EMPLOYMENT TRIBUNALS

Claimant: **Mr J Dunne**

Respondent: **Lumina Investments Limited**

Heard at: **Cardiff** **On: 26 and 27 November 2020**

Before: **Employment Judge S Moore (sitting alone)**

Representation:
Claimant: Mr Griffiths (Counsel)
Respondent: Mr Tudgay (Management Consultant)

JUDGMENT having been sent to the parties on 1 December 2020 and written reasons having been requested in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided:

REASONS

Background and Introduction

1. The ET1 was presented on 12 May 2020 following ACAS early conciliation starting on 24 February 2020 with Day B being 24 March 2020. The Claimant brought claims of constructive unfair dismissal, automatic unfair dismissal contrary to Section 104 of the Employment Rights Act 1996 and an unauthorised deduction from wages claim in respect of holiday pay, wages, statutory sick pay, and notice pay.

2. There was a bundle of 86 pages. I heard evidence from the Claimant who was represented by Mr Griffiths of Counsel. I also heard evidence from Mr Tudgay, Management Consultant for the Respondent (who also represented the Respondent in these proceedings) and Mr Jaswal who is a Director of the Respondent.

Issues

3. The issues in the claim were as set out in Judge Ryan's case management order at paragraph 4 dated 31 July 2020.

The Law

Constructive Unfair Dismissal

4. The relevant law is contained in Section 95 (1) c) ERA 1996 which sets out circumstances in which the Claimant will be dismissed if the employee terminates the contract.

5. Following *Western Excavating (ECC) v Sharp [1978] IRLR 27*, the employee must establish:
   - that there was a fundamental breach of contract by the employer;
   - that the employer's breach caused the Claimant to resign;
   - the employee must not delay too long before resigning or he will have affirmed the breach and lose the right to be discharged from the contract.

6. In *Malik & Mahmud v Bank of Credit & Commerce International SA [1997] 3 W.L.R 95* the implied term of mutual trust and confidence was held to be as follows:

"The employer shall not without reasonable and proper cause conduct itself in a manner calculated and likely to destroy or seriously damage the relationship of confidence and trust between employer and employee."

Automatic Unfair Dismissal – asserting a statutory right

7. Section 104 ERA 1996 provides:

104 Assertion of statutory right

(1) An employee who is dismissed shall be regarded for the purposes of this Part as unfairly dismissed if the reason (or, if more than one, the principal reason) for the dismissal is that the employee—

(a) brought proceedings against the employer to enforce a right of his which is a relevant statutory right, or

(b) alleged that the employer had infringed a right of his which is a relevant statutory right.

(2) It is immaterial for the purposes of subsection (1)—

(a) whether or not the employee has the right, or

(b) whether or not the right has been infringed;

but, for that subsection to apply, the claim to the right and that it has been infringed must be made in good faith.

(3) It is sufficient for subsection (1) to apply that the employee, without specifying the right, made it reasonably clear to the employer what the right claimed to have been infringed was.

(4) The following are relevant statutory rights for the purposes of this section—

(a) any right conferred by this Act for which the remedy for its infringement is by way of a complaint or reference to an employment tribunal,

……..

8. In relation to the reason or principal reason, the bringing of the proceedings to enforce a statutory right must be the primary motivation for the dismissal rather than a material influence.

9. If the dismissal is procedurally unfair the Tribunal must assess the percentage chance of the Claimant being fairly dismissed *(Polkey v AE Dayton Services Ltd [1987] IRLR 503, [1987].*

Unauthorised Deduction from Wages

10. The right not to suffer unauthorised deduction from wages is as set out in Section 13 ERA 1996. The definition of wages in S27 ERA 1996 includes holiday pay, statutory sick pay and notice pay payable under the contract of employment.

Findings of Fact

11. This is a case very heavily dependent on findings of fact and I have taken some care to make some findings based on the evidence before me on the balance of probabilities.

12. The Claimant commenced employment with the Respondent on 28 February 2006 as a Chef. He worked at the Ty Newydd Country Hotel in Aberdare. His contract of employment signed on 11 March 2018 did not provide for any set hours and stated hours would be worked as 'would

reasonably be required and determined by the management depending on company workloads'.

13. His gross weekly pay at the time of his dismissal was £384.46 and his net weekly pay was £296.07.

14. On 12 June 2019 the Claimant brought a Tribunal claim against the Respondent for unauthorised deduction from wages. He succeeded in his claim and Judgment was awarded in his favour in the sum of £1671.00 by Employment Judge Brace. The Respondent duly paid this sum to the Claimant.

15. Employment Judge Brace made a finding of fact that in February 2019 the Claimant had indicated a desire to work reduced hours of 16 to 20 hours per week and they would take effect from the beginning of March 2019. Crucially in relation to the issues in this claim, EJ Brace also found that there was no agreed variation with regards to pay. As such, at the time of the Judgment (written reasons were provided on 21 October 2019), despite a reduction in working hours the Claimant continued to be contractually entitled to an annual salary of £20,000.

16. I now turn to events leading to this claim.

17. On 4 April 2019 the former General Manager of the Hotel, Charlene Evans sent the Claimant an email regarding his holiday entitlement. This set out a table with columns indicating the Claimant was contracted to work 192 hours per month and compared it to the number of hours he had actually worked between April 2018 and March 2019. The Claimant was said to have owed a shortfall of 433.5 hours between his contracted hours and actual hours and is recorded as having taken 28 days holiday, this being his contractual entitlement during that particular year.

18. For reasons I was not able to understand and heard no evidence on, the email concluded that the Claimant would therefore lose half of his annual entitlement for the year 2019/2020.

19. The Respondent's holiday year runs from 1 April – 31 March. At the time of the Claimant's employment terminated he had accrued 24.4 days holiday.

20. On 2 May 2019 the Claimant commenced a period of sick leave. Initially the Fit Notes stated he was absent for reasons of diabetes and this later changed to stress at work. The Claimant was paid statutory sick pay by the Respondent and the last Fit Note ran from 7 October to 22 November 2019 backdated with the assessment taking place on 22 October 2019. The last payment from the Respondent in terms of statutory sick pay was in his

October 2019 salary which was paid at the end of October 2019. Hereafter there is a significant dispute of fact between the parties.

21. There was a typed resignation letter in the bundle dated 31 October 2019. The Claimant's case being that this was a forged letter with a signature not by his hand. The letter was typed with the Claimant's name and address at the top and addressed to Charlene Evans with the full hotel address underneath. The letter unequivocally sets out the Claimant's resignation with immediate effect. It is signed with a signature that appears identical to the signature on the Claimant's contract of employment.

22. It is the Claimant's case is that this letter is a forgery and the signature is not by his hand. He suggests someone has copied his signature from his contract of employment as it was identical to that signature and not his usual signature which he signed under duress during a busy kitchen shift. His signature on the contract was a large style signature which overlapped the text and underlined on the contract. It is difficult to see how someone could copy that signature by, for example, scanning it or copying it without the overlapping text becoming visible.

23. The Claimant's evidence is that he presented for work as fit on 23 November 2019 and did not receive any response from the Respondent. He chased again in December 2019 with still no response. The Claimant's ET1 stated he had emailed the Respondent but these emails were not in the bundle. The Claimant was asked about this in cross examination and told the Tribunal he had contacted Charlene Evans on a number of occasions and spoken to her and sent her Fit Notes signifying he was fit to return to work under a cover letter. This was also not in the bundle and he had not thought to keep a copy. The Claimant told the Tribunal he had also spoken to someone called Dee on Reception but could not remember when he spoke to them or explain why the emails had not been produced in the bundle. He also said that he had spoken to Mr Jaswal, but this was not in his witness statement.

24. On 14 January 2020 the Claimant sent an email to Mr Jaswal resigning with immediate effect. The emails produced to the Tribunal in the bundle did not set out the full email address. They were printed versions of the emails and the addressee has defaulted to the name "Gurjiet' which is Mr Jaswal's first name. Therefore it was not possible to identify from the copy emails the exact email address to whom the emails had been sent.

25. There were a number of other emails sent by the Claimant on 23 and 28 January 2020 chasing a response and it is the Respondent's position that they never received these emails.

26. It was repeatedly put to the Claimant that he had found out that Charlene Evans had left and this resulted in the Claimant fabricating this case that he had never resigned. It was not clear to me why Charlene Evan's departure would have had this result. No evidence was led on this by the Respondent although it was referenced in the Response. The Claimant was categorical in his denial of this allegation. It was also put to the Claimant that the hotel's phone bill showed three phone calls that had been made to his mobile in the month leading up to 31 October 2019. The Tribunal had sight of the bill which showed three calls to the Claimant's number totaling a cost of 6p. It did not show the duration of the calls and the Respondent led no evidence as to who had made the calls or what if any conversations were had. The Claimant accepted the number was his but could not say if he had received the calls and he did not know how to respond to the question.

27. The Respondents' evidence was as follows.

28. It is important to note the Respondent did not call Charlene Evans (the former General Manager of the hotel) to give evidence. The Tribunal was told she no longer works for the business, but no witness order had been applied for. This was a matter for the Respondent but they chose to present their case without a material witness..

29. Although Mr Tudgay was employed by the Respondent at the time of these events he had no direct personal knowledge or dealings with the disputed matters of fact within these proceedings and candidly and rightly accepted so when asked by Counsel for the Claimant.

30. There was a further letter in the bundle purportedly from Mr Jaswal to the Claimant dated 3 November 2019 acknowledging receipt of the resignation. The signature on the letter was not Mr Jaswal's as it states "pp".

31. The Tribunal had no direct evidence from Mr Jaswal's witness statement as to how the resignation letter had been received and by whom and also when. His witness statement consisted of 5 sentences containing no detail surrounding the receipt of the resignation letter.

32. The following evidence in this paragraph and paragraph 34 and 35 was therefore provided for the first time in answers to cross examination. Mr Jaswal is not based at the hotel and is based in London. Prior to COVID he would visit the hotel every few weeks, but the hotel generally was run by management, namely Charlene Evans.

33. Mr Jaswal's evidence to the Tribunal was vague and at times contradictory. Mr Jaswal firstly told the Tribunal it was the Respondent's case that the letter had arrived by post. He accepted he did not receive the letter personally. He told the Tribunal he had seen a copy of the letter and he

assumed the original was on a file somewhere, but then said he could not recall if an original exists. His answer then changed when asked again, that he had, at some point seen the original and insisted his evidence to the Tribunal had always been that he had seen the original.

34. Mr Jaswal accepted that it may have been up to 2 weeks before the resignation letter came to his attention, but he had been alerted on the day that the Claimant had resigned by the General Manager and that the General Manager "would have" written the letter acknowledging the resignation and "pp'd" it. The reason none of this had been set out in his witness statement was that he had not realised he had to do so.

35. The Claimant was not paid any statutory sick pay during November or December 2019 and the only payment received during that time was a tax rebate. A P45 was in the bundle with a leave date of 31 October 2019 and was dated 3 November 2019, but there was no evidence before me as to who prepared this P45, whether it was sent to the Claimant and when it was sent to the Claimant or HMRC.

36. I have accepted the Claimant's evidence and make a finding of fact that he did not send the letter of the resignation dated 31 October 2019. I do so because I find it implausible the Claimant would construct and fabricate this entire case after finding out that the General Manager had departed from the business on an opportunist basis. I heard no evidence why the General Manager's departure would result in the Claimant fabricating his case. This was an extremely serious allegation to make against the Claimant that he would be willing to commit perjury and fabricate documents with no evidence before me as to why he would take such a gamble. This would have also required the Claimant to have embarked on forging a series of emails to Mr Jaswal in January 2020.

37. I have balanced this against the lack of evidence from the Respondent in terms of volume and substance. The Respondent has wholly failed to rebut the Claimant's case. I do not find that Mr Jaswal has been untruthful, moreover that he had no direct dealings with the circumstances surrounding the alleged receipt of the resignation letter and the Respondent chose not to call the one witness that could have addressed these matters, Charlene Evans.

38. The was a wholescale absence of evidence as to the circumstances of the receipt of the letter and the evidence I heard today was not in the witness statements. Some of the evidence was hearsay as Mr Jaswal did not deal directly with the Claimant's resignation. Indeed it remained unclear to me who is said to have received and processed the Claimant's resignation letter. I also accepted the Claimant's evidence that he attempted to contact

the General Manager from the period of 23 November 2019 through to his resignation in an attempt to return to work, but no shift offers of work were forthcoming. I did not hear evidence to the contrary and there is no reason why I should not accept the evidence of the Claimant, who appeared before me.

39. Following the Claimant's termination of employment he continues to receive his state pension. The Claimant is 68 years of age and has received no other benefits. He applied for one job as a Delivery Driver in March 2020. The Claimant candidly accepted, when asked by me about mitigation, that he has not bothered to apply for any other jobs due to COVID, his diabetes and his age. He did not receive a shielding letter. Sadly the Claimant's mother passed away in February 2020 and he was engaged in arranging her affairs for a period of time at that time.

40. The chefs employed by the Respondent were furloughed at the time of the first UK lockdown and have remained furloughed since.

41. I recalled Mr Jaswal to give further evidence relevant to the issue of compensatory award pursuant to Rule 41 and in accordance with the overriding objective. Mr Jaswal informed the Tribunal that the hotel had been closed for refurbishment from 26 December 2019 to 31 January 2019. Mr Jaswal gave evidence that had the Claimant returned to work he would in all likelihood have worked part-time to build himself up after a lengthy period of absence. The hotel traded for 4 days a week in February 2019 and the hotel closed from 18 March 2019 due to the UK lockdown. It stayed closed to date except for the duration of August when they reopened for "Eat Out to Help Out" and the chefs were furloughed throughout that period save for August 2019.

42. The Claimant also had the opportunity to give further evidence on remedy. He told the Tribunal that he would not have accepted part-time shifts as it was not worth his while living in Swansea and commuting to Aberdare. The Claimant maintains that he would have returned on full shifts working the maximum hours available in accordance with what would be offered by the hotel.

43. I find that when the Claimant presented as fit to return to work it would not have been on full time hours but on the 16-20 hours per week as per his request and as per the finding of EJ Brace in her Judgment. I find it implausible that following a long period of sickness absence that the position would have changed on the Claimant's return to work had he done so in November 2019 and started to immediately want to work full-time or greater hours. Indeed why would he have done so when he had a Judgment that determined his contractual terms were to work reduced hours for the same salary.

44. Having made this finding I turn make findings as to what would have happened had the Claimant returned to work on the 16-20 hours per week in regard to his salary. At this point in time, the Respondent had a Judgment that had found there was no agreed variation as to salary. They would have faced a number of choices, namely, carry on paying the Claimant the contractual salary of £20,000 pa. for 16-20 hours per week work, which was the lawful and contractual obligation they were under. Counsel for the Claimant invited me to find that the Claimant's remedy must be assessed on this basis and awarded at the full loss throughout the relevant period that I decide to award compensation for.

45. I gave the Respondent the opportunity to adduce evidence about what would have happened in that situation and I did not hear any further evidence other that what I have set out above.

46. I have therefore considered whether it was likely, or how likely it was, that the Respondent would have continued with the state of affairs as found by Judge Brace to be a legally binding and contractual state of affairs to have paid the Claimant £20,000 per annum for working between 16-20 hours per week.

47. I have concluded that it is far too speculative for me to say with any certainty what would have happened in that situation other than the contractual position must be said to be paramount and have remained in place until the point of dismissal. The reason I have found the dismissal to be the date is that this is the point in time where I can be certain the contract terminated.

48. Having taken that into account, I have also considered what the evidence was that the loss would have continued indefinitely at the rate of £20,000 per annum. I have concluded based on the evidence before me that the answer to that must be no. I have taken into account factors such as the Claimant's age, health and that he had already asked to reduce his hours. I do not think it is plausible that but for the dismissal, the Claimant would have returned to work full time.

49. Had he done so; I find that it is inconceivable the Respondent would have continued to pay the Claimant £20,000 in return for him working 16-20 hours per week. The Respondent is a small employer running a country hotel with 25 employees.

50. I also find on the evidence before me that the Claimant as of the end of March 2020 has failed to mitigate his loss. I have taken into account the situation at the time in March 2020 with the UK lockdown and the pandemic that began to affect the entire country and the impact on job prospects. However the Claimant accepted that he took no steps, apart from the

delivery driver application to look for work. Had he done so my conclusion may have been different, but the Claimant quite candidly accepted he had taken none and he had decided not to bother.

Conclusions

Unfair dismissal Claim

51. The Respondent prevented the Claimant from working after he presented as fit for work from 23 November 2019. He was not offered any shifts and therefore was denied the ability to work and earn wages. This in my Judgment amounted to a fundamental breach of contract by the Respondent which entitled the Claimant to treat the contract at an end. He did not wait to long to affirm the breach. He sought a resolution by contacting the general manager but to no avail.

Automatic unfair dismissal claim

52. I have concluded that the reason or principal reason the Claimant was dismissed was that he had brought the earlier Tribunal claim for unauthorised deduction from wages which is a relevant statutory right under S104 (1) (a) ERA 1996. The reason advanced by the Respondent was that the Claimant had resigned. As I have found the Claimant did not resign and no other reason was put forward I have concluded that the reason for the dismissal must have been the earlier proceedings.

53. Having regard to the compensation for unfair dismissal and I have concluded as follows. S123 ERA 1996 provides that the amount of the compensatory award shall be such amount as the tribunal considers just and equitable in all the circumstances having regard to the loss sustained by the complainant in consequence of the dismissal in so far as that loss is attributable to action taken by the employer.

54. I make a basic award of £7496.97.

55. In relation to the compensatory award I consider that the notice pay I have awarded of 12 week's gross pay is an amount which is just and equitable to compensate the Claimant for his loss taking into account my finding that as of the end of March 2020 he has failed to mitigate his loss. I make no criticism of the Claimant at all in this regard for the reasons he decided not to search for alternative work due to his age and the pandemic and his diabetes, but it must follow that this decision should not fall on the shoulders of the Respondent to burden for an interminable period of loss thereafter for which they should compensate the Claimant. To make such a finding would not be in accordance with S123. Therefore for these reasons I award the

Claimant 12 weeks' notice pay and do not make any further award in respect of future loss.

56. Had I to consider a Polkey argument I would have concluded that there was a 100% chance the Claimant would have been dismissed if a fair procedure had been followed. The reason I have concluded this is I have found above it would be inconceivable that the Respondent would have continued to pay the Claimant a salary previously allocated to a full-time chef to one working 16-20 hours per week. In reaching this conclusion I am mindful that the Respondent should not profit from a conclusion that they would have been in breach of contract in failing to pay the Claimant the contractual salary. However the respondent could have lawfully terminated the Claimant's contract and offered new terms based on wages reflecting the reduced hours subject to suitable compensation. Tt is far more plausible to conclude, on the balance of probabilities, recognising the necessary degree of speculation, hat the Respondent would not have continued to pay the Claimant the annual salary of £20,000 for less hours following a fair procedure.

Unauthorised deduction from wages

57. The Claimant did not receive any statutory sick pay after 31 October 2019. He was so entitled to have received the SSP between 1.11.19 – 22.11.19 and I award him the sum of £391.35.

58. In respect of loss of wages I award the Claimant loss of earnings based on the £20,000 p.a salary between 23 November 2019 up until the date of his resignation on 14 January 2019 which is a period of 7 weeks and 2 days. The amount due to the Claimant is £2998.78.

59. In respect of holiday pay the Claimant did not receive any holiday pay for the holiday year 2019. Based on 24.5 days holiday I award the Claimant the gross sum of holiday pay of £1876.16.

60. I award the Claimant £768.92 for the loss of his statutory rights which represents two week's gross pay.

61. In respect of notice pay the Claimant is entitled to 12 weeks at the gross weekly rate of £4613.52 which amounts to £4613.52.

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Employment Judge S Moore

Case Number: 1601203/2020

Dated: 23 December 2020

JUDGMENT SENT TO THE PARTIES ON

7 January 2021

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FOR THE SECRETARY OF EMPLOYMENT TRIBUNALS

NOTE:
This is a written record of the Tribunal's decision. Reasons for this decision were given orally at the hearing. Written reasons are not provided unless (a) a party asks for them at the hearing itself or (b) a party makes a written request for them within 14 days of the date on which this written record is sent to the parties. This information is provided in compliance with Rule 62(3) of the Tribunal's Rules of Procedure 2013.