EMPLOYMENT TRIBUNALS

Claimant: **Mr Andrzej Glinowiecki**

Respondent: **Eclipse Hotels (Bristol) Ltd**

Heard at: Bristol via CVP **On:** **20 January 2023**

Before: Employment Judge Atkins (sitting alone)

Representation:
Claimant: Mrs Magdalena Gromzynska-Sowa, lay representative
Respondent: Mr Jonathan Munro, solicitor
Interpreter: Ms A Brzezinska (Polish)

JUDGMENT

The judgment of the Employment Tribunal is as follows:

1. The claim of unfair dismissal in not well founded and must fail.

2. The claim for redundancy pay is not well founded and must fail.

3. The claim for unlawful deductions (unpaid notice pay) is well founded and succeeds. The Respondent must pay the Claimant the gross sum of £1,687.38.

4. The claim for unlawful deductions (unpaid leave pay) is not well founded and must fail.

5. The claim for unlawful deductions (arrears of pay) is not well founded and must fail.

REASONS

Claims and Issues

1. The Claimant claims that he was made redundant by the Respondent. He claims for arrears of pay, unpaid notice pay, unpaid holiday pay and unpaid redundancy pay.

2. The Respondent says that the Claimant was dismissed for reasons relating to conduct on 5 May 2021. He was not made redundant and so there is no

entitlement to notice pay. The also assert that there is no outstanding notice pay, holiday pay, or arrears of pay.

Preliminary issue: timing

3. The Respondent took the view that the claim was out of time and should not be considered.

4. The Claimant's position was that he did not receive any notice of his dismissal, including the letter of 5 May 2021 or the email of 11 August 2021 enclosing his P45. He said that he was still querying his employment status in August 2021 and on 30 September 2021. He went to ACAS on 6 November 2021 and the ACAS certificate was issued on 18 December 2021. He issued the claim 11 days later.

5. Mr Munro for the Respondent did not press any point about the 5 May or 11 August 2021 email. He instead said that the date should be calculated from 9 August 2021 as by then the Claimant should have been aware of the need to contact ACAS. Mr Munro accepted the Claimant contacted ACAS within 3 months and 1 day of 9 August 2021. Mr Munro also accepted that time stopped between 6 November 2021 and 18 December 2021, when the certificate was issued.

6. Mr Munro initially said that time would have run out by the end of December 2021. When his attention was drawn to the ET1 which records the claim as having been made on 29 December 2021 (although not issued until 24 February 2022), he took the position that time ran out on 21 December 2021, and so the claim was out of time.

7. The claim was filed a claim within 1 month less 1 day of the date of the ACAS certificate. I confirmed this by using the ACAS online time limit calculator, which gave the last date for filing a claim as 18 January 2022. I accordingly ruled that the claim was made in time.

8. In the alternative then it follows from the Respondent's calculation that the claim was made only 7 days out of time. Having regard to the overriding objective, and noting that ACAS conciliation ended only 11 days prior to filing the claim, I considered it would have been just and reasonable to extend time in any case.

9. The case accordingly proceeded.

Issues

10. The issues are set out in the case management order of EJ Youngs dated 23 December 2022. They are as follows:

"*1. Claim for a redundancy payment*
1.1 Was the Claimant dismissed?
1.2 If so, when? The Claimant says that he did not receive the dismissal letter and that the email address it was sent to is not the correct email address for him. The Claimant says that the first time he knew about the dismissal was when ACAS sent him a copy of his P45 on 7 January 2022.

1.3 What was the reason for dismissal? The Respondent asserts that it was a reason related to conduct. The Claimant asserts that the reason for his dismissal was redundancy.

1.4 It is agreed that if the reason for the termination of the Claimant's employment was redundancy, he is entitled to a statutory redundancy payment.

1.5 What is the Claimant's redundancy pay? In determining the amount of any statutory redundancy payment, the Tribunal will need to determine what the Claimant's weekly pay was for these purposes and, in particular:

> *1.5.1 Was the Claimant a zero hours employee (the Respondent relies on clause 6.1 of his contract of employment), and if so what were his average working hours in the last 12 weeks in which he provided work (ignoring any weeks in which he was not working); or*
>
> *1.5.2 Was the Claimant a fixed hours employee employed to work 38 hours a week (the Claimant relies on the letter to him from the Respondent of 10 March 2021); or*
>
> *1.5.3 Was the Claimant a fixed hours employee working 40 hours a week?*

2. Wrongful dismissal; notice pay

2.1 What was the Claimant's notice period?

2.2 Was the Claimant paid for that notice period?

2.3 If not, was the Claimant guilty of gross misconduct or did he do something so serious that the Respondent was entitled to dismiss without notice?

2.4 If not, what notice pay is due to the Claimant? In determining the amount of any notice payment, the Tribunal will need to determine what the Claimant's weekly pay was for these purposes, as set out in paragraph 1.5 above.

3. Holiday pay

3.1 What was the Claimant's leave year? The Claimant's contract of employment states that the holiday year runs from 1 April to 31 March.

3.2 How much of the leave year had passed when the Claimant's employment ended? Again, the Tribunal will need to decide what was the date of dismissal.

3.3 How much leave had accrued for the year by that date?

3.4 How much paid leave had the Claimant taken in the year?

3.5 Were any days carried over from previous holiday years?

3.6 How many days remain unpaid?

3.7 What is the relevant daily rate of pay? As referred to above, the Claimant's working hours are disputed and therefore in determining this issue, the Tribunal will need to determine:

> *3.7.1 Was the Claimant a zero hours employee (the Respondent relies on clause 6.1 of his contract of employment), and if so what were his average working hours in the last 52 weeks in which he provided work (ignoring any weeks in which he was not working) or if the Claimant has not worked in 52 weeks in the last 104 weeks prior to the termination of his employment, the average will be calculated based on the weeks in which he provided work in that 104 week period; or*
>
> *3.7.2 Was the Claimant a fixed hours employee employed to work 38 hours a week (the Claimant relies on the letter to him from the Respondent of 10 March 2021); or*
>
> *3.7.3 Was the Claimant a fixed hours employee working 40 hours a*

week?

4. Unlawful deductions from wages (arrears of pay)

4.1 What pay should the Claimant have received, if any, for the period 1 September 2020 to the date of termination of his employment? The Respondent's case is that the Claimant was a zero hours worker and therefore was not entitled to work during this period (and therefore not entitled to be paid). Therefore, in determining whether any pay was due and if so how much, the Tribunal will need to determine:

4.1.1 Whether the Claimant was a zero hours employee or a fixed hours worker and if so, was the Respondent entitled not to provide the Claimant with work?

4.2 If the Claimant was not a zero hours employee:

4.2.1 What was the Claimant's weekly pay for these purposes, as set out in paragraph 1.5 above.

4.2.2 Were the wages paid to the Claimant for that period less than the wages he should have been paid?

4.2.3 How much is the Claimant owed?"

Procedure, documents, and evidence heard

11. I have seen the following documents:
    (a) a witness statement from the claimant;
    (b) a witness statement from Mr Glyn Walker, the Hotel Operations Manager at Holiday Inn Bristol, on behalf of the Respondent;
    (c) a bundle paginated to 98 pages, which included the pleadings and the ACAS certificate; and
    (d) the case management order of EJ Youngs.

12. On the day of the hearing I was supplied with some further documents:
    (a) A copy of the email of 5 May 2021 and attached letter
    (b) A copy of the email of 11 August 2021 and attached P45

13. The Claimant gave evidence on his own behalf with the assistance of an interpreter

14. Mr Walker gave evidence on behalf of the Respondent:

15. I am aware that the purpose of this judgement is to set out my decision and reasons so that the parties can understand then. The parties are familiar with the issues and so it is not necessary for me to set out the evidence exhaustively. In making this decision, I have taken account of all of the evidence before me, even if I have not mentioned any specific part of it.

The evidence

16. The Claimant was employed by the Respondent as a commis chef at the Holiday Inn Bristol on a zero hours contract. His employment began on 23 March 2015. Mr Walker agrees that this is the correct start date. He was remunerated weekly for the hours that he had worked.

17. The most up to date version of the employment contract was in the bundle. It was signed by the Claimant on 7 February 2018. Insofar as it is relevant, it states as follows:

"*3.2 During your employment you will be required to carry out such duties as may reasonably be required of you by* [the Respondent] *and* [the Respondent] *may make reasonable changes to your job description and duties where the needs of the business require it. You shall at all times obey the lawful directions of* [the Respondent] *and comply with its rules, regulations, policies and procedures including the terms of the Employee Handbook, and act in the best interests of* [the Respondent].

…

6.1 You acknowledge that there are no normal hours of work applicable to you but that you are required to work shifts as determined by the weekly rota. If you work more than 6 hours a day, you are entitled to a 20-minute break, which are unpaid and do not count as part of your work. Your hours of work are variable each week. Actual days, start/finish times will be variable and in accordance with the rota. You may be required to work on any day of the year, including weekends and public holidays.

…

7.1 Your wage is £7.70 per hour. It accrues on a daily basis and is subject to such deductions as are required to be made by law, for income tax and national insurance purposes, under the terms of your employment, or otherwise agreed by you in writing. Salary is normally paid monthly in arrears by direct bank transfer on or around the last working day of every month. [The Respondent] *reserves the right to change the payment date at any time.*

…

11.1 Your holiday year begins on 1st April and ends on 31st March each year. Your holiday pay will be based on your average earnings for the previous 12 weeks. Your holiday entitlement will be calculated based on the following number: Number of hours worked/100 x 12.07 = Time accrued as annual leave. This includes the usual public holidays in England and Wales or time in lieu if you are required to work on a public holiday to be taken at times agreed by and convenient to [the Respondent]. *During the first and last years of your employment with* [the Respondent] *you shall be entitled to a pro rata holiday entitlement.*

…

11.3 Holiday not taken during the relevant calendar year will lapse. You may not carry over accrued but untaken holiday leave to the next calendar without the authorisation of your manager. There is no entitlement to payment in lieu of holiday other than Christmas Day or New Years Day, or on termination of employment.

11.4 On the termination of your employment, you will be entitled to holiday pay for holiday accrued but not taken at the date of termination. If you have taken more holiday than has accrued at the date of termination, [the Respondent] *may deduct the excess holiday pay from your final salary payment or any other payment due to you from* [the Respondent].

…

15.2 Subject to clause 4 and clause 15.3 below, [the Respondent] *may terminate your employment by giving to the other written notice of the greater of:*

- *Less than 2 years service – 1 week*
- *2 years service or more – 1 week for each completed year of service to a maximum of 12 weeks after 12 years*

15.3 [The Respondent] *may, notwithstanding any other provisions of this*

contract, summarily terminate your employment with immediate effect and without notice or payment in lieu of notice, if, in its opinion, you:
(a) are guilty of gross misconduct…
(b) cease to be entitled to work in the United Kingdom, or
(c) are prevented by illness or otherwise from performing your duties for a period or periods in aggregate of 30 working days in any period of 12 calendar months.
…
17.5 You are responsible for informing [the Respondent] *of any changes to your personal data, including, but not limited to, name, address, marital status, contact details, qualifications and next of kin.*"

18. I have not seen the Respondent's employee handbook. The Respondent in their grounds say that it provides as follows:

"*You must notify us of any change of name, address, telephone number, etc., so that we can maintain accurate information on our records and make contact with you in an emergency, if necessary, outside normal working hours.*"

19. The Claimant says that he regularly worked a 40 hour week. There are two letters in the bundle from the Holiday Inn Bristol. On is dated 23 March 2018 signed by the Food and Beverage Manager, and the other is dated 31 March 2018 and signed by the Head Chef. Both state that the Claimant is employed by the Respondent and that he is working "*approximately 40 hours per week*".

20. The Claimant says that his correct email address ends in @gmail.com. An alternative email ending in @wp.pl is not his email.

21. The Claimant says this his correct address is an address with house number 766. This is also the address given in his witness statement dated 16 November 2022. The address starting Flat 23A was an old address he had not lived at for some time.

22. The Claimant says that he has difficulty communicating with the Respondent due to language difficulties. Mr Walker confirmed that this was sometimes the case.

23. Mr Walker has confirmed that the Claimant was placed on furlough on 23 March 2020.

24. There is a letter to the Claimant dated 24 August 2020 saying that his furlough period ended on the same day. It says that the Respondent does not see, now or in the foreseeable future, that it can offer the Claimant any hours of work. It offers the Claimant the choice of remaining on the books or of walking away from employment. It is addressed to the Claimant at Flat 23A.

25. The Respondent did not pay the Claimant any more remuneration after 24 August 2020. The Claimant confirmed that he received no payment after this date.

26. In September 2020 and January 2021 the Claimant contacted the Respondent to ask what was happening with his employment. There is a letter dated 11 January 2021 from the Claimant which notes that he has not bene paid and asks for:
    (a) confirmation of his employment status;
    (b) conformation of the Respondent's future plans;
    (c) confirmation of any redundancy plans – and if so, payments for redundancy and payments in lieu of notice; and
    (d) payment of any outstanding holiday pay.

27. On 19 January 2021 Mr Walker (for the Respondent) offered to meet the Claimant to discuss returning to work. The letter records the Claimant's email address as ending in @wp.pl and his postal address as house number 766.

28. On 22 January 2021 the Claimant met with the Mr Walker to discuss the Claimant's return to work. Mr Walker confirmed that an interpreter was also present at this meeting. Mr Walker says that:
    (a) He drew the Claimant's attention to the August 2020 letter which said furlough had ended and the Respondent were unable to offer any work to the Claimant at that time.
    (b) He said to the Claimant that they were now in a position to offer him some hours of work.
    (c) The Claimant insisted that he wanted to be made redundant instead of returning to work.
    (d) The Claimant then said he wanted to move to a fixed hours contract.
    (e) Mr Walker agreed that this would be possible, but the Claimant was then unhappy with the level of pay offered and again said he wanted to be made redundant.
    (f) The Claimant was offered contracted hours and a start date which would be notified to him by the Forth app (an app the Respondent used to assign work shifts).
    (g) The Claimant was told that he would be given holiday pay until his start date as a gesture of goodwill.

29. Mr Walker said that the Claimant was not placed on a fixed hours contract on 22 January 2022. He was offered a fixed hours contract on the condition that he came back to work. He did not come back to work and so a fixed hours contract was never put in place.

30. On 12 February 2021 Mr Cousins, the then manager, emailed the Claimant on an email address ending @gmail.com, and saying they would be in touch soon about holiday balance and copies of documents.

31. On 10 March 2021 the Respondent wrote to the Claimant. The letter was sent to house number 766 by recorded delivery. It says that:
    (a) The Claimant did not receive the August 2020 letter.
    (b) The Claimant's contract of employment is a zero hours contract.
    (c) "*Due to your length of service and average working hours after seeking advice from our employment law team your custom & practice does stipulate your average hours of 38 becomes your weekly hours.*"
    (d) The Claimant was entitled to 27 days annual leave and would be on leave until 24 March 2021.

(e) The Claimant would be required to return to work, starting from 25 March 2021, and that Mr Walker would be in touch to arrange shift times.

32. Mr Walker says that the Claimant would have been able to see his allocated shifts, on 25 March 2021 and thereafter, by using the app the Respondent used to allocate shifts to staff.

33. The Claimant was notified, via the app, of his shift on 25 March 2021. He did not attend work on 25 March 2021. He was then notified, via the app, that he was to return to work on 2 April 2021. He did not attend work on 2 April 2021.

34. On 2, 3, and 4 April the Respondent attempted to contact the Claimant by telephone. He did not answer. The Claimant does not say that the Respondent had the incorrect telephone number. The Respondent was able to successfully contact him by telephone later on in the month.

35. On 8 April 2020 the Respondent wrote to the Claimant asking him why he did not attend work. No address is given on the latter. They offered him an opportunity to put forward a medical certificate or other reason for absence. The letter said that disciplinary proceedings would be commenced if he did not reply by 12 April 2021.

36. On 13 April 2021 the Respondent wrote to the Claimant inviting him to a disciplinary meeting on 15 April 2021. He did not attend that meeting.

37. The Respondent contacted him by phone (the date is not identified but can only have been 15 or 16 April 2021) to find out why he had not attended, and discovered that they had been sending letters to the incorrect email address.

38. On 16 April 2021 the Respondent wrote to the Claimant inviting him to a disciplinary meeting on 20 April 2021, and saying that any failure to attend that meeting would also be considered as a separate matter of misconduct. The email in not in the papers and so I do not know to which email address it was sent. The Claimant did not attend the meeting of 20 April 2021.

39. On 21 April 2021 the Respondent wrote to the Claimant inviting him to a disciplinary meeting on 28 April 2021, and saying that failure to attend would result in dismissal. The email in not in the papers and so I do not know to which email address it was sent. The Claimant did not attend the meeting of 28 April 2021.

40. On 5 May 2021 the Claimant was dismissed with a right of appeal. The letter of dismissal and covering email are in the documents before me. It records that it has been sent by email and by first class post. The letter is addressed to Flat 23A. The email address it was sent to ended in @wp.pl. The letter says that the Claimant is dismissed with 4 weeks notice. It does not give an end date for the employment, although I calculate that 4 weeks from the date of the letter would be 2 June 2021. The reasons given for dismissal are:
    (a) Failure to attend for work without reasonable excuse in April 2021
    (b) Failure to respond to a management instruction to provide reasons for

that absence

(c) Failure to attend disciplinary meetings, which is said to be a further failure to follow reasonable management instructions to attend.

41. The Claimant says that he did not receive this letter. He was not aware that he had been dismissed until 7 January 2022 when he received his P45 from ACAS.

42. The Claimant did not appeal.

43. The Claimant subsequently contacted the Respondent by way of a letter dated 2 August 2022. That letter gives his address as house number 766. It says that the Claimant has not received meeting notes from March 2021. It says the Claimant does not know if he is still employed, and if he is the Respondent should issue him with a redundancy payment. On 9 August 2021 the Respondent replied, by way of a letter sent to house number 766, saying that the manager in charge was Mr Walker, that he was away and would respond to the Claimant when he returned on 23 August 2021. As it happened, there was no further response from Mr Walker.

44. On 11 August 2021 a P45 was issued. This was sent by email to the email address ending in @wp.pl. The P45 showed the Claimant's address as Flat 23A, and the end date of employment as 30 April 2021.

45. The Claimant says that he did not receive this email. He did not see his P45 until ACAS sent it to him on 7 January 2022.

46. On 30 September 2021 the Claimant wrote to the Respondent again. He gave his address as house number 766. He said that he does not know if he is still employed, and if he is the Respondent should issue him with a redundancy payment. He said that is he did not get a response he will contact ACAS and the Employment Tribunal.

47. As I have set out above, the Claimant went to ACAS on 6 November 2021, an ACAS certificate was issued on 18 December 2021, the claim was made on 29 December 2021, and issued on 24 February 2022.

Findings of fact

48. It seems to me to be more likely than not that the address of Flat 23A and the email address ending in @wp.pl were supplied to the Respondent by the Claimant. There is no other reason that they would have them, and there is no reason why they would have made them up.

49. It also seems to me to be more likely than not that they are old contact details which have fallen out of use as the Claimant has changed his address and began to use a new email address. This is explicit in the case of the address, which the Claimant says is an old one, and is equally likely in case of the email address. The Claimant says that letters sent to Flat 23A or the email ending @wp.pl were not received by him. I see no reason why that should not be the case.

50. The Claimant was under a duty to keep the Respondent informed of his up

to date contact details. Regardless of what was said in the Respondent's employee handbook, this comes directly from clause 17.5 of the contract of employment.

51. It is apparent that the Respondent did have the correct contact details. A letter was sent to house number 766 on 19 January 2021. An email was sent to the email address ending in @gmail.com on 12 February 2021. These contact details can only have been supplied to them by the Claimant: there is no other source that they can have come from. These correct details have been used by managers but do not seem to have been maintained on the Respondent's central system, which I find is the most likely reason that incorrect contact details continued to be used.

52. It follows that I am content that the Claimant did not receive:
    (a) The letter of 24 August 2020 explaining that furlough had to an end.
    (b) The letters of 8 and 14 April 2021 inviting him to a disciplinary meeting
    (c) The letter of 5 May 2021 dismissing him
    (d) The P45 dated 11 August 2021.

53. However it is equally correct that the Claimant did receive the letter of 19 January 2021 inviting him to a meeting, and he did attend the meeting on 22 January 2021. An interpreter was present at that meeting so he would have understood what was said. He would also have received the 10 March 2021 letter which records the outcome of that meeting. I have considered whether he might have had difficulty reading it. However, given that he would have been aware of its contents, having been at the meeting where the content was interpreted for him, I am content that he would have been aware of what it said.

54. I accordingly find that by 10 March 2021 the Claimant would have known:
    (a) That his furlough was over.
    (b) That he was on paid holiday until 24 March 2021.
    (c) That he was required to return to work on or after 25 March 2021.

55. I have considered what type of contract of employment the Claimant was working under. I have concluded that it is a zero hours contract, because:
    (a) That is what the contract says.
    (b) There is no evidence of any written variation of that contract.
    (c) Mr Walker's evidence was that the Claimant was verbally offered a fixed hours contract on the condition that he returned to work, and he did not, so no such contract was entered into.
    (d) This is not directly contradicted by the letter of 10 March 2021. Although this letter says that his contract 'becomes' a fixed hours contract, that is forward looking, does not record a change as having happened in the past tense, and is not inconsistent with the offer Mr Walker said was made.

56. The Claimant would have been aware that he was required to return to work on or after 25 March 2021. Yet he did not do so. Nor did he contact the Respondent between 25 March 2021 and 15/16 April 2021 to ask when he was to return to work. Nor did he contact the Respondent for some time after 15/16 April to ask when he was to return to work.

57. There is also no explanation from the Claimant why he could not access the app to see his shifts, or why he did not contact the Respondent to ask about them.

58. The fact remains that by 16 April 2021 the Claimant would not only have been aware that he was required to return to work, but also that he had been assigned shifts which he did not turn up for.

59. I have considered whether the Claimant received the letters of 16 and 21 April 2021 inviting him to disciplinary meetings. On the one hand, the Respondent was aware of the correct contact details at this point. On the other hand, later letters were sent to the incorrect contract details. The Claimant says he did not receive these letters. Bearing all of this in mind, I consider it more likely than not that he did not receive these letters.

The law

60. Section 98(1) of the Employment Rights Act 1996 reads:

> "*In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show—*
> *(a) the reason (or, if more than one, the principal reason) for the dismissal, and*
> *(b) that it is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.*"

61. Conduct is a potentially fair reason for dismissal: section 98(2)(b).

62. Section 98(4) reads:

> "*Where the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer)—*
> *(a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and*
> *(b) shall be determined in accordance with equity and the substantial merits of the case.*"

63. The leading case on conduct dismissals remains **British Homes Stores v Burchell** [1978] IRLR 379 EAT, which requires that there be a genuine belief in the employee's guilt, held on reasonable grounds, after reasonable investigation.

64. The Tribunal must assess the reasonableness of the employer's decision and must not substitute its view of the right course of action. There is a band of reasonable responses within which one employer might take one view and be acting fairly and another quite reasonably another view and still be acting fairly (**Iceland Frozen Foods Ltd v Jones** [1982] IRLR 439). The burden of proof in relation to this aspect is neutral.

65. The approach to be taken to procedural questions is a wide one. A Tribunal should view it if appropriate as part of the overall picture, not as a separate aspect of fairness: **Taylor v OCS Group Ltd** [2006] IRLR 613. The Court of Appeal in **Sainsbury's Supermarket Ltd v Hitt** [2003] IRLR 23 CA is authority that the reasonable range of responses test applies to the whole disciplinary process and not just the decision to dismiss. Again, the burden of proof in relation to this aspect is neutral.

66. Section 139(1) of the Employment Rights Act 1996 defines a dismissal for redundancy as follows:

"*(1) For the purposes of this Act an employee who is dismissed shall be taken to be dismissed by reason of redundancy if the dismissal is wholly or mainly attributable to—*
(a) the fact that his employer has ceased or intends to cease—
(i) to carry on the business for the purposes of which the employee was employed by him, or
(ii) to carry on that business in the place where the employee was so employed, or
(b) the fact that the requirements of that business—
(i) for employees to carry out work of a particular kind, or
(ii) for employees to carry out work of a particular kind in the place where the employee was employed by the employer,
have ceased or diminished or are expected to cease or diminish."

Conclusions

Dismissal

67. There is no suggestion anywhere in the evidence, apart from the Claimant's assertion, that he was made redundant. There is no evidence that the Respondent ceased to carry on its business, or that requirement for work had diminished or ceased, or that employment was terminated as a result of any of these.

68. There is clear evidence that he was dismissed, in the letter of 5 May 2021, which sets out the reasons for dismissal. They were that the Claimant had (1) failed to attend shifts which had been assigned to him and (2) failed to attend disciplinary proceedings.

69. I therefore find that the Clamant was dismissed for reasons of his conduct on 5 May 2021.

70. I find that the Respondent had reasonable grounds to consider that the Claimant had committed misconduct by not turning up to work, and had formed the genuine belief that he did consider this to be misconduct. The evidence shows that the Claimant was aware that he was expected to return to work, that he was assigned shifts, that he did not turn up, and that he did not contact the Respondent to offer an excuse for his absence.

71. I have considered carefully whether the Respondent had reasonable grounds to believe that the Claimant had committed misconduct by not attending disciplinary meetings. They had sent him invites for him but these

had been sent to an incorrect address and not received. They clearly had the correct contact details for the Claimant but had not used them.

72. In the end, however, I do not consider that the position would be changed if the Claimant did have reasonable grounds to believe in this misconduct. That is because they did have sufficient grounds to believe in the other misconduct, which was of itself sufficient to justify dismissal.

73. I have asked myself whether it was within the reasonable range of responses for an employer to dismiss an employee on a zero hours contract, who was aware that he was to return to work, had been assigned shifts, but who did not attend work or offer any excuse why not. I consider that the decision to dismiss in these circumstances would not be outside the band of reasonable responses.

74. I considered whether the process was fair, given the amount of correspondence which should have been sent to the Claimant but did not reach him. I bear in mind that the Respondent was attempting to communicate with the Claimant, using contact details that he had supplied them with, during the process. I did not see any evidence to suggest anything other than that the Respondent was trying to do so in good faith.

75. However, set against that was the Claimant's own failure to engage with his employer, when he knew that he was supposed to return to work and yet failed to take any steps to do so. If the Claimant had tried to contact his employer then it is highly likely that he would have been made aware of the disciplinary process and given the opportunity to participate in it.

76. It must also be relevant that the Claimant must have foreseen that there would be consequences of his not returning to work after he was made aware that he needed to do so. If we was interested in what those consequences would be then he would have contacted the Respondent to find out. He did not do so.

77. I therefore conclude that, seeing things in the round, the process was not unfair. The Claimant's refusal to engage with his employer balances out the Respondent's failure to send correspondence to the correct address.

78. I do not consider that the letters of 2 August 2021 and 30 September 2021 changes the position. When they are seen in the context of the Claimant having known for some considerable time that he was to return to work, having taken no steps to do so or to contact his employer, being aware that there would be consequences for not returning to work, and given his prior and repeated requests to be made redundant, it is clear to me that the Claimant was in fact only seeking to walk away from his employment, preferably with some monetary compensation.

79. I therefore find that the process was not unfair.

80. The claim for redundancy pay and unfair dismissal must accordingly fail.

Notice

81. The letter of 5 May 2021 states that the Respondent was dismissed with 4 weeks' notice. It is not said that the Claimant was summarily dismissed for gross misconduct.

82. That Claimant was entitled to notice pay under his contract. He had worked for the Respondent for just over 6 calendar years at the time he was dismissed. He was entitled, under clause 15.2 of his contract, to 6 weeks notice.

83. No payment has been made of any notice.

84. Clause 15.2 does not set out any formula by which notice pay is calculated, unlike leave pay (which is dealt with below). I accordingly conclude that notice pay is to be paid at the level of the average of the Claimant's weekly pay.

85. The Claimant has put forward some payslips which enables me to calculate a weekly average. I have not used the payslips which are dated 2015, 2016, or 2017 as these are not reflective of the Claimant's pay immediately prior to dismissal. They do not record his current hourly rate. I have instead used the payslips which begin November 2019 and go up to August 2020, paying him at his pre-dismissal hourly rate, to calculate the weekly rate. They record a total gross pay of £12,374 over 44 weeks. Dividing the total gross pay by the number of weeks gives an average weekly rate of £281.23. Multiplying this by 6 gives the figure of £1,687.38.

86. The claim for unpaid notice pay therefore succeeds and the Respondent must pay the Claimant the sum of £1,687.38, representing 6 weeks of unpaid notice.

Leave pay

87. Clause 11.1 of the contract of employment says that the leave year ends on 31 March of each year. In that case, the leave year 2020/21 ended on 31 March 2021 and the leave year of 2021/22 began on 1 April 2021.

88. The letter of 10 March 2021 records that the Claimant was entitled to, and was paid for, 27 days of leave. He was then given extra leave until 24 March 2021 as a goodwill gesture.

89. Given that there was no unpaid leave for the holiday year 2020/21, any claim in respect of pay for that leave must fail. It is also not necessary to consider clause 11.3, as there was no accrued leave to carry over or that may have lapsed.

90. The leave entitlement for the leave year 2021/22, which began on 1 April 2021, is calculated according to the formula set out in clause 11.1, which is:

    Number of hours worked/100 x 12.07 = Time accrued as annual leave.

91. However, the Claimant did not work any hours in the leave year 2021/22. He did not work any hours between 1 April 2021 and his dismissal on 5 May 2021. According to this formula, he had therefore not accrued any leave for

that leave year.

92. It follows that as there was no accrued leave that the Claimant could take, he is not entitled to any payment in lieu of it. The claim for holiday pay in respect of the leave year 2021/22 must therefore fail.

Arrears of pay

93. The Claimant has not asserted that he was not paid the monies due to him for work carried out before furlough, or during furlough. As I have noted above, the Claimant did not in fact do any work for the Respondent since his furlough came to an end in August 2020.

94. Clause 7.1 of the contract is clear that his pay accrued on a daily basis at the correct hourly rate (the contract says the hourly rate is £7.70 but the payslips record a higher rate).

95. As there were no days on which the Claimant worked after his furlough came to an end, he has not accrued any pay for that period. As there is no accrued pay which was due, it follows that the claim for arrears of pay must also fail.

Employment Judge Atkins
Dated 10 March 2023

Judgment sent to the Parties on 10 March 2023

For the Tribunal Office