Case No: 2302819/2020

EMPLOYMENT TRIBUNALS

Claimant: Mr S Bhashkaran

Respondent: Ashath Ases

Heard at: London South (by CVP) **On:** 11th March 2022

Before: Employment Judge Reed

Representation
Claimant: In person
Respondent: Roshan Ashath (son)

RESERVED JUDGMENT

1. The Claimant's claim for unlawful deduction of wages is well-founded and succeeds. The Respondent is ordered to pay the sum of £1,948.43 gross to the Claimant.

2. The Claimant's application to amend his case to add claims for unfair dismissal and wrongful dismissal is refused.

REASONS

Background

1. The Respondent runs a fast food franchise, Favourite Chicken & Ribs, as a sole trader. He employed the Claimant to assist in the store. This case arises from events at the start of the Covid-19 pandemic when the Claimant was placed on furlough.

2. The Claimant's case, in brief, was that he was not paid the money he was entitled to while on furlough. He brings a claim for unauthorised deductions of wages. He subsequently resigned, he says in response to this non-payment, and wishes to amend his claim to bring actions for unfair dismissal and wrongful dismissal.

3. The Respondent replies that the Claimant was only entitled to be paid the sums received by the Respondent from the government under the furlough scheme. These, he says, have been paid.

The Evidence and Hearing

4. The Claimant appeared as a litigant in person, supported by his wife. The Respondent was represented by his son, Roshan Ashath. Although at the hearing he was not represented, for much of the litigation the Claimant had been represented by solicitors.

5. I was provided with a joint bundle for the hearing of 103 pages. As well as the pleadings and documentary evidence it contained witness statements from Mr Bhashkaran, Mrs Bhashkaran (his wife) and Mr Ases. Since Mr Ases' statement was brief and did not set out his position on the relevant issues fully, I allowed Mr R Ashath to ask him supplementary questions to expand upon his evidence.

6. Both Claimant and Respondent gave evidence and participated in the hearing with the assistance of a Tamil interpreter.

The issues

7. The issues were agreed between the Tribunal and the parties at the beginning of the hearing as follows:

Unlawful deduction of wages

a. What sum was the Claimant entitled to be paid during his period of furlough?

b. What, if any, sum did the Claimant receive in relation to his furlough? In particular the Respondent alleges that he was paid a sum in cash on the 16th June 2020, which the Claimant denies.

Unfair dismissal and wrongful dismissal

c. Should the Claimant's application to amend to add these claims be allowed?

d. If the amendment is allowed, was the Claimant constructively dismissed? In particular, was there a fundamental breach of contract and did the Claimant resign in response to it?

e. If these claims succeed, what remedy should be awarded?

The law

Furlough and furlough pay

8. The Coronavirus Job Retention Scheme (CJRS) established by the government in response to the Covid-19 pandemic is central to this case. It was established by a series of Treasury Directions made pursuant to the Coronavirus Act 2020.

9. It is important, however, to recognise that the CJRS is a system for paying grants to employers from HMRC in respects of wages costs of employees who are furloughed (i.e. kept on the payroll, but not working during the pandemic). The CJRS does not set out rules governing payments to employees. It therefore contrasts with other statutory regimes such as those for the National Minimum Wage (which requires employers to pay their employees at a particular rate, but does not provide any grant to the employer) and maternity pay (which both requires employees to be paid and provides for the recovery of some or all of that cost by the employer from the government).

10. The detail of the sums an employer can recover through the CJRS can become complex, especially for employees with variable pay. Broadly, however, the intention of the scheme was for employers to receive 80% of an employees pay. In relation to an employee, such as the Claimant, who was paid a fixed salary each month, an employer would simply receive 80% of that fixed rate.

11. Since the CJRS does not deal with the question of what an employee is entitled to be paid, this is left to the common law of contract. In broad terms and leaving aside other statutory regulations such as the National Minimum Wage which are not relevant to this case, this means that an employee is entitled to be paid the wage that he has agreed with his employer.

12. In general, neither party can unilaterally vary a contract. Any change must be agreed between them. None of the limited exceptions to this rule are relevant to this case.

13. In practice, many furloughed employees agreed, either explicitly or implicitly through their actions, to vary their contracts to receive less than their usual salary. In many cases this agreement will have been driven by the pressure of circumstance and a recognition of the commercial pressures on their employer in an exceptional situation. Many employees will have concluded that it was preferrable to receive a lower sum, rather than allow a situation in which their employer (who could not operate their business in the usual way) was likely to dismiss them. In many cases this kind of arrangement will have been based (either explicitly or implicitly) on the sums an employer could recover through the CJRS. Such commercial realities, however, do not alter the underlying legal principle that any variation must be agreed between the parties.

14. The Respondent argued that under the CJRS, once he was on furlough, the Claimant was only entitled to be paid when and to the extent that the Respondent received funds through the system. I reject this argument. There is nothing within the CJRS that allows for such a radical departure from the ordinary principles of contract law.

Unfair dismissal / Wrongful Dismissal: Time limit / Amendment

15. The time limit for bringing a claim for unfair dismissal is set out at s111(2) of the Employment Rights Act 1996. This requires that any claim is brought within three months of the effective date of termination.

16. Extensions of time to bring a claim are possible in accordance with s111(2)(b) if a) it was not practicable to bring the claim within the normal time limit and b) it was presented within a reasonable period thereafter.

17. The time limit for bringing a claim for wrongful dismissal is set out at paragraph 8 of the Employment Tribunals Extension of Jurisdiction (England and Wales) Order 1994. Both the time limit of three months and the provisions relating to extensions of time are the same as those relating to unfair dismissal.

18. The definition of and approach to the concept of 'reasonably practicability' and extensions of time has been the subject of extensive appellate comment. I have considered in particular the guidance laid down in *Palmer and Saunders v Southend-on-Sea Borough Council* [1984] IRLR 119, which concluded that the concept of 'not reasonably practicable' fell between the extremes of what is physically possible to achieve on the one hand and a simple question of what was reasonable on the other. Rather, I must consider broadly whether it was reasonably feasible to present the claim to the Tribunal within the time limit.

19. Since the Claimant relies in particular on his lack of knowledge of his rights and the Tribunal process I have considered the approach to such questions required by the Court of Appeal in *Wall's Meat Co Ltd v Khan* [1978] IRLR 499. Ignorance of a right to bring a claim, how to present a claim to the Tribunal or the relevant deadlines may all mean that it was not reasonably practicable to present a claim in time. In everyday language, it is not reasonably practicable to do something, such as present a claim, if you do not know of the option to do so, do not know how it is done or are unaware that there are strict time-limits involved.

20. But for any lack of knowledge to make it not reasonably practicable to present a claim, that lack of knowledge must be reasonable. When deciding whether lack of knowledge is reasonable, I must consider whether the Claimant has acted reasonably in making enquiries as to his rights and how they may be enforced. A Claimant cannot rely on reasonable ignorance if that lack of knowledge has become unreasonably because they have failed to take reasonable steps to find out where they stood.

21. Although the Claimant was not represented during the initial time-period for presenting a claim he was later represented by solicitors. I have therefore considered what is known as the 'Dedman Principle' (arising from the Court of Appeal's decision in *Dedman v British Building and Engineering Appliances Ltd* [1973] IRLR 379 and elaborated upon in *Wall's Meat Co Ltd*. This principle is that, in considering what it is reasonable for a professionally represented party to know or to find out, the relevant question is what they and their advisors should have been aware of, rather than the Claimant alone.

22. The Dedman principle has a significant impact on questions of reasonableness since professional representatives, especially qualified lawyers, must be

expected to have extensive knowledge of both substantive and procedural law, to be aware of the importance of presenting claims in time and have the resources to investigate any relevant legal or factual question that may arise.

23. I have also had regard to the comments of then President Underhill in *Cullinane v Balfour Beatty Engineering Services Ltd* UKEAT/0537/10 addressing the application of the Dedman principle to the second stage of the test for an extension of time, i.e. whether a claim was presented within a reasonable further period. President Underhill accepted that the two-stage test involved asking different legal questions and that there was therefore a 'formal distinction' in how legal advice / representation might be relevant at the different stages. He went on, however, to say, at paragraph 16 of the judgment:

> … I do not believe that it makes any real difference in practice as regards the question of the relevance of the culpability of the Claimant's legal advisers. The question at "stage 2" is what period – that is, between the expiry of the primary time limit and the eventual presentation of the claim – is reasonable. That is not the same as asking whether the Claimant acted reasonably; still less is it equivalent to the question whether it would be just and equitable to extend time. It requires an objective consideration of the factors causing the delay and what period should reasonably be allowed in those circumstances for proceedings to be instituted – having regard, certainly, to the strong public interest in claims in this field being brought promptly, and against a background where the primary time limit is three months. If a period is, on that basis, objectively unreasonable, I do not see how the fact that the delay was caused by the Claimant's advisers rather than by himself can make any difference to that conclusion.

24. I draw from this that the correct approach to considering whether the claim was brought within a reasonable time-period after the initial deadline, once the Claimant was represented by solicitors, is to approach the question not by regard to what was reasonable for a litigant in person but what was reasonable for a professional represented party.

25. In considering an application to amend I must consider all of the circumstances and seek to balance the injustice and hardship to the Respondent of allowing the amendment, against the injustice and hardship to the Claimant of refusing it. It is useful to bear in mind the criteria identified in *Selkent Bus Co Ltd v Moore* [1996] IRLR 661; the nature of the amendments; the applicability of time limits and the timing and manner of the application. But I must also bear in mind that these are factors commonly applicable to the balancing exercise, rather than an exhaustive list to be approached mechanically.

Application to amend

26. It is convenient to deal with the application to amend at this point.

27. The application to amend to amend was made by the Claimant's solicitors on 7th June 2021. It sought to add both an unfair and wrongful dismissal claim.

28. It is very substantially out of time. The deadline for bringing a claim for both unfair dismissal and wrongful dismissal, given my findings of fact below, was the 17th September 2020. The application to amend was made almost nine

months after that deadline and almost a year after the Claimant left employment.

29. In the application, the Claimant's solicitors seek to argue that the application to amend is in time, because, although he was wrongly terminated on the 31st May 2020, the Claimant only came to know of this in May 2021 when he received his P45. The appear to say that the Claimant's own resignation in June 2020 (the application refers to June 2021, but in context I am satisfied that this is a typo) is immaterial, because the Respondent's decision to dismiss came first.

30. I cannot accept any of this. A dismissal occurs when that decision is communicated to an employee. Any decision made by the Respondent in May 2020, therefore, is irrelevant until it is communicated to the Claimant.

31. What is relevant in this case is the Claimant's own resignation, which both parties agreed had occurred long before May 2021. Once this had occurred the employment contract was at an end. The Respondent could not, from that point, dismiss the Claimant, because there was no ongoing employment to dismiss him from. The deadline for both unfair dismissal and wrongful dismissal therefore runs from the Claimant's resignation.

32. In evidence, the Claimant told me that he did not know the law and did not understand his rights. He said that he went to the solicitors in December 2020 and complained, but did not receive his P45 until May 2021. I can also see from correspondence that solicitors were acting for him in December 2020. I accept the Claimant's evidence of his confusion. It was clear when he was being questioned that, even during the hearing, he struggled with the legal concepts of time-limits, the date of dismissal and constructive dismissal. If he had understood these matters at the point that he was dismissed, there is really no reason that he would not have included the dismissal based claims when he lodged his original claim.

33. I have also concluded that this lack of knowledge was reasonable in all the circumstances, at least during the three months after his resignation. I bear in mind the difficulties involved in seeking guidance and advice during the Covid pandemic, particularly given the Claimant's lack of English. I have concluded that it was not reasonably practicable for him to bring the claims for unfair dismissal and wrongful dismissal during the original time limit.

34. I do not accept, however, that the claims were then presented within a reasonable time thereafter. This is because once the Claimant had secured professional legal representation it should have been obvious to his solicitors that these were potential claims and that any application to amend should be made promptly. The dismissal claims are plain on the simple facts presented by the Claimant: that he had not been paid his furlough pay and therefore resigned.

35. At that stage a reasonable period of time to present the claim would have been a matter of a few weeks at most – not the nearly six months that passed before the application to amend was made. The Claimant has not been able to give me any explanation for this delay, which, given his lack of legal knowledge is unsurprising. It is possible that the delay was caused by a failure to understand the law relating to the Claimant's claims, as suggested by the flawed basis on

which the application was made. But, if this was so, it was not reasonable for a professional and legally qualified representative.

36. Given, however, that this is an application to amend rather than a freestanding claim the time-limit, while an important factor, is not determinative.

37. It seems to me that the strongest factor in favour of allowing an amendment is that, if it is not granted, the Claimant loses what, on my findings of fact, are meritorious claims for unfair and wrongful dismissal.

38. Against that, are a number of factors, starting with the fact that the amendment was made so far out of time. In addition, it is a substantial amendment, since it seeks to add wholly new claims relating to dismissal to the existing wages claim. The prejudice to the Respondent is substantial, since these are significant claims that would add substantially to the amounts claimed by the Claimant.

39. On balance, I find the balance of prejudice to fall marginally in favour of the Respondent. Although the meritorious nature of the claims sought to be added weighs heavily in my consideration, I have concluded it is outweighed by the combination of the very substantial and unexplained delay in seeking the amendment, given the fundamental change in the case that is being sought. I therefore refuse the Claimant's application to amend to add claims for unfair dismissal and wrongful dismissal.

Findings of Fact

40. It is common ground between the parties that the Claimant contracted Covid in March 2020 and took time off sick. It is also agreed that after he was well enough to return to work the Respondent told him that the business was quiet as a result of the lock down and that the Claimant would be placed on furlough. This was not approached with any degree of formality, as might be expected in a small business without significant HR resources. There was no documentary material relating to this agreement.

41. Relying on the evidence of both Claimant and Respondent, however, I conclude that their mutual understanding was the Claimant would be placed 'on furlough' and that he would be entitled to be paid a reduced wage, based on the provisions of the furlough scheme. In effect, by saying that the Claimant would 'be furloughed' the Respondent incorporated the terms of the furlough scheme into the contract by reference. And, by accepting this without objection and remaining at home, the Claimant agreed the proposed variation.

42. The Respondent's understanding of that scheme was that the Claimant was only entitled to be paid once monies had been received from HMRC. I accept his evidence that this was his genuine understanding and he did not appreciate that the furlough scheme did not allow him to withhold pay until the grant had been received. None of the witnesses have suggested that there was any explicit agreement between the parties that payments would not be made until the grants were received.

43. This meant that the Claimant was not paid in March, April or May. I accept that he chased the Respondent on a number of occasions and was told that the money had not yet been received.

44. The crucial factual difference between the parties relates to events at the end of May and June. There are two key areas of dispute. First, the Respondent says that the Claimant resigned on the 23rd May 2020, while the Claimant says he did not resign until later on the 18th June 2020. Second, the Respondent says that on 27th or 28th June he handed the claimant a sum of £1,661.65 in cash. The Claimant denies this.

45. There is limited documentary evidence to resolve these issues, although I draw no adverse inference from this, given the small size of the business. Of particular significance is the following material:

    a. Bank records showing that HMRC paid the Respondent a sum of £1,661.65 as a Job Retention Scheme Grant on the 29th May 2020. There is a entry showing a debit card transaction paying out £1,600 on the 25th June 2020, which the Respondent tells me is a cash withdrawal.
    b. A resignation letter dated 18th June 2020 from the Claimant, referring to a previous verbal resignation. Proof of postage was contained within the bundle and the Respondent accepts that this was received on the 19th June.
    c. iMessage and Whats App messages from the Claimant to the Respondent on 16th June 2020, both saying 'Please can you send me the form titled the consent form for employee to agree to furlough that I have signed'

46. The Claimant's account is that on the 12th May 2020 he spoke to the Respondent by phone and was told that the furlough money had not been received. He spoke to the Respondent's wife a number of times around the 22nd, 23rd and 25th May 2020. He says that he spoke to the Respondent's wife, because the Respondent had stopped taking his calls.

47. In addition to seeking payment, the Claimant says that he wanted to have payslips and his P60, in order to support a claim for Universal Credit, since he was in some financial difficulties. He says that he visited the Respondent's house on the 16th June, with his wife, and they collected his P60 and two payslips for March and April 2020.

48. Much of the detail of that meeting has been the subject of heated dispute in the Tribunal, with cross-examination as to why the Claimant did not come inside to speak to the Respondent, when he looked at the payslips and so on. None of this is relevant to the disputes between the parties and I have not sought to resolve it. The relevant matters – that the Claimant's wife collected the P60 and payslips on his behalf – are agreed between the parties.

49. The Claimant's evidence is that, when he considered his April payslip he was concerned to see that it recorded a furlough payment of £725.50, which he had not received. This lead him to contact CAB for advice and, following that, to contact HMRC who told him that 90% of the furlough payments to employers had been made.

50. The Claimant says that he concluded from this that the Respondent had probably received his money, was deliberately withholding it and had produced a fraudulent payslip. With the benefit of the bank records, I can see that, at least so far as the HMRC payment is concerned, this was definitely not the case. At this stage, no payment from HMRC had been made to the Respondent.

51. Further, I do not take the same view as the Claimant in relation to the pay slip. Payslips are almost invariably produced before payment is made. Indeed, one of their purposes is often to inform an employee what payment will be made in advance and to allow those responsible for operating a payroll to know what amount should be paid. There is nothing inherently suspicious or improper in producing a payslip that indicates what payment was due to the Claimant, even if payment was not then made. My interpretation of the payslip is that it was produced by the Respondent's accountant to indicate what the Claimant was owed, the accountant no doubt left mechanics of making the payment to the Respondent and the Respondent was operating on the basis that, since he had not received funds from HMRC, he did not have to make any payment yet. It might have been better for the Respondent's understanding of the position to have been recorded more fully and more clearly, because it might have avoided some confusion. But I do not think it was done with any malicious or sinister intent.

52. The Claimant, however, says that his conclusion that the Respondent had received his money, was withholding it and producing fraudulent documents lead him first to request a furlough consent form from the Respondent. He believed this would contain a furlough reference number that would allow HMRC to tell him whether a payment had been made. I accept that this request was made, since his messages to the Respondent have been produced in the bundle.

53. The Claimant says that he also decided that, unhappy as he was with the way furlough had been dealt with, he no longer wished to work for the Respondent. He says that he tried to call the Respondent on the 18th June 2020 and, when he did not answer, rang the Respondent's wife and told her that he did not want to work for the Respondent any more.

54. The Respondent, conversely, says that the Claimant resigned earlier, on the 23rd May 2020.

55. On balance I accept the Claimant's account of his resignation, over the Respondent's. His account is a credible one, in that it explains the steps that lead up to his resignation in a logical fashion. His account of being frustrated by the lack of payment, chasing it in various ways, but then being shocked when it seemed to him that his employer was acting fraudulently and this triggering his decision to leave makes sense of his actions.

56. Further, the Claimant's account is supported, albeit in a circumstantial manner, by the contemporaneous documentation. It is, in general, more likely that a resignation letter be sent on the same day as a resignation, rather than several weeks after. And the text messages sent on the 16th June read more naturally if they were sent by the Claimant while he still regarded himself as being on furlough, rather than having already resigned.

57. Conversely, the Respondent's account amounts to a mere assertion that the Claimant resigned on the 23rd May 2020. There is no explanation as to how that occurred, why he resigned at that particular point or what might have lead him to send a resignation letter some weeks later.

58. The second substantial dispute is that the Respondent says that there was a second relevant meeting in which the Respondent's wife handed the Claimant the sum of £1,661.65 in cash. The Respondent say that this occurred on the 27th or 28th June 2020. The Claimant denies this.

59. For a number of reasons that I reject the Respondent's account of having paid this money.

    a. First, I have disbelieved the Respondent in relation to the date the Claimant resigned and this undermines his credibility more generally. I bear in mind that a witness who has lied about one element of a case is not necessarily lying about all of his evidence. But in a case which, essentially, comes down to the Claimant's word against the Respondent's, with limited documentary evidence any damage to a witness' credibility is significant.

    b. I also consider the Respondent's account in relation to when he became aware of the payment by HMRC into his account to be implausible. They payment by HMRC was made on the 29th May 2020. He suggests that he only became aware of this on the 15th or 16th June 2020, over two weeks later. During that time the bank records show that there were significant payments out of the account, taking it from a balance of over £30k to just above £2k. I do not consider it likely that the operator of a business would be so unaware of his financial circumstances, particular in a period where a) the business was dealing with covid and b) there were large outflows from the business account. If the Respondent was aware of the payment earlier, it is difficult to see what good reason he could have had for not either paying the money immediately or having some discussion with the Claimant at a much earlier stage to inform him that the funds had arrived and to discuss how they would be paid to him.

    c. I also consider the Respondent's explanations as to why he did not discuss payment directly with the Claimant at this time implausible. He told me that he was so deeply upset that the Claimant intended to leave his job that his mind was not in a good place and he did not speak to him after 23rd May 2020. I do not think it credible that the Respondent would be so upset in these circumstances that he would cease speaking to an employee. The Respondent's account is that he was deeply upset because the Claimant wished to leave the business. But, even if the Claimant had indicated he wished to resign in late May 2020, such a dramatic emotional reaction on behalf of the Respondent would be wholly unreasonable. At that stage, it is common ground that the Claimant had gone without pay since March 2020. Even if, as the Respondent would argue, this was none of his doing but simply the unfortunate result of the pandemic and a wait to receive funds from HMRC, it could not have been surprising that an employee in such circumstances might feel the need to resign to seek other work. It certainly would not have justified the emotional reaction the Respondent suggests that he had.

60. Taking all of this together I accept the Claimant's evidence that no relevant payment was made to him.

61. In cross-examination the Claimant was asked about the circumstanced whereby he had started a new job at a friend's off licence, which began on the 5th July 2020. This is not directly relevant to the wages claim, but it is relevant to the Claimant's credibility, so I will address it. It was put to the Claimant that he had been speaking to his friend about this job for some time and, in effect, he had this job lined up before he resigned. The Claimant's evidence was initially that he spoke to his friend about a job towards the end of June. When this was challenged there was some confusion in the translation. It was then suggested to me by Mr Roshan Ashath that the Claimant had said, in Tamil, that the Claimant had been speaking to his friend for some time before this. On enquiry, the Translator agreed that the Claimant had said that he had been speaking to his friend for some time, but he had not specified exactly what he had said. The Respondent argued that the correct inference from this was that the Claimant had admitted that he had the new job lined up before he resigned.

62. I reject this argument. I do not think that the Claimant meant to say anything more than he had speaking to his friend, in general terms, for some time about his situation before a specific job offer had been discussed. It would be only natural, in circumstances where the Claimant had been unpaid for several months, for him to mention this in conversation with his friends. If the Claimant was seeking to mislead the Tribunal it would be odd to make a truthful statement in Tamil, but count on it not being translated correctly.

63. I should note, for completeness, that even if I had concluded that the Claimant had had a job offer in place before resigning, this would not have been fatal to the claims for unfair dismissal and wrongful dismissal he sought to bring. The legal requirement of constructive dismissal is that an employee resign in response to a breach of contract, without affirming the contract. It will be common for an employee considering such a resignation to seek alternative work and, indeed, for their decision as to whether to resign to depend, in part, on whether they can find another job. Provided that their resignation is genuinely motivated by the breach, rather than the desire for a new job, and do not delay in such a manner as to affirm the contract this is no barrier to establishing a constructive dismissal.

Conclusion in relation to furlough pay

64. It was common ground between the parties that the Claimant was entitled to be paid a fixed rate of £853.84 a month, as shown on his most recent payslips. I have further concluded that the Claimant had accepted that he would be placed on furlough from the 23rd March 2020. From that point, he accepted that he would be paid 80% of his normal salary, in accordance with the government furlough scheme.

65. The Claimant was therefore 'on furlough' between 23rd March and 18th June 2020 when I have concluded he resigned, or 87 days. I have therefore taken his monthly salary and converted it to a daily rate by multiplying it by 12 months, before dividing it by 366 (the number of days in 2020). This gives a daily rate of £27.99. 80% of this is £22.40. 87 days at £22.40 is £1,948.43.

66. This is somewhat lower than the figure given by the Claimant in his ET1. This is because the ET1 figure is based on furlough continuing until the end of June 2020 I have concluded, however, that the Claimant resigned earlier than this, ending his entitlement to pay.

67. It is somewhat higher than the figure given in the Claimant's schedule of loss. This is because the schedule of loss claims only two months (April and May 2020), but I am satisfied that the Claimant was placed on furlough during March and remained employed until the middle of June.

68. It follows from my findings of fact above that I do not accept that any part of this sum has been paid by the Respondent and I therefore award the whole amount to the Claimant.

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Employment Judge **Reed**

30th June 2022