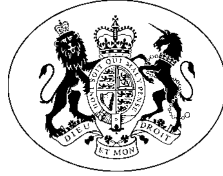

EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Mr K T Hadzhitenev	**v**	**Eden Gardens Entertainment Ltd**

Heard at: London Central
On: 8 September 2021

Before: Employment Judge Hodgson

Representation
For the Claimant: did not attend
For the Respondent: Mr T Gillie, counsel

JUDGMENT

1. **The claim of automatic unfair dismissal fails and is dismissed.**

2. **The claim of unlawful deduction from wages is not well founded and is dismissed.**

3. **The claim of breach of contract (wrongful dismissal) fails and is dismissed.**

REASONS

Introduction

1. On 21 April 2021, the claimant presented to the London Central employment tribunal a claim which included the following allegations: that he was dismissed for asserting a statutory right, contrary to section 104

Employment Rights Act 1996; that the respondent failed to pay notice pay; and that there had been unlawful deduction from wages.

2. Notice of the hearing was sent on 27 May 2021 to the claimant's address, as given on his claim form. This noted the final hearing would proceed by video on 8 and 9 September 2021. The response was accepted on 23 June 2021, and the claimant was notified at the address given on his claim form.

3. On 7 September 2021 at 15:13, the tribunal sent joining instructions to the parties using the email addresses as notified by the parties. On 7 September 21 at 16:00, I sent a further email to the parties. I used the address identified on the claim form. I gave further instructions for preparation for the hearing.

4. At no time did the claimant contact the tribunal or the respondent in relation to any of the documents set out above.

5. The claimant failed to attend the hearing on 8 September 2021. I asked the clerk to telephone him. The clerk spoke with the claimant who stated that he was abroad and had received no notice of any hearing. He said he did not intend to appear at the hearing.

6. The respondent did attend the hearing and was represented by counsel. We reviewed the documentation set out above. I was informed that the claimant had made no attempt to contact the respondent at any time since receipt of the ET3.

7. I was satisfied that the claimant had received the original notification of the hearing, as it had been sent to the address he had nominated. Moreover, the email address used was the one nominated by the claimant, and on the balance of probability, I concluded that the claimant had received the tribunal's notice of 7 September 2021 and had received the further directions I gave. At no time did the claimant respond or confirm that he had not received the original notification of the hearing. In the circumstances, I was satisfied the claimant had been notified of the hearing.

8. Rule 47 Employment Tribunals Rules of Procedure 2013 provides in the case of non-attendance "the tribunal may dismiss the claim or proceed with the hearing in the absence of that party. Before doing so, it shall consider any information which is available to it, after any enquiries that may be practicable, about the reasons for the party's absence."

9. Having made appropriate enquiries, I concluded there was no good reason for the claimant's failure to attend. The respondent was ready to proceed with the hearing and I decided to hear the claim on its merits.

10. The respondent did not call any witness evidence. I received an initial bundle. I also asked the respondent to lodge further documents. I considered the claim form and the response.

The facts

11. Much of the background in this case is agreed. Where there is potential conflict, I have considered both the claim form, the response, and the available documentation.

12. The respondent company operates the Cargo Nightclub, 83 Rivington St, London. The claimant was employed as a chef at Cargo Nightclub on a zero hours contract. His employment started on 4 January 2020. He was paid weekly in arrears. His hourly rate was £10 per hour.

13. The claimant worked his last shift on 16 March 2020. Cargo Nightclub closed on 20 March 2020 following the government's announcement of a national lockdown.

14. On 31 March 2020, the respondent informed all zero hours staff that all work for zero hours staff was cancelled until further notice. It was confirmed that no zero hours staff would be offered furlough arrangements. The letter stated –

> **We have carefully considered realistic viable options to support you at this very difficult time and will continue to do in so far as we are able. You are engaged on a zero-hours contract. As there is currently no work available due to the closure of our venues we have been unable to offer you work. We have taken time to determine whether we are able to Furlough you through the Government's Job Retention Scheme. We regret to inform you that due to the Company's situation and the cash flow crisis it is experiencing we are unable to Furlough you…**

15. On 9 April 2020, the claimant requested that he be furloughed.

16. On 15 April 2020, the claimant sent an email to the respondent stating

> **My last working day was 16 March 2020. I currently working for you or not? I also want to ask if I will receive 80% of my salary under the government programme for the duration of the crisis.**

17. The respondent replied confirming that all work was cancelled for zero hours staff and that he was not furloughed.

18. The claimant visited the club at the end of October 2020, but found that it was closed.

19. On 1 December 2020, the claimant sent a further email as follows:

> **Good morning My name is Kostadin Hadjitenev, my contract is number 25286 with a position as a chef in Cargo. I started working on 04/01/2020, and on 31/03/2020 I learned from you that I am on a zero contract. Would**

you send me P45 and my last pay slip. If necessary, I can come to the office. Best regards Kostadin.

20. The respondent treated the request for the P45 as a resignation and processed the resignation. Accrued annual holiday pay was calculated and paid to the claimant by bank transfer on 18 December 2020. The claimant received the gross payment of £402.50.

21. It appears the P45 was not processed.

22. On 8 February 2021, the claimant requested his last payslip and P45. On 22 February 2021, the respondent sent a further email and the P45, but no final payslip. The P45 confirmed that the contract had been terminated on 18 December 2020.

23. The claimant started conciliation on 26 March 2021. It ended 29 March 2021. A certificate was issued.

24. By email of 21 April 2021, the claimant asserted he had a right to receive furlough pay and alleged that the respondent had received payments from HMRC in respect of him.

The law

25. Section 95 Employment Rights Act 1996 provides the circumstances in which an employee is treated as dismissed for the purposes of claiming unfair dismissal. Dismissal includes circumstances when "the contract under which he is employed is terminated by the employer (whether with or without notice.)" In addition, he is dismissed when he "terminates the contract under which is employed (with or without notice), in circumstances in which is entitled to terminate without notice by reason of the employer's conduct."

26. Section 104 Employment Rights Act 1996 provides that where an employee is dismissed and the reason or the principal reason is the employer had infringed a relevant statutory right, the dismissal will be automatically unfair. Such statutory rights would include a claim that there had been unlawful deduction of wages.

27. Section 13 Employment Rights Act 1996 prohibits employers from making deductions from wages, except in limited circumstances. The section does not apply to payments which are not defined as wages.

28. Wages as defined by section 27 Employment Rights Act 1996 includes "any fee, bonus, commission, holiday pay or other emolument referable to his employment, whether payable under his contract or otherwise."

29. I do not can need to consider the furlough arrangements in detail.

30. At the relevant time, there was no obligation to furlough staff. The furlough arrangements do not affect the contractual arrangements between the parties. Furlough is an arrangement whereby employers are permitted to obtain certain payments from the government for staff

the employer chooses to furlough. No employee has a right to require an employer to offer any furlough arrangements.

Conclusions

31. I am satisfied that the claimant received notice of this hearing and he received details of how to join the hearing. I am satisfied that his failure to attend was his choice.

32. It is claimant's case that he was dismissed. He alleges that the respondent terminated his contract on 18 December 2020, but he was not informed until 22 February 2021. He alleges that there was an express termination of his contract, which was a dismissal.

33. It is respondent's case that the claimant resigned on 1 December 2020. I do not need to review the case law in detail. The principles are straightforward. Where it is alleged that there was either an express dismissal, or an express resignation, it is necessary to look at the relevant circumstances. Where there are clear words, those clear words should normally be given their normal meaning. In situations where there may be doubt, it may be appropriate to consider all the surrounding circumstances.

34. I have considered the claimant's email of 1 December 2020. This email expressly asks for his P45 and his final payslip. It says that he will come to the office, if necessary. I find there can be no doubt as to the claimant's intention. A P45 is a formal document received on termination of employment. I have no doubt that the claimant understood it to be a document supplied on termination of employment. Read in context, the claimant’s reference to the last payslip cannot be interpreted as the most recent; it must be seen as the final payslip due on termination.

35. If there were any doubt that this was a resignation by clear unambiguous words, I would have regard to the surrounding circumstances. The claimant knew he was on a zero hours contract. He had not worked since March 2020. He had received no pay. He knew that he would receive no pay. It would have been open to him to simply leave matters in abeyance, as the respondent and made it clear that we could be offered when available. Instead, he took proactive steps clearly designed to bring the relationship to an end.

36. In all the circumstances I find the claimant resigned on 1 December 2020.

37. I have considered whether he resigned in circumstances when he was permitted to do because of the respondent's conduct. It may be arguable that if the respondent had failed to pay wages that were due, it would be in breach of contract and there could be a constructive dismissal. In the alternative, it may be possible to argue that the failure to provide work, even on a zero hours contract, was a breach of contract.

38. I find that there is insufficient evidence to establish that the respondent was in breach of contract at the time of the resignation. There was no

obligation to provide work because that was the nature of the zero hours contract. In a situation where there is no possibility of providing work, because the club was shut, the failure to offer the claimant work could not be seen as a breach of the term of mutual trust and confidence. It may be different if there was work available, but there was not.

39. If there had been an obligation to pay wages, whether in whole or in part, that could be a breach of contract. The respondent was under no obligation to enter into furlough arrangements with the claimant. The respondent was entitled to rely on the zero hours contract. There is no need for it to engage with the complexities of furlough. The contract continued to exist, but as the claimant undertook no work, and as undertaking work would be the consideration for receiving payment, no wages were due. It may be that the claimant mistakenly thought that he was entitled to some payment. However, failure to pay the claimant was not a breach of contract.

40. It follows that there was no breach of contract which the claimant could accept for the purposes of constructive dismissal. In any event, there is nothing in the claimant's resignation letter which would suggest that he was alleging a breach of contract at the time when he resigned. I therefore find that he did not resign in relation to any actual or alleged breach of contract.

41. For these reasons, there was no dismissal. As there was no dismissal, the claim of automatic unfair dismissal must fail.

42. As there is no dismissal, the claim of wrongful dismissal must fail. There was no breach of contract by the respondent.

43. The final claim is unlawful deduction from wages. For the reasons I have already given, no wages were due to the claimant after his last shift. It is common ground that any holiday pay was calculated and paid, no complaint is brought about that. The complaint relates to the failure to give the claimant furlough pay. The claimant was not furloughed. Furlough arrangements did not engage. There was no payment due under the claimant's contract for wages. It follows there is no unlawful deduction of wages.

44. All claims are dismissed.

Employment Judge Hodgson
Dated: 13 October 2021.

Sent to the parties on:

13/10/2021...

For the Tribunal Office