EMPLOYMENT TRIBUNALS

Claimant	Mr K Nestoridis
Represented by	in person
Respondents	Restaurant Story Limited
Represented by	Ms J Warren (advocate)
Before:	**Employment Judge Cheetham QC**

20 May 2022 at London South
Employment Tribunal by Cloud Video Platform

REASONS

1. Judgment was given orally at the hearing on 20 May 2022, at which the complaints of breach of contract (wrongful dismissal) and under the Working Time Regulations 1998 were dismissed. The Claimant has now requested those reasons in writing.

2. The Claimant was employed from 17 November to 22 December 2020 by the Respondent. He brought a claim to the employment tribunal on 18 March 2021 for unfair dismissal, breach of contract (wrongful dismissal) and breaches under the Working Time Regulations. The claim for unfair dismissal was dismissed on 12 January 2022, as the Claimant was employed for less than 2 years.

3. The issues at this hearing were agreed to be:

   (i) Was the Claimant's contract terminated before the end of the 4-month fixed term? The Respondent contended that the termination was because of redundancy.

   (ii) If so, what – if any – notice was the Claimant entitled to and what – if any – payments in respect of annual leave?

4. The Tribunal heard evidence from the Claimant and, for the Respondent, Jonathan Kleeman (Head Sommelier) and Ursula Ferreira (General Manager).

Findings of fact

5. The Respondent is a restaurant in London. It employed the Claimant on 27 November 2020, which was one week before it reopened following the second national lockdown. The Claimant was employed as Assistant Head Sommelier, working a 55-hour week, and the contract was for a fixed term of 4 months. There was no written contract at that point.

6. However, on 16 December 2020, the Respondent was required to close its doors again under the Government's Covid 19 local tiering system. The Claimant's final shift was therefore on the 15 December. The Respondent treated the dismissal as a redundancy.

7. Given his length of service, the Claimant did not qualify for the Government's job retention furlough scheme, unlike all of the Respondent's other employees. There was no longer any business need for an Assistant Head Sommelier and he was dismissed by reason of redundancy. As the Claimant's service amounted to less than one month, the Respondent did not consider that he qualified for notice pay, but the Claimant was paid up to 22 December, which included any untaken annual leave.

8. The only real issue of fact was over whether there was work available to the Claimant after 16 December. The Claimant asserted that there was work being done, but he did not have any real basis for challenging the Respondent's evidence that, once the restaurant had closed, the only work available was a greatly reduced delivery service from January 2021. The Tribunal therefore accepted the Respondent's evidence that there was no suitable alternative work available for the Claimant to carry out.

9. It also accepted the Respondent's evidence that the intention had been to employ the Claimant for 4 months, because at that point it was anticipated that the restaurant would remain open following the second national lockdown. The further lockdown was not expected.

Conclusions

10. The Claimant started employment at a time when the intention was that he would remain employed for 4 months, but unfortunately his employment then coincided with the further lockdown. The Respondent was therefore forced to close and there was no longer a need for his role. As he had been employed for less than one month, the Claimant did not qualify for the furlough scheme.

11. The reason for the Claimant's dismissal was redundancy, in other words, the requirements of the Respondent's business for employees to carry out the sort of work done by the Claimant had ceased. Therefore, the dismissal

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was fair, but this claim is for wrongful dismissal, in other words that – even if fair – the dismissal without notice was in breach of contract.

12. "Frustration" occurs where a contract is treated as discharged by operation of law, because an event has occurred which renders continued performance impossible. Although, in practice, tribunals have been slow to apply the doctrine of frustration to employment contracts, the circumstances around the Covid pandemic have meant that – as in this case – it has become a more relevant consideration.

13. On the above facts, the December lockdown occurred after the contract had been entered into. Given that London had just come out of a national lockdown and the Respondent's restaurant had just re-opened, it was reasonably within the contemplation of the parties that it would remain open for a prolonged period of time, particularly in light of the Government's strong assurances at the time. Clearly, when the restaurant was forced to close again after just 3 weeks, this was not the fault of either party. In those circumstances, it seems to the Tribunal that the contract can properly be described as having been frustrated, in that further performance was impossible.

14. That being so, the Claimant was not entitled to any further notice pay, nor was he owed any unpaid annual leave.

Employment Judge S Cheetham QC
Dated 22 June 2022

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