EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Mr Selahattin Elmali	**v**	**West Park Lounge Limited**

Heard at: Leeds (via CVP) **On: 20 November 2020**

Before: Employment Judge RS Drake

Appearances
For the Claimant: In Person
For the Respondent: Mr A Odabas (Director)

RESERVED JUDGMENT

1. The Tribunal finds that the Claimant was not dismissed either expressly or impliedly/constructively as defined by Section 95 of the Employment Rights Act 1996 ("ERA") for the purposes of his claims under Section 94 ERA and Article 3 of the Employment Tribunals (Extension of Jurisdiction) Order 1994.

2. Therefore, the claims of unfair dismissal and breach of contract fail and are dismissed. The effective date of termination of employment (by the Claimant's resignation as I find it to be) was 3 March 2020.

3. The Claimant's complaint of unlawful withholding from his pay (in relation to Sick Pay, but found to be for full wages rate, in the sum of £566.55) succeeds but his holiday pay claim under the Working Time Regulations 1998 up to the 3 March 2020 fails and is dismissed. Failure to pay wages amounts to unlawful deduction from his pay contrary to Section 13 ERA. Therefore, the Claimant is awarded judgment and the Respondent company shall pay to him in the sum of £566.55.

COVID-19 Statement on behalf of Sir Keith Lindblom, Senior President of Tribunals.
This has been a remote hearing. The parties did not object to the case being heard remotely. The form of remote hearing was V - video. It was not practicable to hold a face to face hearing because of the Covid19 pandemic.

REASONS

The Claims and the Issues

1. Neither the Claimant nor the Respondents, a limited company, were legally represented, and for both of them their first language was not English but Turkish. Therefore, with the assistance of Mr Kadri Turgay Senin (an official interpreter to whom I am greatly indebted for his involvement in this case) I took special care to ensure that the parties' explanation of their respective cases, their cross examination and their understanding of the complex CVP procedure were fostered by my assistance and intervention when necessary. I reserved my conclusions and therefore set them out with Reasons in full now in writing.

2. I heard oral evidence from the Claimant himself given by way of taking as read two written statements (dated 26 August and 6 October 2020) supported by supplementary testimony, cross examination (with which I assisted Mr Odabas) and reference to a number of documents in an agreed bundle comprising over 100 documents in total. I also heard evidence for the Respondents from Mr Arslan Odabas its principal shareholder and director. His testimony was also in the form of written statement (dated and filed 5 November 2020), supplemental oral evidence, cross examination (with which I assisted the Claimant) and reference to a number of documents in the agreed bundle.

3. I had before me the claims which are as follows.

    3.1 The Claimant (a waiter) complains of unfair and also wrongful dismissal, (in breach of contract) in that he says he was not given notice or paid in lieu;

    3.2 The Respondent company (a restaurant proprietor) resists these claims asserting that the Claimant voluntarily resigned in circumstances not amounting to unfair constructive dismissal, but that if there were a dismissal, it was fair in that it was because of reasons related to his conduct;

    3.3 Further the Respondent assert that it acted fairly, and that it acted reasonably in relying on the reason it can show as being sufficient for dismissal;

    3.4 However, the Respondent's primary and main assertion is that the Claimant resigned and was not dismissed, and is therefore not entitled to claim either unfair or wrongful dismissal;

    3.5 The Claimant also asserted he had not been paid his full holiday entitlement and that the Respondent had withheld his pay from 18 February 2020 until the date he says he was expressly dismissed which he says was 27 March 2020;

3.6 As stated above, the Respondent denies these latter claims on the basis that it says via Mr Odabas that the Claimant resigned on 3 March 2020 and had not returned to work since commencing absence from 17 February 2020.

3.7 The Tribunal had to determine the further following issues: -

3.7.1 Did the Claimant orally resign on 3 March 2020?

3.7.2 If not, was he dismissed by the Respondent expressly on 27 March 2020 as alleged by the Claimant, or if not, on what date did his employment end?

3.7.3 If the Claimant was not dismissed expressly, did the Respondent commit a breach of a fundamental term of his contract, and if so did the Claimant react by terminating his own employment in good time in response only thereto?

The burden of proof of entitlement to compensation for unfair dismissal where dismissal is denied, and for damages for breach of contract and all other heads of claim in this case rested with the Claimant. If the Claimant established dismissal, then the burden of proving what the reason was for dismissal and that it was potentially fair and lawful rested with the Respondent. I explained all this to the Claimant being as he was unrepresented. I also heard detailed submissions by both sides after evidence, and I will refer where relevant to each of those.

The Law

I set out passages from statute and case law relevant to the issues in this case leaving out extracts which are not.

4. **Section 95** of the **Employment Rights Act 1996** ("ERA") provides that: -
"for the purposes of this part of this Act, an employee is dismissed by his employer …. only if
(a) the contract under which he is employed is terminated by the employer (whether with or without notice) …
(b) …
(c) The employee terminates the contract under which he is employed (with or without notice) in circumstances in which he is entitled to terminate it without notice by reason of the employer's conduct … "(my emphases)

5 Section 95 (or its predecessor in identical statutory enactment) is elaborated and explained by the celebrated decision of the Court of Appeal, Lord Denning MR presiding, in **Western Excavating (ECC) v Sharp [1978] ICR 221**. In that case Lord Denning said and held as follows:

"If the employer is guilty of conduct which is a significant breach going to the root of the contract of employment, or which shows that the employer no longer intends to be bound by one or more of the essential terms of the contract, then the employee is entitled to treat himself as discharged from any further performance. If he does so, then he terminates the contract by reason of the employer's conduct and he is constructively dismissed"
This case is also authority for the proposition that the breach must be the direct cause of the resignation and resignation must be timely.

6 By reason of my findings below, I am not setting out the full content of **Section 98** ERA since it is unnecessary to do so unless dismissal were or had been proved.

7. The Court of Appeal held in the case of **Sothern v Franks Charlesly & Co [1981] IRLR 278** that sometimes there may be a dispute as to whether the words used by an employer (or by an employee in the case of resignation) in fact amount to a dismissal (or resignation respectively). Where those words are ambiguous, the Court or Tribunal is to determine how they would have been understood by a reasonable listener in the circumstances. This is an objective test. By contrast, if the words used are unambiguous, then their interpretation is to be judged by understanding the way they were actually understood by the party hearing those words. Thus, this is a subjective test. This approach has been applied on many occasions since and more recently in the cases of **Kwik-Fit Ltd v Lineham [1992] ICR 183** and **Willoughby v CF Capital [2011] IRLR 985**.

The Facts

8. I find that all witnesses gave their evidence to me sincerely and with considerable mutual high regard on both sides. Remarkably, there was little or no conflict of evidence apparent in relation to most but unfortunately not all the key issues as identified above, those issues being whether the Claimant resigned on or about 3 March 2020 or was dismissed on or about 27 March 2020. What mattered is what interpretation a reasonable person may put on words used if ambiguous, or how they were interpreted by the hearer if unambiguous in the circumstances when they were uttered.

9 These are essentially found as follows and for the reasons described: -

9.1 The Claimant was first employed by the proprietor of an unincorporated restaurant business run at Park Lounge on 1 September 2013 as a waiter;

9.2 The business was taken over as a going concern by Mr Odabas in June 2019 at which time he created the Respondent company to run it, and continued to employ the staff at Park Lounge which included the Claimant. Initially he sought to change their terms by stipulating that they all made a fresh start;

9.3 Mr Odabas says that he had cause on various occasions to be dissatisfied with the performance of the Claimant, but this became largely irrelevant to the key issues in the case and in any event, did not cause any friction between him

and the Claimant before the termination of his employment; the working and personal relationships appear to have been cordial and reasonable;

9.4 The Claimant went on leave on 26 January 2020 because he wanted to visit his sick father abroad and he says he sought permission, which Mr Odabas denies – this conflict had no bearing on the key issues and I did not have to resolve it, but is does show that there was general scope for mutual misunderstanding about what was said between the parties on this and later occasions;

9.5 The Claimant returned to the UK on 12 February 2020 and returned to work the following day; he resumed work therefore on 13 February and worked up to and including 16 February, but the following day was stricken with back pain and was unable to work at all thereafter; He sought and obtained from his GP three "Fit for Work Notes" justifying absence because of his condition dated 25 February (for 7 days), 4 March (for 3 weeks), and 26 March 2020 (for 4 weeks) respectively); significantly, he didn't submit these to Mr Odabas until 27 March 2020 after a telephone conversation which took place between them on that date;

9.6 The parties corresponded with each other by text messages and other electronic means during the Claimant's absence, but each message is characterised by enquiries and responses about how the Claimant was and how his health was progressing rather than anything else according to what was interpreted for me for the original Turkish;

9.7 The first event about which there is conflict of evidence occurred on 3 March when Mr Odabas visited the Claimant at his home and spoke to him there; It is common ground between the parties that the conversation was cordial and supportive, but there is little common ground about what was said otherwise; Mr Odabas says that the Claimant said "I am not returning to work" but the Claimant denies this, though I noted particularly that his recollection of this is nowhere near as clear as that of Mr Odabas, so on balance I find that it is more than likely he did use those words or express something so similar as to be interpreted as such by Mr Odabas if only because the latter's recollection is apparently clearer; The context of this conversation was that the Claimant had in his possession one of the three "Fit for Work" Notes mentioned above, he was on the point of obtaining the second, but he did not submit the first or advise that a second would be forthcoming at the time this conversation took place; therefore Mr Odabas had no reason to believe, other than what he saw of the Claimant's condition, that the Claimant's absence was purely and only for medical reasons or that when saying he was not intending to return to work this was to be regarded as a temporary state of affairs as opposed to permanent;

9.8 Mr Odabas indeed took what the Claimant said on 3 March to indicate present and permanent intention to terminate employment, as he didn't have medical certificate before him and hadn't been told to expect any, so on the advice of his accountants he arranged for the Claimant to be sent his P45 on a date which hasn't been made clear to me but was between 3 and 27 March 2020; this recorded apparent or assumed termination of employment by the Claimant

himself, and that it dated from his last day of working which was 17 February 2020; The Claimant was not paid any wage or sick pay from the last date of working up to the date of this discussion – but significantly, he made no complaint on 3 March about not yet being paid;

9.9 The parties continued to exchange cordial messages about the Claimant's health and the next actual oral contact occurred by phone 27 March 2020; Mr Odabas says that the call was prompted by the Claimant seeking to be put on furlough following the economic measures put in place in respect of the general Cpovid19 Lockdown announced by HMG on 23 March 2020 whereas the Claimant doesn't describe why he called Mr Odabas other than to enquire as to why he had been taken off payroll thus showing he was aware his employment had already terminated in some way;

9.10 The Claimant says that on that date, Mr Odabas terminated his employment; in his two statements before the Tribunal, the Claimant does not quote the words actually said to have been used by Mr Odabas, and he didn't make clear in his oral testimony today what words were allegedly used; in contrast, Mr Odabas is categorically clear that he did not say that he was terminating the Claimant's employment on or as of that date, but that he regarded the Claimant's employment as terminated (not by he himself Mr Odabas) and he says he means by this that it had already been terminated according to the advice from his accountants; Mr Odabas' recollection is again clearer than the Claimant's, so I prefer the former's version, though I emphasise I am not judging the Claimant to be telling an untruth; I recognise that this is a situation at which time, like 3 March, there was a mutual misunderstanding between the parties; that misunderstanding needs to be unravelled and a legal interpretation applied to it according to the legal principles set out above in paragraph 7;

9.11 Mr Odabas took no further action as he says and I accept he felt there was nothing for him to do; he regarded the Claimant's employment as terminated by him (the Claimant) as of 17 February being the last day he worked; Indeed the Claimant accepts that his last day of working was 17 February and that he wasn't paid from that date, but learned sometime around 9 March that his employment was treated as ended on that earlier date according to and being the date set out as the termination date on his P45; This contradicts his argument that he was dismissed by Mr Odabas on and as of 27 March 2020;

9.12 However, the Claimant was justifiably absent from work from 17 February on grounds of sickness, but he had not submitted to Mr Odabas his medical certification until after the conversation on 27 March, at which time he submitted three Notes;

9.13 The Claimant had used his absence seeing his father as leave and had thus taken 12 days holiday out of a proportional entitlement of 4.5 days based on an annual entitlement of 28 days.

Consideration and Conclusions

10 On the first issue of the start date of the Claimant's employment, I explained to the parties at the outset of the hearing that as the Claimant had been engaged in an undertaking which had been taken over by Mr Odabas as an "ongoing undertaking", even after its incorporation the Claimant was entitled as of right to regard himself as having been continuously employed from a start date in 2013 with the original proprietor pursuant to the Transfer of Undertakings (Protection of Employment) Regulations 2006 ("TUPE"). Mr Odabas very readily accepted this point which thereafter ceased to be particularly relevant to this case for the reasons set out below.

11 On the second issue of what happened on 3 March I make the following findings of interpretation on applying the law to the above facts that the words "I am not returning to work" were said by the Claimant: -

11.1 The context of the conversation was that the Claimant was absent from work, had not yet submitted any sick notes, and the words used do not appear to refer directly to the reasons for not returning being as alleged by the Claimant because of illness;

11.2 It is more than likely not the claimant meant he was not intending to return until he was fit to do so, but Mr ODA bass thought that his intention was much more long term and was that he didn't intend to return to work at all and that this was a genuine misunderstanding between the two men;

11.3 If the words I found were used, are ambiguous, then they are to be interpreted according to an objective analysis, which in this case can only mean that the Claimant did not intend to return to work at all as his words were not qualified by being related to temporary inability to work because of illness;

11.4 If the words used are to be regarded as unambiguous, then they are to be interpreted according to a subjective analysis and thus to be determined by how they were actually interpreted by Mr Odabas; He interpreted them as expressing current and permanent intention, and I conclude that it was reasonable for him to do so, but that in any event if ambiguous, then the words could in any event be interpreted as meaning expression of present permanent intention;

11.5 This analysis is borne out by my finding a fact that Mr Odabas took advice from his accountants and arranged for P-45 to be sent to the Claimant which in the circumstances can be taken as being indicative of a conclusion that the Claimant had himself terminated his employment at a time when he had not presented medical evidence and that, at the very earliest, the termination of his employment dates from 3 March 2020;

12 On the third issue of what happened 27 March, I make the following findings of interpretation again on applying the law mentioned above; -

12.1 The fact that the Claimant contacted Mr Odabas to ask about payment on furlough but also to question why he had received a P-45 makes it clear that he already regarded his employment as having already been terminated, which completely contradicts his argument throughout this case that his employment was terminated by Mr Odabas on 27 March;

12.2 Because I have been able to find that termination of employment had already occurred on 3 March, whatever else was said or done and how it was interpreted on 27 March becomes academic and unnecessary for me to analyse;

12.3 The claims of unfair dismissal are dependent on establishing dismissal by the Respondent either expressly or by construction as defined by S95(3) ERA.

13. In answer to the question of whether the Claimant was entitled to resign in circumstances whereby he could do so without giving notice, I have to consider whether anything done by Mr Odabas as at 3 March 2020 amounted to breach of a fundamental term of the Claimant's contract as per the facts as found: -

13.1 The Claimant was absent from work from 17 February and had offered no medically supported explanation and had certainly not provided medical certificates until 26 March;

13.2 The Claimant cannot therefore say that not being paid until 3 March when he had the first conversation with Mr Odabas amounts to breach of contract because he had not at that stage justified his absence and did not do so until a later date as 27 March;

13.3 The Claimant did not complain on 3 March about not being paid and indeed did not make any complaints about until 27th March; thus, he cannot argue that if not being paid is to be regarded as a breach of a fundamental term of his contract, he responded immediately by resigning - and he cannot argue that the words he used on 3 March, which related to what he says was his medical condition, amounts to resignation because of not being paid;

13.4 Therefore the Claimant cannot show that he has responded by resignation to a fundamental breach of contract, and thus if he is seeking to claim he resigned and that should be treated as termination as defined by S95(3) ERA, then this aspect of his claims fails;

13.5 I find that on applying the law to the facts that the Claimant resigned on 3 March and was not dismissed constructively on that date nor expressly on 27 March 2020.

14. Accordingly, I cannot find that the Claimant has established either that he was expressly dismissed (on either of the key dates) or that he was constructively dismissed for, in each case, the purposes of Sections 95 and 98 ERA.

15 However, it is clear from my finding that the Claimant was not paid from 17 February to 3 March 2020 which is a period of 15 days, so he is entitled to be paid for

that period, but I also he had taken more days leave as holiday than what he was proportionally entitled to take as at 3 March 2020 as found in paragraph 9.11 above. The holiday claim therefore fails and is dismissed.

16 The entitlement to pay from 17 February to 3 March is calculated on actual daily rate regardless of sickness absence because statute law dictates this in Chapter 11 ERA as being 15 days x daily rate of £37.77 which equals £566.55 and I award Judgment to the Claimant in that sum.

17 I am satisfied, should I need to say so, that all parties have acted reasonably throughout these proceedings and all parts of the process leading up to their conclusion.

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Employment Judge RS Drake

Signed 24 November 2020