

YG



EMPLOYMENT TRIBUNALS

Claimant: Mr G Pan

Respondent: Shanshuijian Limited

Heard at: East London Hearing Centre **On:** 6 April 2017

Before: Employment Judge Goodrich (sitting alone)

Representation

Claimant: In Person

Respondent: Mr Shuai Yuan (Director of Respondent)

Interpreter provided by the Tribunal to interpret for the Claimant: Ms Hsinyi Cheng.

RESERVED JUDGMENT

It is the judgment of the Employment Tribunal that:-

The Claimant's claims for a redundancy payment, unfair dismissal and breach of contract claim for notice pay fail and are dismissed, as further set out below.

REASONS

The claim and the issues

1. The background to this hearing is as follows.
2. The Claimant's first claim to the Employment Tribunal was received on 25 June 2016. It was rejected for failure to comply with the early ACAS conciliation requirements a prospective claimant is required to carry out before issuing an Employment Tribunal claim.
3. The Claimant's second claim was issued on 21 October 2016.
4. In box 8.1 of his claim form the Claimant ticked that he was bringing claims for

unfair dismissal, redundancy payment and notice pay. The redundancy claim was clearly incorrect, as neither party has suggested that redundancy was the reason for the Claimant's dismissal. This claim, therefore, is dismissed.

5. Amongst the details of claim given by the Claimant in box 8.2 of his claim form were the following:

- 5.1. He worked for Shanshuijian Limited from 13 March 2014 until 22 June 2016.
- 5.2. He was paid £550 cash each week.
- 5.3. In May 2015 he asked Mr Shuai Yuan for his P60 and was told that he did not pay taxes for the 2014/2015 tax year and would pay the missing year in the 2015/2016 tax year.
- 5.4. In May 2016 he asked for his P60 again but his boss did not pay his taxes.
- 5.5. He negotiated with his boss from May to June 2016 about this problem and was unfairly dismissed. Although his boss claimed that he threatened him and his personal safety and that he tried to blackmail him, his only threat was to make an appeal to the Employment Tribunal about non-payment of taxes.
- 5.6. He was dismissed in spite of being hardworking with top cooking skills and able to manage all the staff in the kitchen, as stated in his dismissal letter.

6. The Respondent entered a response denying the Claimant's claims. Amongst the points made in the grounds of response were:

- 6.1. The Claimant had blackmailed him for £50,000 without any reason, as recorded in his mobile phone.
- 6.2. He had threatened him and the kitchen staff for a long time.
- 6.3. On 15 July and 25 September Gu Pan (the Claimant) got arrested by Metropolitan Police twice in his restaurant because of punching his head.
- 6.4. He believed it was a fair dismissal as his personal safety was threatened.

7. Although the case was listed for a hearing on 15 February 2017, the hearing was converted to a Preliminary Hearing to consider whether the claims could proceed because, by the time of the Claimant's second claim form being submitted, his claims were out of time.

8. On 15 February 2017 judgment was given to extend time limits and to set this case down for hearing today.

9. At the outset of the hearing I discussed with the parties how I was to proceed.

10. The Claimant speaks very little English and the Tribunal arranged the services of an interpreter, Ms Cheng, who appeared to me to be interpreting conscientiously; and for whose services I am grateful.

11. By way of remedy, if successful in his claims, the Claimant was stating that he wanted his taxes paid, which suggested to me that he might be bringing an unlawful deduction from wages claim for underpayment of tax and National Insurance.

The issues- unfair dismissal claim

12. As regards the unfair dismissal claim, the Respondent's case was that the Claimant was dismissed for misconduct, namely making a threat of physical violence towards Mr Yuan; and demanding £50,000 from him as a form of blackmail.

13. The Claimant disputes that conduct was the reason or principal reason for his dismissal. His case was that he was dismissed because he asked the Respondent to pay his tax and National Insurance; and told him that if he did not do so he would bring legal proceedings.

14. The parties dispute whether the dismissal was fair within the meaning of section 98(4) Employment Rights Act 1996.

15. If successful in his unfair dismissal claim the Claimant seeks compensation not re-engagement with the Respondent (he told me that in February he obtained a better paid job and is happy in it).

The issues- wrongful dismissal claim

16. The Claimant brings a wrongful dismissal claim for notice pay. The parties dispute whether or not the Claimant committed gross misconduct so as to amount to a repudiatory breach of contract and justify summary dismissal.

The issues- statement of terms and conditions of employment

17. If successful in any of his claims, the Respondent accepts that it did not issue the Claimant with any statement of terms and conditions of employment.

The relevant law

Illegality

18. There have been numerous cases considering whether someone who initiates proceedings can enforce a contract, or succeed in any type of civil proceedings, in which the person bringing the claim has participated in the illegality. There have been recent decisions in the Supreme Court on this issue.

19. The guidance on this issue includes adopting a degree of flexibility of approach on the facts of the particular case in question, without laying out a prescriptive or definitive list of factors because of the infinite possible variety of case. Some potentially relevant factors include the seriousness of the conduct, its centrality to the

contract, whether it was intentional and whether there was a marked disparity in the parties' respective culpability.

Unfair dismissal

20. Section 98(1) and (2) Employment Rights Act 1996 ("ERA") require that the employer shows what is the reason or principal reason for the dismissal of the employee. Conduct is one of the reasons for dismissal that is fair, subject to whether the dismissal is also fair within the meaning of section 98(4) ERA.

21. If an employer fails to show that the reason for dismissal falls within section 98(1) or (2) the dismissal is unfair; if, however the employer does show such a reason, the tribunal will consider section 98(4) ERA.

22. Section 98(4) ERA provides that the determination of whether the dismissal was fair or unfair 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 shall be determined in accordance with equity and the substantial merits of the case.

23. In considering section 98(4) ERA a tribunal will usually consider both the fairness of the procedures adopted by the employer and the fairness of the sanction, or penalty, of dismissal. In both these respects the task of the tribunal is to determine whether the decision to dismiss the employee fell within the band of reasonable responses a reasonable employer might have adopted. If the dismissal fell within the band, the dismissal is fair; if the dismissal fell outside the band, it is unfair.

24. A tribunal will consider, where it considers it relevant, the ACAS code of practice on disciplinary and grievance procedures.

25. Section 86 ERA lays down minimum periods of notice of dismissal of an employee. Where, however, an employee commits an act of gross misconduct, summary dismissal (i.e. dismissal without notice, or pay in lieu of notice) may be justified. The conduct must be such as to so undermine the contract of employment that the employer should no longer be required to retain the employee in his employment. Whether or not particular misconduct justifies summary dismissal is a question of fact.

The evidence

26. I heard evidence from the Claimant himself.

27. I heard evidence from Mr Shuai Yuan, the director and owner of the Respondent; and I read the witness statements provided by him from Lin Wang, Yang Wang, Junda Chen, Ajor Martinos and Wen He, none of whom attended the Tribunal to give evidence.

28. I also considered the documents provided to me by the parties.

Findings of fact

29. I set out below the findings of fact I consider relevant and necessary to decide the issues I am required to decide. I do not seek to make findings on every detail provided to me. Nor do I seek to make findings on every detail on which the parties were disagreed. I have, however, considered all the evidence provided to me and I have borne it all in mind.

30. Mr Yuan accepted that only part of what he paid the Claimant was declared in his pay statements and to the relevant authorities. An issue in this case is, therefore, whether the circumstances of how the Claimant was paid are such to make me unable to determine the Claimant's claims because of public policy grounds on the basis that the contract of employment was illegal.

31. As regards the Claimant's claims of unfair dismissal and of wrongful dismissal; tribunals have been encouraged to separate findings of fact on whether the dismissal was fair (having in mind the guidance given in the well known case of *Burchell v British Home Stores*) from findings of fact as to what the employee had actually done.

32. In this case the guidance given is less relevant than usual. The fairness of the dismissal is dependent on my findings of fact as to what happened, as this is highly relevant to whether the procedures adopted by the Respondent were adequate.

33. The Claimant is of Chinese origins, as is Mr Yuan. The Claimant, however, speaks very little English and Mr Yuan speaks good English.

34. The Claimant came to live and work in the UK in September 2007. He has worked as a chef in Chinese restaurants in the UK since his arrival.

35. Mr Yuan is the owner of a Chinese restaurant in Limehouse, East London. It employs ten members of staff, some full-time and some part-time. They are a mixture of kitchen staff and serving staff.

36. Mr Yuan himself is highly involved in the business. He buys food and does deliveries for lunch, helps with waiter duties from time to time and also helps in the kitchen, although he is not a chef and does not carry out cooking.

37. In 2014 Mr Yuan was looking for a head chef for his kitchen. He advertised on a website and the Claimant responded.

38. At the time of Mr Yuan placing the advertisement the Claimant was living outside London and he conducted a telephone interview with him. The parties agree that they had a discussion about pay, holidays, working hours and accommodation.

39. The restaurant has rooms above it where the Claimant lived during his employment with the Respondent. Mr Yuan also lived in accommodation above the restaurant during 2014 and 2015, although he has subsequently moved out.

40. The parties agree that the Claimant was paid £550 cash per week when his employment started and that his pay was subsequently increased. It is agreed that the Claimant was a good chef and managed the kitchen well.

41. In dispute between the parties is whether the Claimant freely agreed to enter into an arrangement where he knew that only part of his income would be declared for tax and National Insurance purposes; so that both he and the restaurant would benefit. The Claimant would benefit by receiving a higher rate of pay and the Respondent would be able to benefit by being able to use the tax evasion involved to pay the Claimant a higher salary than if these deductions were being made. This conflict of evidence, in turn, involves consideration of the respective credibility of the witnesses. There was a reasonable amount on which they agreed; and some key issues on which they were disagreed. On the whole I found Mr Yuan's evidence more credible than that of the Claimant. I give some examples:

- 41.1. Amongst Mr Yuan's documents was a transcript of a recording of the Claimant of an incident that took place on 21 June 2016. The Claimant confirmed that it was indeed his voice that was recorded; and the interpreter informed me that the conversation had been accurately translated from Mandarin to English. It recorded the Claimant saying: *"Tomorrow you cannot open the restaurant, no doubt, go call police if you want. Mate, if you cannot give me £50,000, I will kneel down to you and call you 'grandfather', fxxx!"*
- 41.2. The interpreter explained to me that the second sentence was a translation of a form of Chinese insult or curse. The Claimant's explanation that he was not threatening Mr Yuan in this conversation was unconvincing. The threat recorded on the mobile telephone is consistent with the Respondent's case that the Claimant was demanding £50,000 from him by way of blackmail and behaving threateningly and aggressively so as to ensure that the restaurant would be closed the following day.
- 41.3. The letter of dismissal provided to the Claimant (referred to further below) is also consistent with the Respondent's case.
- 41.4. On 16 July 2016, as recorded in documents provided to me, the Claimant was granted conditional bail on condition he did not contact the Respondent (or others working at the restaurant) and did not attend the premises unless in the company of a police officer or Home Office interpreter or remained silent whilst in attendance. The police report also recorded that there had been victims. The grounds given for imposing conditions on bail were to prevent the person committing an offense whilst on bail and interfering with witnesses or otherwise obstructing the course of justice.
- 41.5. There was also another police report, for 18 September 2016, reporting that the Claimant had assaulted the manager; refused to leave the premises and was removed by the police, told to leave, but sat in front of the door refusing to let people leave/come. It was recorded that *"Due to previous allegations of assault fear may assault someone."* The police recorded that the victim was unwilling to proceed against the Claimant and that there was insufficient evidence.

41.6. The police records and the witnesses' statements, together with that of Mr Yuan, provide support to Mr Yuan's account of events, albeit I give little weight to the statements of witnesses that did not attend the Tribunal.

41.7. The fact that Mr Yuan freely admitted to me that he was engaging in tax fraud and that he initiated the proposal to do so did not, however, help his credibility. It shows that he was not attempting to cover up bad behaviour on his part. It also shows, however, dishonest behaviour on his part in committing tax fraud.

42. Whether, or the extent to which, the Claimant freely entered into the arrangements for his pay that involved tax fraud is a more difficult question to resolve. When I questioned Mr Yuan on this issue he stated that he did not talk specifically about the tax issue in their initial discussion but that the amount of salary in cash was agreed and Mr Yuan explained to Mr Pan that he would benefit by getting more income. As Mr Pan had been living in the UK for several years I expect that he would have been sufficiently well-versed in some restaurant practices and from discussions with other employees to have been at least suspicious that the correct tax was not being paid. The early wage slips issued to Mr Pan showed his correct level of pay. This, Mr Yuan explained, was because the tax threshold had not been reached. Mr Pan's evidence was that he was not subsequently issued with pay slips- as the Claimant produced the few pay slips I saw I accept his evidence on this point.

43. The arrangements were initiated by Mr Yuan, as Mr Yuan admitted. The Claimant would have been aware later on that Mr Yuan was evading paying correct tax and national insurance payments as the Claimant's evidence was that he complained about it and threatened to bring an employment tribunal claim; and it forms part of the grounds of employment tribunal claim.

44. The Claimant was issued with some payslips, early on in his employment, but not thereafter. He was not aware, therefore, of how much, if any tax and national insurance payments were being deducted.

45. Both parties agree that their relationships with each other were good until around May or June 2016. Here, again, the reason for the breakdown in relationships differs. The Claimant's evidence was that the relationship soured because he persistently attempted to ensure that his full tax and National Insurance payments were being paid. He stated that he was concerned to make sure that when he retires he receives a proper state pension. Mr Yuan's evidence was that the Claimant became increasingly concerned about getting more pay in 2016. In addition to having a wife and child he was involved in a relationship with a woman by whom he had children in 2014 and 2015. His evidence is that he did not complain about tax and national insurance deductions until after his employment with the Respondent ended.

46. It appears to me unlikely, with the Claimant wanting higher pay, that he would have been pressing for greater deductions of tax and national insurance, because that would have reduced his net pay. Neither did he refer to the issue in the recorded message in which he demanded £50,000; and the Respondent's ET3 response includes the statement "he blackmailed me for £50,000 without any reason." On the balance of probabilities I find that he did mention the issue in passing to Mr Yuan, but did not press him on the issue, as he was more concerned with getting more pay than

in having the correct deductions from pay being made.

47. I accept, on the balance of probabilities, Mr Yuan's explanation for the Claimant's demand for additional money. The Claimant was becoming more concerned about the financial arrangements between them; and was also wanting a higher rate of pay than Mr Yuan felt able to afford, having already made pay increases. The Claimant did not dispute Mr Yuan's evidence about the Claimant having two young children from a new relationship and the recorded message shows the Claimant demanding £50,000 from Mr Yuan.

48. In dispute is whether the Claimant threatened Mr Yuan by threatening to cut his head off; and repeatedly made demands for £50,000.

49. I find that the Claimant did both things. This is consistent with the contemporaneous evidence of the dismissal letter written by Mr Yuan in which he stated that he was dismissing him for the following reasons:

49.1. Trying to blackmail your employer (Shuai Yuan).

49.2. Verbal threat to your employer's (Shuai Yuan) personal safety.

50. The demands for £50,000 are also consistent with the translation of the recorded conversation heard by me and translated by the interpreter. I found the Claimant's explanations for the recorded conversation unconvincing. His explanation was that the reason the restaurant would have been closed was because they would not have been able to produce the food without him as a chef. In cross-examination he accepted, however, that food could be provided by the kitchen staff, which included a second chef.

51. I find, therefore, that on 21 June the Claimant did back up his conversation to Mr Yuan, referred to above, by behaving aggressively towards his fellow kitchen staff so as to intimidate them against coming to work the following day. I so find because Mr Yuan did in fact close the restaurant the following day when it would otherwise have been open. It is convincing that he did so because of fears for his own and his employees' personal safety, fears that are have some support from the subsequent events referred to in the police records, to which I have referred to above.

52. Mr Yuan closed the restaurant on 22 June and consulted a solicitor. As a result of the advice he received, he drafted a dismissal letter.

53. In dispute is whether, prior to drafting and giving the Claimant the dismissal letter, Mr Yuan attempted to discuss the allegations with the Claimant. I find that he did so attempt and accept Mr Yuan's evidence that the Claimant refused to have any discussion with him. Mr Yuan's evidence was that this was the advice that the solicitor gave him; and this appears convincing to me, as it is advice that any solicitor with any reasonable degree of knowledge about employment law, would have been likely to have given.

54. Following his attempt to discuss the matter with the Claimant, Mr Yuan drafted a letter of dismissal to the Claimant notifying that he was dismissed for the reasons I have referred to above; and that he should vacate the premises immediately with his

personal possessions; and would have his salary from 20 – 22 June forwarded to him in seven days.

55. The Claimant did return to the premises on subsequent occasions in July and September as referred to in my findings of fact above. It is not necessary to go into these matters in detail as I am concerned with the Claimant's dismissal, rather than events that occurred subsequently (other than in so far as what happened after the Claimant's dismissal is relevant to my findings of fact as to what happened before his dismissal and the circumstances of the dismissal).

Closing submissions

56. I gave the parties a brief summary of relevant legal principles as to illegality of contract, unfair dismissal and wrongful dismissal. Both parties gave verbal submissions in support of their versions of events.

Conclusions

Illegality of contract issue

57. The contract of employment was illegal in that the Claimant's income was being under declared so as to evade payment of the correct tax. Do I decline to determine the merits of the Claimant's claims because the contract of employment between the Claimant and Respondent was illegal?

58. The Respondent has not pleaded illegality of contract. Their defence, as set out in paragraph 6 above, is on the merits of the case. Nonetheless, it is an issue I consider that I need to determine; and to make clear that a public body, such as an employment tribunal, disapproves of tax evasion.

59. The conduct concerned was serious. Tax evasion is a criminal offence.

60. The tax evasion was central to the employment contract. The Claimant benefitted from it by getting a higher net pay than he would have done had the correct deductions been made. As set out in my findings of fact the tax fraud was intentional. The Respondent benefitted by being able to pay the Claimant a higher net salary and thus make the job more attractive to him, whilst keeping his overheads down to the extent of the tax deductions he would have paid had he declared the Claimant's income correctly.

61. There was a marked disparity in the relative culpability between Mr Yuan, the employer, for the tax evasion, and Mr Pan, the employee. Mr Yuan initiated and implemented the fraud. The Claimant may have had suspicions from the outset, as explored in my findings of fact above, but was not receiving regular wage slips so as to confirm what was being declared. He was also in the position of wanting a job with the Respondent. It is the employer's responsibility to deduct tax and national insurance payments. The Claimant did also make some, albeit not as persistent as he has stated, efforts to have the correct deductions made to his pay.

62. On balance, and narrowly, I have decided, therefore, to decide the case on its merits rather than to decline jurisdiction on the grounds of illegality of contract. My

findings on the relative culpability of the parties persuade me in favour of doing so.

Unfair dismissal claim

63. I have considered, firstly, what was the reason or principal reason for dismissal and whether the Respondent has shown that the Claimant was dismissed because of his conduct.

64. For the reasons given in my findings of fact, I am satisfied that conduct was the reason or principal reason for the Claimant's dismissal. As referred to in the letter of dismissal it was his attempts to extract £50,000 from Mr Yuan, the Respondent, and threatening violence towards him.

65. Conduct is a reason that comes within section 98(2) ERA.

66. I have gone onto consider whether the Claimant's dismissal was fair within the meaning of section 98(4) ERA.

67. I have considered the procedures adopted by the Respondent. The Respondent did dismiss the Claimant without following the kinds of procedures advised by ACAS in their code. Mr Yuan did not set out in a letter the allegations against the Claimant. Ordinarily I would have considered the dismissal to be procedurally unfair.

68. In this case, however, the Claimant did make threaten violence towards Mr Yuan, his employer. He threatened to cut his head off. He was a head chef, working in the kitchen. He lived above the restaurant. He had the use of knives in order to perform his job. Nor was he willing to discuss the allegations with Mr Yuan. The Respondent is also a small employer. In the particular circumstances of this case, therefore, I consider that the absence of the usual recommended procedures was not such as to make the dismissal unfair in that they fell within the band of reasonable responses that a reasonable employer might have adopted.

69. So far as the sanction of dismissal is concerned I have found in the findings of fact above that the Claimant did threaten to cut Mr Yuan's head off; intimidated kitchen staff so that the restaurant had to be closed for a day and did utter threats, or curses, to attempt to obtain £50,000 from Mr Yuan. A violent threat such as that made by the Claimant amounts on its own to gross misconduct. His intimidation of the kitchen staff he managed also amounted to gross misconduct. The manner of his demands for £50,000 added to the gross misconduct in question.

70. The Claimant's dismissal was not, therefore, unfair.

71. For the reasons given in my findings of fact and for the reasons given in paragraph 68 above the Claimant committed gross misconduct, so that the Respondent was entitled to dismiss the Claimant without notice. The Claimant's wrongful dismissal claim also, therefore, fails.

RESERVED JUDGMENT & REASONS SENT TO THE PARTIES ON
.....
.....
FOR THE TRIBUNAL OFFICE