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EMPLOYMENT TRIBUNALS

Claimant: **Mr F Afzal**

Respondent: **East London Pizza Ltd T/A Dominos Pizza**

Heard at: **East London Hearing Centre** **On: 14 June 2017**

Before: **Employment Judge Foxwell (sitting alone)**

Representation

Claimant: Ms S Chan (Counsel)

Respondent: Mrs H Winstone (Counsel)

JUDGMENT

It is the judgment of the Employment Tribunal that the Claimant's complaint of unfair dismissal is not well-founded and is dismissed.

REASONS

1. The Respondent, East London Pizza Ltd, holds a number of Domino's Pizza franchises in London. The Claimant, Mr Fahim Afzal, began working for the Respondent, originally as a delivery driver, in September 2009. His employment ended in August 2016 when he was summarily dismissed.

2. On 19 January 2017, having gone through early conciliation, he presented a complaint of unfair dismissal to the Tribunal and that is the matter that has come before me for determination.

3. In deciding this claim I have heard evidence from Mr Jack Cunningham and Mr Gavin Sahota for the Respondent. Mr Cunningham is an employee relations advisor in the Respondent's HR department and is based in Camberley, Surrey. Mr Sahota is an area manager and was the Claimant's direct line manager at the time of his dismissal. The Claimant has given evidence in support of his claim and called no other witnesses.

That is quite normal and I draw no inference from the number of witnesses a party calls. In addition to the evidence of these three witnesses I considered the documents to which I was taken in an agreed bundle and references to page numbers in these Reasons relate to that bundle. Finally, I received submissions from counsel. Mrs Winstone had prepared written submissions which I read. She also drew to my attention three authorities which were also relied on by Ms Chan. These were the cases of *Bouchaala v Trusthouse Forte Hotels Ltd* [1980] ICR 721, *Hounslow London Borough Council v Klusova* [2008] ICR 396 and *Nayak v Royal Mail Group Ltd* UKEATS 2016 0011.

4. The broad background to the claim is as follows.

5. The Claimant is from Pakistan. He is married to a European national from an EU or EEA member country. He has lived in the UK for at least the last seven or eight years, most of which time he has spent working for the Respondent. His right to work is controlled under various immigration statutes and it is common ground that he has only time limited permission to work in the United Kingdom. It is an agreed fact in this case that this permission was due to expire on 12 August 2016 under the terms of his visa.

6. The Government operates a stringent regime in respect of the employment of people without the appropriate permission to work. It is a criminal offence to employ a person who does not have the right to work in the UK. There are also civil penalties which are imposed upon employers for breach of this principle. The penalties are stiff: the rate, as I understand it, can be up to £20,000 for each infringement, although there may be reductions in respect of certain relevant facts. The employer's liability is strict however, so, in effect the Government has passed some of the responsibility for policing the employability of migrant workers onto employers directly.

7. In this case the Claimant was working as a manager-in-training and acting assistant manager at the time of his dismissal. It is quite clear to me on the evidence that he was a competent, capable and well-regarded employee. He had a good working relationship with his line manager, Mr Sahota. He was seen as a future branch manager and was being trained to become such. This is no small achievement given that he had originally joined as a delivery driver.

8. I have the impression that the Respondent employs a number of workers from overseas who require specific permission to work in the United Kingdom, that is people not from the EU or the EEA. It is clear to me on the evidence that Mr Cunningham has a significant body of experience in dealing with the permit and visa requirements of these workers to ensure that the Respondent does not fall foul of the criminal and civil penalties to which I have referred. It is in this context that he wrote to the Claimant on 3 June 2016 to inform him that his right to work in the United Kingdom was due to come to an end on 12 August 2016.

9. Workers in that position are permitted to, and I imagine very often do, make applications for that permission to be continued. The rules relating to these applications are also set out in statutory instruments. In summary however, what the worker must do is present an application for continuation of his or her permission before the date upon which his or her current permission expires. So, in the Claimant's case, he needed to present to the Home Office an application for continuation of his

permission to work before the end of 12 August 2016.

10. In these circumstances it is possible for an employer to continue to employ the worker in what might be termed a period of grace, fixed at 28 days. This grace period is intended to allow the employer to make enquiries of the Home Office to ensure that an application has been presented. However, prior to the expiry of the current permit the employer must be satisfied on reasonable grounds that an application has been made. If it is not so satisfied then it cannot assume the extra 28 days' grace. This is how the relevant legal provisions have been summarised to me by the parties.

11. So, when Mr Cunningham wrote to the Claimant on 3 June 2016, he did so to remind him that this important watershed was due imminently. A further hurdle in the bureaucracy of these procedures is that an application for a continuation of a permission to work cannot be made more than 28 days before the expiry of the relevant permission (at least, that is what I have been told by counsel). So as at 3 June 2016 it would have been too early for the Claimant to present an application. However, the time in which he could present an application began running from the middle of July 2016.

12. Returning to Mr Cunningham's June letter, he invited the Claimant to provide the HR department in Surrey with evidence that he had made an application for continuation of his permission to work. Mr Cunningham asked that the Claimant provide this evidence before 11 August 2016, I read that as 10 August 2016 at the latest, to allow a couple of says to deal with any loose ends or queries.

13. Mr Cunningham sent a chasing letter on 15 July 2016 repeating what he had said in June. By this stage the clock had started running for the period in which the application could be made. I note that Mr Cunningham ended his letter by saying that, should the Claimant have any questions, he could contact HR and was provided with an email address to do so.

14. The Claimant did not contact HR. There has been some criticism of the HR department in his case for its alleged failure to contact him directly after July. I consider that that criticism to be misplaced; he had been informed twice in writing about the steps he needed to take.

15. For reasons which I accept were reasonable and understandable the Claimant chose to deal with his immediate manager, Mr Sahota, in respect of this issue, and I am sure that they discussed it from time to time as the deadline approached.

16. As the deadline became imminent, there was a flurry of emails exchanged between Mr Cunningham and Mr Sahota regarding the Claimant. Shortly after 6pm on 11 August 2016, Mr Cunningham emailed Mr Sahota to say that he had not seen any evidence provided by the Claimant to show that he was applying to extend his work permit (page E5). Mr Sahota did not respond to this email immediately, rather he replied the following morning at 11.04am to say *"I asked him to send me any evidence but he hasn't. I think you will just need to send him the letter"*. I will come to what *"the letter"* means in a moment, but it is right to state that there was a telephone conversation between the Claimant and Mr Sahota on the night of 11 August. The Claimant had tried to call Mr Sahota twice at around about 6.15pm that evening but it is clear from his telephone records that those calls were unsuccessful. However, the

men did talk at about 9.30pm; the conversation was a short one, 47 seconds according to the records, but Mr Afzal's told Mr Sahota that he was in the process of preparing his application and that evidence of it would be supplied the following day. This is the context of Mr Sahota's email to Mr Cunningham (at page E6) sent shortly after 11am on 12 August 2016 when he says "*"I asked him to send me any evidence but he hasn't"*.

17. In fact, the Claimant emailed Mr Sahota at 4.28.29pm on 12 August 2016 (so, just before 4.30pm) writing *"Hi Gavin, Could you please find the attached letter and post receipt of my file sent to HOME OFFICE"*, and he attached two documents to this email. The Claimant's evidence is that this email contained clear evidence of an application to renew his permission to work. It is common ground that Mr Sahota did not forward that email to anyone else at that time and I shall come on to his explanation for not doing so in a moment. However, other events took place on the afternoon of 12 August 2016.

18. Shortly after 4.45pm that afternoon a letter of dismissal was received at the post office for delivery to the Claimant. The receipt shows that it was accepted by the post office at 4.46pm and I find on the balance of probabilities that it was drafted earlier that afternoon and it is more likely than not that it was drafted before the sending of the Claimant's own email sent at 4.30pm. This letter informed the Claimant that his employment was terminated with immediate effect. It said as follows:

> *"…It is a term of your contract of employment that you continue to provide evidence of your right to work within the United Kingdom. You have not done this as has been requested.*
>
> *Consequently, you are in fundamental breach of the terms and conditions of your employment.*
>
> *As it is not legal for us to employ any individuals without the required evidence to demonstrate their right to work in the UK we can no longer offer you employment and thus your Contract of Employment is terminated due to failure to demonstrate your right to work in the UK.*
>
> *This termination is effective immediately and you will be paid any outstanding monies, including any deductions as outline in your contract of employment, will be forwarded to you along with your P45 at the end of the next pay period.*
>
> *Please ensure that you return your Company uniform, failure to do so may result in the cost of a replacement being deducted from any outstanding wages."*

19. The Claimant suggested in his written statement that he received this dismissal letter on 12 August 2016. When he gave oral evidence, however, he corrected this, stating that he received the letter on Monday 15 August 2016. That is consistent with the delivery information that the Respondent has and I accept that that is the date when he was informed of his dismissal. Accordingly, I find that that was the effective date of termination. However, prior to that, on the afternoon of 12 August there was a further conversation between the Claimant and Mr Sahota. It is clear from Mr Sahota's

phone records that this took place at 5.19pm and lasted approximately two minutes. Both men give a very different account of what was said in this telephone conversation and this has been a key factual issue which I have had to resolve on the balance of probabilities.

20. Before I turn to my conclusion on this point I want to say something about the credibility of the witnesses and the impression that each made on me when giving evidence. I can deal with all three in the same way. My impression was that each witness did his best to give me a straightforward account of events as he recollected them. So, although there are stark differences between some aspects of the witnesses' accounts, I at no stage had the impression that any of them was trying to mislead me. Nevertheless, I have to resolve what is likely to have happened on the balance of probabilities so my assessment is of what is the most probable course of events.

21. The Claimant's account of the 5.19pm telephone conversation is that Mr Sahota acknowledged receipt of the documents he had sent and said in effect that he would forward them to HR. The upshot of this version is that the Claimant would have provided evidence to his employer of an in-time application before the date when the employer had to make a final decision about whether there was reasonable evidence of such an application. In other words, the Claimant's case is that he just squeaked through the door and he says that this is of fundamental importance to the issue of fairness.

22. Mr Sahota's account is that he told the Claimant that he could not open the attachments to the email. He told me that because he could not open the attachments he did not forward the email to anyone else but he thought that the Claimant would re-send legible documents. In those circumstances, of course, there would have been no accessible evidence upon which the employer could reasonably form the view that a proper application had been made in time. So, this dispute lies at the heart of this case although it may not be the beginning and end of it.

23. I find, on the balance of probabilities, that Mr Sahota's evidence that he could not open the attachments is the most likely. I reach that conclusion for the following reasons: I regarded his evidence as credible, measured and consistent with the documents. It is right that there is no contemporaneous documentary corroboration but that is unsurprising in my judgment. What happened in this case is that the Claimant sent an email to his manager (not HR) at 4.30pm taking a chance that it might not be seen and acted on before 5.30pm when business closed. It was seen by Mr Sahota but only at shortly before 5.20pm and his immediate reaction was to call as the records show. I find that this passage of events is consistent with my conclusion. Furthermore, subsequent events are also consistent with it: Mr Cunningham became aware of this email on 7 October 2016 when Mr Sahota forwarded it to him. There is clear documentary evidence to show that for whatever reason Mr Cunningham could not open the documents he had been sent either. Indeed, at Mr Cunningham's request the Claimant sent further attachments (photographs of two post office receipts) by email on 12 October 2016 because of this.

24. I have had regard to Ms Chan's careful submissions in respect of the documents in looking at this issue where she has highlighted what she says are inconsistencies in the Respondent's account, but in truth I do not find that they are inconsistencies; this

was an unfolding sequence of events and there is sufficient corroboration between the documents that I have seen to support Mr Sahota's account. So for these reasons I prefer his recollection of this telephone conversation to the Claimant's.

25. It follows on the facts therefore that the Claimant had attempted to send evidence of his application at 4.30pm that afternoon but it had not been received in a decipherable way before close of business and this was the context in which the decision to dismiss was made. I should emphasise that the decision to dismiss had been made before this sequence of events took place by HR In Surrey; they were ignorant of the Claimant's email and his phone conversation with Mr Sahota when they made it. The essence of the Claimant's case has been that, had that email been read, it would have led to a reprieve and a withdrawal of the dismissal letter, but of course in the circumstances of the facts as I find them to be there was no evidence which could have led to that reprieve.

26. Against that background I turn to the legal questions that I need to resolve in this case before turning to further matters about which I may need to make findings of fact.

27. Where an employer dismisses its employee it must establish a potentially fair reason for dismissal: these are set out in Section 98 of the Employment Rights Act 1996. One of the potentially fair reasons for dismissal is that continued employment is prohibited by statute. I can say at the outset that the Respondent accepts that in the circumstances as they subsequently proved to be the Claimant's employment was not prohibited by statute as at 12 August 2016 because he had made an in-time application to the Home Office for a work permit extension; so, that ground is not relied on as a potentially fair reason for dismissal. Nevertheless, the Respondent contends that in circumstances where the employer genuinely and reasonably believes that employment is precluded by statute this amounts to *"some other substantial reason"* ("SOSR"), a residual category of fairness under section 98. I accept that this is correct in law.

28. I find on the evidence that the Respondent believed that the Claimant could no longer lawfully be employed. I am also satisfied on the evidence that this belief was a genuine one and that it was reasonable to reach this conclusion; after all, the Claimant had not attempted to present any evidence of a valid application until his email of 12 August 2016. He had, of course, indicated to Mr Sahota to expect some evidence but it proved very late in coming and the Claimant took a risk in that regard. So, I am satisfied that the Respondent has established a potentially fair reason for dismissal in this case.

29. That is not the end of the matter however, because the reasonableness of the decision to dismiss still has to be tested by reference to the test of fairness contained in Section 98(4) of the 1996 Act. Ms Chan argued in this respect that there was a failure on the part of the Respondent to follow any procedure prior to dismissal. She sought to draw an analogy with the ACAS Codes of Practice, although no such code applies directly to SOSR dismissals. One matter which has concerned me however is whether the failure to offer a right of appeal renders this dismissal procedurally unfair. I noted that appeals featured in two of the three authorities to which I was referred and I asked counsel to address me on this on the facts of this case.

30. I accept Mrs Winstone's submission that the Respondent had to act decisively on

12 August 2016 because to leave the impression that employment continued after this date would, based on its reasonable belief, have exposed it to the criminal and civil liabilities to which I have referred. I am satisfied therefore that this was a case where it lay within the range of reasonable responses to dismiss summarily because of the substantial reason that I accept exists. I bear in mind in reaching this conclusion the warnings that Mr Cunningham had given about the risk of this in his letters of June and July 2016. Furthermore, the Claimant in his evidence told me that he was fully aware of the work permit rules and knew of the significance of this date, so none of it could have come as a surprise to him in that sense. I do not find therefore that this dismissal was procedurally defective simply because it was a summary dismissal by letter in these circumstances. There was nothing to discuss, once the employer was in the position where it did not think it could reasonably conclude that there was a valid application for an extension of the work permit.

31. That leaves the question of appeal. It is generally good employment practice to include a right of appeal. Mrs Winstone suggested that it might be inconsistent with immigration law for such a right to be included because it could convey the impression that some form of employment relationship was continuing. I cannot accept that submission for two reasons. Firstly, there is no legal argument before me to support it, so it is a submission made without any substantiation. Secondly, it is clear that in earlier cases there was an appeal and that does not appear to have given rise to any particular difficulty. Nevertheless, I accept Mrs Winstone's submission that in this case there was nothing to appeal against: the test which the employer had to apply is whether before the date of the expiry of the permission it had reasonable grounds for believing that the Claimant had made a valid application for an extension. So, once the date had passed, there was no basis for the employer to, as it were, back calculate or back-fill a belief it did not have on 12 August. In those circumstances, while not ideal, I cannot say looking at it as a whole that it was unfair to fail to offer a right of appeal in the dismissal letter.

32. In reaching this conclusion, I also bear in mind the continued contact between the parties after dismissal, which included an open offer to reengage the Claimant, albeit as a new starter. So, there was no question of the Respondent not wanting to have the Claimant back, it simply was a question of what terms should apply as to continuity and back pay.

33. I take this opportunity to deal with one matter which I took into account but did not refer to in my oral reasons. The Claimant compares his treatment with that of another worker, T, whose permit expired shortly after his. The Claimant says that T was allowed the grace period despite failing to provide documentary evidence of an in-time application to the Home Office before the expiry of his permit. Inconsistent treatment may affect fairness under section 98(4).

34. Mr Cunningham accepted T had not provided documentary evidence to him in time but he said that he had received a phone call from T's solicitor informing him of the application before the deadline, which he felt able to accept at face value. Ms Chan asked him about a solicitor's letter dated 12 August 2016 confirming that the Claimant had made an in-time application which she suggested was one of the attachments to the Claimant's 12 August 2016 email (page E30). Mr Cunningham said that he had not seen this document until after these proceedings had begun and I accept that evidence. This letter remained unseen because the attachments to the

Claimant's 12 August email could not be opened and the Claimant did not think to volunteer it later given what had happened.

35. I have come to the conclusion for these reasons that the dismissal was fair and, accordingly, that the claim is not well-founded and is dismissed.

Employment Judge Foxwell

20 June 2017