EMPLOYMENT TRIBUNALS

BETWEEN

Claimant		**Respondent**
Mr J Connellan	AND	The St Enodoc Hotel

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

HELD AT Bodmin **ON** 23 August 2021
Hybrid (Partly Remote Video) Hearing

EMPLOYMENT JUDGE N J Roper

Representation

For the Claimant: In person
For the Respondent: Mr J Strachan, Proprietor

JUDGMENT

The Judgment of the Tribunal is that:
1. The claimant is entitled to a statutory redundancy payment of £1,700.00; and
2. The claimant's claim for unfair dismissal is dismissed; and
3. The claimant's claim for breach of contract in respect of his notice period succeeds, but he is awarded no compensation in this respect because he fully mitigated his loss; and
4. The claimant's claim for accrued holiday pay is also dismissed.

RESERVED REASONS

1. In this case the claimant Mr James Connellan claims that he has been unfairly dismissed, and he claims his notice pay and a statutory redundancy payment. He also brings a claim for accrued but unpaid holiday pay. The respondent denies that the claimant was dismissed and denies the claims generally.
2. I have heard from the claimant, and I have heard from Mr James Strachan and Mrs Lucy Strachan on behalf of the respondent.
3. There was a degree of conflict on the evidence. I found the following facts proven on the balance of probabilities after considering the whole of the evidence, both oral and documentary, and after listening to the factual and legal submissions made by and on behalf of the respective parties.
4. The respondent is a hotel in Cornwall. The claimant commenced employment at the hotel on 12 April 2016, and his employment transferred to the current respondent in January

2019. He signed an updated contract of employment in June 2019 which under the clause headed "Job Title and Base" confirmed that he was employed as a Breakfast Chef, but the respondent reserved the right "to appoint you to other positions (whether within the company or any sister company) and to transfer you to other locations whether temporarily or permanently, as the needs of the business require". Under the clause headed "Hours" the contract provided "under this agreement there are no fixed hours of work. You will be notified of your working pattern in advance each week." Under the clause headed "Salary" the contract provided "Your daily rate will be £85 for working eight hours a day usually from 0700 until 1500, five days per week, paid in monthly intervals". The claimant's duties, hours and pay reflected the provisions until the events of the Covid-19 pandemic in early 2020.

5. The respondent hotel was forced to close during the spring of 2020 as a result of the national lockdown. The claimant and other staff agreed where necessary be placed on furlough in accordance with government guidelines. On 4 June 2020 all staff including the claimant were informed that they were required to take nine days of their annual holiday entitlement during the shutdown period, which was to commence in 18 days' time. The respondent was effectively giving notice to employees to take holiday in accordance with Regulation 15(4) of the Working Time Regulations 1998. The claimant was paid for the nine-day period of holiday which followed that 18 days' notice (with effect from 22 June 2020) and did not work during that period, and so I find that the claimant did take paid annual leave during that period.
6. There was then a dispute between the parties which resulted in the termination of the claimant's employment with effect from early July 2020. There was a meeting between Mr Strachan of the respondent, Mr Owen the executive chef, and the claimant which took place on 2 July 2020. In the respondent's own words: "We explained to Mr Conellan that the company had suffered a significant financial impact during covid-19, having been unable to open for three months, and that we faced a very uncertain future. We were trying to protect the future of the business, while keeping everyone employed, with the help of the government coronavirus job retention scheme. We have had to reduce costs across the business while adhering to social distancing in small spaces such as the kitchen."
7. The respondent's minutes of that meeting on 2 July 2020 also record the following: "We discussed the plan going forward and how as a business we needed to adapt to life post-covid-19. We need to reduce staff levels in the kitchen to adhere to social distancing and to reduce costs. The plan for James was for him to remain furloughed and come back part-time two days a week. James' contract from the previous company was on a day rate basis, when asked about moving to an hourly wage, James declined this offer. In order to reduce staff levels it was discussed that we would be moving James's role as per his contract "the company reserves the right to appoint you to other positions" trying to work out that he could still be on his day rate but it would have to be a split shift as kitchen porter and prep chef. His contract also states there are no fixed hours of work. On conclusion of the meeting everyone agreed and understood how we would be proceeding. There were no additional questions."
8. The claimant's version of events against this background is slightly different. He asserts that he was informed that his job would be given to the pastry chef who would then split his work between the kitchen and the garden. The reason given was that the respondent was reorganising for the future and effectively his job was no longer open to him. He accepts that he was offered an alternative position working two days per week doing split shifts, doing the job as a kitchen porter. He was also told that he would be paid on a day rate which he concluded was a different job with different hours on a lower salary. The claimant asked for a redundancy package and was told that it was the job which was being made redundant and not the claimant. The claimant asserts that he informed the respondent that he was unable to work split shifts because he lived 15 miles away, and there would also be a loss of earnings. He declined to accept that job.
9. It seems that the claimant assumed that his job was at an end and that it had been terminated by the respondent. He did not resign his employment. However, it seems that the respondent assumed that he would continue in the new position and included the claimant in the rota commencing on 4 July 2020 for that reason. The claimant was able to

obtain alternative employment immediately at the same rate of salary as his current job with the respondent and he left the respondent's employment to commence that new position on 6 July 2020.

10. On balance I find that effectively the respondent terminated the claimant's current existing position as at 2 July 2020 for the reasons which the respondent itself explained, namely because it needed to reduce staff and reduce costs.
11. Having established the above facts, I now apply the law.
12. The reason for the dismissal was redundancy which is a potentially fair reason for dismissal under section 98 (2) (c) of the Employment Rights Act 1996 ("the Act").
13. The statutory definition of redundancy is at section 139 of the Act. This provides that an employee shall be taken to be dismissed by reason of redundancy if the dismissal is wholly or mainly attributable to (section 139(1)(b)) "the fact that the requirements of (the employer's) business for employees to carry out work of a particular kind, or for employees to carry out work of a particular kind in the place where the employee was employed by the employer, have ceased or diminished or are expected to cease or diminish"
14. I have considered section 98 (4) of the Act which provides "…. 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".
15. The claimant's claim for breach of contract in respect of his lost notice period is permitted by article 3 of the Employment Tribunals Extension of Jurisdiction (England and Wales) Order 1994 ("the Order") and the claim was outstanding on the termination of employment.
16. The claimant also claims in respect of holiday pay for accrued but untaken holiday under the Working Time Regulations 1998 ("the Regulations").
17. I have considered the cases of Williams & Ors v Compair Maxam Ltd [1982] IRLR 83; Safeway Stores v Burrell [1997] IRLR 200 EAT, and Polkey v A E Dayton Services Ltd [1988] ICR 142 HL. I take these cases as guidance, and not in substitution for the provisions of the relevant statutes.
18. Dismissal and Reason:
19. The respondent denies it dismissed the claimant and denies that there was a redundancy. The respondent accepts that it "moved the claimant's role" reliant on the provision in the contract that "the company reserves the right to appoint you to other positions". It also asserts that the claimant was employed under a zero hours contract, and effectively therefore that the respondent was entitled to reduce the claimant's hours.
20. This was not a contractual relationship between the parties where the claimant had been employed over a number of positions which repeatedly changed. The claimant was employed on a consistent and repeated basis as a Breakfast Chef on the same hours and for the same salary. I do not accept that the respondent's contractual provision upon which it seeks to rely entitles the respondent to change the claimant's duties whenever it wished. In addition, I do not accept that the claimant was employed as alleged by the respondent on a zero hours contract. Under the clause in the contract of employment headed "Hours" the contract provided "under this agreement there are no fixed hours of work. You will be notified of your working pattern in advance each week." The parties operated on the basis that the claimant always worked the pattern which was notified to him. It was not the case that he was at home or otherwise waiting to be notified of possible work against the background of no hours or minimum hours only being allocated. In addition, under the clause headed "Salary" the contract provided "Your daily rate will be £85 for working eight hours a day usually from 0700 until 1500, five days per week, paid in monthly intervals". The reality of the contractual relationship between the parties was that the claimant was employed as a Breakfast Chef on a regular eight hour shift.
21. At the meeting on 2 July 2020 the claimant was informed that the respondent needed to reduce costs and reduce staff, and effectively therefore was told that his existing contract arrangements could not continue. He was offered an alternative position, which he chose to decline.

22. In my judgment the statutory definition in section139(1)(b) of the Act is satisfied because the requirements of the respondent's business for the claimant to carry out work of a particular kind had ceased or diminished. The claimant was informed of the same but declined an offer of alternative employment. I find that the claimant was dismissed on 2 July 2020 by reason of redundancy.
23. Statutory Redundancy Entitlement:
24. Given that the claimant was dismissed by reason of redundancy I find that he is entitled to a statutory redundancy payment. He is entitled to four weeks' gross pay for each of his four years of employment, at the rate of £425.00 per week, and is therefore entitled to a statutory redundancy payment of £1,700.00.
25. Unfair Dismissal Claim:
26. The respondent asserts that it acted entirely reasonably in difficult financial circumstances to comply with government guidance and national lockdown restrictions, and in the hope of surviving as a business and retaining as many staff as possible. I agree entirely with that assertion. I find that in this case the respondent consulted reasonably with the claimant, along with other employees, and offered him such alternative employment as was available. Given the size and administrative resources of this employer, I find that it acted fairly and reasonably in all the circumstances of the case. I therefore dismiss the claimant's claim for unfair dismissal.
27. Breach of Contract Claim:
28. The claimant was entitled to four weeks' statutory notice on the termination of his employment. Although this was not given, the claimant obtained alternative employment immediately, without any loss of earnings. Given the confusion over exactly what happened at that stage, I find on balance that the claimant should have been given four weeks' notice by the respondent, and although this was not given, the claimant suffered no loss. Accordingly, the claimant succeeds in his claim for breach of contract, but no compensation is awarded.
29. Accrued Holiday Pay Claim:
30. For the reasons explained above I find that the respondent gave the claimant the appropriate notice under Regulation 15(4) of the Working Time Regulations 1998, namely 18 days' notice given on 4 June 2020 to take nine days' holiday with effect from 22 June 2020. The claimant did take this holiday and was paid for it. There was no further holiday outstanding on the termination of the claimant's employment. I therefore also dismiss the claimant's claim for accrued but unpaid holiday pay.
31. For the purposes of Rule 62(5) of the Employment Tribunals Rules of Procedure 2013, the issues which the tribunal determined are at paragraph 1; the findings of fact made in relation to those issues are at paragraphs 4 to 10 ; a concise identification of the relevant law is at paragraphs 11 to 17; how that law has been applied to those findings in order to decide the issues is at paragraphs 18 to 28 .

Employment Judge N J Roper
Dated: 23 August 2021
……..