EMPLOYMENT TRIBUNALS

Claimant: Ms S Bennett v **Respondent:** The Aviator Hotel Ltd

Heard at: Watford (via CVP) **On:** 20 January 2023

Before: Employment Judge Fredericks

Appearances
For the claimant: In person
For the respondent: Mr F Greatley-Hirsch (Counsel)

RESERVED JUDGMENT

1. The claimant was not an employee of the respondent at the time of the respondent's redundancy process.

2. The claimant therefore has no standing to bring claims of unfair dismissal and failure to make a redundancy payment and those claims are dismissed.

3. The claimant's claim for not being placed on furlough and for wrongful dismissal are not well-founded and are dismissed.

REASONS

Introduction

1. The claimant brought claims alleging that she was made redundant by the respondent but was excluded from the respondent's redundancy process. She says she was not paid redundancy pay, and did not receive any notice pay either. She brought claims for unfair dismissal, failure to make redundancy payment, and wrongful dismissal. The claimant also claimed for 13 weeks' missed 'furlough' payment for the period covered by the Coronavirus Job Retention Scheme.

2. The respondent accepts that a redundancy process occurred which did not include the claimant. It accepts that she did not receive a redundancy payment or furlough payments. However, it says that the claimant was not an employee of the respondent at the material times, having earlier resigned. For the same reason, it says she was not owed notice pay.

3. The claimant represented herself and gave evidence in support of her own case. The respondent was represented by Mr Greatley-Hirsch of Counsel and provided evidence from Ms Janey Jones (Finance Director) and Mr Michael Bletsoe-Brown (Managing Director). I also had access to a bundle of documents which ran to 104 pages.

Issues to be decided

4. The parties agreed that the claimant had not been subject to the redundancy process and had not received a redundancy payment. To be successful in those claims the claimant would need to establish that she was an employee at the time the process took place. Similarly, to be succeed in her wrongful dismissal claim, the claimant would need to show that she was entitled to that payment and it had not been paid.

5. The issues therefore, were:

   5.1. *Was the claimant an employee of the respondent at the time of the furlough payments or the redundancy process?*
   5.1.1. If no, then the claims for unfair dismissal and redundancy and furlough payments must fail.
   5.1.2. If yes, then what award is due to the claimant for her unfair dismissal by reason of redundancy, taking into account the likelihood that she would have been dismissed in the redundancy process in any event?
   5.1.3. If yes, what if anything is owed for the period covered by the CJRS?

   5.2. *Was the claimant owed any notice pay at the termination of her employment, however that employment ended?*

Findings of fact

6. The relevant facts as I find them are as follows. These are found on the balance of probabilities – ie. that I consider the facts are more likely than not to have happened in the way I have found. Where I have had to resolve any conflict of facts, I explain how I have done so at the material time.

7. The claimant began her engagement with the respondent on 24 May 2015, working as a waitress. On 23 March 2016, the claimant was issued with a document titled 'Statement of terms and conditions of employment for restaurant staff' (pages 35 to 40). That document described the engagement as 'employment' and the claimant as 'employee' and respondent as 'employer'. The document stipulated an hourly rate and that the claimant was *"a part time employee"*. The claimant was able to terminate the engagement on one week's notice.

8. Most relevantly for understanding the initial engagement between the parties, clause 5.2 reads (page 36):-

> *"You are employed on shift working. Each week comprises of shifts to be determined in accordance with the rota prepared by your manager/supervisor for that week. You are expected to work the shifts that you have been allocated for the number of basic hours that you are contracted to work. You may be allocated to work shifts on weekends, bank or statutory holidays you are expected to work on these days. If you refuse to work a weekend, bank or statutory holiday (without good cause or reason) you may face disciplinary action under the Company's disciplinary procedures."*

9. The parties agree that the contract itself operated as a 'zero hours' contract. In other words, no clause in the contract required the respondent to provide any work for the claimant at all. The hours that the claimant was required to work were allotted through a weekly rota and hours fluctuated according to business need. In practice, each witness confirmed that there was an element of 'two way' negotiation about those shifts. The claimant was able to inform management of her availability, and this was taken into account when producing the rota. The claimant also told me that she was able to swap shifts with other staff members if she was unable to do an allotted shift. The respondent only required the shifts were covered and was relaxed about who covered them.

10. The claimant was also a student throughout her engagement, initially at sixth form and then at a De Montfort University in Leicester, which is situated some distance from the respondent and from home. The hours worked and pay paid to the claimant throughout her employment, on a week by week basis, were shown at pages 51 to 99. These show a fluctuation of hours of, broadly, something in the region of 9 to 26 hours per week from the beginning of the engagement to late 2017. These hours appear consistent across all of the months of the year. The claimant started her University course on 1 October 2018 with an expected finish date of 17 June 2022 (page 50). This coincides with a marked change in the hours worked by the claimant and the pattern of those hours.

11. Under cross examination, the claimant asserted that there was no change to her working arrangements upon the commencement of her course. She considered that any reduction or alteration in the hours worked was as a result of the respondent not having the hours to give her. The respondent's evidence was that she told her manager that she was going to University and would not be available, and to take her off the rota until she informed them she was back at home and able to work. The documentary evidence appears to support the respondent's view, and I asked the claimant to explain why the respondent would suddenly not have hours for her during term time (save for the odd shift which fell in the middle of a term, which may be reading week), but then have somewhere between 15 and 30 hours per week available in term time. The claimant could not answer that question and I was left with a conflict of fact about the cause of the claimant's working pattern alteration.

12. I prefer the respondent's account on this issue, and find that the claimant informed the respondent that she was going away to University and would not be present to do shifts during term time. This meant that the respondent was aware that the

claimant could not fulfil any shifts given to her in these periods, until she returned in the holiday, and so did not rota her on to any shifts. I find these points as facts because:-

12.1. The record of hours worked show that the claimant was working for the respondent with consistent hours across the year prior to the commencement of her University studies;

12.2. The claimant's working pattern changed from October 2018 so that she was not working in term time, save for the odd short shift, but was working a significant amount of hours from mid-December to mid-January, over Easter, and from mid-June to October in each year until 2020;

12.3. The claimant attended University in Leicester, which is likely too far to commute and so too far to be able to work at the respondent during the week; and

12.4. I did not find the claimant to be remotely convincing about this particular issue in her evidence, and very much drew the conclusion that the claimant was sticking to her narrative because she thought that that was an argument which would lead her to win her claim.

13. On the claimant's case, the situation remained the same until she was unwell in late 2019 and early 2020 and required surgery, which she said meant that she was not working at the respondent at the outbreak of the pandemic. Clearly, she maintained that she was still employed. I accept that the claimant was unwell and required surgery. The respondent says it did not know that the claimant was unwell, and Mr Bletsoe-Brown said that there was no evidence of any medical letters or fit notes being given to the respondent to cover any illness. I accept this evidence, which was unchallenged by the claimant.

14. The onset of the pandemic caused problems for the respondent, as with any business in the hospitality sector. The respondent witnesses told me, and I accept, that the CJRS was used for staff who had a guaranteed minimum number of hours in their contracts. The business could not pay them for those minimum hours without an income. The situation was different for those on a 'zero hours' arrangement. The claimant was not placed on CJRS, but it is factually (as well as legally) the case that there was no right to be placed on 'furlough' and that if an employer chose not to furlough somebody, then there is no recourse to compensation for that choice. Ms Jones said that the claimant was not included in the CJRS considerations because she had not worked for the respondent for some months prior to that, and the respondent considered that she was not an employee or worker at that time.

15. The claimant's final shift for the respondent was in the first days October 2020. She says that she was not placed on the rota from this date because there was little trade and so no hours available to her. The respondent says that the claimant told it that she was going back to University (with an open campus), and so would not be available to work. Again, I prefer the evidence of the respondent on this issue. This is because:-

15.1. Such a position is consistent with my earlier findings that the claimant did not work during term time; and

15.2. The respondent paid the claimant all shifts owed to date and accrued but untaken holiday in November 2020, treating her lack of availability as a resignation; and

15.3. The claimant had no credible alternative explanation as to why she would have been paid holiday pay in such a way.

16. In late 2020, the respondent began to consider a redundancy process for staff. Ms Jones told me that 'at risk' letters were sent to affected staff on 16 December 2020. Initial consultation meetings took place on 15 January 2021 with final meetings taking place on either 29 January 2021 or 5 February 2021. I accept these dates. The claimant found out about the redundancy process and called the respondent in the first week of February to ask why she was not included. She was told that she was not employed by the respondent. At that time, the respondent realised she had not been processed as a leaver. It therefore completed that step and a P45 was produced, dated 5 February 2021 (page 45). The respondent accepts this the failure to complete this step has caused confusion contributing to litigation and it has updated its practices for the future.

17. The claimant raised a grievance about the matters outlined above and, when this was not resolved, she brought this litigation.

Relevant law

Claim for 'furlough' expressed as a wages claim

18. The *Coronavirus Act 2020 Functions or Her Majesty's Revenue and Customs (Coronavirus Job Retention Scheme) Direction* was made on 15 April 2020. That set out the directions for how the CJRS would operate, and the mechanism by which funds would be released. Paragraph 6 relates to 'furloughed employees'. Relevantly:-

18.1. Paragraph 6.1 – *"An employee is a furloughed employee if:*

(a) The employee has been instructed by the employer to cease all work in relation to their employment';

18.2. Paragraph 6.7 – *"An employee has been instructed by the employer to cease all work in relation to their employment only if the employer and employee have agreed in writing (which may be in electronic form such as an email) that the employee will cease all work in relation to their employment.*

19. It is clear that the employee cannot force a position where they are placed on to the CJRS. The Direction requires there to be a joint process where the parties agree to the operation of the CJRS in respect of that particular employment. Importantly, the scheme makes clear that the employer must instruct the employee to cease work.

20. *Section 23(1)(a) Employment Rights Act* 1996 allows an employee to present a complaint to the Employment Tribunal that they have suffered an unlawful deduction from wages. *Section 24* of the same Act requires the Tribunal to make a declaration where it finds such a complaint to be well-founded, and to order that any deduction is paid. *Section 24(2)* also allows the Tribunal to order the respondent to pay the worker *"such amount as the tribunal considers appropriate in all the circumstances to compensate the worker for any financial loss sustained by [them] which is attributable to the matter complained of"*.

21. An employer is unable to deduct from the wages of a worker employed unless this is authorised by statute or contract, or where the worker has previously agreed to the deduction in writing (*section 13(1) Employment Rights Act 1996)*. Wages must be 'properly payable' to count as a deduction (*section 13(3)*). Determining whether wages claimed are 'properly payable' requires the tribunal to consider the circumstances of the case and what the contract of employment means for those circumstances (*Agarwal v Cardiff University and anor [2019] ICR 433 CA; Delaney v Staples (t/a De Montfort Recruitment) [1991[ICR 331 CA)*.

22. Naturally, the work must be completed for the wages to fall due and become properly payable. In *Hussman Manufacturing Ltd v Weir [1998] IRLR 288 EAT*, Mr Weir brought a claim alleging unlawful deduction when his shifts were altered lawfully (though under protest), which led to a reduction in his earnings because he was moved to day shifts which did not carry the premium he used to earn. The EAT held that the fact that a lawful change or circumstance might have a negative impact on the economic situation of the employee affected does not mean that there has been an unlawful deduction from wages. The wages 'properly payable' to Mr Weir on his new shift pattern were the same as the others on his pattern; he was not entitled to keep his shift premium once he was not working shifts which attracted a premium.

Redundancy unfair dismissal

23. *Section 94 Employment Rights Act 1996* provides that an 'employee' has a right not to be unfairly dismissed. A person has no standing to bring a claim in the Employment Tribunal for unfair dismissal unless the parties agree or the Tribunal finds that they are an 'employee' according to the legal definition outlined below.

Redundancy pay

24. *Sections 136 to 139 Employment Rights Act 1996* outline the circumstances within which an employee is dismissed by reason of redundancy and the consequences that follow. These sections, including any sections outlining the remedy following dismissal, only apply to those who were 'employees' at the time of the redundancy process.

Definition of 'employment' – was the claimant employed?

25. The starting point in relation to considering the employment status of an individual is to consider the wording of the relevant statute. *Section 230(1) to Section 230(3) Employment Rights Act 1996* provides:

> ***"230 - Employees, workers etc.***

(1)In this Act "employee" means an individual who has entered into or works under (or, where the employment has ceased, worked under) a contract of employment.

(2)In this Act "contract of employment" means a contract of service or apprenticeship, whether express or implied, and (if it is express) whether oral or in writing.

(3)In this Act "worker" (except in the phrases "shop worker" and "betting worker") means an individual who has entered into or works under (or, where the employment has ceased, worked under)—

(a)a contract of employment, or

(b)any other contract, whether express or implied and (if it is express) whether oral or in writing, whereby the individual undertakes to do or perform personally any work or services for another party to the contract whose status is not by virtue of the contract that of a client or customer of any profession or business undertaking carried on by the individual;"

26. There is no single test provided for by case law about how to determine a person's employment status. Each case falls to be determined on its own particular facts and often there are factors pointing in each direction which complicate the determination. The usual approach requires all aspects of the relationship to be considered and then I should ask the question whether the claimant was carrying on a business on their own account (*O'Kelly v Trusthouse Forte plc [1983] IRLR 369 CA*).

27. Naturally, this means that the wording in any document and the assumptions made by the parties will only be part of the matters to be considered when making a determination. The test is not 'what was the claimant called' or 'what do the documents label the parties' or 'what did the claimant think they were'. I may be required to look behind the contractual documentation to consider how the relationship operated in reality to determine the employment status of the claimant (*Autoclenz Ltd v Belcher [2011] UKSC 41*; *Uber BV v Aslam & others [2019] UKSC 29*).

28. In relation to whether someone is an 'employee' for the purposes of *s230(1)(a)*, case law has found that a person will not be an employee without the mutual contractual obligation for the employer to provide work and the employee to do that work which is provided (*Carmichael v National Power Plc [1999] IRLR 43, HL)*. This is often referred to in cases as the 'irreducible minimum of obligation'. Employees who have a contract of employment containing the irreducible minimum of obligation will also be 'workers' by operation of *s230(3)(a)*. Such workers are often referred to in cases as 'limb (a) workers'.

Notice pay

29. Wrongful dismissal, or a claim for notice pay, is a contractual claim where the claimant alleges that they were owed notice pay or payment in lieu of notice at the end of their engagement. A claimant must show that they were contractually entitled

to notice pay or payment in lieu, and that that had not been paid on the balance of probabilities.

Discussion and conclusions

Was the claimant an employee of the respondent?

30. The claimant asserts that she was an employee of the respondent at the time of the redundancy and relies upon (1) what her contract said at the outset of the parties' relationship; (2) her understanding that she was an employee at that time; (3) the fact she had always had periods of less frequent work at the respondent but been able to pick up shifts without a formal process; and (4) that she did not receive a P45 from the respondent until after she had queried her employment status with them.

31. The respondent asserts that the claimant resigned of her own accord in October 2020, or that her employment status changed from October 2018 because it was not obliged to offer her shifts on a regular basis and she was not obliged to work shifts if she was included on the rota to do them. In other words, the respondent submits that the relationship lacked the 'mutuality of obligation' which is a crucial feature defining when someone is an 'employee'.

32. Although the documents between the parties use the terminology of an employment relationship, and the claimant was paid as if an employee through PAYE, I am obliged to look beyond the face of the documents in order to establish how the contractual relationship between the parties operated in practice. I have found as facts that the respondent was not obliged to offer the claimant any shifts at all. No evidence was offered which indicated there was an obligation on the respondent to provide shifts, which might have displaced that contractual construction. Further, although the contract indicated that there would be consequences for the claimant if she did not work shifts for which she was rota'd, I heard evidence from both sides to the effect that the restaurant and bar staff were freely able to negotiate or swap shifts which were allocated.

33. In my judgment, the claimant was never an employee of the respondent and only ever benefitted from 'worker' status. This is because the respondent was never obliged to provide the claimant with work, and has had the contractual ability to not offer the claimant any hours right from the outset of their engagement in 2015. Further, because the allocated shifts could be swapped by the workers, I consider that there was no real obligation upon the claimant to complete the shifts she had been allocated personally. Consequently, I consider that the relationship between the parties was missing the crucial 'irreducible minimum of obligation' right from its outset.

34. The claimant seems to consider that her engagement did not end until 5 February 2023 because this is what her P45 says. This is a common misconception. The date upon which HMRC was informed of the end of an engagement is a relevant piece of evidence when thinking about the ending of that engagement. However, it is only one piece of information which may help me to establish when an engagement ends as a matter of fact and it is not determinative. The engagement ends when any obligations between the parties ceases in accordance with the contract. On the facts I have found, that engagement ended once the claimant (1) told the respondent she

was not available before October 2020, (2) worked her last shift in early October 2020, and (3) was paid all outstanding shift pay and holiday pay in November 2020. This means that, even alternatively if the claimant had been an employee, that employment ended in October 2020 and so she was not employed at the time of the redundancy process at the respondent.

35. On either construction, then, the claimant was not an employee at the relevant time and was not dismissed through the redundancy process. Consequently, she is not entitled to any compensation and/or redundancy pay. She cannot mount a claim relating to the decision not to put her on CJRS because there is no mechanism for someone to make such a complaint. I have found that everything owed to the claimant was paid to her at the end of her engagement and I note that the claimant produced no evidence that any money was outstanding other than that which may have been assuming that any employment was extended through to the redundancy process. Her engagement ended in October 2020 and so this claim also fails.

Disposal

36. The claimant was not an employee of the respondent. In any event, her engagement ended before the redundancy process began and so she could not bring the claims related to redundancy. I have found no indication that the claimant is owed any pay, either through a mis-application of CJRS or through not paying the claimant for a period that she should have been paid.

37. All of the claimant's claims fall to be dismissed.

Employment Judge Fredericks

13 April 2023

Sent to the parties on:

18/4/2023

For the Tribunal Office:

NG