. My findings on these messages are that I cannot safely conclude that they are indicative of a redundancy, as suggested by the Claimant. The sender of the messages was not a witness before the Tribunal and thus was not subject to cross examination or further enquiry. In addition, these messages stand in stark contrast to the actual correspondence which occurred between the parties as discussed below.

35. Following this the Claimant sent a text message to Ms Sandhu on 3 July at page 21 of the bundle enquiring when her last day of work would be. This was then followed up by another text message on 7 July (page 22 of the bundle) asking for a copy of her contract of employment and again enquiring when her last day of employment would be.

36. Ms Sandhu replied on 7 July to say that she would attempt to call the Claimant shortly thereafter.

37. On 15 July 2020 at pages 23 and 24 of the bundle, the Claimant wrote a letter entitled Grievances and sent it to Ms Sandhu and the Respondent. In the letter she alleges issues regarding non-payment of holidays, her employment contract, itemised wage statements and dismissal and redundancy.

38. A further message was sent by Ms Sandhu to the Claimant on 19 July, again at page 22 of the bundle. In this message she confirms that the pub would be reopening to the public shortly and on Wednesday to Friday of that week. She asked the Claimant if she wanted to work or remain furloughed for one week.

39. In a reply on 21 July, the Claimant references Ms Sandhu having called her but asked the Respondent to text her back.

40. At page 25 of the bundle, there is a letter from Ms Sandhu to the Claimant replaying to her grievance letter. In it she responds to the questions raised by the Claimant about holiday pay, her contract of employment, itemised wage statements and dismissal and redundancy.

41. In evidence, the Claimant alleged that she had not refused to return to work but instead had not been willing to undertake any more work unless the Respondent actually put in writing to her the conditions of her returning to work including the days and hours and specifically the job role she would be undertaking. When questioned as to whether this was unreasonable given the Respondent didn't know what it was that she wanted, she simply repeated that she wanted everything in writing.

42. The Respondent in contrast, averred that it had offered the Claimant a return to work, taking into consideration the opening hours which the pub would be opening, its reduced capacity to seat customers indoors owing to social distancing and that despite its best efforts, the Claimant had failed to engage or even discuss the return to work. In evidence, Ms Sandhu made clear that when her offer of a return to work had not been responded to by the Claimant and her receipt of her grievance letter, she believed the Claimant had been essentially refusing to return to work owing to her preferring to remain furloughed.

43. She further set out that despite attempts to discuss the Claimants return to work,

the Claimant had in effect, made it impossible to do so by demanding precise details of the return to work. The Respondent did not believe it could do that, because having made an offer to the Claimant, it had heard nothing back and so ultimately needed to discuss the matter with the Claimant to ascertain exactly what it was that she wanted before a further offer was made.

44. It is of course important to note that during the entirety of this period, the Claimant remained furloughed and was in receipt of 80% of her wages without a requirement to work.

45. It is true that at the time, the Respondent ultimately decided initially that the Kitchen would not be reopened. However this will have been almost identical to thousands of hospitality venues across the country who were reopening with changes to their normal operating procedures until such time as the pandemic allowed normal operation. In evidence, and I accept, the Respondent said its kitchen had ultimately reopened before the second lockdown for Covid19.

46. The Respondent's actions in seeking to discuss temporary changes to hours and work will have been mirrored across the country as hospitality businesses sought to reflect the change in working practices owing to every changing legislation and regulations regarding social distancing. The Claimant was offered bar work and hostess duties, some of which had not formed part of her role prior to lockdown and some of which had. The Claimant did not expressly set out what she made of these proposals but given her Claim includes a claim for redundancy pay, it follows that her case must be that the changes to the job role are indicative that her role was redundant.

47. On this point, I find that whilst there was clearly a temporary cessation of the kitchen operating, it was only temporary and on the Claimant's own evidence it was clear that the kitchen had reopened before the end of 2020. In seeking to offer temporary changes in job role, the Respondent acted reasonably in seeking to gain the Claimant's agreement. In addition, I find that the changes being suggested by the Respondent were temporary. They did not in fact become permanent and were clearly therefore reasonable in the circumstances.

48. The Claimant's evidence about her refusal to discuss a return to work was unsatisfactory. When asked why she had refused to even discuss a return other than in writing, she appeared bemused at the question. In my view, her behaviour put the Respondent in an impossible position. In order to put an offer for a return to work in writing, it needed to know what the Claimant wanted given all previous offers to return to work had been rebuffed. It could therefore not put anything in writing to the Claimant because she refused to engage.

49. My findings on the evidence are as follows. The Claimant could not have made it more difficult for the Respondent to agree a return to work. The Respondent's attempts to initiate communication regarding the Claimant's return to work were rebuffed entirely. The offer to return to work made at the beginning of July was

ignored entirely. In circumstances where one party (the Respondent) was seeking to agree the end of the Claimant's furlough and a return to work and the other (the Claimant) was doing everything she could to avoid having a conversation, it would appear that the Respondent could do little more than it did. I find that the Claimant refused to work.

50. On the question of the Respondent's allegation that the Claimant clearly wished to remain furloughed and that she had repeatedly mentioned this, would appear to be a safe conclusion. The Claimant's behaviour was not that of an employee who wished to return to work; such return being rendered impossible by her failure to engage. I also find that, it was only at the point at which the Respondent had made it clear to the Claimant that her furlough would be ending, did she choose to write and send her grievance letter. I need not conclude whether the letter was an attempt by the Claimant to remain furloughed, but it is certainly possible that this is why it was sent.

51. Overall, what is strikingly clear is that despite all of the communication and the Claimant's assertion that she was dismissed, the evidence does not support this. At no time did the Respondent tell the Claimant her employment was ceasing, in fact by letter dated 1 August 2020 at page 26 of the bundle, they specifically set out that the Claimant's employment was not ceasing.

52. In reaching this view, I have also considered the fact that the Claimant remains on the Respondent's pay roll system, has received no P45 and her contract was not ended. Interestingly here, the Claimant did not bring a claim for unauthorised deduction from wages, which she may well have been able to argue on the facts (subject to her being willing and able to work.)

53. Similarly, I cannot find on the evidence before the tribunal that this was a redundancy situation within the meaning of s139 ERA 96. The Respondent was able to offer temporary alternative work until such time as the restrictions affecting the hospitality sector were lifted. This is reinforced by the fact that the Kitchen at the pub where the Claimant worked, reopened at some time in October 2020. The Respondent had previously considered whether it needed to make the Claimant redundant and whether her job role was but decided it did not need to do so. That decision, on the facts would appear to be correct.

54. In closing submissions, Mr Hines, Counsel for the Respondent ventured that it might be that the Claimant, by her conduct had resigned. However on examination of the facts, even had that been the case, the Respondent did not treat the Claimant's actions as a resignation. It's case before the Tribunal was that the Claimant remained on its payroll system. I am therefore duty bound to find that even had there been a resignation by conduct, that the Respondent did not accept it.

55. Turning next to the question of holiday pay, the parties' positions differed. The Claimant asserts that since working at the Respondent's pub she has not taken

or been paid for annual leave. The Respondent's position is that she had in fact chosen to take pay in lieu of annual leave and thus there are no payments outstanding or due to the Claimant. Both parties in questioning said they knew that the Claimant was entitled to annual leave.

56. The Claimant in evidence said that she only had bank holidays and Sundays off because on those days the pub's kitchen was closed. When questioned about having taken money in lieu of annual leave, the Claimant denied that this had ever happened. She was also asked about taking money from the till for annual leave. The Claimant denied that the monies taken were for anything other than her wages because she rarely saw Ms Sandhu when she worked.

57. The Respondent however sought to paint a picture of the Claimant being adamant that she needed the money and so always chose to receive pay in lieu of annual leave which she would take from the till in the pub with permission. In relation to the question of the Claimant never having taken leave, in its grievance response letter at page 25 of the bundle, the Respondent provided dates on which the Claimant had taken annual leave namely, 14 November 2016, 15 April 2017 and 9 June 2017.

58. Taking the evidence as a whole and my general impression of the witnesses for each party, I prefer the Respondent's case. The Claimant knew that she had annual leave entitlement, had worked in the United Kingdom previously and said she knew about taking annual leave and had only raised the issue some 4 years after, on her case, she says she was not allowed to take her annual leave. The Claimant did not strike me as someone who would be shy in coming forward to assert her rights and I find it more likely than not, that she received payment in lieu of annual leave by agreement with the Respondent.

Determination

59. The Claimant was not dismissed – all of the evidence points to this being the case. She remains on the Respondent's pay roll, she has not received a P45, there were not acts on the part of the Respondent which amount to a dismissal. Even in the case of the removal of the Claimant from furlough – was an attempt to get the Claimant back to work. In terms of the work, whilst it is true that initially the job role into which she would return was different (although this work had formed part of her work previously), ultimately had she engaged then eventually, later in 2020, she would have continued to carry on the duties she was originally engaged for. The Claim for unfair dismissal must therefore fail.

60. Given there has been no dismissal, the Tribunal has also had to examine whether in the circumstances, the Claimant was redundant. Whilst true that initially the type of work and the need for it had changed, this was temporary and the Respondent's offer to the Claimant to return to work to undertake slightly different duties was a sensible mitigation against redundancy. On all of the facts and the circumstances of the case, the Claimant's role was not redundant. The kitchen in which she worked opened before the end of 2020 and what the Respondent

proposed in July 2020 was simply a temporary change in job role to mitigate against redundancy. The Claimant is therefore not entitled to a redundancy payment.

61. Finally, on the question of annual leave, given I have found that the Claimant received pay in lieu of annual leave, there is no leave owed to the Claimant and accordingly this claim too must fail.

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Employment Judge Phillips

Date: 5 September 2021

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