



EMPLOYMENT TRIBUNALS

Claimant: Mr R Hermanowicz

Respondent: City and Country Hotels Limited t/a The Royal Hotel Cardiff

Heard at: At Cardiff by CVP

On: 25 February 2022

Before: Judge MM Thomas

Representation

Claimant: Mr R Hermanowicz, Litigant In Person

Respondent: Mr J Swingler, General Manager of The Royal Hotel Cardiff

JUDGMENT

The Judgment of the Tribunal is that:

1. The Claimant was dismissed by reason of redundancy by the Respondent on 31 October 2020. The Claimant is entitled to be paid a statutory redundancy payment by section 135 of the Employment Rights Act 1996. The Respondent is ordered to pay to the Claimant the sum of £1765.80.
2. The Respondent was in a breach of contract by dismissing the Claimant with one month's notice. The Claimant was entitled to 10 weeks' notice. The Respondent is ordered to pay to the Claimant the sum of £848.79 gross as damages for the breach. The sum ordered is the difference in the sum paid to the Claimant by way of notice monies and what he is due pursuant to section 86 of the Employment Rights Act 1996.
3. The Respondent made an unauthorised deduction from wages by its failure to pay the Claimant in lieu of accrued but untaken holiday leave on termination of employment. The Respondent is ordered to pay to the Claimant the sum of £119.60 being the gross sum due representing 2.5 days of untaken holiday leave.

4. The Respondent is ordered to pay to the Claimant additional compensation of £392.40 representing two weeks wages pursuant to section 38 of the Employment Act 2002 for its failure to provide the Claimant with a written statement of employment particulars.

REASONS

Issues

1. The Claimant's claim is for redundancy pay, notice pay, and pay for untaken holiday leave he asserts was due to him upon the termination of his employment. He accepts that some money has been paid in regard the same however, not the amount that he should be due.
2. The Respondent asserts that the Claimant had two employment contracts, one for full time employment as a night time duty manager for 40 hours a week ('full-time contract'), and the other, a zero hours contract as a bar/ kitchen worker ('zero hours contract'). As the Claimant had terminated his full-time contract at the beginning of September 2020, the redundancy related only to the zero hours contract. Further as the Claimant failed to provide his availability to work under the latter no notice monies were due. In short, the Respondent asserts all money due to the Claimant has been paid to him.
3. The Respondent has raised a counterclaim. The basis of the counterclaim, from that recorded at the preliminary hearing on 30 July 2021, is that the Claimant has breached the terms of notice of his full-time employment contract by a failure to give sufficient notice of termination, and by inappropriate behaviour towards other staff members. In the Respondent's schedule of loss, the Respondent also claims losses as a result of the Claimant working whilst furloughed, in short, the Respondent's obligation to pay back monies paid to the Claimant as a result of the same, losses in regard its time spent in defending the claim and in the ET3 and at hearing identifies the Claimant's behaviour in coming to the Royal Hotel Cardiff on the 30 September 2020 as an act of gross misconduct.
4. Finally, whether the Claimant was provided, in accordance with section 38 of the Employment Act 2002 ('s.38 EA 2002'), with a written statement of employment particulars at the commencement of his employment.

Proceedings to date

5. There have been two preliminary hearings in regard this claim first, on the 5 February 2021, and the second, on the 30 July 2021 resulting in case management orders in relation to the claim and the cross claim ('counterclaim'). In the latter hearing, the counterclaim, which had been issued separately, and therefore allocated a case number (1601040/2021), was consolidated with the main claim (the Claimant's claim), and a direction made that the two claims would be heard together. Further, it was set out

specifically the agreed issues for the Tribunal to determine at the substantive hearing. At the outset of the hearing, I checked with both parties that what was set out therein was their understanding of the issues, which both parties affirmed.

Documents and Witnesses

6. The Respondent has provided two bundles of documents, one, which runs to 362 pages ('Bundle1') and the second, which runs to 73 pages ('Bundle 2'). In addition, the Respondent relies upon an audio recording, a copy of a grievance dated 8 March 2020 from another employee about the Claimant, its schedule of loss, and a notice of change of terms of employment dated 21 May 2015.
7. The Claimant's documents are in the main contained within Bundle 1 but, in addition and separately, he provides a statement dated 30 September 2021, and a response to the Respondent's counterclaim dated 1 August 2021.
8. Neither party was legally represented. I therefore took time to explain the format that would be adopted for the hearing. I explained to the Claimant that the burden of proof was upon him to prove his claim. Similarly, I explained to Mr Jon Swingler, the General Manager of the Royal Hotel Cardiff, and who was representing the Respondent at the hearing, that the burden of proof would switch to the Respondent to prove its counterclaim.
9. I heard oral evidence from the Claimant, and on behalf of the Respondent from Mr Swingler and Mr Marcus Davies, its operations manager. All three witnesses adopted the contents of their witness statements as their evidence in chief. The Claimant relied on both his statements stated 13 July 2021 and 30 September 2021. Mr Swingler who had previously submitted a witness statement dated 6 July 2021 instead relied solely upon his later statement, an undated statement which ran to 39 paragraphs in Bundle 2 (pages 10 to 18), and the transcript of his meeting with the Claimant of the 30 September 2020 (pages 19 -28). He advised that the statement dated 6 July 2021 was 'obsolete'. Mr Davies relied upon his updated and unsigned statement again found in Bundle 2 (pages 29 to 30). None of the witnesses amplified upon the contents of their statements in evidence.

Background

10. The Claimant was employed by the Respondent from 10 September 2010.
11. The Respondent states that there were two contracts in regard to the Claimant's employment. A full-time contract, as a night shift duty manager working 40 hours a week, and a zero hours contract, as a bar / kitchen worker.

12. As a result of the impact of the COVID-19 pandemic some of the Respondent's employees, one of whom was the Claimant, were furloughed in March 2020. The Claimant was paid furlough which was calculated on the basis of the hours worked by him for his shifts, both under the full-time contract, and the zero hours contract, over the previous year (Mr Swingler's statement paragraph 4).
13. On 16 July 2020, Mr Swingler emailed all employees updating them as to the position in regard the reopening of the hotel. To summarise, it had been hoped that the hotel was going to reopen however, because the restrictions still remained in place in Wales it was not viable. The email also advised that although, in general, there had previously been flexibility with an employees' selection of holiday leave, because of the situation, holiday leave was to be enforced. The Claimant was allocated eight days holiday leave in July 2020. He was, as a result, in addition to furlough, paid '*holiday top up*' of £156.56.
14. On 1 September 2020 Mr Swingler emailed the Claimant concerning his return to work and in particular, his return to night shifts (page 158).
15. On the same day, 1 September 2020, the Claimant responded to Mr Swingler by email. He stated that he was starting full time education and as a result, would no longer be able to carry out night duties, and would only be available for '*mornings or afternoon shifts at the hotel*', and that he would let Mr Swingler know of his availability once he had his timetable from college (page 160).
16. There were then two further emails, one from Mr Swingler, to which followed a response from the Claimant. To summarise, Mr Swingler's email was to request a definitive confirmation from the Claimant in regards his unavailability for the night shifts' The Claimant's email in response confirmed his unavailability for night shifts, but his availability to work the 5pm to 11pm shift. Again, the Claimant indicated that he would confirm his full availability for day and evening shift patterns as soon as he received his college timetable (page 161/162).
17. On 2 September 2020, Mr Swingler responded to the Claimant's email. He indicated that he did not need bar work covered because the bar was not operational. However, what he needed covered were the night shifts. He advised in that email that as the furlough payment was calculated on the basis of the Claimant's availability to cover the night shifts, and as he was no longer able to do so, that that element would be deducted from his furlough payment. In relation to the bar/kitchen shifts, he indicated that the further payments for the bar shifts would continue until the Respondent was able to offer them, or the furlough scheme reached its end in October. He indicated that the reduced furlough payment would be from Monday 7 September 2020 (page 163). No response was received from the Claimant in relation to this email.
18. The next communication to the Claimant was an email from Mr Swingler on the 30 September 2020 (page 170). The email was in the main a generic email to all employees

however, the section in regard to the '*voluntary redundancy*' offer was edited for each specific recipient. In short, voluntary redundancy was offered. It indicated that from 30 October 2020, as the business was to be restructured, staff would lose their previous jobs, but steps were being taken to ensure staff were offered some employment. It was anticipated that all staff would be offered a third of their previous working hours. Notice of termination of the employee's existing terms of contract was given as one month from 30 September 2020 with their length of service remaining unbroken. Thereafter, the email set out the terms of the proposed voluntary redundancy, acceptance of which was to be by 9 October 2020. The Claimant was offered a voluntary redundancy payment of £795.44. Finally, Mr Swingler wrote that if anyone had any questions to contact him.

19. Later, on that same date, 30 September 2020, the Claimant attended at the hotel to speak to Mr Swingler about the contents of the email. A meeting took place.
20. On 7 October 2020, a further email was sent by Mr Swingler reminding all employees that if they wished to accept the redundancy payment that they had to do so by the end of Thursday 8 October 2020.
21. By an email later on that same date, 7 October 2020, the Claimant replied accepting the redundancy offer.
22. On 20 October 2020, Mr Swingler responded to the Claimant's acceptance, confirming termination of employment on 31 October 2020 with notice effective from 30 September 2020. The email stated that the Claimant was not required to attend work during the notice period. Further, that all outstanding holidays would be calculated to the 31 October 2021. The email stated that notice pay would be calculated as one calendar month, and in addition, monies paid in lieu of untaken holiday leave. At the end of the email, it stated there was due to the Claimant notice pay of £1113.21, and '*holiday top up*' of £48.96. In total, £1162.17 was due (page 181).

The Law

23. I have set out below the sections of the relevant statutes that I refer to within these reasons. I have not set out the full section. I have put in bold the paragraphs of each section which are in contention.

Section 135 Employment Rights Act 1996 ('s.135 ERA 1996') The right

'(1) An employer shall pay a redundancy payment to any employee of his if the employee-

(a) is dismissed by the employer by reason of redundancy, or

(b) is eligible for a redundancy payment by reason of being laid off or kept on short-time.

(2) *Subsection (1) has effect subject to the following provisions of this Part (including, in particular, sections 140 to 144, 149 to 152, 155 to 161 and 164)'.*

Section 162 Employments Rights Act 1996 ('s.162 ERA 1996') Amount of a redundancy payment

'(1) The amount of a redundancy payment shall be calculated by—

(a) determining the period, ending with the relevant date, during which the employee has been continuously employed,

(b) reckoning backwards from the end of that period the number of years of employment falling within that period, and

(c) allowing the appropriate amount for each of those years of employment.

(2) In subsection (1)(c) "the appropriate amount" means—

(a) one and a half weeks' pay for a year of employment in which the employee was not below the age of forty-one,

(b) one week's pay for a year of employment (not within paragraph (a)) in which he was not below the age of twenty-two, and

(c) half a week's pay for each year of employment not within paragraph (a) or (b).

(3)

Section 163 Employments Rights Act 1996 ('s.163 ERA 1996') References to employment tribunals

'(1) Any question arising under this Part as to—

(a) the right of an employee to a redundancy payment, or

(b) the amount of a redundancy payment,

shall be referred to and determined by an employment tribunal.

(2) For the purposes of any such reference, an employee who has been dismissed by his employer shall, unless the contrary is proved, be presumed to have been so dismissed by reason of redundancy.

(3)

Section 38 Employment Act 2002 ('s.38 EA 2002') Failure to give statement of employment particulars etc

'This section applies to proceedings before an employment tribunal relating to a claim by a worker under any of the jurisdictions listed in Schedule 5.

(1)not relevant.....

(2) If in the case of proceedings to which this section applies—

(a) the employment tribunal makes an award to the worker in respect of the claim to which the proceedings relate, and

(b) when the proceedings were begun the employer was in breach of his duty to the worker under section 1(1) or 4(1) of the Employment Rights Act 1996 or in the case of a claim by an worker under section 41B or 41C of that Act,

the tribunal must, subject to subsection (5), increase the award by the minimum amount and may, if it considers it just and equitable in all the circumstances, increase the award by the higher amount instead’.

Section 86 Employments Rights Act 1996 (‘s.86 ERA 1996’) Rights of employer and employee to minimum notice

‘1)The notice required to be given by an employer to terminate the contract of employment of a person who has been continuously employed for one month or more—

(a)is not less than one week’s notice if his period of continuous employment is less than two years,

(b)is not less than one week’s notice for each year of continuous employment if his period of continuous employment is two years or more but less than twelve years, and

(c)is not less than twelve weeks’ notice if his period of continuous employment is twelve years or more.

(2).....’

The Facts and My Findings

24. To summarise, the Claimant’s position is that he agreed to redundancy, however, is owed by the Respondent further monies by way of a redundancy payment, notice monies and untaken holiday leave.
25. It is not in dispute that the Claimant was made redundant however, the Respondent’s case is that the Claimant has been paid all the monies that he is entitled to, alternatively, if held that he has not, the damages claimed pursuant to the counterclaim, will set off, and exceed, any monies held to be owing to the Claimant.
26. My approach is to deal with first, the Claimant’s claim, and thereafter, the Respondent’s counterclaim.
27. The Claimant has calculated his redundancy payment, outstanding notice monies and monies owing in regard untaken holiday leave on the basis of his income prior to lockdown in March 2020. His schedule of loss is set out at pages 57/ 58 of Bundle 1. In short, he claims notice monies to the sum of £5225, holiday pay to the sum of £544.64,

and an award for the failure of the Respondent to provide him in accordance with s.38 EA 2002 a statement of particulars of employment. There is missing from the Claimant's schedule of loss any information in relation to the claimed redundancy payment however, the Claimant confirms that he is seeking the same.

28. Prior to the lockdown, the Claimant had been working in general between 60 to 62 hours a week in the Royal Hotel Cardiff, some weeks more than those hours, and others less since late 2018. Nevertheless, it is common ground between the parties that 60 - 62 hours represents an average of the hours worked. At hearing, the Claimant was directed to the schedule of working hours for him from July 2017 to February 2020 which had been prepared by Mr Swingler ('schedule of working hours'). The Claimant did not challenge what is recorded within it, and in particular, from late 2018, that the hours worked were the night shifts, with, in general, four additional evening bar/kitchen shifts in the week.
29. The Respondent states that there were two employment contracts in existence, one, a full-time contract, under which the Claimant worked 40 hours of night shifts, and a second contract, a zero hours contract, for evening bar and kitchen work. The Respondent's states that since 2018 the Claimant's full-time contract was for the night shifts, and that it was under the zero hours contract that he was employed for the four evening bar/ kitchen shifts a week. On the contrary, the Claimant states, that he knew nothing about two separate contracts, he simply worked the hours he was scheduled to work. He accepted in oral evidence that the schedule of working hours reflected the hours he worked.
30. The Respondent asserts that the Claimant knew that there was a full- time contract and a zero hours contract. In the ET3 the Respondent writes that the full-time contract started in July 2019 (although in oral evidence refers to this being from 2018 in accordance with the schedule of working hours), and was ended by the Claimant on 1 September 2020. Equally, the zero hours contract started on 10 September 2010, and was terminated on 31 October 2020. The Claimant's case is simply that he worked for the Respondent for 10 years.
31. I find the Respondent's submissions in relation to the two subsisting contracts to be contradictory and ambiguous. At hearing Mr Swingler asserts that there was no notice due under the zero hours contract yet, the wage slip for October 2020 refers to the payment made as '*notice pay*' (page 362), and the contract of employment disclosed, which it is asserted would have been a contract which the Claimant would have signed at the outset of his employment, provides notice on termination in line with statutory notice (page 128/129 Bundle 1). Further, the wage slips disclosed which date back to 2010 are not itemised to show payments of wages under two separate contracts. The Respondent has not produced either a full-time contract or a zero hours contract in regard to the Claimant, nor any documentation to support that the Claimant was aware that he was working under two contracts.

32. In summary, in the absence of any definitive evidence in relation to the contractual arrangement which the Respondent's asserts was in place, my consideration of the evidence has been to that provided in regard the pattern of the actual shifts that the Claimant worked. Accordingly, I have carefully considered the schedule of working hours provided (pages 202/203). The schedule records that the Claimant worked only night shifts from late 2018, in addition to up to four evening bar /kitchen shifts a week. Mr Swingler stated that on average, the Claimant's bar/ kitchen shifts equated to 22½ hours a week over and above the 40 hours night shift work. It was on the basis of 22½ hours of work a week that the furlough payment was calculated for September 2020. I find that the schedule of working hours in the absence of any contractual documentation to the contrary reflects a well-established regular work pattern from August 2018 of the Claimant working 40 hours of night shifts, in addition to the four evening bar/kitchen shifts. In summary, I find these were the established and agreed hours for the Claimant to work for the Respondent.
33. Equally, on 1 September 2020 when Mr Swingler wrote to the Claimant regarding his return to work, the Claimant's response reflects that he considered himself to have been an employee who worked the night shifts, and the evening bar/ kitchen shifts identified. The Claimant stated in his return email that he would no longer be available to work the night shifts, in short, it was the Claimant who sought to vary the terms of his employment. I find that the email in response from Mr Swingler on 2 September 2020 reflects the Respondent's agreement to the requested variation to the Claimant's hours of work, as within it, it accepts the Claimant's confirmation that he would no longer be able to work the night shifts, only the four evening bar/kitchen shifts. As a result, the Claimant was advised that he would only be paid from thereafter for the four evening bar/kitchen shifts. I find that the lack of response then following this email from the Claimant was an affirmation of his acceptance of that position.
34. In summary, I find that the Claimant varied his terms of contract, a variation which was accepted by the Respondent. I find it to be immaterial that the Claimant asserts that he indicated he would be able to undertake day, and afternoon shifts, as these were shifts which had not previously been available to the Claimant, or hours that he had worked from as far back as August 2018, as set out in the schedule of working hours, and accepted by the Claimant in oral evidence. In short, I accept the Respondent's evidence on this. The schedule of working hours provided clearly identifies that on other than one occasion throughout the previous three years the Claimant had only worked the night shifts and approximately four evening shifts. The Claimant had not been allocated day or afternoon shifts.
35. In summary, I find that from the 2 September 2020 the Claimant was only available to work the four evening bar/ kitchen shifts which was reflected in the furlough payment then received by the Claimant for the month of September 2020. As such the Claimant's hours of work for those shifts in a week were, as agreed, 22 ½ hours.

36. In regard to the Respondent's assertion as to the Claimant providing inadequate notice in regard to the night shift work, I find that the Respondent accepted his notice on 2 September 2020 and affirmed the position by paying the Claimant for the first week of September but thereafter, from 7 September 2020, on the reduced basis.
37. Turning now to what happened subsequently following the variation. I have set out above from paragraphs 14-22 details of the communications which passed between the parties which ultimately led to the Claimant accepting the voluntary redundancy offered. In addition to the emails identified, Mr Swingler also relies upon his transcript of what was said at a meeting between himself and the Claimant on 30 September 2020 at the Royal Hotel Cardiff ('the transcript' - pages 19 to 26 Bundle 2). In short, the transcript is Mr Swingler's written account of the discussions on that date. The Claimant does not accept its contents. In summary, other than confirming that he went to the hotel, and he had the meeting with Mr Swingler during which they discussed his potentially taking the redundancy payment, he does not accept anything else set out within the transcript. Specifically, he does not accept that there was a discussion about his behaviour towards other staff. I would state at this juncture that I have attached little weight to what is set out within the transcript. It is no more than a record of discussions solely from the perspective of one party. It is not taken from a document recorded contemporaneously, or an audio recording of the discussions. When I sought clarification as to its date of origin, I was told the account was not committed to writing until the October/November 2020. I even question the latter date, considering the date on the transcript is 6 July 2021, more than 9 months after the meeting.
38. Therefore, when considering the evidence, I have in the main relied upon what was set out in the exchange of emails between the Claimant and Mr Swingler at the relevant time.

The redundancy payment

39. As set out, s.135 ERA 1996 states that if an employee is dismissed by reason of redundancy, he shall be paid a redundancy payment. The Respondent accepts that the Claimant was made redundant and was entitled to a redundancy payment. The Respondent asserts that the sum to be paid to the Claimant was an enhanced payment as a result of voluntary redundancy. At the end of the email from the Respondent dated 30 September a payment of £795.44 is offered. I sought some clarification from Mr Swingler on this and was advised that the figure had been calculated on the basis that all employees were to be offered one third of their hours from November 2020. In short, the Claimant's hours would be 8 hours a week, therefore, his redundancy was calculated at the hourly rate of £8.72 multiplied by 8 hours and then, multiplied by 10, recognising the 10 years of continuous employment. In total, a sum of £676, albeit I calculate this should be £697 on the basis of the methodology (page 172). As to then

how the figure of £795.44 was calculated, the extra sum was '*just under £100*' in regard holidays.

40. I turn to the wage slips for the months of September and October 2020 (pages 361 and 362). September 2020 records the Claimant's furloughed pay for that month. I am advised that the total wage received reflects the night shifts and four evening bar/kitchen shifts for the first week of September (62 ½ hours), and from 7 September 2020, four evening bar/ kitchen shifts per week (22 ½ hours x 3 weeks). The wage slip for October 2020 set out the final wages due to the Claimant, with '*holiday top up*' of £48.96 and '*notice pay*' of £1113.21. There is no reference to any redundancy payment.
41. I sought further clarification in regard to the payments for September and October 2020 and the redundancy payment. I found Mr Swingler's response to be ambiguous. However, my understanding of his explanation was that there was a miscalculation on the basis of the September furlough payment because the Claimant had been paid for the night shifts in the first week of September. In short, a higher payment was made to the Claimant that he should have received. Further, that although labelled '*notice pay*' it was a redundancy payment as the Claimant was not entitled to any notice because he had failed to indicate his availability to work the bar/ kitchen shifts despite being requested to do so in early September.
42. I do not accept as plausible the latter account in regard to the redundancy payment. In short, I find despite the email to the Claimant of 30 September 2020 stating that he would be paid a redundancy payment of £795.44, he has never been paid that sum. No evidence has been adduced by the Respondent to indicate that he has. Similarly, the monies paid in October 2020 I find were what it states they were, '*notice pay*' and '*holiday top up*'. Mr Swingler's email dated 20 October 2020 to the Claimant identifies that a month's notice would be paid of £1113.21, '*holiday top up*' of £48.96 and that the Claimant did not need to work.
43. The Claimant's employment was terminated on 31 October 2020, with notice of termination from 30 September 2020. At the date of termination, the Claimant had been working for the hotel for 10 years. An employee dismissed by reason of redundancy is entitled to at a minimum, a statutory redundancy payment from his employer (s.163 ERA 1996). The voluntary redundancy payment which I have previously referenced was based upon the hours under the proposed new terms and conditions of employment from 1 November 2020, however, to use that wage figure for its calculation was wrong (s.221 ERA 1996). The wages on which the redundancy payment should have been calculated was that under the terms of the varied contract, that is, 22½ hours a week. That was the wage that the Claimant was earning at the time of the termination of his employment. In short, as set out in s. 221 ERA 1996, that was the wage that the Claimant was entitled to in the week ending with his dismissal.

44. A redundancy payment is calculated by applying a formula based on age, length of service and a week's pay (s.162 ERA 1996). It is not in dispute that the Claimant had worked for the Respondent for 10 years. The Claimant's weekly wage at the date of termination on the basis of his 22½ hours working week at an hourly rate of £8.72 was £196.20. The Claimant was 30 years of age at the date of termination, as such, applying s. 162 ERA 1996, he had worked eight years over 22 years of age, and two years below it. In total, the statutory redundancy pay due to him was £1765.80.

Notice monies

45. In regard to notice monies, because the Claimant was to be paid a redundancy payment does not mean that he was not entitled to notice monies. In the Claimant's schedule of loss, he claims £5250 by way of notice pay calculated on the basis of a week's wages of £525 for 10 weeks. The Claimant had worked for the Respondent for 10 years. In the absence of any contract of employment or in this instance, as asserted by the Respondent, contracts of employment, his statutory notice entitlement would be 10 weeks (s.86 ERA 1996). It is not in dispute that notice of termination was given on 30 September 2020. Further, on the basis of my previous finding, that he was employed to work 22½ hours each week. In Mr Swingler's email dated 2 September 2020 he indicated that the bar was not operational, and in his email dated 20 October 2020, he advised the Claimant that he did not have to work his notice period and that his contract would terminate on 31 October 2020. In summary, I have heard significant submissions pertaining to the fact that the Claimant never advised Mr Swingler of his availability however, what the two emails from Mr Swingler indicate, is that in the September, there was no work, and in the October, he was told he did not need to work. Further, it is not consistent for the Respondent to state on the wage slip that the monies paid was '*notice pay*', and now state that the Claimant was not entitled to any notice. In summary, there is nowhere within the documentation provided any indication that the Claimant agreed to waive his right to his statutory notice. The fact that the Respondent chose to terminate the Claimant's contract on 31 October 2020 was a matter for it. In short, albeit the Claimant agreed to his contract being terminated on that date, he did not agree to not receiving his full notice monies.
46. I find the Claimant was entitled to 10 weeks' notice, not the one month's notice given. There is no documentary evidence to confirm that he agreed to a shorter notice period or to receive lesser monies by way of notice. As such, on the basis of the 22½ hours contract, with a weekly wage of £196.20, the Claimant was entitled to be paid notice monies of £1962 gross. However, the Claimant has already been paid notice monies amounting to £1113.21 (net) therefore, from the £1962 must be deducted the sum of £1113.21 which leaves notice monies outstanding to the sum of £848.79 gross.

Holiday pay

47. In regard to holidays, the Claimant's entitlement was 28 days holiday a year. At the date of termination, Mr Swingler states that the Claimant had been paid monies representing 10.8 days of holiday, for the holiday year running from April 2020 to end of March 2021. In the Claimant's schedule of loss, he indicates that his holiday entitlement at the date of termination was 16.5 days and identifies his outstanding entitlement as 7.5 days. At hearing I specifically addressed this with the Claimant. What became clear was that he had not quite understood what was set out in the wage slips in July and October 2020 in regard '*holiday top up*'. In brief, holiday wages were paid at full pay, not the furloughed rate, therefore the '*top up*' reflected the difference between the furloughed wage and the full wage.
48. The October 2020 wage slip shows holiday pay total, that is the '*top up*' of £205.92. I am advised, on the basis of what is set out in the July 2020 wage slip, that the day '*top up*' was £19.57. The July 2020 wage slip shows '*holiday top up*' at a rate of £19.57 per day for 8 days totalling £155.56, and the October wage slip shows '*holiday top up*' at £48.96, which would equate to 2.5 days. The October 2020 wage slip, the last wage slip received by the Claimant, records the total '*holiday top up*' as £205.92. In short, the figures indicate that 10.5 days of holiday had been paid, not 10.8, however, I accept the difference is negligible.
49. I am told the monthly holiday entitlement was 2.3 days a month. At the end of August 2020, the Claimant would have accrued 11.5 days of holiday in the 2020-2021 holiday year (2.3 days x 5 months). I sought some clarification from Mr Swingler as to what then would have been the holiday entitlement on the 22½ hours contract. Mr Swingler advised that holiday entitlement is run through an electronic system based upon the hours worked therefore, it is not common for him to have to try and work out manually what the figures would be. In short, although Mr Swingler did try to assist, the figure that he arrived at of 0.4, I cannot understand its basis. I have therefore carried out a very coarse calculation. In short, the Claimant in September and October 2020 by the variation of his contract reduced his contractual hours by two thirds. Applying a pro rata entitlement, his holiday entitlement would therefore also have been reduced by two thirds. As such, 2.3 days per month would be reduced to 0.76 days per month. In short, I find that the Claimant's holiday entitlement was in total 1.5 days for September and October 2020. The latter figure added to the 11.5 days accrued at the end of August 2020 gives a holiday entitlement at the date of termination of 13 days. At the date of termination holiday entitlement of 10.5 days had been paid. In the absence of either party being able to tell me the Claimant's daily wage entitlement in August 2020, and then in September 2020, or the number of hours considered as a day for the accrual of the holidays I have, applied the methodology I set out above. I therefore find the Claimant had 2.5 days of untaken holiday leave at the date of termination of his employment which amounted to £119.90 gross (daily pay @ £47.96 on 5.5 hours shift x 2.5 days).

S.38 EA 2002

50. Finally, in relation to s.38 EA 2002, I find that the Claimant was not provided with a statement of employment particulars at the outset of his employment. The Respondent has adduced a document dated 21 May 2015 pertaining to food safety ratings as evidence that the Claimant would have been provided with a written statement of particulars of employment. In addition, it has adduced employment contractual documentation in relation to other employees, but none in regard the Claimant. In the absence of any documentary evidence from the Respondent in support of its contention that a statement of employment particulars was provided to the Claimant, I find that it was not. Although, the Tribunal may award up to four weeks' pay to reflect the breach I do not consider it would be just and equitable to do so. Whilst there was a failure to provide the Claimant with his employment particulars, there is evidence in relation to other employees who were recruited around the same time as the Claimant to show that the Respondent had in other instances provided them. Similarly, the document dated 21 May 2015 supports the Respondent's contention that it is and was aware of its obligations. I therefore limit the award under this head to two weeks' pay to reflect the Respondent's breach of its duty. As such, the Claimant is awarded £392.40.

Respondent's Counterclaim

51. Turning now to the Respondent's counterclaim. As previously stated, it is the Respondent's submission that any award made to the Claimant should be set off against the Respondent's damages claim. The Respondent has provided a schedule of loss (page 102 Bundle 1 and also served it separately). I will address each of the Respondent's claims in turn.
52. In regard the assertion that the Claimant has failed to pursue this claim as an unfair dismissal claim I say little. The Claimant has never claimed unfair dismissal. The only claim made is that of breach of contract as a result of the Respondent's failure to pay the correct monies due to him by way of the redundancy payment, notice pay and holiday pay.
53. In regard to the Claimant's failure to provide the appropriate notice to terminate the night shift work, I refer to my previous finding at paragraph 36. The Claimant's unavailability for night shift work was affirmed by Mr Swingler in his email of 2 September 2020. In short, his notice was clearly accepted by the Respondent, as the Respondent continued to pay the wages due for the night shift work until 7 September 2020, after which, the Claimant's wages were reduced to that for the four bar/kitchen shifts. I find that there was no breach of contract by the Claimant.
54. The Respondent states that the Claimant was paid furlough totalling £5180.37. The Respondent's assertion is that the Claimant was '*working elsewhere*' whilst furloughed and has therefore been overpaid. The Respondent has adduced no evidence whatsoever in support of its contention. I find that no overpayment has been made.

55. The Respondent asserts that there have been multiple staff members who have reported '*oppressive actions of harassment conducted by the Claimant*'. In support of the same the Respondent relies upon at hearing (i) a grievance lodged by Emma Kinsella dated 8 March 2020; (ii) an audio recording of the Claimant taken by another member of staff whilst he was in reception; and (iii) the evidence of Mr M Davies. The assertion is that the behaviour of the Claimant amounted to a repudiatory breach of contract which would have brought the contract to an end. As such, no monies are due.
56. I was referred by Mr Swingler to the list of examples provided in the email sent to all employees on 26 March 2020 setting out what was considered by the Respondent as gross misconduct (page 143). In short, the assertion is, that the Claimant's behaviour towards others amounted to gross misconduct, and if known at the time, would have resulted in his immediate dismissal.
57. I will deal with each point raised in turn. I have been provided with a copy of the grievance submitted to the Respondent from another employee Emma Kinsella dated 8 March 2020. No evidence has been adduced by the Respondent in relation to what steps, if any, it took in respect of that grievance. During the time that the Claimant was within the Respondent's employ he was never provided with a copy of the grievance, nor was its contents raised with him. Some of the points made by the complainant refer to incidents the previous October and November 2019 nevertheless, there is no indication that she raised any issue at the time of those previous incidents. The letter from the complainant is dated 8 March 2020. In short, even when the Respondent received the grievance, it did not consider that it had any need to act upon it. I attach significant weight to this. In the 10 years that the Claimant worked for the Respondent there is no evidence of any previous complaints having been raised by any other employee against him where the Respondent has had to take disciplinary action. Similarly, it is not consistent, that had the Respondent such concerns about the Claimant that in Mr Swingler's email dated 20 October 2020 it indicated the possibility of re-employment in the future. In summary, if there was a breach, albeit I cannot identify there to have been one on the basis of the evidence, I find it was affirmed by the Respondent's failure to take any disciplinary action. I therefore attach little weight to this as evidence of repudiatory breach.
58. In regard the audio recording, it was played at hearing. The recording is not clear in that what is being said is not easily discernible however, what can be heard is a raised voice. The Claimant did not dispute that it was his voice that was heard. Nevertheless, he did challenge the circumstances, and the non disclosure of the identity of the person who had made the recording. Mr Swingler was unsure as to when the recording was taken, but believed it to be around October 2019, but could not be definitive. Again, the Respondent has adduced no evidence as to the circumstances that gave rise to the recording being made, or even the reasons it was made. The person who made the recording has not been identified. Equally, no explanation has been given as to why the

person who took the recording has not attended this hearing to give evidence in relation to the matter to allow the Claimant to put questions to him/her. In short, again, if there was a breach, albeit I cannot identify there to have been one on the basis of the evidence, the lack of any action taken in relation to this audio recording affirms the breach, and I attach little weight to this evidence in support of the asserted repudiatory breach of contract.

59. In regard the evidence of Mr Davies. In his statement Mr Davis addresses his knowledge of the Claimant's working hours, I have already dealt with this and refer to my findings. In the latter part of his statement, he addresses problems that he had with the Claimant. In particular, he refers to a written complaint having been raised against the Claimant by another colleague and the Claimant being able to persuade the general manager against investigating complaints against him. I can only assume that the general manager referred to is Mr Swingler, as his statement identifies that he has been general manager of The Royal Hotel Cardiff since 2010. Nevertheless, Mr Swingler does not raise this. In short, I attach little weight to Mr Davies' evidence. Despite identifying the problems that he had with the Claimant, and having been a witness to '*unacceptable interactions*' between the Claimant and other members of staff, he did nothing. I do not find it credible that if he had been so concerned about the Claimant's behaviour, as a more senior employee of the Respondent, he would not have taken some action.
60. There is also a statement from another employee, Michelle Condon however, I attach no weight to her statement as it is neither signed nor dated (Bundle 2). There is also a statement from the Respondent however, as the Respondent is not a person, but an entity, I attach no weight to what is set out therein.
61. There is then the issue raised in relation to the Claimant's breach of the Respondent's policy pertaining to employees coming to the hotel unannounced/ without appointment. I am referred to the meeting previously referenced when the Claimant attended at the hotel on 30 September 2020. In short, Mr Swingler asserts that for the Claimant to come to the hotel without arrangement/appointment was gross misconduct on his part. I am referred to the paragraph in regard to this in the previously referenced email dated 26 March 2020.
62. The Claimant stated that he went to the hotel because the email dated 30 September 2020 from Mr Swingler indicated that Mr Swingler should be contacted if the Claimant wished to discuss what was set out in it. As accepted by Mr Swingler, the Claimant was unable to access the hotel as the pin code had been changed therefore, access could only be granted if someone opened the door to him and let him in. In short, the Claimant could not gain entry without someone permitting access. The Claimant was let in on the instruction of Mr Swingler, this was established in oral evidence, and thereafter, met with Mr Swingler. In none of the emails from Mr Swingler following this meeting is there any reference to the Claimant's behaviour amounting to gross misconduct. In short, I

find that what happened on that date did not amount to gross misconduct. The Claimant did not try and force his way into the hotel. If Mr Swingler had not wanted the Claimant to enter, or to meet with him, he was able to say no. In short, any breach that there was, albeit I cannot identify there to have been one on the basis of the evidence, I find was affirmed by Mr Swingler's actions on that date and subsequently.

63. There is then the claimed loss to the hotel of £10,000 pertaining to *'the business to keep staff working for the purpose of case communication'*. The Respondent's assertion on this is that these were costs incurred to it in defence of the Claimant's claim. Eight months loss is claimed at £1250 a month. The loss is assessed on the basis that it is half the working time for an employee. I dismiss this element of loss without further discussion. A statement to the effect that it is based on half the working time for an employee has no foundation. The burden is upon the Respondent to adduce the evidence to support its loss. I find that this is not substantiated.

Conclusion

64. On 30 September 2020, the Claimant was offered voluntary redundancy which he accepted on 8 October 2020. The Claimant's contract of employment was terminated on 31 October 2020. In the absence of any written terms/particulars of employment, the Claimant is entitled to a statutory redundancy payment, notice monies owing in accordance with s.86 ERA1996 and his wages in regard to untaken holiday leave.
65. The Claimant's established pattern of work was to work 40 hours night shifts a week and in addition, four evening bar/ kitchen shifts which totalled 22 ½ hours a week. By agreement on 2 September 2020, the terms of employment were varied at the request of the Claimant. The Claimant was no longer required to work night shifts, and the only work he was required to undertake were the four evening bar/kitchen shifts a week. As such, on the date of termination the Claimant's working hours were 22 ½ hours a week for bar/kitchen shifts.
66. At that time, the bar in the Royal Hotel Cardiff was not operational, and the Claimant was not required to work.
67. The Claimant was entitled to a statutory redundancy payment. At the date of termination of the Claimant's employment his gross weekly wage was £196.20. The total redundancy payment due is £1765.80.
68. The Claimant was entitled to 10 weeks' notice. The Claimant was paid a month's notice. In total, the Claimant is entitled to be paid notice monies of £1962 gross however, from that sum must be deducted the already paid *'notice pay'* of £1113.21 (paid net). In total, the Claimant is owed notice monies of £848.79 gross.

69. The Claimant is entitled to 2.5 days of untaken holiday leave which amounts to £119.90 gross.
70. The Claimant is awarded £392.40 pursuant to s.38 EA 2002.
71. The figures given are gross figures as net figures have not been provided.
72. In regard the Respondent's counterclaim, all heads of damages claimed are dismissed and no award is made.

Judge MM Thomas

Date 8 March 2022

JUDGMENT SENT TO THE PARTIES ON 9 March 2022

FOR THE TRIBUNAL OFFICE Mr N Roche