



EMPLOYMENT TRIBUNALS

Claimant: Mr A. Balu

Respondent: Masterfreight Limited

Heard at: Birmingham

On: 11 & 12 March 2020

Before: Employment Judge Hughes

Representation

Claimant: In person

Respondent: Mr P. Starcevic, Counsel

REASONS

Background and Issues

1 The claimant presented a Claim Form on the 27 December 2018. He had complied with Early Conciliation and the claim was presented in time. The dates of the claimant's employment were the 1 April 2013 – 31 July 2018. The claimant was an Operations Manager. His claim was in respect of unfair dismissal, redundancy, arrears of pay, notice pay and other payments [6]. Oral judgment was given on the second day. The claimant has since requested written reasons.

2 In the Particulars of Claim [14-16] the claimant said that he and his brother (Mukesh Balu) worked in a family-run company with his father (Kishore Balu). The claimant's case was that his father had been changing their roles and responsibilities without proper discussion or agreement. He explained that he and his brother met with the company accountant (who was not employed by the respondent but had provided accounting services for many years) and voiced concerns about their father. They wanted their father to resign from being a Director and remain as a shareholder, and for the claimant and his brother to be the management team. The claimant described a situation where there were various negotiations (the substance of which is not relevant to these proceedings) but, in summary, the proposal was that there would be a settlement sum to buy out his brother (who was a shareholder) and for he and the claimant to leave the business if their father would not take a less active role. There was then a good deal of legal correspondence which is not relevant for these purposes. The claimant was then told to work from home and on 27 July 2018 was advised by letter that his contract was terminated as from 31 July 2018. The contract was terminated without notice.

3 The respondent presented a Response Form. It was accepted out of time by Regional Employment Judge Monk [23]. The respondent's position was that there were some issues with the claimant over proposals to change his role and that the claimant (and his brother) had chosen to involve the company accountant, rather than discuss the situation with their father [30]. The respondent said that the accountant had told Mr Balu (senior) that his sons had two proposals but ultimately their preference was to leave the business. Mr Balu senior explained that on the 1 March 2018 a meeting was held at the business premises with the company accountant (Mr Terry Hitchin) present and that at this point the claimant was placed on garden leave. Most of the grounds of response concerned pre-termination settlement negotiations which are inadmissible and unnecessary for this purpose. It was the respondent's position that the claimant's employment had not been terminated on the 31 July 2018 because termination was contingent on a settlement being agreed. The respondent said that the claimant was on full pay until the end of July 2018 [40].

4 The evidence before me was a witness statement provided by Mr Kishore Balu (the claimant's father), a witness statement provided by Mr Terry Hitchin (an accountant working for Garratts Wolverhampton Ltd), a witness statement from the claimant and a witness statement from his brother (Mr Mukesh Balu, who is also sometimes referred to as Tony). The respondent's witnesses gave evidence on the first day of the hearing and the claimant gave evidence on the second day. His brother did not attend to give evidence and I explained to the claimant that I would attach less evidential weight to his brother's statement because he was not available to be questioned. In addition, there was a bundle R1 and references in square brackets are to page numbers in the bundle unless otherwise stated.

5 As will be apparent, I decided not to take into account pre-termination negotiations save to the extent that it was necessary to do so to decide if the claimant was dismissed or not. I explained to the parties which extracts of the settlement documents I intended to take into account. The respondent's representative subsequently made it clear that the respondent now accepted that there had been a dismissal and that the dismissal was without notice. The claimant accepted that he was not in a redundancy situation and that therefore there was no claim in respect of that. The claimant was not claiming arrears of pay but was claiming in respect of a car allowance.

6 Consequently, the issues that I had to determine were whether the claimant was dismissed for some other substantial reason ie: an irretrievable breakdown of his employment relationship with the respondent company and, in particular, with his father. I had to consider whether the dismissal was fair, although the respondent's representative very properly conceded that it was difficult to say that there had been a fair or, indeed, any dismissal process. The respondent argued that the claimant had caused, or contributed, to his dismissal. The respondent also argued for a Polkey deduction limited to the question of how long it would have taken for a fair procedure to have been followed. The respondent argued that the claimant had not taken reasonable steps to mitigate his loss. It was conceded by the respondent that the claimant had not been paid notice pay. The unauthorised deduction from the wages claim, the claim for redundancy payment and an application by the claimant for costs were all dismissed on withdrawal because the claimant decided not to pursue them.

Findings of Fact

7 From the evidence I saw and heard I made the following primary findings of fact relevant to the issues I had to determine.

8 The respondent had a company handbook [47-104]. The claimant claimed that he had not seen that document and his father contended that it was available in the office. I found it difficult to accept that the claimant would have been unaware that there was a company handbook but, in any event, nothing turned on this point. The company handbook was issued on the 2 April 2016 [47].

9 The bundle also contained a contract of employment dated 1 January 2017 which had not been signed by the claimant. The claimant said that he had not been issued with the contract but did accept that he had been responsible for issuing contracts to some of the other employees of the company, specifically those who reported to him. The contract said that it was between the respondent and the claimant and that he was employed as a Manager. It stated that any additional documents referred to would be available on request from “your line manager” which Mr Balu senior said was him, although the claimant contended it was his brother. The document said the claimant commenced employment on 1 April 2013 [106]. There was a provision in the contract dealing with garden leave [113]. The contract also contained a dispute and disciplinary procedure [114]. The contract had a further provision about garden leave stating that on written notice the claimant could be placed on garden leave following service of notice to terminate his employment [115]. It was common ground that the claimant was not given notice of termination of employment before being placed on garden leave. The fact is that the provisions in the contract (whether the contract was issued to the claimant or not) were not followed in his case and therefore the contract was to a large extent irrelevant.

10 There was some information in the bundle relating to overtime payments. Specifically, there was an email dated 11 August 2017 from Alisha Clare (who is the claimant’s sister) asking the claimant to authorise overtime for the two members of staff who reported to him [121]. There was also a document explaining about overtime [122]. The subject of overtime was surprisingly contentious. The claimant said that it was not part of his responsibility to organise overtime payments or to authorise them. His father said that the claimant was expected to do this but, when he refused, his brother Mr Mukesh Balu, said he would take responsibility for it, but ultimately did not. The result was that his father had to authorise the overtime. His father explained that he could not sit by and watch staff going unpaid for work that they had undertaken.

11 There was an email dated 16 January 2018 from Mr Kishore Balu to his sons. He made reference to a meeting that had taken place at the beginning of 2018 and he said he wanted to make changes to both their job roles as from the week commencing 22 January 2018. He proposed the claimant would handle sales in all areas of the business and be responsible for sorting out AEO (Authorised Economic Operator) accreditation and purchasing any software that was required. He stated that Mr Mukesh Balu would manage the office staff, warehouse staff and day-to-day operations. The claimant said this was a unilateral proposal being imposed upon him and that he did not agree with it. His father said that he had taken the view that this would make the business more

efficient because the claimant's expertise was in dealing with people and consequently he would be a good person to be responsible for sales. There was an email from his son Mukesh (Tony) Balu sent on the 19 January 2018 asking for a meeting on the 22 January to discuss the situation. Mr Kishore Balu replied saying that it would not be possible to meet on the 22 January, but if they were to email their questions and views he would look at them later that evening (that email was sent first thing in the morning on the 22 January). Mr Mukesh (Tony) Balu replied at 8.21 a.m. copying the claimant in. He said as follows: "No that is not the way to do things, we need to discuss these matters face to face. Sorting the rear yard is not as important as this meeting. We all have to make time today without fail to sort [this out]". There was then an email on the 22 January from Mrs Clare (the claimant's sister) to the claimant and his brother, copied to their father, saying that since they had not authorised the overtime she had taken responsibility for sorting it out. She stated that going forward, if overtime had not been calculated when she had to complete the payroll, the staff would not be paid overtime for that month, and if they were to query it, they would be told to speak to the claimant or his brother for an explanation. The claimant's brother responded by saying he would sit down with the claimant and make sure someone was responsible for overtime. From this it was clear that the overtime issue continued to be a source of contention and, as previously stated, the claimant's father eventually took responsibility for it.

12 I heard evidence from Mr Terry Hitchen who I found to be a good and reliable witness. In summary, he described having met with the claimant and his brother at their request. He said they voiced concerns about their father's conduct of the business and alleged he was making unilateral decisions impacting on their authority. He said they put forward the proposal that their father should cease to be a Director and relinquish day-to-day control to them or, alternatively, that they should leave the business and the respondent company should purchase Mr Mukesh Balu's shareholding. Mr Hitchen's evidence was that the claimant had participated in that discussion as though he were a shareholder when, in fact, he was not. He said that Mr Mukesh Balu said that as far as they (i.e. the brothers) were concerned they were in effect equal shareholders. Mr Hitchen said he found himself in an unusual and difficult position but agreed to their request to discuss their proposals with their father. He said on the day that he was due to discuss it, he received a phone call from Mr Mukesh Balu saying that he and the claimant now wanted to exit the business. Mr Hitchen said that he explained this to Mr Balu senior. Mr Hitchen also explained that he was asked to attend a meeting between Mr Balu senior and his sons on 1 March 2018 and agreed to do so as an independent party. He hoped to help resolve matters between the family members. He said there were separate meetings with the claimant and his brother and that this was because his brother was a shareholder and the claimant was not. He said that Mr Kishore Balu had told the claimant that he would place him on garden leave and try to resolve his alleged grievances and that this would be with immediate effect because the claimant had already decided to leave his employment. The claimant did not cover the meeting in any detail, save to describe it as "an ambush". There was a description of the meeting in the witness statement of Mr Mukesh Balu where he also used the term "ambushed" and said that they were called into separate meetings with the claimant having been called into the boardroom on his own after his meeting with Mr Hitchen and his father.

13 There was an email dated the 26 February from Mr Hitchen to Mr Mukesh Balu (Tony) which had been copied to the claimant and his father. He stated: "As instructed by you, I had a meeting with Kishore and outlined your grievances which he would have been prepared to discuss directly with you. However, as you instructed, I informed him that you and Ajay (the claimant) had decided to leave Masterfreight Limited and you wanted the company to buy your shares". He sent a further email on the same day, but this was not copied to the claimant [128A]. In that email, Mr Hitchen said that Mr Balu senior wanted them to put their specific grievances in writing and meet to try and reach an amicable resolution. He said: "I would suggest that this is the best course of action for the company and the family and it is certainly worth the effort before this goes any further".

14 On 5 March 2018 Mr Kishore Balu sent an email to the claimant and Mr Hitchen entitled "Grievance Meeting". He stated: "Following on from our meeting on Thursday 1 March 2018, I have compiled a proposal for your review. The proposal has been designed to facilitate a way forward in the hope of reaching a fair resolution for both you and the company. I would like to take this opportunity to note that I accept that both you and Mukesh have grievances and confirm those matters will be treated and addressed independently". He proposed that the company grievance policy should be followed with a view to resolving the grievance and maintaining the claimant's ongoing employment. He said: "If you feel a formal grievance procedure will not suffice, I see no alternative but to discuss and agree an exit plan (termination of employment)". He asked the claimant not to contact any of the staff directly and to return company property [129]. Mr Mukesh Balu sent an email to his father and to Mr Hitchen on the same day in which he stated: "On a separate note, Ajay (the claimant) has brought to my attention this morning that he too has received a similar email from you (which I have a copy of). This too is out of order and not required and I have advised Ajay not to reply on the basis that... no further action will be taken against him, as you are jeopardising the business as you are taking a personal attack at him which has no grounds within his employment at Masterfreight Ltd. I have reassured Ajay that a repeat of this will not happen again and thankfully he has gracefully accepted". The claimant was not copied into that email and he was not copied into the reply, which was sent by his father on 5 March, in which he stated that he would arrange to meet the claimant and until then, he would remain on garden leave. On 6 March 2018, Mr Kishore Balu sent an email to his sons which was copied to Mr Hitchen. He confirmed that the claimant should remain on garden leave. He said he understood the claimant had been instructed by his brother not to reply, but that: "Your appointed position of Manager has a direct reporting line into myself, this reporting line is also shared by Mukesh Balu. With this in mind, the instruction received from Mukesh on the 5 March 2018 stating no reply is required is outside the remit of his authority and therefore not valid. Please note, your direct reports are assuming to my report line and will subsequently receive operational instructions from myself". He asked the claimant to reply to his email of 5 March to try to resolve the situation [132]. He sent a further email the same day asking his sons to respect the garden leave procedure and not go into work because he did not want any bad feeling upsetting work operations.

15 On the 15 June 2018, Mr Mukesh Balu responded to an email about a meeting to discuss an exit plan for his sons. The meeting was scheduled for the 25 June 2018. The claimant was not copied into that email. It is fair to say that

the claimant's brother was very much taking the lead in these matters and appeared to be speaking on behalf of the claimant as well as himself in much of the email correspondence. It is difficult to assess precisely what his role was given that he did not attend to give evidence but it is fair evident that the claimant appeared to be following his brother's line, notwithstanding that he was not in fact a shareholder.

16 An incident arose which was brought to the attention of Mrs Clare, her father and her brother Mukesh. She was sent an email on 18 July 2018 by a member of staff called Mrs Harbinder Loi. Mrs Loi stated that she was aware that Mrs Clare was on maternity leave but she wanted an attached grievance letter to be addressed and some form of reassurance from both Kishore Balu and Tony (i.e. Mukesh) Balu that she would not be placed in such a situation again [156]. The attachment was dated 17 July 2018 and was described as a formal note to raise a concern as to how she had been treated. Mrs Loi said she had an incident with Tony (Mukesh) and Ajay (the claimant) which left her feeling very distressed and upset. She said she was not raising a formal grievance but wanted the situation addressing so there was no recurrence. She said that Mr Mukesh Balu (Tony) had gone into the accounts office and asked for information off the accounts system. When she told him that he had to speak to his father before she could give him the information, he left the office and said in a "high" tone of voice that everybody would be hearing from his solicitor. Mrs Loi said this made her feel very unsettled at work. She went on to say that later that afternoon, both Tony and Ajay came into the accounts office and said she was wrong to withhold the Sage accounts information because Tony was a shareholder and entitled to the information without the consent of his father, Kishore. Ms Loi said she reiterated they must contact Kishore for the information and that they were putting her in an awkward position. She said their reply was that it was their father (Kishore) who was putting her in an awkward position. Mrs Loi said the claimant raised his voice and said that she should email the HR Department about the position his father had put her in. She stated that she would not accept the way she had been treated that day and that it was unacceptable, upsetting, and unsettling and causing her a lot of stress about going into work. When giving evidence, the claimant's account differed from Mrs Loi's. He maintained that his father was at fault. Clearly that opinion was not shared by the complainant, Mrs Loi. At the time this incident occurred, the claimant and his brother were on garden leave and the only reason Mr Mukesh Balu had for trying to access the accounts was to value his shareholding.

17 On 27 July 2018 the respondent's solicitors wrote to the claimant [165]. Most of the content is inadmissible, however, it did state that the claimant's contract of employment would terminate on 31 July 2018. A further letter from the respondent's solicitors sent 6 August 2018 stated that because the claimant's contract of employment had terminated on 31 July 2018 he was entitled to no further remuneration from the respondent [173]. Solicitors acting on behalf of the claimant and his brother sent an email to the respondent's solicitors stating that they did not accept the decision made unilaterally by Mr Kishore Balu to dismiss the claimant was appropriate and that he had clear grounds to claim unfair dismissal/wrongful dismissal. It requested that Mr Kishore Balu reconsider his unilateral decision to terminate the claimant's employment which it described a "confrontational and unhelpful".

18 The claimant did not make any efforts to find work during the four-month period when he was on garden leave. He was paid by the respondent up to 31 July 2018 and could have looked for other work. He considered the possibility of enrolling on a project management course online but ultimately did not pursue that option [181-184]. Again, that was something he could have started during garden leave to gain additional skills and make him more marketable.

19 On 29 August, Mr Mukesh Balu withdrew two sums of money in cash from the respondent's bank account. These were for £3,000.00 and £1,333.00. Mrs Loi queried this with him on 4 September. He confirmed the two cash withdrawals were made by him [187].

20 In the claimant's schedule of loss, he included an amount in respect of car allowance, holiday allowance, tyre maintenance and car servicing and maintenance. The holiday allowance was a sum paid to him by his father personally and therefore cannot be an item of compensation. The claimant's father accepted that the claimant was paid a car allowance and that the servicing and maintenance of his vehicle and tyres was also paid for by the respondent. The claimant also included the sum of £4,330.00 which he said was a verbal loan agreement with his brother Mr Mukesh Balu [43]. This was the sum that Mr Mukesh Balu withdrew from the bank and give it to the claimant by way of salary after he had been dismissed. I was informed that this sum had been deducted from the settlement figure reached with Mr Mukesh Balu. I accepted this money was wrongly taken from the company account and that the claimant must give credit for it. The other point to be made about the alleged verbal loan agreement is that the schedule of loss already included wage loss as from 31 July 2018 onwards. Therefore, by including this sum, the claimant was claiming that sum of money twice.

Submissions

21 The respondent's representative made brief oral submissions because he had provided a skeleton argument – R2. Much of what was in the skeleton argument had fallen away for the reasons previously discussed. In summary, it was the respondent's case that the claimant was dismissed without a proper procedure for some other substantial reason ie: an irretrievable breakdown in the claimant's relationship with the respondent and with his father. The binary options i.e. "We control the business, or we leave", left the respondent with no choice. Mr Starcevic submitted that the claimant had contributed to his dismissal very substantially by his behaviour in the meeting between him and his father with Mr Hitchen trying to arbitrate. The respondent argued that any compensatory award should be limited to the time it would have taken to follow a fair process (Polkey). The respondent accepted the claimant was entitled to notice pay. Because there was dispute as to whether the contract of employment in the bundle applied [105], it was to be assumed that statutory notice would apply. The respondent also submitted the claimant failed to mitigate his loss.

22 The claimant was offered the opportunity to collect his thoughts but said that he did not require this. He said that he did not agree that the breakdown in the working and family relationships amounted to some other substantial reason. He said that he had been brought up by his father to resolve things by round the table discussions but that in this instance his father had refused to do this and instead engaged solicitors. The claimant added that he had not wanted to leave

the business and that the schedule was incorrect because it only accounted for the period up to the 23 September 2019 which was when the hearing was originally listed. The claimant confirmed he was not claiming costs.

The Law

23 The relevant statutory provisions are contained in section 98 of the Employment Rights Act 1996 ("The 1996 Act"):

98 General

(1) In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show –

- (a) the reason (or, if more than one, the principal reason) for the dismissal, and
- (b) that it is either for a reason falling within sub-section (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.

.....

(4) Where the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer) –

- (a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as sufficient reason for dismissing the employee, and
- (b) shall be determined in accordance with equity and the substantial merits of the case.

24 The respondent must satisfy the tribunal as to the reason, or principal reason for dismissal, and that the reason is one listed in section 98(2) of the 1996 Act, or is for some other substantial reason. If the respondent establishes a potentially fair reason for dismissal, the tribunal then must consider the question of fairness, which must be done in accordance with the provisions of section 98(4) of the 1996 Act.

25 In this case the reason was said to be some other substantial reason ("SOSR"). SOSR dismissals can arise in a number of different circumstances. In this case the reason relied on by the respondent was an irremediable breakdown in the trust and confidence necessary for the employment relationship to function. In Perkins v St George's Healthcare Trust [2006] ICR 617 CA, personality clashes with colleagues was held to be SOSR. In Ezsias v North Glamorgan NHS Trust UKEAT/0399/09 an employee who has been dismissed because of the breakdown of working relationships between himself and his colleagues (irrespective of whether he had been responsible for, or had contributed to, that breakdown) had not had action taken against him because of his conduct. The reason for his dismissal was SOSR. Accordingly, it had been open to the Employment Tribunal to rule that such disciplinary procedures as applied when allegations of misconduct were made did not have to be invoked in his case. In Leach v OFCOM [2012] IRLR 839 (CA) Mummery LJ said: "The mutual duty of

trust and confidence, as developed in the case law of recent years, is an obligation at the heart of the employment relationship. I would not wish to say anything to diminish its significance. It should, however, be said that it is not a convenient label to stick on any situation, in which the employer feels let down by an employee, or which the employer can use as a valid reason for dismissal whenever a conduct reason is not available or appropriate. The circumstances of dismissal differ from case to case. In order to decide the reason for dismissal, and whether it is substantial and sufficient to justify dismissal, the Employment Tribunal has to examine all the relevant circumstances”.

26 If the dismissal was unfair, the tribunal should consider the chance of the claimant being dismissed if a fair procedure had been followed (Polkey). In addition, the respondent argued that the claimant had contributed to his dismissal. As regards the question of contributory conduct, section 123(6) of the 1996 Act provides that where the tribunal finds that the dismissal was to any extent caused or contributed to by the action of the complainant, it shall reduce the amount of the compensatory award by such proportion as it considers just and equitable having regard to that finding. Section 122(2) provides that where the tribunal considers the conduct of the complainant before the dismissal was such that it would be just and equitable to reduce or further reduce the amount of the basic award to any extent, the tribunal shall reduce or further reduce that amount accordingly. If the tribunal considers there was culpable or blameworthy conduct then contribution will be an issue – see Nelson v British Broadcasting Corporation No.2 [1979] IRLR 346 CA,

Conclusions

27 Applying the above legal principles it was manifestly clear that there had been an irremediable breakdown in the trust and confidence necessary for the employment relationship to function. This was a truly sad case. The claimant and his father were both extremely distressed by the breakdown of their working and family relationship. I thought that they were both truthful witnesses and that Mr Hitchen was a very credible witness. The reality is that there came a point where the claimant and his brother took the view that his father was seeking to impose unilateral conditions on them. It appears that things such as the dispute over responsibility for signing off on overtime got blown out of proportion. The unfortunate result was that the claimant and his brother became entrenched in terms of the two options they put forward, i.e. “You step down as Director and we manage the company, or we leave the company”, which later became “We leave the company”. A good deal of the background to this case was not relevant in because it concerned pre-termination settlement discussions, most of which seemed to be in respect of the claimant’s brother who was a 50% shareholder. The claimant was not a shareholder but did appear to think that he should have the same status as a matter of morality, if not law. From his statement, it appears that his brother took a similar view. It is very clear that the employment relationship had broken down irretrievably and that the reason for the dismissal was some other substantial reason.

28 I did not think that the claimant had caused or contributed to his dismissal because I thought that in many respects, both sides were equally at fault and both parties found themselves in a situation where there was no going back. I did not think that the claimant, or the respondent could be said to be culpable or blameworthy for what was, on any analysis, a very difficult and upsetting situation for all concerned. However, it was also very clear that after the point of no return, the claimant’s dismissal was inevitable. Therefore, if the respondent had followed a proper procedure, the claimant would have been dismissed in any event. I took

the view that this would have taken a month. The claimant's claim for notice pay also succeeded but overlaps with the compensatory award for loss of earnings.

29 The parties agreed that the claimant was entitled to a basic award of £2,540.00. The claimant was also entitled to notice pay for the period of seven weeks calculated at £2,000.00 per month. The claimant was also entitled to loss of statutory rights. The sum which the claimant received as a result of the actions of his brother was £4,333.00 which fell to be offset against loss of earnings and/or notice pay. Consequently, the total award was the basic award of £2,540.00 plus £300.00 for loss of statutory rights, which gave a total amount of £2,840.00. The Recoupment Regulations do not apply. I wish the parties well for the future.

Signed by: Employment Judge Hughes

Signed on: 9 June 2020