EMPLOYMENT TRIBUNALS

Claimant 1: Ms D. Carey
Claimant 2: Mr M. Riley

Respondent: Tom's Kitchen CCS Ltd

Heard at: Cambridge Employment Tribunal

On: 25 and 26 April 2022

Before: Employment Judge Hutchings (sitting alone)

Representation
Claimant 1: in person
Claimant 2: in person
Respondent: Mr O. Fuller of Counsel

Claimant 1 is the claimant in case no: 3300355/2021
Claimant 2 is the claimant in case no: 3301502/2021

JUDGMENT having been given to the parties at the hearing on **26 April 2022** and the parties requesting written reasons at that hearing in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided:

REASONS

Background – Ms Carey

1. Claimant 1, Ms Diane Carey, was employed by the respondent, Tom's Kitchen CCS Ltd, on a full-time contract of 45 hours per week. Initially she was employed as a driver and kitchen assistant, later becoming event manager, from 7 April 2015 until she gave notice by email on 11 November 2020, '*with immediate effect*'.

2. On 18 March 2020 Ms Carey signed a zero hours contract, which changed the terms and conditions of her employment. Following introduction by the government of the Coronavirus Job Retention Scheme (CJRS') on 20 March 2020 Ms Carey was placed on this furlough scheme by the respondent.

3. In her claim form dated 12 January 2021 Ms Carey makes the following claims to the Tribunal:

   3.1. The zero hours contract was never implemented and that she signed this contract under duress.
   3.2. She is entitled to holiday pay and wages under her full-time contract until this was terminated on 11 November 2020.
   3.3. A claim for constructive dismissal.
   3.4. A claim for unlawful deduction from wages in respect of flexible furlough pay.

Background – Mr Riley

4. Claimant 2, Mr Matt Riley, was employed by the respondent, Tom's Kitchen CCS Ltd, as a chef from 1 April 2015, becoming head chef in April 2016. Whether Mr Riley's employment is continuing was an issue for determination by this Tribunal. On 18 March 2020 Mr Riley signed a zero hours contract, changing the terms and conditions of his employment. Following introduction by the government of the Coronavirus Job Retention Scheme on 20 March 2020 Mr Riley was placed on this furlough scheme by the respondent.

5. In his claim form dated 25 February 2022 Mr Riley makes the following claims to the Tribunal.

   5.1. The zero hours contract was not legally effective as he signed this contract under duress and, in any event, he did not do any work under it.
   5.2. His terms and conditions of employment are those set out in his employment contract dated 1 April 2015 and under this contract he is owed:
      5.2.1. Holiday pay from 18 March 2020 to date; and
      5.2.2. Wages from the end of July 2020 to date.
   5.3. His employment has been terminated by reason of redundancy as he has not worked under the zero hours contract; therefore, he is owed redundancy and notice pay.

6. The respondent is a small company providing catering and event management services. It accepts that Ms Carey and Mr Riley were employed on full-time contracts in 2015 but submits that these contracts were amended in March 2020 when Ms Carey and Mr Riley signed zero hours contracts. The respondent contests Ms Carey's and Mr Riley's claims that these contracts were signed under duress. The respondent's position is that the zero hours contracts are legally effective and set out Ms Carey's and Mr Riley's terms and conditions of employment.

7. In respect of Ms Carey's other claims, the respondent contends that:

   7.1. Ms Carey is not owed any wages or holiday pay.
   7.2. She terminated the zero-hours contract by notice on 11 November 2020 and had been paid all outstanding monies due to her under it.
   7.3. Any breach of contract by the respondent did not result in Ms Carey terminating her contract of employment; therefore, her claim that she was constructively dismissed has no merit. The respondent's position is that it was Ms Carey's decision to terminate her employment.

8. The respondent accepts that it did miscalculate her wages under the flexible furlough agreement, and it owes Ms Carey the sum of £295.26. The respondent agrees to pay Ms Carey this amount.

9. In respect of Mr Riley's other claims, the respondent contends that:

   9.1. Mr Riley has not been dismissed by reason of redundancy or for any other reason and continues to be employed on the zero hours contract he signed in March 2020.
   9.2. It has not made any unlawful deductions for wages or holiday page under Mr Riley's full-time contract or zero-hours contract, and that any such claims are out of time in any event.

Procedure, documents and evidence

10. On 22 August 2021 the claimants were notified by the Tribunal that by Order of Judge R Lewis the claims in cases 3300355/2021 and 3301502/2021 would be heard together. The reasons are: the claims appear to give rise to common or related issues of fact and law and it is in accordance with the Tribunal's overriding objective that they are heard together.

11. I considered documents from a 389-page agreed bundle which the parties introduced in evidence. Ms Carey and Mr Riley gave sworn evidence to the Tribunal. They submitted witness evidence for each other and from Mr Peter Jenkins, who also gave sworn evidence to the Tribunal. Ms Carey also submitted a witness statement from Ms Zoe Shipp. The respondent was represented by Mr Oliver Roberts of Counsel, who called sworn evidence from Mr Tom Chudleigh, the respondent's managing director. Ms Carey, Mr Riley and Mr Fuller made oral submissions to the Tribunal.

12. Prior to the hearing, at the direction of the Tribunal, the respondent produced a chronology of keys events relating to the claims and a list of issues for the Tribunal to decide. At the hearing, Ms Carey and Mr Riley confirmed to the Tribunal that they agreed the chronology and the list of issues. The list of issues for each claim are as follows (the numbering for the issues reflects the numbering in the document produced by the respondent).

Issues for the Tribunal to decide – Ms Carey

1.1. Did Ms Carey accept the zero-hours contract?
1.2. If not, are any wages or holiday pay owing to Ms Carey?
1.3. If yes, has Ms Carey been paid correctly in accordance with the Coronavirus Job Retention Scheme?
1.4. Did Ms Carey resign of her own accord on 11 November 2020 or did she resign in response to the Respondent's breach of contract?
1.5. If she resigned in response to the Respondent's breach of contract, what was the breach?
1.6. If there was a breach of contract, was it a fundamental breach of contract?
1.7. If Ms Carey was constructively dismissed, was there a reason for the Claimant's dismissal and what was the reason?
1.8. If Ms Carey was constructively dismissed, has she made reasonable efforts to mitigate her loss?

Issues for the Tribunal to decide – Mr Riley

2.1. Did Mr Riley accept the zero-hours contract?
2.2. If not are any wages of holiday pay owing to Mr Riley?
2.3. If yes, has Mr Riley been paid correctly in accordance with the Coronavirus Job Retention Scheme?
2.4. Has Mr Riley been dismissed by the Respondent, if so, when?
2.5. If the dismissal was more than three months before the submission of Mr Riley's claim to the Tribunal does the Tribunal have jurisdiction to hear the unfair dismissal claim?
2.6. If Mr Riley was dismissed, what was the reason for the dismissal and did the Respondent act reasonably in treating that reason as a sufficient reason to dismiss Mr Riley?
2.7. If Mr Riley was dismissed, has he made reasonable efforts to mitigate his loss?
2.8. If Mr Riley has not been dismissed by the Respondent, is he owed any unpaid wages?

Findings of fact

Zero hours contract

13. The relevant facts are as follows. Where I have had to resolve any conflict of evidence, I indicate how I have done so at the material point. Many of the facts are common to both claims; therefore, I will deal with the finding of fact together, before stating my conclusions for each claim separately by reference to the individual claimant's respective list of issues.

14. Ms Diane Carey was employed as an event manager by the respondent, Tom's Kitchens CCS Ltd, from 7 April 2015 and Mr Matthew Riley, was employed by the respondent, as a chef from 1 April 2015. Both had written contracts of employment. Ms Carey had an initial contract dated 17 July 2018; this was amended by a contract dated 18 March 2019, of which the Tribunal has a signed copy. The Tribunal does not have a signed copy of Mr Riley's contract, but in evidence Mr Riley confirmed that the contract on page 219 of the bundle was his full-time contract of employment.

15. Clause 60 is common to both employment contracts and states:

> *'Any amendment or modification of this Agreement or additional obligation assumed by either party in connection with this Agreement will only be binding if evidenced in writing signed by either party …'*

16. In oral evidence to the Tribunal both claimants accepted that any change to these full-time contracts must be agreed by them individually with the respondent and be evidenced in writing.

17. In a letter to Mr Peter Jenkins Mr Chudleigh refers to a general staff meeting held on 15 March 2020. I find this date unusual as it was a Sunday. Neither Ms Carey nor Mr Riley attended this meeting, if indeed it took place. Both did meet individually with Mr Chudleigh on 17 March 2020 and were asked by Mr Chudleigh to sign new zero hours contracts, which changed the terms of their full-time contracts. In oral evidence to the Tribunal both accepted that the purpose of their conversations with Mr Chudleigh on 17 March was to discuss

the impact of the Covid-19 pandemic on the hospitality industry and that they were being asked by the respondent to sign new contracts due to the impact of the pandemic on the respondent's business. Both claimants signed the zero hours contract. At the time they did the government had not announced the CJRS; it did so on 20 March 2020.

18. Ms Carey told the Tribunal that she knew, from agreeing to a change to her full-time contract in 2019, that if she did not sign the contract, she would remain on the full-time terms. She received a letter at the meeting confirming the changes were being requested due to the impact of the Covid-19 pandemic on the respondent's business. The letter requests that the change is effective from 17 March 2020. It invites her to *'fully consider the proposed change',* states she can ask for a further meeting *'to discuss queries or concerns'* and that the change *'will not be implemented without your express agreement'.* A further letter from the respondent asks for the new contract to be signed *'by no later than 18 March'.* In evidence Ms Carey confirmed she understood the letter and the offer of a further meeting had she wanted one.

19. Ms Carey signed this letter and initialled a note that she did not require a further meeting. In oral evidence Ms Carey confirmed that she was aware of the impact of signing a new contract; that the terms would replace her existing contract of employment. Indeed, she acknowledged this had been the case when the 2019 contract replaced the contract signed in 2018. She also confirmed that at the time she signed the zero hours contract she understood the terms meant she would have no fixed hours going forward, that she had no obligation under its terms to accept work from the respondent and that she was free to find alternative work. Ms Carey was paid a higher hourly rate of £13 under the new contract.

20. Ms Carey also told the tribunal that she only had 24 hours to sign the contract, saying:

> *'Mr Chudleigh stipulated that the contracts had to be signed the following day. I signed the contract on that day because Mr Chudleigh was extremely stressed and panicking what was going to happen with the events of pandemic and was extremely persuasive for me to sign the zero hours and he said he would make sure I would be financially ok and he would support me in any way he could.'*
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> Ms Carey described the situation at that time as *'stressful and under extreme pressure and Mr Chudleigh was begging me to sign'.* She said: *'I did not feel I needed to raise any concerns as I trusted what Mr Chudleigh was telling me.'*

21. The same day Ms Carey signed the zero hours contract she exchanged friendly WhatsApp messages with Mr Chudleigh. He refers to talking to his legal advisors the following day to *'see if there is anything I can do for you guys' and* Ms Carey replies, saying she is 'grateful' and includes friendly emoji in the messages.

22. I find that when Ms Carey signed the zero hours contract, she understood the consequences of doing so, she knew she could have a further meeting with the

respondent to discuss the terms before doing so and she confirmed (by signature) that she did not want one. It was a stressful situation for all; Mr Chudleigh was concerned about survival of the respondent's business, as was Ms Carey, as was Ms Carey for her job security and income. Relations between them were friendly at that time, as the messages in the trial bundle evidence. Ms Carey asked Mr Chudleigh to write to her landlord to explain the change in her employment, which he did explaining the change to her work situation and the reasons for this.

23. Mr Riley told the Tribunal that his conversation with Mr Chudleigh on 17 March 2020 was a '*loose chat'*, at which he was presented with the zero hours contract to sign. On 18 March Mr Riley had a further conversation with Mr Chudleigh in the respondent's car park. On 17 March along with a copy of the zero hours contract Mr Riley received the same letter as Ms Carey asking him to agree a variation to the terms of his contract. The letter states the reason for the change to employment terms is the reduction in business due to the Covid-19 pandemic. In evidence Mr Riley accepted that this was the genuine reason he was being asked to change his terms of employment to a zero hours contract. The letter requests the change is effective from 17 March 2020. It invites Mr Riley to *'fully consider the proposed change',* states he can have a further meeting *'to discuss queries or concerns'* and that the change *'will not be implemented without your express agreement'.* A further letter from the respondent asks for the new contract to be signed *'by no later than 18 March'.* Mr Riley told the Tribunal that in the car park conversation on 18 March he told Mr Chudleigh that he was not happy to sign the new contract; however, he also confirmed that he did not ask for more time.

24. Mr Riley accepted that he understood that the new contract meant no fixed or guaranteed hours and that he would be paid a higher hourly rate of £14 (the zero hours contract refers to two hourly rates: £13 and £14; the respondent confirmed the first is a typo and the correct hourly rate is £14). I find Mr Riley understood why he was being asked to sign the contract and the consequences of doing so.

25. After the conversation on 17 and 18 March Mr Riley and Mr Chudleigh exchanged friendly messages. On 20 March 2020 Mr Riley asks Mr Chudleigh to write to his landlord explaining his change in circumstances. Mr Chudleigh emails to confirm that the letter has been sent and asks if Mr Riley needs anything else; he replies that he does not.

26. Both claimants signed their zero-hours on 17/18 March 2020. The correspondence at the time made it clear that while the respondent wanted them to sign by 18 March, they could ask for a further meeting. Both Ms Carey and Mr Riley said they had no choice but to sign the contracts in this timeframe. This was not the case. Mr Peter Jenkins was also asked to sign a new contract. In evidence to the Tribunal, he confirmed he was asked to do so on 17 March but did not return the signed contract to the respondent until 21 March. I find that while there was some pressure to sign by 18 March, there was also the opportunity to take more time to consider the terms, request an additional meeting or to return the contract a couple of days late, as Mr Jenkins had.

27. At the time the claimants signed their new contracts both had amicable working relationships with Mr Chudleigh. In their claims both say they signed the

contracts under duress. No doubt the meetings discussing the contracts were stressful for all parties. However, neither claimant expressed their concerns that they felt pressured into signing in writing at the time they signed. In their evidence they make general references to conversations and messages with other employees after they signed explaining how they felt; however, there are no copies of any such contemporaneous messages before the Tribunal and neither claimant provided specifics of any such conversations in evidence. I read the text and email exchanges between Ms Carey and Mr Chudleigh in March and April 2020; they are friendly and supportive to each other. Indeed, Ms Carey even refers to Mr Chudleigh having a pint.

28. Hindsight is said to be a wonderful thing. In relation to the zero hours contract the key consideration for the Tribunal is whether, when signing the zero hours contract, the claimants felt under such a level of pressure that this amounted to duress by reference to the standard at law and that the contracts they signed become voidable as a result. This means that their contracts can be set aside and are not legally effective. There is no doubt that the situation on 17 and 18 March 2020 was stressful and emotive for all parties. Mr Chudleigh was worried about the survival of his business, which had effectively been prevented from operating by the government. Ms Carey and Mr Riley were worried about their jobs, incomes and supporting themselves and their families. Mr Riley spoke very clearly in evidence of his worries at that time about being about to pay bills and feed his family; in reflecting he said that thinks he put the business' needs before his own, which is understandable as the respondent's business was his source of income at that time. Mr Riley spoke again of this pressure and the impact on his family in his closing statement.

29. I have no doubt that both claimants felt some pressure to sign the new contracts to help the business and protect a job for themselves albeit on different terms. However, a stressful situation does not automatically translate to duress at law. Mr Riley does not think he made an informed decision about the zero hours contract. There is an oblique reference to this in an email he sent to Mr Chudleigh in June 2020 when he talks about needing to make an informed decision about work in June. I find this to be the case. However, failure to make an informed decision is not duress. There is no correspondence before this time, and certainly no contemporaneous evidence of either party that they felt an extreme level of pressure and threatening behaviour from Mr Chudleigh in March 2020 to sign the zero hours contracts. I find that relations between all parties were agreeable when the contracts were signed.

Redundancy

30. Both claimants have made claims about redundancy. Ms Carey emailed Mr Chudleigh on 11 November 2020, saying she has *no choice but to resign with immediate effect'.* Mr Chudleigh's response is one of surprise *'are you absolutely sure you want to resign with immediate effect??'* Indeed, many of the exchanges suggest that Mr Chudleigh viewed Ms Carey as conscientious and hardworking. Mr Carey replies that she is resigning with immediate effect as the respondent '*refused to honour a redundancy package'.* This was not the case. On 12 November Mr Chudleigh says he will look at redundancy options; however, the respondent does not follow up on this. Redundancy may have been discussed in general terms March 2020; however, recollections are unclear and there is no contemporaneous written evidence to suggest this was

the case. The letter addressed to Mr Jenkins refers to a redundancy option; however, neither claimant attended the staff meeting which purported to take place on 15 March, nor did they receive a copy of this letter. What is clear from the evidence is that Ms Carey did not receive an offer or any details of a redundancy package at this meeting, or at all. In an email dated 9 November 2020 Ms Carey says to Mr Chudleigh *'I would prefer you to make me redundant now'.* This is Ms Carey's proposal; the statement is not made in response to any offer of redundancy from the respondent. In fact, Mr Chudleigh replies the following day:

'I am very confused as to what has happened with you and why you do not want to work for the company anymore?? I sincerely thought everything was going will and I would love to continue working with you.

I am certainly not going to be offering you redundancy as I want you to keep working for the company, if you do not want to work for Tom's kitchen anymore that is your decision, but this is certainly not a redundancy situation.'

Ms Carey replies on 11 November *'I have no choice to resign with immediate effect'* and on the 12 November after Mr Chudleigh has queried her resignation, asking her if she is sure, she emails *'as you originally refused to honour a redundancy package, you left me no choice but to resign with immediate effect.'*

31. At no time did the respondent made Ms Carey an offer of redundancy. She gave the respondent written notice to terminate her employment with immediate effect on 11 November 2020.

32. Mr Riley claims for redundancy pay on the basis that he was dismissed. It is a matter for the Tribunal to determine if he was dismissed and, if so, any entitlement to notice pay and compensation. The evidence is clear that Mr Riley did not receive any redundancy offer.

33. Both claimants suggest that they should have been made an offer for redundancy. There is no legal basis for these claims. Redundancy is a commercial decision for an employer to make; any redundancy process is based on an employer's assessment of the state of a business and a decision that it needs to reduce the size of its workforce of a type or at a location. It is not an option available for an employee to request redundancy unless a voluntary redundancy situation is offered by the employer. While Mr Chudleigh may have discussed redundancy options with other employees, I find that neither claimant was not made an offer of redundancy. This was not a voluntary redundancy situation. In the unprecedented circumstances in March 2020 the offer to put employees on zero hours contracts was a genuine offer to protect the interests of a business which had been severely impacted by the Covid-19 pandemic and the government's decision to temporarily shut down the hospitality sector. It meant employment could continue in the hope that the situation would improve, and the business could open up again. There was no intention on the part of the respondent to make Ms Carey or Mr Riley redundant.

<u>Furlough</u>

34. On 20 March 2020 the government announced its CJRS. It was an employer's decision whether to places employees on this scheme. The respondent put

both claimants on the government's furlough scheme. The respondent had to determine how to calculate the claimants' wages (claimed from the government) under this scheme. When the scheme was introduced, the calculation was based on average salary for the previous 12 weeks. For the claimants the timing of the scheme was unfortunate. I find this caused much confusion in understanding how the salary they received was calculated. Ms Carey and Mr Chudleigh have a friendly exchange of texts from 24 June where they discuss how she will be paid. The letter from Mr Chudleigh's accountants dated 21 October 2021 explains the calculations which were made.

35. On 17 March both claimants signed the zero hours contracts. On 20 March CJRS was implemented. When both were placed on the scheme, they had not worked any hours under the new contract, but having signed them, and receiving a higher hourly rate, those contracts legally and validly replaced the full-time contracts. I find the position was this on 20 March 2020:

    35.1. Their contracts of employment on 20 March 2020 were the zero-hours contracts; signing those contracts amended their terms of employment from their full-time contract to the zero hours contracts; the claimants did not have to work any hours under them for them to be effective.
    35.2. The calculation of furlough pay was based on the average of the previous 12 weeks of employment ('the Calculation Rule"). As they had not worked any hours at the new hourly rate, as the business had been shut down by government rules, when applied the Calculation Rule meant the figure used for furlough (what they had worked in the previous 12 weeks) was the same as their pay under the full-time contract. The calculation was based on the reality of work done and amounts paid in the previous 12 weeks, not on the form of any contractual terms (due to the timing of their switch to zero-hour terms and the implementation of CJRS by coincidence the figure was the same for both). The respondent did try to explain this to the claimants during message exchanges through Spring and Summer 2020 and again in the accountant's letter in October 2021.

Flexible furlough – Ms Carey

36. On 1 July 2020 the respondent moved Ms Carey to a flexible furlough agreement, under which she was paid an hourly rate. Ms Carey continued flexible furlough until 31 October 2020. During the period of flexible furlough Ms Carey worked 175.75 hours. There was some debate as to whether there was work available for Ms Carey in October and November 2020. Ms Carey says she was not offered work at this time because she had been taking legal advice. She claims the respondent hired temporary staff to do work she should have been offered. Ms Carey was not offered work at this time but there was no evidence before the Tribunal to support these claims. In closing submissions Mr Fuller told the Tribunal that the respondent only had 2 employees in the payroll in the last 2 weeks of October, first 2 weeks of November and that the respondent had only one event in November as all other bookings were cancelled due to speculation of another lockdown. I find that it was the case that the respondent did not have work to offer Ms Carey in November and that the working relationship broke down around November 2020.

37. Ms Carey resigns on 11 November 2020 with immediate effect. Between 11 and 16 November Ms Carey and Mr Chudleigh exchange emails; Mr Chudleigh repeatedly invites Ms Carey to change her mind. On 16 November he emails:

    'Although you have resigned, it is still possible for you to be reinstated onto our payroll and to benefit from the extended furlough scheme and so I invite you again to change your mind about your resignation and to stay with Tom's kitchen.'

38. The respondent has accepted there was an error in the calculation of Ms Carey's flexible furlough pay and agreed to pay £295.26. Ms Carey confirmed to the Tribunal that all holiday pay due under her full-time contract has been paid.

    Furlough – Mr Riley

39. On 21 March Mr Riley confirmed that he was happy to be furloughed. There follows a series of text and email exchanges until June 2020 between Mr Riley and Mr Chudleigh which are friendly in nature, including a conversation about them having a socially distanced drink. On 1 July 2020 Mr Chudleigh asks for ideas for the respondent's social media. Some tension was creeping into the working relationship at this time; Mr Chudleigh says that Mr Riley did not actively engage and was busy building up his own business, which he was entitled to do under the terms of the zero hours contract. The email exchanges in July are cool. Mr Riley is offered some work but does not accept it. On 31 July Mr Chudleigh offered Mr Riley 3 options, which I find was a genuine attempt to find a way forward. Mr Riley accepted the option to continue to be offered work and be paid an hourly rate. However, he did not. Tension developed and by July 2020 the tone of correspondence had changed. A decision to place employees on furlough sits with the employer, who also decided to remove employers. I find that Mr Riley was removed from furlough as he was not doing any work for the respondent.

    Dismissal and Mr Riley

40. In September 2020 Mr Riley is unable to access the respondent's payroll system and queries this. I find that he was removed as he was not being paid by the respondent at this time as he was not doing any work. Following a request for his P60, on 1 October 2021 Mr Riley was sent a P45 by the respondent's accountant. 15 minutes later he was sent an email stating this was sent in error, attaching the P60 and apologising. This is confirmed in a letter to the respondent from his accountant. I find that sending the P45 to Mr Riley was an error on the part of the accountant. I address whether the fact the P45 had any impact on MR employment status in my conclusions.

    Law

    Duress

41. A person signing a contract may not dispute agreement to its terms unless there is a reason in law to do so. There may be certain circumstances where parties to a contract should be relieved from its obligation because of threats they were

subjected to at the time of entering into the contract or at the time of agreeing to variations to an existing contract.

42. The claimants are saying they signed the zero hours contract under duress. If duress is established the party claiming duress can set aside the contract and its terms are not enforceable. To establish duress a party to a contract must show:

    42.1. There is a threat (or pressure) exerted by one party to the other which is illegitimate; and
    42.2. If there is an illegitimate threat (or pressure) it caused the claimant to enter into the contract.

43. Illegitimate threat occurs when a party applies a level of threat where the other party has no other option but to accept the new terms; for the threat to be illegitimate there must be no commercial or similar justification for the request. During the Covid-19 pandemic it has been commonplace for parties to renegotiate contracts as the impact of the pandemic has meant that the parties are unable to perform the terms of their current contract. Renegotiation with a degree of pressure for a genuine reason does not amount to duress. If a party states that it would suffer severe financial difficulties or a business would become insolvent and unable to perform contractual terms, without evidence of a significant degree of threatening behaviour, this is unlikely to be regarded as a threat. However, if a party sought to profit from an uncertain economic climate by falsely overstating its financial difficulties that may be viewed as illegitimate pressure. Whether or not a party was acting in good or bad faith will be considered.

44. The party seeking to avoid the contract for duress must show that, were it not for the threat(s) it would not have entered into the contract, considering:

    44.1. whether or not the party claiming duress had a reasonable alternative to agreeing to the terms; and
    44.2. whether or not the party claiming duress protested against the change in terms at the time the request was made.

45. If a Tribunal concludes on the evidence that a contract was signed under duress, it is voidable; the party who proves it is subject duress can end the contract and the terms are not legally enforceable.

<u>Calculation of furlough pay under the CJRS</u>

46. Section 224 of the Employment Rights Act set out the basis of calculation of wages for the CJRS up to 5 April 2020 where an employee has no normal working hours under the contract of employment in force on the calculation date. This calculation changed on 6 April 2020; from this time an average of the previous 52 weeks formed the basis of the calculation.

47. Under section224(2) the amount of a week's pay is the amount of the employee's average weekly remuneration in the period of twelve weeks ending (a)where the calculation date is the last day of a week, with that week, and (b)otherwise, with the last complete week before the calculation date.

Constructive dismissal

48. An employee who claims to have been constructively dismissed must show:

    48.1. the employer acted in repudiatory breach of contract. The employer must have committed a serious breach of contract; and
    48.2. that he resigned in response to this breach and not for some other reason (although the breach need only be a reason and not the reason for his resignation).

49. It is open to an employer to prove that the employee affirmed the contract despite the breach, perhaps by delay or taking some other step to confirm the contract.

Unfair dismissal

50. Section 94 of the Employment Rights Act 1996 (the '1996 Act') confers on employees the right not to be unfairly dismissed. Enforcement of the right is by way of complaint to the Tribunal under section 111. The employee must show that he was dismissed by the respondent under section 95. This is also satisfied by the respondent admitting that it dismissed the claimant (within section 95(1)(a) of the 1996 Act).

51. Section 98 of the 1996 Act deals with the fairness of dismissals. There are two stages within section 98. First, the employer must show that it had a potentially fair reason for the dismissal within section 98(2). Second, if the respondent shows that it had a potentially fair reason for the dismissal, the Tribunal must consider, without there being any burden of proof on either party, whether the respondent acted fairly or unfairly in dismissing for that reason.

52. Section 98(4) of the 1996 Act deals with fairness generally and provides that the determination of the question whether the dismissal was fair or unfair, having regard to the reason shown by the employer, shall depend 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 shall be determined in accordance with equity and the substantial merits of the case.

Conclusions

53. The Tribunal's conclusions are set out by reference to the issues for each claim.

Ms Carey

1.1 Did Ms Carey accept the zero-hours contract?

54. I find that Ms Carey did accept the zero hours contract. She understood clause 60 of her full-time contract and had previously agreed changes to her 2018 contract, signing a new contract in 2019. She signed the zero-hours contract, understanding the change to her hours and pay as a result of doing so. She also confirmed by signature that she did not want another meeting with the respondent to discuss the proposed contract before signing it.

55. Ms Carey was not subject to a threat or level of pressure by Mr Chudleigh equating to a threat in law which is illegitimate. On the evidence before the Tribunal, she has not discharged the burden that she was subject to duress. There is no contemporaneous evidence that Mr Chudleigh displayed threatening behaviour to Ms Carey, or of her discussing the pressure she felt at that time with anyone. Ms Carey told the Tribunal that she was *'terrified of losing her income and her home'.* Although she might have felt a degree of pressure to help the business for which she had worked for 5 years, she was not subject to duress.

56. No doubt she felt pressure; the impact of the Covid-19 pandemic and the restrictions introduced in March 2020 created a very stressful and emotive environment, particularly for sectors of the economy like hospitality which were severely impacted. Mr Chudleigh was feeling the pressure of the impact of the pandemic on the respondent's busines. Ms Carey was feeling the pressure and worry of what this would mean for her employment and income. Ms Carey describes Mr Chudleigh being stressed. However, there is no evidence that Mr Chudleigh's behaviour towards Ms Carey was threatening. Indeed WhatsApp and email messages between them at that time were friendly. Mr Chudleigh did ask Ms Carey to sign the contract in a short timeframe and this placed her under an element of pressure but in a letter to Ms Carey he made his reasons for doing so (the impact of the Covid 19 pandemic on the respondent's business) clear and offered her the option of a further meeting to discuss the proposed contract. She did not take up this offer.

57. Ms Carey claimed that because she had not worked any hours under the zero-hours contract it was not legal binding. This is incorrect. The contract was a variation under clause 60 of the full-time contract. The zero hours contract was freely entered into by Ms Carey, confirmed by her signature. She was not subject to duress when signing the zero hours contract.

1.2. If not, are any wages or holiday pay owing to Ms Carey?

58. Ms Carey did accept the zero-hours contract. No wages or holiday pay are due to her.

1.3 If yes, has Ms Carey been paid correctly in accordance with the Coronavirus Job Retention Scheme?

59. Ms Carey was correctly paid when she was on furlough from March to June 2020; she was paid an average of the previous 12 weeks, and then the previous 52 weeks when the basis of calculation changed on 6 April 2020. Both calculations result in the same average. Where an employee had not worked any hours under a contract the CJRS rules state that an employer must not estimate hours but use the basis as any hours worked in the time period on which the average calculation is based. Although on 20 March 2020 Ms Carey was employed under the zero-hours contract, she had not worked any hours under the new terms. Therefore, the respondent had to refer to actual hours worked to calculate furlough pay. The calculation was based on hours she had actually worked and her earnings for these, not the terms of the full-time contract. As Ms Carey had worked fixed hours for which she received a fixed wage in the 12 and 52 weeks before being placed on furlough, the average

calculation was the same whether the 12 week or 52-week rule was applied. The fact the figure was the same as her full time contract was due to the fact Ms Carey had not worked under her new terms. It was the substance of hours worked not the form of the contract that was the basis of the calculation. This was explained to Ms Carey in text exchanges in June 2020. The calculations on which furlough was paid are correctly explained in the letter from the respondent's accountant dated 21 October 2020.

60. On 1 July 2020 Ms Carey was placed on flexible furlough by the respondent. She was not correctly paid by the respondent under the CJRS for the time she worked on a flexible furlough agreement. At this time, she should have been paid her hourly rate under the zero-hours contract (£13). She was paid the rate she had worked at under the fixed term contract in error. The respondent accepts it made this error and that Ms Carey is owed £295.26.

1.4 Did Ms Carey resign of her own accord on 11 November 2020, or did she resign in response to the Respondent's breach of contract?

61. To succeed in her claim for constructive dismissal Ms Carey must show that the respondent committed a serious breach of contract. It did, in failing to her the pay proper amount under the flexible furlough agreement. However, Ms Carey did not resign in response to this breach. She continued to work after she was paid the incorrect amounts. By her own words in her November email of resignation she says she *'had no alternative to resign'* as the redundancy offer she alleged she had received was not honoured. Indeed, at the time of her resignation on 11 November 2020 she does not refer to the incorrect payments. Ms Carey resigned due to the tension in her working relationship with Mr Chudleigh, resulting from the fact she did not work for the respondent in late October / early November 2020 and the fact she felt she had a redundancy package that had not been honoured. The respondent paying her the incorrect amount in flexible furlough pay played no part in her decision to resign.

62. There was not redundancy entitlement in her contract or offer on the table so there was no fundamental breach of contract in respect of redundancy.

1.5. If she resigned in response to the Respondent's breach of contract, what was the breach?

63. Ms Carey did not resign in response to the respondent's breach of contract for the reasons explained above.

1.6. If there was a breach of contract, was it a fundamental breach of contract?

64. There was a fundamental breach (incorrect flexible furlough payments) but this did not cause Ms Carey to resign.

1.7. If Ms Carey was constructively dismissed, was there a reason for the Claimant's dismissal and what was the reason?

65. This is not an issue for determination as the Tribunal has concluded that Ms Carey was not constructively dismissed as she did not resign in response to the respondent's breach of contract.

1.8. If Ms Carey was constructively dismissed, has she made reasonable efforts to mitigate her loss?

66. This is not an issue for determination as the Tribunal has concluded that Ms Carey was not constructively dismissed as she did not resign in response to the respondent's breach of contract.

67. Therefore, Ms Carey's loss claims have no legal basis for the following reasons:

    67.1. Her claims for wages, holiday pay and loss of pension contributions from 11 November 2020; she resigned on 11 November and has no entitlement to any payment after this date.
    67.2. Her claim for redundancy payment. She was never made an offer of redundancy. Her employment did not terminate by reason of redundancy; she resigned. She is not entitled to redundancy pay.
    67.3. Her claim for loss for constructive dismissal fails; she was not constructively dismissed; it was her decision to resign with immediate effect.
    67.4. There is no entitlement to damages for mental health, stress, anxiety, and depression in a claim for constructive dismissal or unlawful deduction from wages even when such claims are successful.

Conclusions - Mr Riley

2.1. Did Mr Riley accept the zero-hours contract?

68. I find that Mr Riley did accept the zero hours contract. He understood clause 60 of his full-time contract and signed the zero-hours contract, understanding the change to his hours and pay as a result of doing so. While he was reluctant to sign, Mr Riley was not subject to a threat or level of pressure by Mr Chudleigh equating to a threat in law which is illegitimate. On the evidence before the Tribunal, he has not discharged the burden that he was subject to duress. There is no contemporaneous evidence that Mr Chudleigh displayed threatening behaviour to Mr Carey, or of his discussing the pressure he felt at that time with anyone. Mr Riley told the Tribunal of his concerns at the time he signed the contract of a loss of income and ability to pay his bills and provide for his family. Without doubt he felt some degree of pressure to sign in the circumstances at that time. Mr Chudleigh did ask Mr Riley to sign the contract in a short timeframe and this placed him under an element of pressure but in a letter to Mr Riley the respondent made the reasons for doing so (the impact of the Covid 19 pandemic on the respondent's business) clear and offered Mr Riley the option of a further meeting to discuss the proposed contract. Indeed, Mr Chudleigh and Mr Riley were on friendly terms at that time; messages show they discussed having a socially distanced drink. Between March 2020 and July 2020 Mr Riley has not accepted any work and from July 2020 he is not offered anymore work but neither party formally terminated the zero hours contract. The zero hours contract notice term is clause 3.1:

    'If you no longer wish to be considered for work by the Company and thereby wish to terminate this contract, you should notify Tom Chudleigh as soon as possible in writing'

69. Mr Riley has not done so. Mr Riley was not under duress when he signed the zero-contracts contract and as there has been no notice by either party the contract continues to be legally effective.

2.2. If not, are any wages of holiday pay owing to Mr Riley?

70. I have found that Mr Riley did accept the zero hours contract. His full-time contract came to an end on 17 March 2020. He has been paid all holiday pay in full under this contract. Mr Riley claims for loss of earnings from 3 August 2020 to date. He also claims for pension contributions. During this period the terms of his employment were governed by his zero hours contract. Clause 7.1 of that contract states the holiday period runs from 1 April to 31 March and holiday pay is calculated as 12.07% of the hours actually worked in the holiday year. He did not work any hours under this contract; therefore, he does not have any entitlement to the wages claimed; holiday pay only accrued under this contract if work was done. The calculation of holiday pay under the zero hours contract is based on the number of hours the employee actually worked and Mr Riley had not worked any so any calculation is £0.

2.3. If yes, has Mr Riley been paid correctly in accordance with the Coronavirus Job Retention Scheme?

71. Mr Riley claims for holiday pay from 1 April 2020 to 31 July 2020, on the basis that his contract of employment was his 2015 full time contract. I have found it was not; for the period of this claim his contract was the zero hours contract. Mr Riley has not worked any hours under this contract so is not due any holiday pay under it.

72. In any event, any outstanding holiday pay for the period 1 April 2020 to 31 July 2020 is out of time. This was a claim for top up in relation to payment for days.

2.4. Has Mr Riley been dismissed by the Respondent, if so, when?

73. A P45 dated 2 August 2020 was sent to Mr Riley in error in October 2021 when he asked for a copy of his P60. Mr Riley says this was prepared because of his dismissal, but that he did not become aware that he had been dismissed until October 2021. He concludes he was dismissed in or around August 2020 on the basis of the P45 and the fact he has not done any work for the respondent under his zero hours contract. He also claims that Mr Chudleigh may be jealous of his success in his own business, and this was another reason why he was dismissed.

74. Mr Riley has not been dismissed by the respondent and continues to be employed by the respondent under the terms of his zero hours contract which this Tribunal has found legally effective. The respondent contends that Mr Riley was not accepting (the little) work he was offered so the respondent had nothing to pay him for, so he was removed from the payment system to simplify entries and as part of this process a P45 was generated. It is a fact that Mr Riley was not paid by the respondent after 4 August 2020 because he had not done any work and had been taken off furlough. The tribunal does not have sufficient evidence to determine if this was the reason for the P45 being generated. However, had it been generated for this purpose it should have been sent to Mr Riley in August 2020; it was not.

75. The cases of *May and Adico UK Lird 1302294/2016* and *Frederick Ray Limited and Davidson* confirm that a P45 alone does not amount to a dismissal. There is no other evidence in August 2020 pointing to a decision by the respondent to dismiss Mr Riley. There are no conversations about discontinuing the working relationship. Under the zero-hours contract there is no obligation on the respondent to offer work or for Mr Riley to accept it. Not offering work is not a dismissal. On November 2020 Mr Riley and Mr Chudleigh exchanged emails regarding dates of availability; on 9 December 2020 the respondent makes Mr Riley an offer to work under the zero hours contract. If the respondent had dismissed Mr Riley Mr Chudleigh would not be sending emails about availability. Nor has Mr Riley been dismissed under clause 3.1 of the zero-hours contract.

2.5. If the dismissal was more than three months before the submission of Mr Riley's claim to the Tribunal does the Tribunal have jurisdiction to hear the unfair dismissal claim?

76. Mr Riley has not been dismissed.

2.6. If Mr Riley was dismissed, what was the reason for the dismissal and did the Respondent act reasonably in treating that reason as a sufficient reason to dismiss Mr Riley?

77. Mr Riley has not been dismissed.

2.7. If Mr Riley was dismissed, has he made reasonable efforts to mitigate his loss?

78. Mr Riley has not been dismissed.

If Mr Riley has not been dismissed by the Respondent, is he owed any unpaid wages?

79. Mr Riley has not been dismissed.

80. Therefore, Mr Riley's loss claims have no legal basis for the following reasons:

    80.1. Between 3 August 2020 and now Mr Riley's employment terms are governed by the zero-hours contract under which he did no work so is not due any wages or pension.
    80.2. Under this contract his holiday pay is calculated by reference to hours worked. As he did no work, there is no holiday pay due between 1 April and 31 July 2020. For a period of this he was on furlough but any claim for holiday pay while on furlough and under the zero hours contract is, in any event, out of time.
    80.3. Mr Riley claims for notice pay under his 2015 contract. As I have found his employment contract was validly amended by the zero hours contract and this contract has not been terminated in line with clause 3.1 by either party Mr Riley is not entitled to notice pay under his 2015, which was amended, or zero hours contract, which is still in force
    80.4. Mr Riley claims for redundancy pay. Mr Riley has not been made redundant.

80.5. Mr Riley claims for compensation for injury to feels. Mr Riley's claims have not succeeded. In any event for is no entitlement to compensation for injury to feelings in claims Mr Riley has made to the Tribunal.

Employment Judge **Hutchings**

REASONS SENT TO THE PARTIES ON

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FOR THE TRIBUNAL OFFICE