## EMPLOYMENT TRIBUNALS (SCOTLAND)

**Case No: S/4100275/17**

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**Held in Glasgow on 19 & 20 June 2017 with written submissions being considered by the Employment Judge, in Chamber on 31 July 2017 & 5 August 2017**

10 **Employment Judge: Mr C Lucas (sitting alone)**

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| **Mr Duncan Livingston Logan** | **Claimant**<br>**In Person** |
| **Mr Robin Kho Shim Lim Chow Tom (aka "Robin Lim") t/a "Chinatown Deliveries"** | **1st Respondent**<br>**Represented by:**<br>**Mr L K Kennedy - Advocate (instructed by Mr R Murdanaigum, Solicitor)** |
| **Chinatown Deliveries Ltd** | **2nd Respondent**<br>**Represented by:**<br>**Mr L K Kennedy – Advocate (instructed by Mr R Murdanaigum, Solicitor)** |

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## JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The Judgment of the Employment Tribunal is in sixteen parts, namely:-

40 (1) Because the Employment Judge has been satisfied from submissions made to him and from the evidence presented to him for consideration that throughout the relevant period the Claimant`s employer had been the 2nd Respondent, the Claimant`s claims as made in the form ET1 presented to the Employment Tribunal on 14 February 2017 are dismissed, but only in so
45 far as such claims are directed against the 1st Respondent.

(2) The Claimant`s employment with the 2nd Respondent ended on 23 December 2016.

5 (3) Throughout the period which began on 2 February 1999 and ended on 23 December 2016 the Claimant had been employed by either the 2nd Respondent or by employers whose business had been transferred, ultimately, to the 2nd Respondent in such a way as to provide the Claimant with continuity of employment throughout that period.

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(4) The reason given by the 2nd Respondent to the Claimant for termination of his employment was that he was being dismissed because he was redundant.

15 (5) When served by the 2nd Respondent with notice of termination of his employment on the ground of redundancy the Claimant had accepted that he was being dismissed by the 2nd Respondent for a potentially fair reason. He has never claimed that such dismissal was unfair.

20 (6) Having accepted notice of termination of his employment on the ground of redundancy the Claimant never acceded to any attempt by the 2nd Respondent to withdraw or rescind such notice of redundancy.

(7) On or about 30 November 2016, before the end of his employment with it, 25 the 2nd Respondent made an offer to the Claimant to renew his contract of employment with such renewal to take effect immediately on the end of his employment on the basis that the provisions of the contract as renewed as to the capacity and place in which he would be employed and the other terms and conditions of his employment would not differ from the 30 corresponding provisions of the previous contract, but that offer was refused by the Claimant.

(8) The Claimant`s refusal of that offer of renewal of his contract of employment, with such renewal to take effect immediately on the end of his employment on the basis that the provisions of the contract as renewed as to the capacity and place in which he would be employed and the other terms and conditions of his employment would not differ from the corresponding provisions of the previous contract, was an unreasonable refusal.

(9) Because the Claimant`s refusal of that offer of renewal of his contract of employment, with such renewal to take effect immediately on the end of his employment on the basis that the provisions of the contract as renewed as to the capacity and place in which he would be employed and the other terms and conditions of his employment would not differ from the corresponding provisions of the previous contract, was an unreasonable refusal, and given the terms of Section 141(2) of the Employment Rights Act 1996, the Claimant is not entitled to a redundancy payment, in which case his claim that he is owed a redundancy payment by the 2nd Respondent has failed and is dismissed.

(10) During the course of the Claimant`s employment with the 2nd Respondent – {when the Claimant, as a Worker – [in terms of Section 230(3)(b) of, and for the purposes of Section 13 of, the Employment Rights Act 1996] – who had carried out work for the 2nd Respondent during the period which had begun on 2 February 1999 and had ended on 23 December 2016, was entitled to receive payment for such work carried out during that period} – the 2nd Respondent made unauthorised deductions totalling £125.00 from the wages properly payable by it to the Claimant and, in so doing, breached the provisions of Section 13 of the Employment Rights Act 1996.

(11) As at the date of termination of his employment with the 2nd Respondent, still as at the date of presentation of the Claimant`s claim form ET1 to the Tribunal and even as at the end of the evidential part of the Final Hearing of

the Claimant`s claim the £125.00 which had been deducted from the Claimant`s wages without authority and contrary to the provisions of Section 13 of the Employment Rights Act 1996 remained outstanding and due by the 2nd Respondent to the Claimant, in which case the 2nd Respondent is ordered to pay the sum of £125.00 to the Claimant in respect of such previously unauthorised deductions.

(12) The Claimant`s claim as set out in the form ET1 presented to the Tribunal on 14 February 2017 that he was owed holiday pay by the 2nd Respondent has failed and is dismissed.

(13) The 2nd Respondent failed to provide the Claimant with either a written statement of particulars of employment or with a written statement containing particulars of changes to the particulars of his employment as it was required to do by, respectively, Sections 1 and 4 of the Employment Rights Act 1996.

(14) The 2nd Respondent is ordered to pay the sum of £497.28 to the Claimant in respect of its failure to provide him with a written statement of particulars of employment as it was required to do by Section 1 of the Employment Rights Act 1996.

(15) The Claimant has paid fees in connection with this claim. In the case of **R (on the application of Unison) v the Lord Chancellor** the Supreme Court decided that it was unlawful for Her Majesty`s Courts & Tribunals Service (HMCTS) to charge fees of this nature. HMCTS has undertaken to repay such fees. In these circumstances the President of Employment Tribunals in Scotland will draw to the attention of HMCTS that this is a case in which fees have been paid and are therefore to be refunded to the Claimant. The details of the repayment scheme are a matter for HMCTS.

(16) The Claimant`s claim as set out in the form ET1 presented to the Tribunal on 14 February 2017 that he is entitled to "compensation for slander" allegedly inflicted on him by the 2nd Respondent is a claim which an Employment Tribunal does not have any jurisdiction to consider.

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**REASONS**

**Background**

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1. In a claim form ET1 presented to the Tribunal Office on 14 February 2017 – (hereinafter, "the ET1") – the Claimant named the employer, person or organisation he was claiming against as being "Mr Robin Lim" whose address was given as being "Chinatown Deliveries, 290 Glentanar Road, Glasgow G22 7XS".

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2. The Claimant alleged in the ET1 both that his employment had begun on 2 February 1999 and that it had ended on 23 December "2017" (*sic).*

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3. At section 8.1 of the ET1 the Claimant claimed a redundancy payment and alleged that he was owed holiday pay and other payments. He also alleged that "last year my boss taken out £130 from my wages without my permission from my £10 a week because of broken handbrake on forklift truck ..".

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4. At section 9.2 of the ET1 the Claimant expanded on his claims and added a claim that he was entitled to compensation "for slander ……".

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5. In a response form ET3 received by the Employment Tribunal on 20 March 2017 – (hereinafter, "the ET3") – "Chinatown Deliveries" with an address at 290 Glentanar Road, Glasgow G22 7XS was identified as being the individual, company or organisation responding to the Claimant`s claim as set out in the ET1.

6. It was contended in the ET3 that the Claimant`s employment had begun on 2 April 2001 and not 2 February 1999 as claimed by the Claimant in the ET1.

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7. It was apparent from the narrative set out in the paper apart annexed and forming part of the ET3 that it was alleged that the Claimant's employer had sought to withdraw or rescind a previously issued notice of redundancy and to ensure and procure that the Claimant`s employment with it had continued without interruption. It was alleged that the Claimant`s employment was continuing.

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8. The ET3 contained a denial that any money had been deducted from the Claimant`s wages in respect of damage to a handbrake on a forklift truck and it was denied that any holiday pay was due to the Claimant.

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9. Generally, as indicated at Section 6.1 of the ET3, the individual, company or organisation responding to the Claimant`s claim as set out in the ET1 made it clear that the Claimant`s claim was being defended.

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10. The ET3 was copied by the Tribunal Office to the Claimant who, prior to the commencement of the final hearing of his claim, did not disagree with the contention contained within the ET3 that "Chinatown Deliveries" with an address at 290 Glentanar Road, Glasgow was the individual, company or organisation against whom it was appropriate for him to make his claim and which had the right to respond to it.

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11. A final hearing of the Claimant`s claim was scheduled to take place – (and did begin) – at Glasgow on 19 June 2017 and on 19 & 20 June 2017 preliminary matters were discussed and evidence was heard from the Claimant and on behalf of both the 1st Respondent and the 2nd Respondent. Those two Hearing days, 19 & 20 June 2017, are hereinafter referred to as "the evidential part of the Final Hearing of the Claimant`s claim".

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12. There had been no preliminary hearing.

13. On 19 June 2017, at commencement of the evidential part of the Final Hearing of the Claimant`s claim – (at a stage when preliminary discussions were taking place among the parties respective representatives and the Employment Judge but prior to any evidence being heard) – the Tribunal ordered that the 2nd Respondent – (a company incorporated under the Companies Acts and having the registration number SC490525 and a place of business at 290 Glentanar Road, Glasgow) - be added as a party to the proceedings because it appeared to the Employment Judge that there were issues between that company and the Claimant, and might be issues between that company and the 1st Respondent, which fell within the jurisdiction of the Tribunal and which it was in the interests of justice to have determined in the proceedings. Such Order was made in terms of Rule 34 as contained in Schedule 1 to the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013 – (hereinafter, "the Regulations") – and on the basis that the identity of the Claimant`s employer as at any relevant date or dates would be determined by the Tribunal after consideration of evidence and written submissions.

14. During the course of the preliminary discussions on 19 June 2017 the Employment Judge advised the Claimant that the claim of compensation in respect of alleged slander was not a claim which an Employment Tribunal had jurisdiction to consider and that such a claim would not be dealt with by the Tribunal as part of the final hearing of the claims made by the Claimant in the ET1. The Claimant accepted that guidance and ruling.

15. During the course of the preliminary discussions on 19 June 2017 the Respondents` representative sought to elaborate on the Respondents` response as set out in the ET3. The Employment Judge considered the submissions made and determined that because, in his view, what was being proposed constituted an elaboration of the existing response as

contained in the ET3 it would be accepted as such. The evidential part of the Final Hearing of the Claimant`s claim proceeded with the assistance of that elaboration to the response as contained in the ET3.

16. During the course of the evidential part of the Final Hearing of the Claimant`s claim it was apparent that – (notwithstanding what had been said either in the ET1 or in the ET3) - there was no dispute among the parties that the Claimant`s direct employment with the 2nd Respondent had begun on or about 4 November 2014 when that company was incorporated under the Companies Acts and that prior to being employed (directly) by the 2nd Respondent the Claimant had been employed by other companies or individuals with whom the shareholder and director of the 2nd Respondent is closely linked. It was apparent, too, that there is no dispute among the parties that throughout a period which began, at the latest, on 2 April 2001 - (and, at the earliest, 2 February 1999) - there had been continuity of employment for all purposes of the Employment Rights Act 1996 – (hereinafter, "ERA 1996") - and other relevant legislation.

17. Preliminary matters having been dealt with, the evidential part of the Final Hearing of the Claimant`s claim began on 19 June 2017.

18. During the course of the evidential part of the Final Hearing Mr Lim gave his evidence to the Tribunal by video link from Australia. This was by prior arrangement.

19. During the course of his cross-examination on the second day of the evidential part of the Final Hearing of his claim, the Claimant sought to amend his claim to include an allegation of whistleblowing and an allegation of unfair dismissal. He attempted to excuse his failure to include such claims in the ET1 by saying that he had not previously taken appropriate advice. The Respondents` representative opposed such applications. After discussion, the Employment Judge refused to allow the Claimant to amend his claim as set out in the ET1 and suggested that if he wished to separately

raise claims alleging detriment because of whistleblowing on his part or of unfair dismissal he should do so by means of a new application – (which, the Employment Judge warned him, might be subject to refusal or challenge because of time-bar).

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20. The evidential part of the Final Hearing of the Claimant's claim was completed on 20 June 2017 with written submissions thereafter being received, as ordered, and considered by the Employment Judge on 31 July 2017 and 5 August 2017.

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**Findings in Fact**

21. The Tribunal found the following facts, all relevant to the Claimant`s claim, to be admitted or proved:-

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22. The 1st Respondent is not, and has never been, the Claimant`s employer.

23. Throughout a period which began on or about 4 November 2014 and continued to 23 December 2016 – (not 23 December 2017 as alleged by the Claimant in the ET1) – the Claimant was employed directly by the 2nd Respondent but from 2 February 1999 until (directly) employed by the 2nd Respondent he was employed by companies or individuals closely connected with the 2nd Respondent whose businesses and certain of whose staff members, including the Claimant, were ultimately transferred to the 2nd Respondent, thereby – (for the purposes of ERA 1996 and other relevant legislation) - providing the Claimant with continuity of employment throughout the period which began on 2 February 1999 and ended on 23 December 2016.

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24. The 2nd Respondent's sole shareholder and sole director is Mr Robin Kho Shim Lim Chow Tom who is otherwise known and referred to as "Robin Lim".

25. The business of the 2nd Respondent is the supply by wholesale sale of stock, primarily Asian food, to restaurants and caterers in Scotland.

26. Mr Lim spends a large part of the year living in Australia with his life-partner but operates the 2nd Respondent's business using internet and telephone communication systems, so much so that he is in daily contact with suppliers, customers and dealing with the 2nd Respondent`s banking activities. He personally makes any and all decisions relating to the 2nd Respondent`s employees.

27. Mr Lim has known the Claimant since, at the latest, 2004 when he, Mr Lim, helped out in his parents' business where the Claimant then worked. He describes his relationship with the Claimant as being "a very good relationship".

28. The Claimant`s role within the 2nd Respondent`s business was that a warehouse operative and forklift truck driver working within the 2nd Respondent`s warehouse at 42-44 New City Road, Glasgow. As at 18 November 2016 the Claimant was the only person working at that warehouse who held certification which authorised him to operate a forklift truck there.

29. On Friday 18 November 2016 the Claimant approached Mr Lim and asked to be made redundant. Mr Lim immediately consulted with his Operations Manager, Mr Craig MacPherson, who was the Claimant`s line manager and had previously been a Director of the 2nd Respondent company.

30. Mr MacPherson claims to have been employed by the 2nd Respondent since 1 December 2014, "when the company started" but had previously worked for Mr Lim`s mother and father in businesses which were ultimately transferred to the 2nd Respondent.

31. Mr MacPherson is aware that all employees working “in the Chinatown Deliveries business” are employees of the 2nd Respondent and not of Mr Lim in any sole-trader capacity.

32. Following a brief discussion between themselves, Mr Lim and Mr MacPherson then met with the Claimant later on 18 November 2016 and at that meeting the Claimant repeated his wish to be made redundant by the 2nd Respondent. Mr Lim and Mr MacPherson told the Claimant to take the weekend to think about his request.

33. Mr Lim`s recollection is that on 11 November 2016 – (a week before the first formal approach made by the Claimant asking to be made redundant) - the Claimant had “casually mentioned” to him that he was “struggling with finances” and “maybe I could get a redundancy”. Mr Lim recalls that at that initial, casual, discussion he had told the Claimant that he would “help if I could” and that “I would look into it”.

34. On Monday 21 November 2016 the Claimant met with Mr Lim and Mr MacPherson again and repeated his request to be made redundant.

35. At that 21 November 2016 meeting Mr Lim advised the Claimant that if he was to be made redundant the redundancy would not take effect until a date twelve weeks later, i.e. until a date in February 2017. When told that that would be the case the Claimant insisted to Mr Lim and Mr MacPherson that he wanted his employment to end, and to receive a redundancy payment, before the end of the 2016 calendar year.

36. In an endeavour to assist a long-serving and valued employee – (and to meet the Claimant’s target of the end of 2016 as a date by which his employment with the 2nd respondent would end and he would receive a redundancy payment) - Mr Lim agreed to provide the Claimant with a, suitably-back-dated, notice of termination of his employment on the ground of redundancy.

37. There were no Minutes taken – (or subsequently prepared) - to record what was discussed at either of the 18 November or 21 November 2016 meetings but Mr Lim has a clear recollection that a meeting took place on 18 November at which the Claimant more formally requested to be made redundant and that there was then a meeting on 21 November at which the Claimant repeated his request and asked to be provided with a letter which would have the effect of terminating his employment before the end of 2016 on the ground of redundancy. Mr MacPherson also recalls both of such meetings.

38. Following the meeting among the Claimant, Mr MacPherson and himself on 21 November 2016 Mr Lim prepared and provided the Claimant with a letter headed "Re: Redundancy" which bore the date "1/09/2016", is hereinafter referred to as "the Dismissal Letter", and stated:-

> "I am writing to you to confirm our discussion on 1st September 2016. As I advised you on that date, it has regrettably been necessary to consider certain operational changes within the organisation located at 290 Glentanar Rd.
>
> As a result of these proposed changes we have made the following decision:
>
> To reduce the number of warehouse staff at 290 Glentanar Rd due to the fact that the need for the same number of staff to carry out warehouse operations has diminished.
>
> Unfortunately, this means that your position will be made redundant. Whilst we have considered all available alternative options, it has not been possible to avoid instituting redundancies. As I explained, you have been selected for redundancy by reason of lack of work in the

warehouse. The selection criteria, which we have adopted, have been fully explained to you.

If you have a complaint or query about your selection or the methods and criteria used or you wish to appeal against your selection, you may do so by writing to Robin Lim within 14 days, setting out your reasons. The organisation`s grievance procedure will be implemented and your complaint/appeal will be considered, you will be advised in writing of the organisation`s decision. Please refer to the organisation`s handbook for details of the grievance procedure.

We have attempted to identify a suitable alternative vacancy to offer you, but unfortunately none is available. In the circumstances I confirm that your employment with the organisation will terminate by reason of redundancy on 23rd December 2016.

We do require you to work out your full notice period.

Upon termination we will pay you the following severance payments.

1. Statutory redundancy pay £4,719.79

It is possible to make the payments under 1 & 2 without deduction of income tax or national insurance.

Arrangements will be made to ensure that you receive your final salary payment and P45 on termination of your employment or soon thereafter.

If you have any queries with regard to any of the terms of this letter or your redundancy generally please do not hesitate to contact me.

In the meantime please let us know if we are able to assist you in any way in finding future employment.

We wish you all the success in the future."

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39. Mr Lim admits that he was not in the United Kingdom on 1 September 2016, the date on which the Dismissal Letter purports to have been signed and issued.

10 40. Both the Dismissal Letter, as such, and the content of the Dismissal Letter – (in so far as such content referred to decisions having been taken to reduce warehouse staff because of the need for the number of staff to carry out warehouse operations having diminished, to the consequence that the Claimant`s position would be made redundant, to having considered all 15 available alternative options, to reasons for selection for redundancy having been explained to the Claimant and to seeking to identify suitable alternative employment for the Claimant) - was a total fabrication, such a fabrication that, at best, the Dismissal Letter verged on being tainted by illegality. It is not a document which evidences any contract between the 20 2nd Respondent and the Claimant that an Employment Tribunal would seek to give effect to if relied upon by the Claimant as the sole evidence of his alleged entitlement to redundancy pay.

41. The Dismissal Letter was provided to the Claimant by the 2nd Respondent 25 on or shortly after 21 November 2016.

42. Having been provided with the Dismissal Letter on or shortly after 21 November 2016 the Claimant signed a copy of it on 24 November 2016 to signify his receipt of it and his acceptance of its terms.

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43. The Claimant expected to receive £4,719.79. If a severance payment had been paid to the Claimant as a redundancy payment it would have been

received by him without deduction by the 2nd Respondent of PAYE tax or employee national insurance contribution.

44. The Claimant never raised any grievance about his employment being terminated on 23 December 2016 and he did not appeal against the notice of termination contained in the Dismissal Letter.

45. Sometime during the period which began on 21 November 2016 and ended on 30 November 2016 the 2nd Respondent took advice from its external accountant, Mr Herbert Choc, to explain what had been agreed with the Claimant at the 21 November meeting and what had been done by way of issue to the Claimant of the Dismissal Letter.

46. Mr Choc is a Chartered Accountant with some 30 years post-qualifying experience. He is a partner in the Glasgow office of Whitelaw Wells, C.A.

47. Mr Choc had personally been involved in the incorporation of the 2nd Respondent company in 2014, was aware that the company had been incorporated under the Companies Act 2006 on 4 November 2014 and that at that time the 2nd Respondent had taken over the business previously carried out by Mr Lim`s parents and/or his parents' company for some 15 years.

48. When Mr Choc met with Mr Lim to discuss the circumstances leading up to and the fact of and content of the Dismissal Letter there was no discussion about any other member of the 2nd Respondent`s staff being made redundant. Nor was there any discussion about the need for the 2nd Respondent to reduce the overall number of employees working for it.

49. During the course of those discussions Mr Choc told Mr Lim that because the 2nd Respondent had an ongoing need for a warehouse operative who held certification authorising him to drive a forklift truck it, the 2nd Respondent, could not fairly terminate the Claimant`s employment on the

ground of redundancy, i.e. because there was in fact no cessation or diminution or expected cessation or diminution of the 2nd Respondent`s requirement for an employee to carry out work of the particular kind carried out by the Claimant in the place where the Claimant was employed by it, and that by purporting to terminate his employment on the ground of redundancy the 2nd Respondent would be opening itself up to a complaint being made by the Claimant that he had been unfairly dismissed.

50. Mr Lim admits that in November 2016 the 2nd Respondent`s business was “still expanding” and that there was no need for any member of its staff to be dismissed because of redundancy.

51. Having taken advice from Mr Choc and had further discussions with Mr MacPherson, Mr Lim decided that the 2nd Respondent would withdraw the notice of redundancy, would explain to the Claimant that there was no ground justifying termination of his employment on the pretext of redundancy and would reassure him that his employment would continue – (without break on 23 December 2016) – for the foreseeable future.

52. Mr Lim and Mr MacPherson met with the Claimant on 30 November and sought to explain that the notice of redundancy was to be withdrawn – (and why) - and to reassure the Claimant that his employment would continue, without break – (and certainly without being terminated on 23 December 2016 as had previously been agreed and been confirmed by the Dismissal Letter).

53. Mr Lim`s recollection is that the meeting on 30 November lasted for about one and a half hours and that during the course of that meeting the Claimant told him that he “had plans”, specifically that he had had a secondary source of income, a house-decorating business, that he wanted to expand, and that he wanted the support of a redundancy payment from the 2nd Respondent so as to make progress with those plans.

54. Mr Lim's recollection is that at that meeting on 30 November the Claimant "wasn`t happy" to be told both that the 2nd Respondent intended to withdraw or rescind the notice of termination of employment on the ground of redundancy as set out in the Dismissal Letter and that his, the Claimant`s, employment would continue beyond 23 December 2016.

55. So far as Mr Lim perceived it, the meeting on 30 November ended on the basis that "we all understood there was to be no redundancy". He recalls that the Claimant made angry comment about working for so many years without getting a payoff. Mr MacPherson`s recollection of that 30 November meeting was that during the course of it the Claimant indicated that he clearly understood what was being explained to him by Mr Lim but that he, the Claimant, was obviously unhappy at what was being said. Mr MacPherson refers to the Claimant using phraseology such as "so I`m not getting it" and "you work all the years and don`t get a pay off".

56. Mr MacPherson met with the Claimant again on 2 December. That meeting was not a formal or even pre-arranged one but was prompted by the Claimant again raising the matter of his request to be made redundant.

57. At that 2 December meeting Mr MacPherson again explained the 2nd Respondent`s reasons for withdrawing the notice of termination as contained in the Dismissal Letter.

58. Mr MacPherson's recollection is that at that 2 December meeting the Claimant`s response was to the effect that the 2nd Respondent`s decision "was rubbish" and that it, the 2nd Respondent, "couldn`t just do that.. ".

59. On 6 December 2016 the Claimant and Mr MacPherson were together out-with the warehouse delivering goods to a customer when the Claimant brought the matter up again and when Mr MacPherson again explained the 2nd Respondent`s reasons for withdrawing the notice of termination set out in the Dismissal Letter.

60. There were no further discussions between the Claimant and Mr MacPherson about termination of the Claimant`s employment until the effective date of termination, 23 December 2016.

61. The Claimant never acquiesced in or acceded to the 2nd Respondent`s attempts to withdraw or rescind the notice of termination of employment contained within the Dismissal Letter but those attempts did constitute an offer to the Claimant to renew his contract of employment, with such renewal to take effect immediately on the end of his employment on the basis that the provisions of the contract as renewed as to the capacity and place in which he would be employed and the other terms and conditions of his employment would not differ from the corresponding provisions of the previous contract.

62. After the Claimant`s shift had ended on 23 December Mr MacPherson – (not unusually) – gave him a lift part of the way home and gave him his pay and a Christmas bonus before telling him that he would see him again on Wednesday 28 December – (which would normally have been the Claimant's first scheduled working day after the Christmas break). The Claimant did not respond.

63. The Claimant did not turn up for work on 28 December. Indeed, he did not turn up for work again at any time after 23 December and before conclusion of the evidential part of the final hearing of his claim.

64. On 4 January 2017 the Claimant went to the 2nd Respondent`s external accountants` offices and met with a payroll officer there. At that meeting the Claimant asked for a redundancy payment cheque and for his P45 but was told that the external accountants were not aware of any changes to his employment status.

65. On 5 January, at the prior suggestion of the payroll officer that he had met on 4 January, the Claimant went back to the 2nd Respondent`s external accountants` offices and met with Mr Choc. At that meeting Mr Choc made it clear that the external accountants had no knowledge about the Claimant having been made redundant or about his employment otherwise having been terminated on the effective date of termination or on any other date.

66. Mr Lim attempted to contact the Claimant by telephone on 6 and 16 January 2017, but without success, and attempts were made by the 2nd Respondent to communicate with the Claimant by mail on 17, 19 and 27 January 2017.

67. All of these attempts to contact the Claimant either by telephone or in writing took place after the effective date of termination.

68. The 2nd Respondent has never issued the Claimant with a P45 certificate or with a cheque in payment of the "statutory redundancy pay" of "£4,719.79" referred to in the Dismissal Letter. Mr Lim accepts that that is the case. His position re this on the second day of the evidential part of the Final Hearing of the Claimant`s claim, i.e. at the stage of his giving evidence, was still that "I was able to provide him with a job for the last 12 years and I still have that job for him", that "he is still on the books" and that "he has never told me he is not coming back to work".

69. The 2nd Respondent now admits both to having made deductions totalling £125.00 from the Claimant`s wages in respect of damage alleged to have been caused by the Claimant to a forklift truck owned by the 2nd Respondent and that such deductions had not been authorised by the Claimant.

70. Mr Lim admits that he is unable to state with any precision what the Claimant`s commencement date of employment with his, Mr Lim`s parents had been and that when referring to 2 April 2001 as being his start date the

2nd Respondent has relied entirely on information provided by Mr Choc from Whitelaw Wells' records.

71. As at the effective date of termination the Claimant was not due to be paid in lieu of any accrued but untaken holiday entitlement. He had taken all of the paid holiday to which he was entitled in respect of the 2016 holiday year.

72. The Claimant was paid for all work carried out by him during the period which ended on the effective date of termination.

73. The Claimant was never provided with any terms and conditions of employment or with any statement of changes to terms and conditions of employment, whether by the 2nd Respondent directly or by any predecessor of the 2nd Respondent.

74. The Claimant has paid lodging and Hearing fees in respect of the pursuit of his claim.

**The Issues**

75. The issues identified by the Tribunal as being relevant to the determination of the Claimant`s claims were:-

- What or who had been the employer or the organisation or the person that was the Claimant`s employer at any relevant date or over any relevant period? In particular, had it been the 2nd Respondent or had it been the 1st Respondent?

- Assuming that at the relevant date the employer was the 2nd Respondent, was the Claimant dismissed by the 2nd Respondent?

- If so, was the Claimant dismissed on the ground of redundancy?

- If so, what was the effective date of termination of the Claimant`s employment?

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- If not dismissed on the ground, or pretext, of redundancy on 23 December 2016 is the Claimant's employment still continuing and, if so, on what basis?

- What sums were due to be paid by the 2nd Respondent to the
10 Claimant as at the effective date of termination of his employment?

- If any sums were due to be paid by the 2nd Respondent to the Claimant as at the effective date of termination of his employment have such sums been paid?

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- Had the Claimant ever been issued by the 2nd Respondent or the 2nd Respondent`s predecessors with either a written statement of terms and conditions of employment or a written statement of alteration of terms and conditions of employment?

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- Did the 2nd Respondent make deductions from the Claimant`s wages and, if so, was such deduction required or authorised to be made by virtue of a statutory provision or a relevant provision of the Claimant`s contract or had the Claimant previously signified in writing
25 his agreement or consent to the making of such deduction?

- If there had been such deduction what was the amount of such deduction?
- What payment in lieu of accrued but untaken holidays was the
30 Claimant entitled to receive?

- If any payment in lieu of accrued but untaken holiday was due to the Claimant as at the effective date of termination of his employment what payment in lieu of holiday did he receive?

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- Of the total monies due to the Claimant as wages, as a redundancy payment and as payment in lieu of holiday, what sums were outstanding and still due to the Claimant by the 2nd Respondent as at the date of presentation of the ET1?

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- Does an Employment Tribunal have jurisdiction to consider the Claimant`s claim for compensation based on his allegation that the 2nd Respondent "slandered" him?

**The Relevant Law**

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76. The Law:-

(a) Case Law

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- R (on the application of Unison) the Lord Chancellor 2017 UKSC 51.
- British Polythene Limited t/a "BPI Stretchfilms" v Bishop, EAT/1048/02.

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- Coombe v North East Lincolnshire Council ET Case No 2602502/12.

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(b) Legislation

- The Employment Rights Act, 1996, particularly Sections 98, 138, 141 and 163.

- The Employment Act, 2002, particularly Section 38.

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## Discussion

77. "*Oh, what a tangled web we weave, When first we practice to deceive!" (Sir Walter Scott) (*not that the Tribunal wishes to infer at all that any party has
10 deliberately set out to deceive the Tribunal).

78. In the view of the Tribunal there had certainly been – (at the very least) - optimism on the part of the Claimant that financial difficulties that he was experiencing or/and his desire to expand his painting and decorating
15 business would be lessened or aided by his receipt of a – (tax and employee national insurance contribution free) - redundancy payment – (rather than any other form of negotiated severance payment) – from the 2nd Respondent.

20 79. Having heard evidence from, on the one hand, the Claimant and, on the other hand, Mr MacPherson, Mr Choc and Mr Lim the Tribunal was left in no doubt that what led up to the very fact and content of the Dismissal Letter and its issue on 21 November 2016 had had, as its genesis, a request made by the Claimant to be made redundant.

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80. It was clear to the Tribunal, too, that because of feelings of loyalty towards a long-standing member of staff who had previously worked for his parents or his parents` company Mr Lim, as the sole shareholder and sole director of the 2nd Respondent company, was initially tempted to give whatever
30 assistance he could give to the Claimant, so much so that he personally prepared and provided the Claimant with the Dismissal Letter, a document which bore to have been dated 1 September 2016 – (a date when Mr Lim was not even in the United Kingdom but was quite literally on the other side

of the world) – and which, as if referring to facts, contained narrative that was completely and utterly untrue – (so far as a redundancy situation, consultation and inability to find alternative work for the Claimant to do was concerned).

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81. In the ET1 the Claimant claimed a redundancy payment – (amongst other things).

82. The Claimant did not claim that he was entitled to the sum referred to by him as a redundancy payment because the 2nd Respondent had somehow breached the terms of the Dismissal Letter by not paying the sum in question to him. But had he done so the Tribunal would have reached the conclusion that any contract constituted by the 2nd Respondent's issue of the Dismissal Letter document and its acceptance by the Claimant was tainted by illegality and could not be enforced by the Tribunal. In short, the Tribunal would have found that that "tainted contract" had, as its consequence, the effect of preventing consideration of a claim founded on contract.

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83. But the Claimant has not based his claim for redundancy payment on only the wording of the Dismissal Letter or on any alleged breach of a contract, whether tainted by illegality or not, that is constituted by the terms of the Dismissal Letter. To the contrary, whether or not having his employment terminated on the ground of redundancy had been fair in terms of Section 98 of ERA 1996, he bases his claim on a statutory entitlement to a redundancy payment on an argument that in terms of the Dismissal Letter the 2nd Respondent had brought his employment to an end on the ground of redundancy.

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84. This is a case in which credibility has been an important factor in the Tribunal`s assessment of the Claimant`s claim and of the 2nd Respondent`s response to the Claimant`s claim.

85. The Tribunal found the Claimant`s evidence to be at times unbelievable, on many occasions to be self-contradictory and generally not to be relied upon as being more likely to be an accurate account of what had happened than any account given by any of the 2nd Respondent`s witnesses and it has had no hesitation in reaching the conclusion that in the event of there being significant inconsistency between what the Claimant had said and what any of Mr MacPherson, Mr Choc and Mr Lim has said it was the 2nd Respondent`s witnesses` evidence that it preferred to rely upon.

86. The Tribunal was satisfied from the evidence that it heard that at all relevant times, i.e. times relevant to the various bases of his claim as set out in the ET1, the Claimant`s employer had been the 2nd Respondent and not the 1st Respondent. To put it another way, the Tribunal was satisfied that the Claimant`s claims as directed against the 1st Respondent were unfounded and that those claims against the 1st Respondent should be dismissed.

87. The Tribunal was satisfied from the evidence that it heard that for the purposes of application of ERA 1996 and other relevant legislation the Claimant had continuity of employment backdated to 2 February 1999.

88. The Tribunal was satisfied from the evidence that it heard that the facts and content of the Dismissal Letter arose from a request initially informally made by the Claimant to Mr Lim on 11 November 2016 and then more formally made on 18 November and repeated on 21 November – (the two later meetings involving not just the Claimant and Mr Lim but also Mr MacPherson).

89. The Tribunal was satisfied, too, that the Claimant was only too willing to accept that his employment would be brought to an end on 23 December 2016 on the ground – (or pretext) – of redundancy and that he was keen to receive a tax-free redundancy payment on or shortly after 23 December 2016.

90. The Tribunal has borne it in mind that in a claim for a statutory redundancy payment it is the employee who has to prove, on the balance of probabilities, that there has been a dismissal.

5 91. The Tribunal was satisfied both from the evidence that it heard and the law which it considered that the Claimant`s employment did terminate on 23 December 2016, the date given in the Dismissal Letter as being the date on which his employment would end. The Tribunal was satisfied that the terms of the Dismissal Letter were unequivocal so far as intimating dismissal with
10 effect from 23 December 2016 was concerned.

92. The Tribunal has borne it in mind, too, that there is a statutory presumption that a dismissed employee claiming a redundancy payment has been dismissed by reason of redundancy. That presumption applies unless the
15 contrary is proved. In this context Section 163(2) of ERA 1996 is relevant.

93. This is not a case where the Claimant has claimed unfair dismissal or where he has challenged the selection for redundancy. It is a case in which the Claimant has chosen only to claim a redundancy payment rather than to
20 claim compensation for unfair dismissal and it may be that that is a decision that will haunt the Claimant in the months and years ahead – (especially so now that he has heard evidence that Mr Choc very clearly warned Mr Lim that the 2nd Respondent would be exposing itself to a claim of unfair dismissal if it went ahead with termination of the Claimant`s employment on
25 the pretext of redundancy).

94. The 2nd Respondent`s defence to the Claimant`s claim for a redundancy payment has, throughout, been that the Claimant`s employment has never ended and that he is still “on the books” as an employee of the 2nd
30 Respondent, albeit an employee who is no longer being paid because of unauthorised absence from work. The 2nd Respondent has based that argument of continuity of employment, of still-continuing employment, on the fact that ERA 1996 encourages employers to seek to make an offer of

re-employment before the old employment ends and the 2nd Respondent`s representative has argued – (and through its evidence the 2nd Respondent has sought to demonstrate) - that very shortly after the Dismissal Letter was given to the Claimant serving on him notice that his employment would terminate on 23 December 2016 the Respondent, having taken advice from its external accountant Mr Choc, sought to withdraw or rescind the notice of termination of employment as contained in the Dismissal Letter.

95. The Tribunal is aware that it is well-established law that once it has been given an employer cannot unilaterally withdraw a notice of dismissal, not even dismissal based on the ground, or pretext, of redundancy and it has borne it in mind that a notice of dismissal, even dismissal based on the ground or pretext of redundancy can only be withdrawn by mutual agreement. The underlying law was considered in detail by the Employment Appeal Tribunal in the case of **British Polythene Ltd t/a "BPI Stretchfilms" v Bishop.**

96. It was clear not only from what the Claimant said but also from what Mr MacPherson and Mr Lim themselves said that the Claimant had never agreed that his employment would continue beyond the intimated, intended, date of termination. That being the case, the principles enunciated in that case of **British Polythene Ltd t/a "BPI Stretchfilms" v Bishop,** principles acknowledged by the 2nd Respondent`s representative in his closing submissions, apply.

97. Albeit acknowledging those principles in his closing submissions, the 2nd Respondent`s representative has argued that Sections 138 and 141 of ERA 1996 encourage an employer to offer, and the employee to accept, new employment as an alternative to a redundancy payment and that if an employee has been dismissed by reason of redundancy and his contract of employment is renewed either immediately or within four weeks of the dismissal then the dismissal is deemed never to have happened and there is no right to a redundancy payment. The Tribunal has taken guidance from

the case of **Coombe v North East Lincolnshire Council** where a first instance Employment Tribunal found that because the employer in that case had not made an offer to the employee of either renewal or re-engagement, but had simply sought to rescind the notice of redundancy dismissal - (which it could not do unilaterally) - the terms of Sections 138 and 141 of ERA 1996 were not engaged and it was not open to the employer to argue that the Claimant was not entitled to a redundancy payment and that even if such an offer had been made it would not have been unreasonable for the employee to refuse it.

98. The 2nd Respondent`s representative has argued, too, that if, after notice of redundancy has been issued, an employer makes an offer to the employee of his old job back on the same terms and conditions of employment but the employee turns it down it is open to the employer to argue that no statutory redundancy payment is due because the employee has unreasonably refused an offer of suitable alternative employment and that refusing to accept the job back simply to obtain a redundancy payment is in itself unreasonable.

99. Section 141 of ERA 1996 discusses the circumstance where an offer (whether in writing or not) is made to an employee before the end of his employment either to renew his contract of employment or to re-engage him under a new contract of employment with renewal or re-engagement to take effect either immediately on, or after an interval of not more than 4 weeks after, the end of his employment. Subsection (2) of Section 141 states that where subsection (3) is satisfied, the employee is not entitled to a redundancy payment if he unreasonably refuses the offer. Subsection (3) refers to that subsection (3) being satisfied where the provisions of the contract as renewed .. as to .. the capacity and place in which the employee would be employed and .. the other terms and conditions of his employment .. would not differ from the corresponding provisions of the previous contract.

100. It was clear to the Tribunal from the evidence that it heard that the proposals made by the 2nd Respondent to the Claimant on or about 30 November and early in December, i.e. before the end of his employment with it, constituted an offer to the Claimant to renew his contract of employment, with such renewal to take effect immediately on the end of his employment on the basis that the provisions of the contract as renewed as to the capacity and place in which he would be employed and the other terms and conditions of his employment would not differ from the corresponding provisions of his previous contract. An offer which was refused by the Claimant.

101. In the finding of the Tribunal the Claimant`s refusal of that offer of renewal of his contract of employment, with such renewal to take effect immediately on the end of his employment on the basis that the provisions of the contract as renewed as to the capacity and place in which he would be employed and the other terms and conditions of his employment would not differ from the corresponding provisions of the previous contract, was an unreasonable refusal.

102. The Tribunal was satisfied that genuine attempts were made by the 2nd Respondent in November and December 2016 which should be considered to be attempts to renew his existing contract on the same terms and conditions as had applied for several years and that in the circumstance that the Claimant unreasonably refused that offer Section 141 of ERA 1996 should apply to negate the Claimant`s entitlement to any redundancy payment.

103. In conclusion, so far as his claim for a redundancy payment is concerned, the Tribunal has found that although his employment was terminated on the ground, or pretext, of redundancy, and even if it might otherwise have been established that a genuine redundancy situation applied which would give rise to a statutory redundancy payment, the Claimant`s actions were such

as to make it appropriate in terms of Section 141 of ERA 1996 for the Tribunal to refuse the Claimant`s claim for a redundancy payment.

104. The Claimant`s claim as set out in the ET1 included an allegation that during the course of his employment the 2nd Respondent had made unauthorised deductions from his wages. The 2nd Respondent`s representative has conceded that there were unauthorised deductions totalling £125.00. The Tribunal has made a declaration to that effect in the "Judgment" section of this overall document and has ordered the 2nd Respondent to pay the sum of £125.00 to the Claimant in respect of such previously-unauthorised deductions from his wages.

105. The Tribunal has found that as at the effective date of termination there was no payment due to the Claimant in lieu of accrued but untaken holiday and that finding is reflected in the "Judgment" section of this overall document.

106. Section 38 of the Employment Act 2002 states that Tribunals must award compensation to an employee where, upon a successful claim being made under any of the Tribunal jurisdictions listed in Schedule 5 – (jurisdictions which include redundancy payments claims and unauthorised deductions claims) - it becomes evident that the employer was in breach of its duty to provide full and accurate written particulars under Section 1 of ERA 1996.

107. In this context it became apparent to the Tribunal during the course of the evidential part of the Final Hearing of the Claimant`s claim that at no time during the course of the Claimant`s employment with it had the 2nd Respondent sought to comply either with Section 1 of ERA 1996 by providing him with a written statement of particulars of employment or with Section 4 of ERA 1996 by providing him with a written statement containing particulars of changes to his employment particulars and that by failing to do so the 2nd Respondent had breached both Sections of that Act. So far as the 2nd Respondent`s failure to comply with Section 1 of ERA 1996 is concerned the Tribunal has determined that because Section 38 depends

on a claim brought under one of the jurisdictions referred to and because the Claimant's claim under Section 13 of ERA 1996 has been successful – (even if his claim for a redundancy payment has not been) - it has no option but to make such an award and that it is appropriate that it should make the minimum mandatory award, an award equivalent to two weeks' pay, in recognition of that failure. In the circumstance that the Claimant`s normal gross weekly pay was £248.64 the Tribunal has determined that the 2nd Respondent should be ordered to pay the sum of £497.28 to the Claimant in recognition of that failure to provide him with a written statement of particulars of employment .

108. The Tribunal has determined – (and the Claimant has accepted) - that it has no jurisdiction to consider the Claimant's application for compensation because of alleged "slander" of him by the 2nd Respondent.

109. The Tribunal has found that the Claimant has paid lodging and Hearing fees in respect of the pursuit of his claim and appropriate reference is made to such lodging and Hearing fees in the Judgment section of this overall document.

Employment Judge: Chris Lucas
Date of Judgment: 21 August 2017
Entered in register: 24 August 2017
and copied to parties