



EMPLOYMENT TRIBUNALS

Claimants: Mr A Teixeira (First Claimant) and Mr H Da Silva (Second Claimant)

Respondent: Zaika Restaurant Limited

Heard at: London Central by CVP (V)¹ **On:** 25-26 January 2021

Before: Employment Judge Norris (sitting alone)

Appearances:

For the Claimant: Ms A Dannreuther, Counsel

For the Respondent: Mr N Mishra, Financial Controller and Mr A Roy, accountant.

RESERVED JUDGMENT

1. The First Claimant's complaint of unfair dismissal is well-founded and succeeds. His complaint of notice pay is well-founded and succeeds in part.
2. The Tribunal does not have jurisdiction to hear the Second Claimant's complaint of unfair dismissal, which is accordingly struck out. His complaint of notice pay is not well-founded and is dismissed.
3. The Respondent's counterclaims succeed.
4. The Respondent is ordered to pay to the First Claimant the sum of £989.19, being the balance of his redundancy payment. No order is made in respect of the Second Claimant.

WRITTEN REASONS

Introduction

5. The Claimants are Mr A Teixeira and Mr H DaSilva. I refer to them as the First and Second Claimant respectively. They worked for the Respondent, a high-quality Indian restaurant in London, part of the Tamarind Collection ("Collection"). It was common ground that the Collection comprises three

¹ This has been a remote hearing which was consented to by the parties at a PHCM in December 2020. A face-to-face hearing was not held because it was not practicable, no-one requested the same and all issues could be determined in a remote hearing.

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London restaurants. The First Claimant was a chef and the Second Claimant a waiter at one of them: "Zaika".

6. The start and end dates of the Claimants' employment are contentious and I return to my findings on this point below. However, put neutrally, both Claimants have in common that they were dismissed by the Respondent following the start of the first national lockdown that began in March 2020 as a result of the global pandemic.

History of the claims

7. The matter came before Employment Judge Nicolle on 17 December 2020 for a Preliminary Hearing (Case Management) (PHCM). On that occasion, the First Claimant was represented by Mr N Clark of Counsel (i.e. not the same Counsel as appeared on his behalf at the full Hearing) while the Second Claimant was neither present nor represented; the Respondent was represented, then as now, by Mr Mishra, financial controller for the Respondent and Mr Roy, its accountant. A full Hearing via CVP was listed for 25-26 January 2021.
8. The Second Claimant had been represented at the outset by the same solicitors as now represent the First Claimant. By the date of the Hearing, they had come off the record for the Second Claimant but advised the Tribunal that they had informed him of the directions made by Employment Judge Nicolle. These had included that the Second Claimant was to confirm his dates of continuous employment and whether he intended to pursue his claim of unfair dismissal. The parties were to agree a bundle of documents and to exchange witness statements, the latter to be done by no later than 4 PM on 14 January 2021.
9. In the event, the Second Claimant neither complied with the direction in relation to his dates of employment nor produced a witness statement before the Hearing commenced. A bundle had been produced by the Respondent.

The Hearing

10. At the Hearing, which took place as listed on 25 and 26 January 2021, I had before me witness statements from Mr Mishra and Mr Roy (the latter having also produced a supplemental statement) which were in very similar terms, and a witness statement from the First Claimant which was password protected but the password had not been supplied so I could not open it until the first morning of the Hearing. Since the statement was very short, however, I read it at the beginning of the Hearing. I also had the trial bundle of just under 350 pages.
11. During the first morning, the First Claimant's representative emailed some payslips from January to March 2019 to the Tribunal and these were also considered during the Hearing.
12. I heard evidence from Mr Mishra and Mr Roy on behalf of the Respondent on the first day. They readily accepted that the Respondent did not follow any

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procedure in dismissing the Claimants and consequently I indicated that it would inevitably be my finding that their dismissal was unfair, at least in procedural terms. However, there remained an issue as to whether the Tribunal has jurisdiction to hear the Second Claimant's complaint of unfair dismissal, because it was argued by the Respondent that he did not have two years' service, and whether the dismissal(s) was/were also substantively unfair.

13. In addition, the Respondent counterclaims against both Claimants for money paid to them under the coronavirus job retention scheme ((CJRS) - also known as the furlough scheme) if my finding is that their employment ended on the dates set out in the ET1s. Again, I return to the evidence and my findings on these points below.
14. Both Claimants claim unfair dismissal, unauthorised deductions from wages and breach of contract (notice pay). It was reasonably clear on the face of the evidence that the Respondent would succeed in showing that the reason for the dismissals was redundancy, the place of work in which both Claimants were employed having closed temporarily and hence the Respondent's situation was likely to meet the statutory definition of redundancy at section 139(1)(b)(ii) Employment Rights Act 1996 (ERA). This was asserted by the Respondent and it was conceded on behalf of the First Claimant that no other reason was being put forward, nor did the Second Claimant positively assert any other reason. It was common ground that the place in which the Claimants worked had closed, temporarily, in March, and that it was not known when it would reopen.
15. By the end of the first day, it was therefore also clear that I would have to determine whether, and if so, when, the Claimants (or either of them, assuming the Tribunal had jurisdiction to hear the Second Claimant's unfair dismissal complaint) would have been dismissed if a fair procedure had been followed; and, further, that I would have to determine their correct pay in order to establish whether they had received less than their entitlement to wages, including their pay in lieu of notice and/or if the counterclaims succeeded, where any remedy might lie.
16. The difficulty I had in conducting such analysis was that neither the First Claimant nor the Respondent's witnesses had addressed the redundancy selection process in their witness statements, and the Second Claimant had, as I have indicated above, not produced a witness statement at all. It transpired in any event that it was neither Mr Roy nor Mr Mehta who had made the selection during the redundancy exercise but a Mr Dhaliwal (a director of the Respondent), who had also not made a statement and was not in attendance on the first day of the Hearing.
17. Accordingly, in order to be able to deal with the "*Polkey*" point (which had in fact been clearly flagged at the PHCM by EJ Nicolle and set out in his written case management summary), I ordered that both the Second Claimant and Mr

Dhaliwal were to produce witness statements overnight and Mr Dhaliwal, who I was told had gone to India, was to be asked to give evidence via CVP link the following morning.

18. So that I could make an assessment of the evidence if Mr Dhaliwal was unavailable, the First Claimant was also asked to address overnight the question of how many chefs there were in the restaurant, how many had been dismissed (so far as he knew) and why he was asserting that he should have been retained rather than the others; further, he was to set out why he was entitled to the tronc payments he was claiming.
19. All those required to make statements then did so, and on day two the Tribunal heard from Mr Dhaliwal, who was cross examined by Ms Dannreuther and (briefly) by the Second Claimant as well as answering some questions from me; we also heard from the First Claimant and then from the Second Claimant before submissions from Ms Dannreuther on behalf of the First Claimant, the Second Claimant in person and then the Respondent. I reserved my decision.

The Law

20. A person with at least two years' continuous employment has the right not to be unfairly dismissed (section 108 Employment Rights Act 1996 (ERA)).
21. It falls to the employer to show the reason or, if more than one, the principal reason for dismissal, and that reason must be potentially fair. Redundancy is a potentially fair reason for dismissal (section 98(2)(c) ERA). The Tribunal must then determine the question of whether the dismissal is fair or unfair in all the circumstances (including the size and administrative resources of the employer) by considering whether the employer acted reasonably or unreasonably in treating that as a sufficient reason for dismissal by reference to equity and the substantial merits of the case (section 98(4) ERA). In other words, the Tribunal must consider whether dismissal was in the "band of reasonable responses". The Tribunal is not permitted to substitute its own decision of whether it would have dismissed the employee(s).
22. The statutory definition of redundancy includes (at section 139(1)(b)(ii) ERA) the fact that the requirements of the business for employees to carry out work of a particular kind in the place where the employee was employed by the employer have ceased or diminished. These words "cease" and "diminish" mean either permanently or temporarily and for whatever reason (section 139(6) ERA).
23. If a dismissal is substantively fair but procedurally unfair, in assessing remedy, the Tribunal must have regard to the authority of *Polkey v AE Dayton Services*² by considering whether to make any adjustment to the compensatory award to reflect the possibility that the employee(s) would still have been dismissed had

² [1987] UKHL 8

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a fair procedure been followed. This assessment is usually expressed as a percentage chance.

24. The ACAS Code of Practice on Disciplinary and Grievance Procedures (giving rise to a potential uplift if it is not followed in a dismissal situation) is explicitly not applicable to dismissals for redundancy.
25. Pursuant to section 13 ERA, an employee has the right not to suffer unlawful deductions from their wages. For this purpose, a deduction occurs when there is a deficiency in the amount properly payable by the employer.
26. When considering the amount of notice payable to an employee, the employer must have regard to the greater of any contractual provision and the requirements under section 86 ERA, which provides for an employer to give to an employee one week's notice for each complete year of service up to a maximum of twelve weeks' notice after twelve years' service.
27. All of the above are to be determined according to the normal civil standard of proof, i.e. on the balance of probabilities.

Findings of fact and conclusions

28. I have concluded that it would be helpful to detail my findings and conclusions in a series of questions and answers, and these are set out below:

Was there a redundancy situation and were the Claimants placed on furlough?

29. The Respondent's evidence, which inevitably could not be and was not contested, was that with effect from 20 March 2020, pubs and restaurants across the UK were ordered by the Government to close as part of the first national lockdown. All the three restaurants in the Collection closed with effect from March 17 and did not reopen for some months; Zaika (in which both Claimants worked) remained closed until 8 September 2020. That was Mr Dhaliwal's evidence, which was not contested.
30. Zaika did not operate takeaway delivery services during lockdown (although I heard that the Second Claimant had previously worked on the takeaway counter) and accordingly from that date had no revenue. The Respondent obtained advice about the CJRS and took steps to deal with the situation.
31. The Respondent's evidence, which I accept, was that notwithstanding the provisions permitting employees to be placed on furlough and the potential to recoup their wages via the CJRS, a decision was taken to carry out a number of redundancies. There could be no guarantee that the Respondent would still require the same number of staff once lockdown was lifted, as to which no date had been fixed. The view was taken by its management that if the Respondent gave notice early, those employees who were thus dismissed would be able to look around for alternative employment at once. They would not be misled by

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false assurances that they would be able to return to work as before, once restrictions were removed and the premises reopened, but they could be kept on furlough pay in the meantime for as long as the CJRS was operational.

32. I accept Mr Dhaliwal's evidence that even prior to the first lockdown, business had reduced significantly and that he was not optimistic that footfall would increase to pre-pandemic levels quickly or possibly at all. It is unfortunate that none of this was discussed adequately (or in the First Claimant's case, at all) with the employees. I accept that there was a potential redundancy situation.
33. It was not disputed that on accordingly, on 22 March 2020, Mr Roy emailed staff in the Collection advising them that as all three restaurants had been closed, and in light of government measures announced to help employers pay salaries, they would "reimburse" 80% of wages up to a cap of £2,500 per month.
34. This was followed up on 31 March 2020 by a further email from Mr Roy, again intended for all colleagues across the Collection, and was headed "Furlough letter – variation of contract". This indicated that in light of the furlough scheme that had been announced by the government, all employees were being requested to "agree" to be furloughed for an initial period of 12 weeks from 1 March 2020; they were informed that if the restaurants could reopen before the end of June, they would be advised and asked to return to work. This, it was suggested, was an alternative to other exercises such as redundancies.
35. The email also stated (inaccurately, but I find on balance unintentionally so) that employees would be paid a sum amounting to "80% of the employment costs which [the Respondent was] able to claim under the scheme", i.e. a maximum of £2,500 for each employee per month and that once the furlough scheme ended, pay would return to normal. In other words, I consider that the Respondent was attempting to say that it would pay 80% of wages in compliance with the scheme and reclaim that from the CJRS, rather than (taking the words literally) that it would only pay over 80% of what it recovered from the scheme. Employees were asked to reply by email if they did **not** agree.
36. Neither Claimant emailed back refusing to be placed on furlough. In this decision, I describe these emails of 22 and 31 March from Mr Roy as the "furlough" emails.
37. On 1 April 2020, the First Claimant's line manager Mr Daniel (the Head Chef) spoke to the First Claimant on the telephone and advised him that he was being dismissed. Mr Roy emailed the First Claimant the following day to confirm the discussion that he was being given notice of termination. The First Claimant responded shortly afterwards stating "I am not accepting any notice at this time because it is my employee right and I have no other alternative job and I want support my family and pay rent". Mr Roy replied again on the same day

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indicating that the First Claimant's acceptance was not required but that the Respondent would "pay all your dues to help you in this difficult time". The First Claimant was the only chef to be made redundant in this way or at all.

38. On 8 April 2020, the Second Claimant received a phone call from the Head Chef, also advising him that his contract was being terminated. There is a minor dispute over the exact words used by the Head Chef, but again, Mr Roy confirmed the termination in writing by email the same day. Mr Roy initially said that the date of termination was 8 March, but when this was queried, acknowledged that he had made a mistake and that he should have said 8 April. According to the Second Claimant's claim form, Mr Roy stated, "Company has decided to let you go as the restaurant is closed and Company is unsure about trading conditions as and when the restaurant reopens". The Second Claimant was one of seven "front of house" (FOH) staff, in addition to two managers, made redundant. FOH includes waiters.
39. Neither Claimant was offered the right of appeal. Both remained on payroll until the end of July, and I return to the significance of this below. They were processed as leavers and issued with P45s showing their leaving date from the Respondent as 31 July 2020. Neither Claimant having agreed to be placed on furlough, I find that despite the Respondent's intentions, neither of them was so placed. I also return to this point below.

What were the First Claimant's employment dates and salary?

40. The First Claimant started work for the Respondent in August 2015. His job description was "tandoor chef". According to his new starter form (presumably used for internal payroll purposes), his starting salary was £25,000 per year. However, his offer letter gave his starting salary as £16,380 gross, payable monthly in arrears, although his contract of employment said that his basic salary was £15,725 and his employee details form, signed on 3 August 2015 by the First Claimant and an unknown director or manager says £19,000.
41. In addition to the First Claimant's starting salary, a letter dated 3 August 2015 from the "troncmaster" Mr Sahu indicated that there was a "tronc" scheme in operation with the Respondent, the rules of which were apparently provided separately, though they were not in the bundle, but under which, the First Claimant was "eligible" to receive payments in addition to his basic pay. These "tronc" payments were expressly discretionary and did not form part of his contract of employment. Indeed, as is customary in the hospitality sector, the tronc was operated independently of the Respondent, though I return to the unique circumstances of the tronc in this particular case below.
42. So far as notice pay was concerned, the First Claimant was entitled to the statutory minimum, i.e. for up to two years' service he would receive one week's notice and thereafter a minimum of two weeks plus one additional week for each continuous year of employment. Accordingly, by the date of dismissal,

whether that was 29 April or 31 July 2020, he was entitled to four weeks' notice from the Respondent because he had more than four but less than five years' service.

43. As regards the First Claimant's salary, my attention was also drawn to a letter in the bundle which was not dated but which was signed by Mr Dhaliwal, headed "salary confirmation" and briefly stated that the letter was to confirm the First Claimant's new salary would be £30,000 per annum from 1 May 2018. This letter did not suggest that additional tronc payments formed part of the First Claimant's contract or that the rules of the discretionary tronc scheme had been revised.
44. Other than payslips, there were no other documents in the bundle relating to the First Claimant's salary; however, I was told by his Counsel on the first day that at some point he was told his salary would increase to around £34,000, or in other words to just over £2,309.50 per month net, but he had not been given any letter to reflect this.
45. The payslips that were in the bundle from May 2019 indeed showed that net figure, but this was said to comprise basic pay of £1,604.16 and tronc payments of £1,229.16. There was no explanation from either party as to how these figures had been arrived at, and accordingly overnight on the first day as I have indicated above, I ordered there to be supplemental witness statement served by both parties dealing with the question of the First Claimant's pay.
46. The First Claimant confirmed in the supplemental witness statement that he served on the morning of day two of the Hearing that in May 2018, he had been offered a role with one of the Respondent's competitors but had spoken to Mr Fathi, Financial Controller, to hand his notice and had explained that the salary on offer with the competitor was £2,000 more; Mr Fathi agreed to match this, so the First Claimant stayed with the Respondent. In May 2019, he had again approached Mr Fathi, who this time saw him with the Head Chef, and they agreed to increase his salary again to £34,000. I understand that the "Mr Fathi" being referred to here is in fact Mr Fateh Dhaliwal, director of the Respondent.
47. In the event, it was not disputed by the Respondent that the Claimant had been offered an increased salary in order to retain his services as he was offered a job at another restaurant. The dispute lay in how that salary should be calculated. I return to the impact of the tronc below, but it is my conclusion that the First Claimant was entitled to a salary of £34,000.
48. As to the end date of the First Claimant's employment, it transpired during evidence that the furlough emails had not been sent to the First Claimant at all. It was explained that the emails were ostensibly sent to a single addressee - Mr Roy himself - but blind copied to over a hundred other employees and, in accordance with their obligations of confidentiality under data protection law,

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this was in order not to disclose the email addresses of their employees to all other staff. The intention was undoubtedly to include all employees across the Collection. However, on looking during the Hearing at the list of addressees, it was agreed by the Respondent that the list did not contain the name of the First Claimant, although it did contain the Second Claimant for both furlough emails, and indeed the Second Claimant did not dispute that he had received them.

49. The Respondent's evidence, which I accept, was that the directors thought although the First Claimant was entitled only to four weeks' notice, he could be retained on the payroll for as long as the furlough scheme was operational and that they had intended to give, in terms, far longer notice than his entitlement, and he was kept on the payroll until the end of July and paid at 80% of his normal pay throughout that period.
50. However, as a matter of law, I find that the First Claimant's employment ended on 29 April 2020, four weeks after he was told he was being given his contractual notice. Further, since the First Claimant did not receive the furlough emails, much less agree to be placed on furlough, the purported notification was not effective. He was entitled to receive 100% of his salary at the rate of £34,000 per annum throughout that notice period.

What were the Second Claimant's employment dates and salary?

51. The Second Claimant was in a slightly different situation. Although his start date had been an issue before Employment Judge Nicolle, it was quickly agreed before me that he began working for the Respondent in June 2018, although he had previously worked for Imli Limited/Tamarind Kitchen, another restaurant in the Collection, between 2017 and 30 April 2018. That previous service did not count towards his continuous employment with the Respondent and so by the date of the first lockdown, he did not have two years' continuous service.
52. The Second Claimant did, however, as I have said above, receive the two furlough emails regarding the reduction in his pay to 80% as a result of the Respondent taking advantage of the furlough scheme, although he also did not expressly agree to any reduction. Further, as he had not yet completed two years' service, his notice entitlement, which also mirrored the statutory minimum in his contract, was just one week.
53. The telephone call from his manager notifying the Second Claimant that he was being given notice took place on 8 April 2020 and therefore his entitlement was to one week's notice which would take him to 15 April 2020.
54. Like the First Claimant, on the face of it, the Second Claimant was kept on the payroll until the end of July, by which time he would have had two years' service. However, I conclude that the Second Claimant's dates of employment were from June 2018 to 15 April 2020. Accordingly, by the effective date of termination, he did not have two years' complete service with the Respondent

and the Tribunal does not have jurisdiction to hear his unfair dismissal complaint; nor was he entitled to a redundancy payment.

What were the Respondent's actions after notice had been given?

55. To the extent this is relevant, Mr Mishra claims to have tried to call the First Claimant in order to re-hire him and the evidence in the bundle shows that five calls were made from Mr Mishra's mobile phone number to the First Claimant (on 25th June, 7 August, 11th August, 18th August and 30th September 2020). The call log in the bundle does not show whether these calls were picked up but Mr Mishra's evidence is that the calls were unsuccessful and I accept that evidence. He says that there was no facility to leave a voicemail message, which was not contradicted by the First Claimant.
56. Mr Mishra also gave evidence that he tried to contact the Second Claimant to offer him work too, and the bundle shows that there were also two calls, on 4 June and 12 August to the Second Claimant but again not whether those calls connected.
57. Having unsuccessfully tried to contact the Claimants, as I have said above, the Respondent issued them both with P45s.

What relevance, if any, did the tronc scheme have on the Claimants' pay?

58. Dealing with the question of the tronc, I find that on the face of it, as is usual with such schemes, this was a discretionary payment to which neither Claimant was initially entitled. Further (although ultimately irrelevant to the issues), I accept the Respondent's evidence that pursuant to the furlough payment scheme, tronc payments were not to be used when calculating furlough pay. This is based on the specific example used in the government's website article "Steps to take before calculating your claim using the coronavirus job retention scheme". It says: "You cannot include the following when calculating wages: payments made at the discretion of the employer or a client – by the employer or client was under no contractual obligation to pay, including: any tips, including those distributed through troncs...".
59. Mr Mishra and Mr Dhaliwal gave oral evidence about the tronc. Mr Dhaliwal elaborated on the way in which the Respondent calculates pay, which went some way to explaining the different amounts given as salary in the First Claimant's paperwork when he joined. Mr Dhaliwal said that the Respondent starts by taking the National Minimum Wage (or, in the Claimants' case, National Living Wage) and then supplements this with a tronc payment. He said that staff do not want their pay to fluctuate so the Respondent tries to keep it stable. In months when the Respondent does not hit the figures that would be required for the tronc to pay out the amount to keep everyone's pay stable, the directors top up the tronc "from their own pockets".

60. Clearly this is unusual because it contradicts the express provision that the tronc is discretionary and (by implication) only payable if the Respondent is in funds. If the Respondent simply tops up the funds in less profitable months, very little discretion is actually involved and as Mr Mishra said in cross-examination, if the Respondent is open, the tronc is effectively “guaranteed”. This is of course something for which the Respondent is not criticised. It does mean however that the distinction in the payslips between what I will call “basic” pay (“house”) and tronc pay is somewhat artificial. The only variation would appear to be where an employee works overtime. The employees can be paid more, but apparently are not paid less each month.
61. It was put to Mr Dhaliwal that the First Claimant could have been paid less from the tronc if his performance had been poor, but Mr Dhaliwal said that the Respondent would never cut anyone’s tronc payment. He repeated several times that the Respondent tries its level best to ensure employees’ wages do not vary, because the directors are aware that the employee’s housing and transportation costs are not reduced, for example, in January and August (when I infer the restaurant is less busy and hence the takings – and tips – are lower). Mr Dhaliwal explained that the Respondent had been pressured by the First Claimant into increasing his pay, and that in their haste to issue the letter confirming the rise to £30,000, an error had been made in that the Respondent did not split out the two elements of “house” and “tronc”. He sought to rely on the payslips which did continue to show those two elements.
62. I conclude that the First Claimant’s pay was not contingent on the tronc by the date of his dismissal. If there was an error in 2018 when the pay was increased to £30,000, in not making it clear that part of the First Claimant’s wages were even notionally discretionary, it could have been corrected but was not; it was perpetuated until his dismissal in 2020. By then, as I have found, his annual pay had increased again to £34,000 or £2,833.33 gross per month. I accept Ms Dannreuther’s submission that regardless of the expressly discretionary nature of the tronc payments, the reality of the situation from various sources - the total shown on the payslips, the 2018 letter and the Claimant’s understanding, determined objectively - was that he was entitled to a flat monthly salary payment. The fact that the Respondent did not take any revenue once it had closed down, and therefore no tronc payments would be payable under a properly discretionary tronc scheme, therefore has no impact on the First Claimant’s entitlements.
63. The Second Claimant’s position was different. His contract showed that he was entitled to £17,150 per annum, which, without tronc payments, would equate to £328.90 per week or £7.83 per hour for a 42-hour week (this was the correct rate for the National Living Wage (NLW) from 1 April 2018). It appears that by the date of termination, this had increased to £17,950 per annum or £344.25 per week. However, his gross monthly pay in February 2020 for instance was £1,864.16 excluding overtime, the equivalent of £466.04 per week. It does not

appear that he was ever given a similar letter to the one issued in 2018 to the First Claimant and therefore I conclude that the Second Claimant remained entitled to a basic salary equivalent to the NLW, plus discretionary tronc payments. In the Second Claimant's case, the tronc payments were discretionary, notwithstanding that when the restaurant was open, the Respondent would undoubtedly have continued to pay tronc wherever possible, in light of the evidence to which I have referred above.

64. However, even though the Second Claimant did receive the furlough emails, he did not expressly agree to receive a reduced salary during his notice period. His silence in response to those emails cannot be taken as consent to a variation of his contract, even though they purport to say that a response is only required if the employee disagrees with what is being proposed. As with the First Claimant, there had been no prior discussion and accordingly these emails do not simply confirm any agreed variation. Hence, the Second Claimant should have been paid 100% of his basic wages, i.e. £344.25 per week or £366.24 from 1 April 2020 (when the NLW increased), until his dismissal, and was entitled to one week's notice at his basic rate of pay.

What was the likelihood of a fair dismissal if a fair procedure had been followed?

65. As I have noted above, it is essential to determine the likelihood that the First Claimant would have been dismissed in any event, had a fair procedure been followed (the issue not being relevant to the Second Claimant since he did not have sufficient continuous service). According to the First Claimant's supplemental statement produced for the second day of the hearing, he worked in a team of ten chefs and was second-in-command but nonetheless was the only one to be dismissed. He believes that if there had been a genuine redundancy situation whereby they were all pooled together, one of his colleagues would have been removed and he would have been retained.
66. The First Claimant said in both his statements that he had obtained a degree (in "food production and pastries") and experience in other countries before coming to the UK and had an ability to work across any of the five departments in the restaurant. He sought to distinguish himself from his colleagues, who he said were all based in only one of the departments (pastry, pantry, curry, tandoor and pass).
67. I observe for completeness that although he made no corrections to the contents of either his original or his supplemental statement, and although this was advanced on his behalf in Ms Dannreuther's cross-examination of Mr Dhaliwal, the First Claimant denied in his own cross-examination that he is a graduate. Indeed, his application form says only that he had studied for a year before obtaining a "diploma in hotel managment" (sic) while he was in Goa. In any event, both parties agree that the First Claimant was not working for the Respondent as a "speciality" chef.

68. However, the parties' approach to this common ground differs. The First Claimant says that his versatility and flexibility demonstrate his value to the Respondent and that he should have been retained – and would have been, if a fair procedure had been followed, with consultation taking up to a month (or more) if conducted fairly, with all the chefs being pooled.
69. The Respondent, through Mr Dhaliwal, says the opposite. Mr Dhaliwal said that the First Claimant was a “helper” in all five departments but could not run any of them. He did not accept that the First Claimant was essential to the business. He clearly considered it absurd that he would retain a non-specialist chef in preference to a specialist and did not accept Ms Dannreuthers' proposition that if he had consulted all the chefs, one or two others could have been offered redundancy instead. His other chefs had, he said, up to twelve or thirteen years' service with the Respondent. The First Claimant did not challenge this.
70. Mr Dhaliwal asserted that the First Claimant was in a pool of one: non-specialist chefs, since he was the only non-specialist. He absolutely refuted the suggestion that the First Claimant was a specialist in all five sections (indeed, he said that “pass” is not really a section but the area where the food is sent out); he said no human being in an Indian kitchen has five specialities and that anyone who was so highly specialist would not be working for the Respondent earning £30,000 a year but in a Michelin-starred restaurant earning six figures.
71. Therefore, while Mr Dhaliwal accepted that the First Claimant could be put to work in any of the sections, it was as a commis chef (helper, albeit a senior one) and not as the chef in charge; the others would not move around in this manner at all and would stay in their speciality sections. The First Claimant's job description says “tandoor chef”, but Mr Dhaliwal said that the other tandoor chef, Sumnath, was much more senior than the First Claimant.
72. It was put to Mr Dhaliwal in cross-examination that rather than retain three curry chefs, the Respondent could have made one of them redundant and retained the First Claimant. Mr Dhaliwal said that if the Respondent had wanted to decrease the quality of the food that would have been an excellent suggestion, but since it did not, he had taken the decision to make the First Claimant redundant instead. Given that each chef works only five days a week, that would mean that with a reduction to two curry chefs, when one was on holiday, the First Claimant would have to step up and run the curry section two days a week. Mr Dhaliwal was clearly wholly unconvinced that the First Claimant was sufficiently skilled to do so.
73. I accept Mr Dhaliwal's assessment of the situation; he is, as he said, the owner of the restaurant and ran it, and was therefore well-placed to decide on the respective merits or otherwise of those employed by him, even though it would clearly have been desirable to have committed that assessment to writing at

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the time and to have followed the correct legal requirements (which however as I have noted in the Law section above do not include the ACAS Code of Practice when considering a redundancy situation).

74. In any event, it is not for the Tribunal to substitute a view of the commercial decisions that might have been taken, provided the pool is potentially reasonable. I accept Mr Dhaliwal's evidence that in the run-up to the first lockdown, the Respondent's trade was down by 60 or 70% and that it was reasonable for him, in all the circumstances, to contemplate making redundancies, rather than to keep all the employees on furlough for an indefinite period. It was not, in those circumstances, objectively unreasonable to determine that the First Claimant was in a pool of one (of non-speciality chefs) and that he should be dismissed for redundancy.
75. I also find on the balance of probabilities that even if the Claimant had been pooled with all the Respondent's other chefs, they had all been placed at risk of redundancy and (for example) a matrix had been drawn up by Mr Dhaliwal, the irresistible conclusion is that the First Claimant would have been the lowest scorer and that Mr Dhaliwal would have proceeded to individual consultation with him and him alone. It was clear that Mr Dhaliwal did not want to lose a speciality chef; that is a commercial conclusion that he was entitled to reach and in which the Tribunal is not permitted to interfere and/or to substitute its own view, even if my view differed from Mr Dhaliwal's.
76. I also note for completeness that in addition to refuting that he had a degree, notwithstanding what it said in his witness statements, the First Claimant also appeared to accept in his oral evidence that he was occasionally late for work, although adding that he would contact the Head Chef to advise him if he was delayed coming in. I entirely accept that this was not something that was of sufficient gravity to merit a formal disciplinary warning, but it was something that the Respondent would have been entitled to take into account, as Mr Dhaliwal said he did, when considering who might be made redundant. This is not the same thing as saying that the First Claimant was dismissed for performance or conduct issues; had there been no global pandemic, he might never have been dismissed or even formally warned at all, but his less than perfect attendance was a legitimate, though minor, factor in Mr Dhaliwal's overall assessment.
77. The final reason Mr Dhaliwal gave was that, in terms, he was not persuaded of the First Claimant's loyalty to the Respondent. He said that on more than one occasion, the First Claimant had waited until the Respondent was short-staffed to say that if he did not receive a pay rise, he would leave (on one occasion, to join a competitor). It was common ground that the First Claimant had indeed intended to give notice that he was leaving to join another Indian restaurant, and I accept that this made him less reliable in Mr Dhaliwal's eyes. Again, this was a legitimate factor to take into account.

78. Overall, then, I consider that while quite clearly no procedure was followed in conducting the redundancy exercise, there is 100% likelihood that if the Respondent had followed a fair procedure, the outcome would still have been the First Claimant's redundancy. Accordingly, while the dismissal was procedurally unfair, the outcome would have been the same in any event. Further, given that I have accepted that the First Claimant could reasonably have been placed in a pool of one had Mr Dhaliwal put his mind to it, I consider that the redundancy would still have occurred **when** it did, i.e. that the First Claimant would have been given notice on 1 April to terminate on 29 April 2020.
79. I do not accept the submissions from Ms Dannreuther either that the chances of dismissal were 1:10 (on the basis that there were ten chefs) or that it would have taken the Respondent eight weeks (or indeed any weeks) to conduct consultation meetings, for the simple reasons that the First Claimant was reasonably not considered to be on a par with his nine colleagues and was not on any analysis in a pool with 38 others; this number included non-kitchen staff such as waiters and others from "FOH". Ms Dannreuther's argument that the Respondent ought to have conducted something in the order of 114 meetings at the rate of around three a day before dismissing the First Claimant is not sustainable in the circumstances that pertained at the time.
80. In the circumstances:
- a. The First Claimant's claim of unfair dismissal is well-founded and succeeds but there is 100% Polkey reduction of any compensatory award.
 - b. The Respondent did not pay the First Claimant a redundancy payment and therefore he is entitled to receive a basic award.
 - c. The Tribunal does not have jurisdiction to hear the Second Claimant's claim of unfair dismissal nor any claim for a redundancy payment.
 - d. The First Claimant's complaint of notice pay is well-founded and succeeds to the extent that he was not paid the correct amount for the four weeks of his notice in April 2020.
 - e. The Second Claimant's complaint of notice pay is not well-founded and is dismissed.
 - f. However, both Claimants were ultimately paid in lieu of their notice (see calculations below).
 - g. The Respondent's counterclaims succeed because both Claimants continued to be paid and to accept money after what they considered to be their effective date of termination as set out in their claim forms.
 - h. In each case, although they were underpaid once they were "placed on furlough", the Claimants must give credit for sums received in excess of their contractual entitlement.
 - i. However, in the First Claimant's case the Respondent still owes him money because the shortfall in what it has paid him is greater than the amount he owes the Respondent.

Remedy

81. I assess the amounts payable in each case as follows:

a. First Claimant:

- i. March gross pay owed £2,309 - received £1,121.04 – shortfall = £1,187.96
- ii. April gross pay owed £2,232.03 (notice pay) - received £1,145.80 – shortfall = £1,086.23
- iii. Redundancy payment £538 x four years = £2,152.00 – not yet paid shortfall = £2,152.00
- iv. May, June and July owed £0 - received £1,145.60, £1,145.60 and £1,145.80 = £3,437 overpaid

The amounts paid in May to July extinguish the shortfalls in March and April's pay. The overall shortfall is therefore £989.19 ((i) + (ii) + (iii) - (iv)) and that is the amount that the Respondent is ordered to pay the First Claimant, being the balance of his basic award/redundancy payment, which should be paid without deduction. It is a matter for the Respondent to regularise its position vis-à-vis the CJRS in this regard, given that it has recouped money from the scheme to which it is not, on the face of it, entitled.

b. Second Claimant:

- i. March gross pay owed £1,495.85 – received £1,196.67 – shortfall = £299.18
- ii. April gross pay (one week's wages, one week's notice) owed £795.70 – received £1,196.67 – £400.97 overpaid
- iii. May, June and July owed £0 - received £3,590.01
- iv. Total overpaid = £3,691.80.

Again, the Respondent will need to regularise the position with the CJRS. It indicated during the Hearing that it would not seek recovery of the overpaid amount from the Second Claimant and therefore I make no order in this regard.

Employment Judge Norris

Date: 7 March 2021

JUDGMENT SENT TO THE PARTIES ON

08/03/2021.

FOR THE TRIBUNAL OFFICE