EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4110602/21

Held in Edinburgh on
13, 14 and 15 December 2021

Employment Judge A Jones

Mr F Nicholl	**Claimant** **Represented by** **Ms L Nicholl (sister)**
The Ultimate Highland Experience Ltd	**Respondent** **Represented by** **Mrs Bremner, (Director)**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The judgment of the Tribunal is the claimant's was not unfairly dismissed by the respondent.

REASONS

Introduction

1. The claimant claimed he had been constructively and unfairly dismissed by the respondent. He claimed that if he had not been forced to resign, he would have been made redundant after a further period of furlough leave and sought notice pay and holiday pay which would have accrued during the period his

employment would have continued. The respondent denied that the claimant had been dismissed and rejected any claim for compensation arising from any dismissal on the basis that he would not have been made redundant and his earnings after the termination of employment were similar or more than his earnings with the respondent.

2. The claimant was represented at the hearing by his sister, who had previously been a solicitor. The respondent was represented by one of its directors, who was also a solicitor. A joint bundle of documents was produced. The Tribunal heard evidence from the claimant and Mr Bolger who had accompanied the claimant to a meeting with the respondent. Mrs Bremner gave evidence on behalf of the respondent and also called Ms Jeffrey who had been the claimant's line manager to give evidence.

Findings in fact

3. Having considered the evidence led, documents to which reference was made and the submissions of the parties, the Tribunal found the following facts to have been established.
4. The claimant worked as a tour guide and driver for the respondent which operates coach tours in the Highlands of Scotland.
5. Although the claimant had worked for the respondent previously, his continuous service commenced on 2 January 2017.
6. The claimant was employed under an annualised hours contract of employment. His working hours were 2340 over a 52 week calendar year commencing on 1 January. He had no fixed hours and was paid on an hourly basis for any hours worked in excess of his contractual requirement. His contract provided that if he had worked less than the annualised hours requirement at the end of the calendar year or on a pro rata basis on termination of employment, he was required to 'repay to the Company, or authorise the Company to deduct from any final payments due to you in respect of the Employment, the difference between the amount actually paid to you, and the amount you have earned based on the number of hours worked.'

7. The claimant's salary was £24,040 per annum at the time of the termination of his employment.
8. The claimant was contractually entitled to undertake secondary employment if he first obtained written permission from the respondent.
9. The claimant's line manager was Ms Jeffrey who was the Transport Manager. The claimant was one of a small number of 'senior drivers' employed by the respondent. Ms Jeffrey would organise rotas and in so doing would seek to ensure that drivers were allocated sufficient hours to meet their annualised hours requirements.
10. The respondent has two directors Mrs Bremner and her husband, who is the Managing Director. The respondent employs a core number of staff and then additional staff during seasonal requirements. The respondent's business is busy at Easter and in the summer months in particular and quiet at other times of the year which impacts significantly on the respondent's cash flow position.
11. Around 13 March 2020, the respondent was called by its bank's relationship manager who advised the respondent that swift decisions would require to be taken given the developing pandemic in order to secure the business' future. The respondent was advised that it would need to restructure.
12. On 16 March 2020, the respondent had a meeting of its senior management team at which various decisions were taken in light of the developing pandemic and the likely impact on the respondent's business. The respondent decided to cease its activities in England which operated under a related business and arranged payment plans with creditors.
13. The respondent employed 42 staff at that time. It had just undergone a recruitment exercise for the coming season and the staff who had been recruited were advised that the respondent could no longer employ them. Further decisions were taken about potential redundancies. It was also decided that staff who were employed under annualised hours contracts would have to move to hourly paid contracts as there would be no income to pay them if the respondent could not continue to operate. The respondent decided on a core team it wished to keep employed.

14. Mr Bremner sent an email to all staff in the evening of 16 March advising that it was proposed to reduce staff levels across the whole company and that staff would be spoken to individually over the next 48 hours.
15. The respondent then wrote to the claimant by letter dated 17 March indicating that a number of redundancies would be required and that he would be invited for a consultation meeting with the respondent.
16. A meeting took place on 18 March 2020 with Mrs Bremner and Ms Jeffrey at which the claimant was accompanied by his sister's partner, Mr Bolger who had been an experienced journalist at the Financial Times with knowledge of employment issues.
17. The atmosphere of the meeting was a supportive one where Mr Bolger on behalf of the claimant brought to the respondent's attention potential support which he understood the UK Government might make available for businesses impacted by the pandemic. The claimant was advised during the meeting that the respondent wanted to continue to employ him, but that they were proposing that his contract be amended so that he was only paid for hours worked for a temporary period while the respondent's business was being impacted by the pandemic. The claimant indicated his intention to stay with the respondent but requested any proposals be put in writing to him to allow him to consider them.
18. A letter dated 23 March was then sent to the claimant. The letter asked that he sign and return it to indicate his agreement to a 'temporary amendment of his contract to an hourly paid contract'. The claimant did not sign and return the letter as requested.
19. On 25 March, the claimant forwarded on a link to information about the new coronavirus job retention scheme ('JRS') being introduced by the UK Government to the respondent. Later that day he sent a further email to the respondent which stated 'I did not, as you suggest, agree to a variation of my contract with effect from 18 March. You undertook to consider the points that Andrew and I raised with you and to write to me with your proposals and I said that I would consider these.' The email went on to suggest that the JRS may offer 'a solution that would be of benefit to us both.' This email and all

subsequent emails sent by the claimant to the respondent were largely authored by the claimant's sister.

20. On 26 March an email drafted by Mrs Bremner was sent by Ms Jeffrey to the claimant and other staff. At that point the respondent did not believe it would be eligible for the JRS. The email stated 'we had already agreed amended contracts with our retained team in order to preserve your employments rights (which take two years to gain in any job).' Staff were also advised that any additional work they took on would have no impact on their existing contracts of employment.

21. The claimant emailed Ms Jeffrey on 26 March indicating 'I would be prepared to agree a variation of this type provided that the variation applied only for the period of any lay off attributable to government measures to address the Coronavirus pandemic and that on the lifting of those restrictions my current contractual terms would apply. As I explained in my email to Elizabeth yesterday I have not agreed to a variation in my annualised hours contract and I reserve any rights I may have in relation to breach of that contract, and of course, any statutory rights applicable in this situation."

22. On 3 April, Ms Jeffrey forwarded an email to the claimant from Mrs Bremner indicating that the respondent had decided to apply for the JRS and would be writing to individuals to designate them as furloughed workers.

23. The claimant replied in an email later that day indicating 'I would agree to that variation, so that we can access the scheme, on condition that this variation is temporary and that my annualised contractual terms will reapply once the Scheme ends'.

24. Mrs Bremner responded by email that day stating "We are offering the furlough scheme to those members of our team who we have been able to retain because they agreed to a change in their contracts…..I hope you understand that it is not possible for the company to commit to the annualised hours arrangement until we are though this….Before we send the final confirmation that you are to be treated as 'furloughed' please could you confirm whether you are prepared to accept an hourly paid contract (effective 18 March) and return to it if the Government scheme ends before the company is financially stable again?'

25. On 6 April, the claimant replied "I cannot afford to lose the opportunity to be included in the Scheme and confirm that I agree that you should declare me to be a furloughed employee." This amounted to an agreement by the claimant that his contract should be varied to that of being hourly paid. The variation was effective from 18 March 2020.
26. Mrs Bremner response was forwarded by Ms Jeffrey on 7 April, which stated 'Thanks for your confirmation that you wish to be included in the Furlough scheme."
27. Drivers who did not wish to agree to the variation in their contract by being paid on an hourly rate were made redundant. The respondent paid any drivers who did not wish to move to hourly paid contracts a redundancy payment. At least one 'senior driver' indicated he did not wish to move to being hourly paid and was made redundant.
28. Ms Jeffrey kept in touch with the claimant and other drivers during the period of furlough.
29. On 12 June, Ms Jeffrey sent an email drafted by Mrs Bremner indicating that the respondent was working towards running some tours from 15 July and that there may therefore be some work in July and August.
30. A phone call then took place on 26 June between the claimant, Ms Jeffrey and Mrs Bremner at which the claimant was accompanied by his sister. Ms Jeffrey took notes of that meeting. The purpose of the meeting was to discuss the claimant's ability to carry out work for the respondent on a flexible furlough basis. The question of reverting to annualised hours was discussed and Mrs Bremner indicated that she hoped this would be from April 2021 but would need to be when the company could afford it.
31. While remaining on furlough, the claimant carried out some work for the respondent in August and September 2020 and May 2021 and was paid on an hourly basis. The claimant was however reluctant to carry out work for the respondent. He said that he had lost his tachograph card, but did not inform the respondent when he had obtained a new one.
32. The claimant was during this period carrying out work for Royal Mail through an employment agency and was reluctant to carry out work for the respondent as this would interfere with his availability to carry out additional work.

33. The respondent wrote to the claimant on 12 November 2020 to advise him of the flexible furlough arrangements which applied to him.

34. Ms Jeffrey telephoned the claimant on 14 June 2021 to discuss his availability to carry out work for the respondent and advise him that the respondent was intending on bring the furlough scheme to an end. The claimant said that until he was given the information in writing he wouldn't discuss the matter with Ms Jeffrey.

35. A letter was then sent to the claimant dated 28 June advising that the furlough scheme would be brought to an end. The letter stated "From 1st July you will revert to your previous contract which requires you to be available for work which is communicated to you by rota. As before, you will be paid your normal hourly rate for the hours that you work until we are in a position to return you to your previous annualised hours arrangement." The letter went on to say "we are willing to agree that you may continue with any secondary employment provided that it doesn't impact upon your availability for Highland Experience. ….We will try to work with you to ensure that you have sufficient notice of your allocation of work with Highland Experience to organise your working hours in any secondary employment" The letter also indicated that holiday entitlement should not be taken between June and September.

36. The claimant responded by email dated 29 June 2021 stating "I have never consented to my annualised hours contract being varied except for the limited purpose of being furloughed for the purpose of the Job Retention Scheme". It also went on to say that the claimant had already notified the respondent of his intention to take annual leave in September. The email concluded "As the company appears to be intend on not honouring the terms of my employment contract I propose to contact ACAS to ask them to conciliate in this matter."

37. Mrs Bremner responded on 2 July apologising for referring to September in her letter and indicating that Ms Jeffrey would be in touch if there was any difficulty with the claimant's annual leave during that period. She then went on to say that it was the respondent's position that the claimant had agreed to a variation of his contract to being paid on an hourly rate basis and setting out her reasoning for this view. The email concluded "If you still wish to maintain at this stage that you did not agree to a temporary variation to your

contract then please let me know. I would be happy to meet to discuss it further."

38. The claimant responded that day stating "You are clearly in breach of employment law. Therefore I feel I cannot continue with your company and so resign with immediate effect." The claimant then indicated that further communications should be sent to his sister.

39. Mrs Bremner emailed the claimant again that day inviting him to reconsider his resignation until they had had the opportunity to discuss his contract properly.

40. The claimant resigned as if he was no longer on furlough from his employment with the respondent, this would limit his availability to work in his secondary employment, and he was likely to earn more in that employment than if he remained employed by the respondent.

41. On 6 July, the claimant's sister contacted Mrs Bremner setting out the claimant's position and concluding "In all the circumstances, Fergus considers the company to be in fundamental breach of its obligations under his contract of employment, hence his decision to tender his resignation. As Fergus has previously intimated, I shall be contracting ACAS to ask them to conciliate in this dispute."

42. Thereafter there was email correspondence between Ms Nicholl and Mrs Bremner regarding ACAS and the claimant's P45 was issued.

43. The claimant has continued to work for the Royal Mail through Manpower employment agency and is paid on a weekly basis. Since 2 July 2021, he has earned between £248.18 and £849.86 per week gross. In a five month period he has earned £11,420.75 gross. This is in excess of the income he would have received from the respondent over that period even if he had continued to be employed on an annualised hours basis.

Observations on the evidence

44. The claimant was generally a credible witness. Mr Bolger, whose evidence was very brief was a credible and reliable witness. The Tribunal also found Mrs Bremner both credible and generally reliable. Ms Jeffrey was an impressive witness who gave her evidence in a straightforward and careful

manner. She was no longer employed by the respondent and a witness order had been required in order to secure her attendance. Where there was any dispute between the evidence of the claimant and Ms Jeffrey or Ms Jeffrey and Mrs Bremner, the Tribunal preferred the evidence of Ms Jeffrey who appeared to have a clear recollection of events. It was apparent to the Tribunal that Mrs Bremner was dealing with a developing and extremely challenging situation in seeking to find ways in which to maintain the business owned by her and her husband during this period. Her recollection of some events concerning the claimant was therefore, unsurprisingly not as precise as that of Ms Jeffrey.

45. There were a number of occasions on which the claimant's sister appeared to be seeking to give evidence. While the Tribunal acknowledged that she had drafted much of the correspondence which was sent by the claimant and had been advising him throughout the process, she had not indicated an intention to give evidence and did not seek leave to do so. Therefore, the Tribunal did not take into account any information provided by the claimant's representative in this manner.

46. The key issue in dispute was whether or not the claimant had agreed to a variation of contract and the nature of any such agreement. However, the claimant's evidence before the Tribunal was that he had accepted the variation which was proposed by the respondent, albeit under duress as he felt he had no other option if he wished to be paid by the respondent under the furlough scheme. This was accepted on behalf of the claimant in submissions.

47. Notwithstanding that concession, it was suggested on behalf of the claimant in submissions that his acceptance was not sufficiently clear and unequivocal. It was also suggested that the claimant had resigned on the basis that the respondent had breached the duty of mutual trust and confidence, both in relation to way in consultation was carried out regarding the variation to the claimant's contract and forcing him to accept an hourly paid contract. However, there was no evidence from the claimant in relation to a breach of mutual trust and confidence at all. The claimant's evidence was that he would have preferred to remain on furlough until September 2021 and that he would

have continued to work for the respondent. He did not give any evidence to suggest that the relationship had broken down. The Tribunal formed the impression that the case being put forward on behalf of the claimant was not consistent with the claimant's actual evidence before it.

48. Rather, the Tribunal concluded that the claimant agreed to the variation in his contract in order be able to take advantage of the respondent's ability to access the JRS and the income he would receive as a result. While the Tribunal accepted that he did not want to move to an hourly paid contract, it was in his best interests at the time. Therefore he agreed to it. The submissions subsequently made on his behalf were that he had not really agreed to that change. This was not consistent with his evidence.

Relevant law

49. Section 95(1)(c) Employment Rights Act 1996 ('ERA') provides that an employee is dismissed if 'the employee terminates the contract under which he is employed (with or without notice) in circumstance sin which he is entitled to terminate it without notice by reason of the employer's conduct'
50. Section 98 ERA provides potentially fair reasons for dismissal and if a potentially fair reason is provided by a respondent further requires that the provisions of section 98(4) are met which requires a Tribunal to be satisfied that an employer has acted fairly in all the circumstances of the case.

Issues to determine

51. The issues for the tribunal to consider were
    a. Was there was a fundamental breach of the claimant's contract on the part of the employer?
    b. Did the claimant resign in response to that breach?
    c. If so, did the claimant delay too long before resigning, thus affirming the contract and losing the right to claim constructive dismissal?
    d. If the claimant was dismissed, has the respondent demonstrated a potentially fair reason for dismissal, and did the respondent act reasonably in all the circumstances?

e. If the claimant had been unfairly dismissed, what if compensation should be awarded to him?

52. Both parties helpfully provided submissions in writing.

Claimant's submissions

53. The claimant's submission made reference to *R v British Coal Corporation and Secretary of State for Trade and Industry ex parte Price* and *King and others v Eaton 1996* SCLR 232 in seeking to argue that the consultation which had taken place with the claimant in relation to the variation of his contract was not fair. It was said that the change in contract required his clear and unequivocal consent which had not been given.

54. It was said that there was no evidence that the claimant and other drivers had been working under hourly paid arrangements during the flexible furlough period as the hourly rate was calculated by reference to the claimant's hourly rate under his annualised hours contract. Rather it was said that the variation did not take effect until the respondent decided to withdraw from the JRS at the end of June 2021. It was said that the letter of 28 June 2021 to the claimant was an 'anticipatory breach', which, taken together with the breaches of the duty of trust and confidence regarding the consultation process and the condition which the respondent sought to impose before declaring him to be a furloughed worked, entitled him to resign without notice.

55. Reference was made to *Wadham Stringer Communications (London) Ltd v Brown* UKEAT/332/82 in support of the proposition that the circumstances leading to an employer breaching an employee's contract should not be taken into account when determining whether a breach has occurred and that economic pressures are not relevant.

56. Reference was also made to *Mr P G Roberts v The Governing body of Whitecross School* UKEAT/70/12 in relation to the proposition that a disagreement between the parties on the interpretation of the contract does not prevent a breach from being a repudiatory breach.

57. *Abrahall & Others Nottingham City Council* [2018] EWCA Civ was referred to as authority for the argument that if a term of a contract is to be varied in the future the employee can wait until the variation takes effect before resigning.

It was said that the hourly paid terms did not apply until the respondent withdrew from the JRS.

58. In addressing the question of whether there was implied acceptance of a variation of the claimant's contract, it was said that there was no evidence that this was in fact the case.

59. In response to the respondent's position that the claimant failed to engage with the respondent's request to discuss his resignation, it was said that Ms Nicoll had written to the respondent on behalf of the claimant referring to relevant correspondence and explaining why the claimant had resigned and that ACAS were to be involved.

60. It was submitted that the provision in the claimant's contract which made reference to the employer's right to unilaterally vary the contract did not entitle it to vary the contract to provide for an hourly rate of pay with no guarantee of hours.

61. Turning to the question of whether it could be said that the claimant had been dismissed for some other substantial reason, it was submitted that even if such a reason existed, then the respondent did not act reasonably in the circumstances.

62. It was submitted that the claimant's constructive dismissal was unfair and he sought a basic award. In addition it was said that the claimant ought to be entitled to a redundancy payment because the respondent ought to have allowed the claimant to remain on furlough and then may have made him redundant at the end of that period. Compensation was also sought for a reasonable period of consultation to effect such a redundancy, the notice pay to which the claimant would have been entitled and pay on the basis of the furlough pay the claimant would have received had he remained on furlough until the end of September 2021. In addition, payment sought payment in lieu of holiday entitlement which would have accrued during that period.

63. In addressing the respondent's position that the claimant had failed to raise a grievance and that therefore any compensation should be reduced for failure to follow the ACAS code, it was said that it would have been futile for him to raise a grievance as the only person who could have dealt with it was

Mr Bremner. The claimant's indication that he would contact ACAS and did indeed contact ACAS was also relied upon.

Respondent's submission

64. The respondent's position was that there was no repudiatory breach. The respondent had no option but to vary contracts. The variation was said not to have disadvantaged the claimant as had he not worked his annualised hours, he would have been required to pay back to the respondent a sum equivalent to the difference between the hours worked and the annualised hours required by reference to the hourly rate of pay.
65. It was said that there was no breach of mutual trust and confidence and the facts did not cross the *Malik* threshold as set out in *Malik v Bank of Credit and Commerce International SA* [1997] ICR 606.
66. It was said that while there may have been a misunderstanding in relation to the claimant's agreement to vary his contract at the meeting on 18 March, the claimant subsequently accepted the variation in the email forwarded to the respondent on 6 April 2020.
67. In any event, it was said that the claimant's subsequent actings were such that it could not be said that he was working under protest in relation to the variation to his contract.
68. Further, if the claimant was aggrieved, he could have raised a grievance at any time from April 2020 and failed to do so.
69. It was the respondent's position that the claimant had no intention of returning to work for it at the end of the furlough period because he had obtained better paid work elsewhere.
70. It was denied that there was any redundancy situation in relation to the claimant at the time of his resignation or subsequently in that the respondent had sufficient work for the claimant. The suggestion that he could be entitled to furlough pay when he was not on furlough and none of the respondent's other staff were on furlough was also rejected. There was said to be no basis on which the claimant could be entitled to notice pay or accrued holiday pay.
71. If the claimant was found to have been unfairly dismissed, it was said that any compensation should be reduced by 100% due to his conduct in the lead

up to his resignation when he did not make himself available for work. In any event it was said that he had no losses as he received a higher income from his alternative work than he would have received had he remained employed by the respondent.

Discussion and decision

72. The first question to address is whether the respondent breached the claimant's contract of employment and if so, whether that breach was fundamental.

73. The breaches relied upon are the manner in which consultation regarding the variation to the claimant's contracts was conducted and the variation in contract itself.

Consultation and breach of mutual trust and confidence

74. The manner in which the consultation was conducted did not amount to fundamental breach of the claimant's contract of employment. The claimant's position appeared to conflate what might amount to unfairness in a redundancy dismissal and whether the claimant's contract had been breached. It is well established that unreasonableness on the part of an employer is not a fundamental breach of contract. (see for instance *Bournemouth University Higher Education Corporation v Buckland 2010 ICR 908, CA*).

75. While there may be circumstances in which a breach of contract will amount to unfairness when an employee is dismissed by reason of redundancy, this is not relevant in the present circumstances. The claimant was not made redundant. He resigned voluntarily. While there may have been a potential redundancy situation at the point at which the consultation regarding the variation to the claimant's contract took place, he would only have been at risk of redundancy had he not agreed to the variation. The respondent made clear that it wished to retain the claimant's services. It sought to consult with the claimant in relation to a proposed variation to his contract of employment. The claimant ultimately agreed to that variation in his contract of employment.

While the claimant remained unhappy about agreeing to the variation of contract, he agreed because it was in his interests to do so. His agreement was unequivocal. He wished to take advantage of being placed on furlough in that he would remain in employment and receive 80% of his income during the period the respondent could not operate its business. Other members of staff did not want to agree to the variation and were made redundant. The claimant expressed the wish to remain in employment. There was no subsequent redundancy situation as the respondent had to engage additional drivers, partly due to the claimant's unwillingness to make himself available to carry out work. The issue of redundancy was, in the Tribunal's view, a red herring.

76. Even if it could be said that the manner in which the consultation was conducted with the claimant amounted to a fundamental breach of contract, the claimant did not resign in response to any such breach. The claimant resigned fifteen months after he had agreed to the variation in his contract. He resigned because he wished to continue in the additional employment he had taken up during his furlough for which he received a higher income than he was likely to earn if he remained employed with the respondent.

77. Moreover, the claimant delayed too long in resigning. The Tribunal could not accept the submission made on behalf of the claimant that it was only when the claimant was advised that he was required to return to work that any breach of contract crystallised. The claimant's contract was varied in April 2020. There is a difference between a breach of contract and an employee feeling the effects of that breach of contract. The Tribunal could not accept that the position of the claimant was similar to the employees in the *Nottingham City Council* case to which reference was made. In that case employees were advised that their employer did not intend to apply pay increases in the future to which they were contractually entitled. The employer therefore was indicating an intention to breach their contracts at the point at which the contractual entitlement arose. That is different from a contract being varied but the impact of that variation not being felt by the claimant until a later point. The variation of the claimant's contract took place in April 2020.

78. The Tribunal also considered whether it could be said that the manner in which the consultation had taken place together with the respondent's intimation that the claimant should return to work and would be paid on an hourly rate could amount to a fundamental breach of contract. That suggestion was rejected. The respondent was entitled to require employees to return to work and the claimant accepted that he had no contractual entitlement to remain on furlough while a scheme was still available for employers. While the written notice given for the claimant was short, he had previously been advised by Ms Jeffrey that the respondent was intending on withdrawing from the scheme as bookings were increasing and the cost of taking part in the scheme was also increasing for the respondent. The claimant was advised the he could continue to work in a second job but that his employment with the respondent should take precedence. This was not an unreasonable approach for the respondent to adopt. It was certainly not a breach of contract.

79. Moreover, when the claimant indicated he was resigning, the respondent asked him to rethink his position until they could discuss matters. He did not do so. He did not raise a grievance at any stage. The Tribunal did not accept that it would have been futile to raise a grievance. Mr Bremner had had nothing to do with the claimant or the implementation of the variation to his contract and there was no evidence that he would not have approached matters with an open mind. Indeed, the Tribunal accepted that Mrs Bremner was also willing to discuss matters with the claimant was keen to retain his services. Further the respondent could have appointed an independent party to consider the matter.

80. While it was said that the claimant's reference to involving ACAS demonstrated that he was seeking to resolve matters, he nonetheless submitted his resignation He did not respond to the respondent's request that he reconsider the position and instead asked that the respondent only correspond with the claimant's sister. There was no evidence that the claimant was willing to reconsider his position.

81. Therefore the Tribunal finds that the manner in which the respondent dealt with the variation to the claimant's contract of employment did not amount to

a fundamental breach of contract and in any event this was not the reason for the claimant's resignation.

Variation of contract

82. The position advanced on behalf of the claimant appeared to be variously that he had not agreed to a variation in his contract; he had agreed to the variation but only did so under duress, the variation was not effective; or it was an anticipatory breach of contract and there was no actual breach of contract until the claimant would be paid on an hourly rate while he was no longer on furlough.

83. The Tribunal finds as a matter of fact that the claimant's contract of employment was varied on 6 April 2020 when he agreed to the variation with effect from 18 March 2020. His agreement was unequivocal. The claimant wished to be placed on furlough and he would not have been placed on furlough had he not agreed to the variation. The claimant did not work under protest. He did not raise a grievance. He had the advantage of receiving 80% of his normal pay with the respondent and additional income from a second job. When he worked for the respondent during the period he was on flexible furlough, he was paid on the basis of an hourly rate of pay.

84. Even if it could be said that the variation did not bite until the claimant returned to work and was no longer on the furlough scheme, in that the breach was anticipatory, this did not entitle the claimant to treat himself as constructively dismissed. Even if it could be said that this was an anticipatory breach, (which the Tribunal does not accept is an accurate characterisation of the contractual position), the anticipatory breach did not ever take effect. The respondent indicated an intention to discuss the matter with the claimant and to go through correspondence with him to understand his position. The claimant did not take that opportunity and resigned. At the time of his resignation, the respondent had not confirmed the position to him. Therefore, even if it could be said that there was an anticipatory breach of contract, the claimant did not give the respondent an opportunity to discuss the issue. In those circumstances, there was no fundamental breach of contract.

85. In any event, as outlined above, the Tribunal concluded that the claimant did not resign because of the variation to his contract but because returning to work with the respondent would impact on his ability to work in his second job and he believed he would be likely to earn more in his second job.

Conclusion

86. In all these circumstances, The tribunal finds that the respondent did not fundamentally breach the claimant's contract of employment. If it is in error in that regard, the claimant did not resign in response to any such breach but to allow him continue with better paid employment elsewhere, and in any event the claimant delayed too long in resigning. Therefore his claim is dismissed.

Employment Judge: Amanda Jones
Date of Judgment: 30 December 2021
Entered in register: 12 January 2022
and copied to parties