



EMPLOYMENT TRIBUNALS

Claimant: Mr Kwok Chiu Mui

Respondent: Mr & Mrs Pun t/a Dynasty

Heard at: Watford ET by CVP **On:** 5 February 2021

Before: EJ Cowen

Representation

Claimant: Mr Mui (Claimant's son)

Respondent: Ms Jennings (counsel)

COVID-19 Statement on behalf of Sir Keith Lindblom, Senior President of Tribunals.

"This has been a remote hearing. The form of remote hearing was by CVP. A face to face hearing was not held because it was not practicable and all issues could be determined in a remote hearing. The documents that I was referred to were provided by the parties and I have recorded the contents which I have referred to.

RESERVED JUDGMENT

1 The Claimant's claims for wrongful dismissal, unfair dismissal and redundancy pay are dismissed.

REASONS

Introduction

1. By way of a claim issued on 14 December 2018, the Claimant claimed wrongful dismissal and redundancy payment from his employment as a chef for the Respondent at their fish and chip and Chinese takeaway premises in Borehamwood, Hertfordshire. A claim for unfair dismissal was added by way of an application dated 10 July 2019 which was allowed by the Tribunal.

The case was heard on 25 February 2021, by CVP online, due to the Covid 19 pandemic.

2. The Tribunal was provided with a bundle of documents, an index, and witness statements provided by the Claimant for himself and Mei Lin Stefanie Lau. The Respondent provided witness statements from Mr Kau Pun, Stephanie Foo, Koon Ping-Lok and Mrs Pun. Mr Kau Pun is sadly deceased and Mrs Pun chose not to give evidence to the Tribunal. As neither were subject to cross examination the Tribunal amended the weight to be attached to their evidence in light of the lack of oral evidence.
3. At the start of the hearing the Respondent applied to rely upon an additional document which they asserted had come into their possession on 9 January 2020, a year prior to this hearing. The document amounted to a witness statement from a supplier to the business. It was not proposed that the writer be called to give oral evidence, but the Respondent was requesting to rely upon the content of the statement. The content of the letter was disputed by the Claimant. The Respondent could offer no explanation as to why it had not been disclosed to the Claimant until 2 February 2021, other than the fact that the family had faced a bereavement for some of the time. I decided that on the basis that the Respondent had withheld the document until shortly before the hearing and that there was no sufficient reason for having done so throughout the period and that the Claimant disputed the content, it would not be proportionate or within the overriding objective to allow the document to be relied upon. Had the Respondent wanted to rely upon it, they could have applied to have the writer appear as a witness. To rely upon the content of it with no opportunity to cross examine or produce evidence in rebuttal, would not be appropriate and therefore I declined to admit it.
4. The Claimant was represented by his son and had the assistance of an interpreter throughout the hearing. The Respondent was represented by Ms Jennings of counsel. Both sides made closing submissions, which the Tribunal took into account.

The Facts

5. The Claimant was employed as a chef by the Respondent in their fish and chip and Chinese takeaway known as 'Dynasty' from 1 April 1993.
6. The Claimant's wife is the niece of Mrs Pun and therefore there was a family connection as well as an employment relationship. This led to feelings of obligation and respect on the part of the Claimant and his wife towards the Respondents.
7. Mrs Pun was in regular attendance at the business as she worked behind the counter serving customers. She ran the business on a day to day basis, whilst her husband travelled to undertake other business interests.
8. In February 2018 the Respondents started to discuss matters of succession with Mr Lok, who had previously worked for them. They talked about Mr Lok taking over the business in partnership with the Claimant. This was not discussed with the Claimant at the same time, but Mrs Lau was aware that

the Respondents were thinking about transferring the business to the Claimant and Mr Lok.

9. Around this time, Mr Lok and the Claimant discussed the idea of running the business after the Respondents retired, but did not make specific plans. Some steps were taken by the Respondents to instruct their solicitors to draw up an agreement to transfer the business. However, this was not shown to the Claimant and Mr Lok at the time, nor was it discussed with them in detail.
10. Sadly in September 2018 Mr Pun was diagnosed with cancer and became very ill. Mrs Pun took the decision to stop working in order to be able to spend more time with her husband. The Claimant was told that he was to continue to run the business as usual from 8 October 2018. He was told that Mr Lok would assist him to do so. There was no discussion of any alternative to this transfer and no suggestion that the Claimant would be dismissed if he did not agree to enter into partnership with Mr Lok. It was on 2 October 2018 that the Claimant was issued with a P45 with a termination date of 7 October 2018. The parties agree that the Claimant's termination date was 7 October 2018.
11. The Claimant was also told by Mrs Pun to go to see her solicitor in order to pay 'the council deposit'. The Claimant did not ask why he should do this, partly because he was too pressured by the situation and work and partly out of respect of his elder and family member. He attended at the lawyer's office with his wife and met Mr Lok there. At the meeting they were told that there was a draft agreement between the Respondent and the Claimant and Mr Lok, to transfer the business to them. Once this was done, the lease would be transferred to them. They were also told that they needed to pay money for the council lease. This was a deposit which the council required in order to transfer the lease from the Respondent to the Claimant and Mr Lok.
12. The Claimant did not understand all the terms of what was being told to him. This was partly due to his lack of understanding of English language, but also because the lawyer said that they were acting for Mr and Mrs Pun and therefore could not advise them. The Claimant clearly understood that he was taking over the business with Mr Lok, who complained during the meeting that he had been given little notice of this move and was having to resign from his employment in order to return to work at the Dynasty. The lawyer provided them with a copy of an agreement between them and the Respondents, but did not provide a copy of the lease with the council for the property. They were told to go away and come back with a cheque for £1523.25 each. Both the Claimant and Mr Lok did this a few days later on 8 October 2018.
13. Both Mr Lok and the Claimant did as they were asked by the Respondent out of respect for them. They assumed that the Respondent would not be doing anything which would not be in their interests as they trusted and respected them. They did not therefore scrutinise the accounts of the business or seek their own independent valuation of the business.

14. There was a problem with the transfer of the lease to the Claimant and Mr Lok as the deed had not been registered. It was agreed that whilst the Respondents sorted this out, the Claimant and Mr Lok could begin to run the business.
15. Mrs Lau accepted that it was probably explained to her and the Claimant that he was to take over the lease of the property, but that they did not understand this at the time.
16. The Claimant took control of the business finances after 8 October 2018 and paid suppliers and split the profits between himself and Mr Lok. From time to time, he also paid Mrs Pun the £50 per week that she had agreed would be the sum payable for taking on the business. He was not able to open a bank account in the business name as he was not able to provide the relevant legal documents which showed his ownership. All the financial arrangements remained with the Respondents, whilst the Claimant took control of the takings of the shop.
17. The Claimant also instructed an accountant on behalf of himself and Mr Lok to look after the financial aspects of the business in the future. He registered their business for VAT and with the pension regulator.
18. Unfortunately the Claimant withdrew from the arrangement on 4 November 2018 as he felt he could not continue to work with Mr Lok. He phoned Mrs Pun and told her that he could not continue to work in the business with Mr Lok. The business closed the following day as Mr Lok was unable to run it on his own. There was some discussion between the Claimant and Mr Lok about selling the remaining stock which did occur. The lease remained with the Respondents who then closed their business.

Law

19. The Claimant claims Unfair Dismissal under s. 95 and 98 Employment Rights Act 1996 ('ERA'). The Respondent asserts that the Claimant resigned or alternatively, that a potentially fair reason under s.98 was conduct.
20. In order to claim unfair dismissal, the Claimant must prove on a balance of probabilities that they were dismissed. S.95 ERA outlines the types of dismissal;

95.— Circumstances in which an employee is dismissed.

(1) For the purposes of this Part an employee is dismissed by his employer if (and, subject to subsection (2) [...][1](#), only if)—

(a) the contract under which he is employed is terminated by the employer (whether with or without notice),

(b) he is employed under a limited-term contract and that contract terminates by virtue of the limiting event without being renewed under the same contract, or

(c) the employee terminates the contract under which he is employed (with or without notice) in circumstances in which he is

entitled to terminate it without notice by reason of the employer's conduct.

(2) An employee shall be taken to be dismissed by his employer for the purposes of this Part if—

(a) the employer gives notice to the employee to terminate his contract of employment, and

(b) at a time within the period of that notice the employee gives notice to the employer to terminate the contract of employment on a date earlier than the date on which the employer's notice is due to expire;

and the reason for the dismissal is to be taken to be the reason for which the employer's notice is given.

21. Employment may also be terminated by way of a resignation by the employee. It need not be expressed in a formal way and may be inferred from the employee's conduct and the surrounding circumstances — Johnson v Monty Smith Garages Ltd EAT 657/79.

22. A further means by which employment can be terminated is when parties to an employment contract agree between themselves to terminate it. Both sides are then released from further performance of their obligations under the contract and the contract is discharged by mutual consent. When this happens there is no dismissal, the effect being similar to that of a resignation by the employee. Clear evidence that an entirely voluntary arrangement has been entered into should be shown to the Tribunal. In Hart v British Veterinary Association EAT 145/78, the EAT said that tribunals should look at such situations carefully to ensure that the employer's words do not, in reality (as a matter of law), amount to a dismissal. The intention of the employer and the attitude of the employee need to be considered: if there is no threat of dismissal and the employee acts voluntarily, termination is by agreement.

23. In order to consider whether a dismissal under s. 95 is fair, the reason for dismissal must be fair within s. 98 ERA;

(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 a reason falling within subsection (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.

(2) A reason falls within this subsection if it—

(a) relates to the capability or qualifications of the employee for performing work of the kind which he was employed by the employer to do,

- (b)relates to the conduct of the employee,
- (c)is that the employee was redundant, or
- (d)is that the employee could not continue to work in the position which he held without contravention (either on his part or on that of his employer) of a duty or restriction imposed by or under an enactment.

24. If there is such a dismissal s.98(4) ERA the Tribunal must consider the fairness of the dismissal

“(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 a sufficient reason for dismissing the employee; and (b) shall be determined in accordance with equity and the substantial merits of the case.”

25. The leading case of *British Home Stores v Burchell* [1980] ICR 303 indicates that the Tribunal must consider the following factors in a matter of Unfair Dismissal for reasons of conduct-

- a) Did the Respondent have a genuine belief that the Claimant had committed misconduct,
- b) Was that belief based upon reasonable grounds
- c) Were those grounds the result of a reasonable investigation
- d) Did the Respondent follow a fair procedure.

26. Furthermore, the Tribunal must consider-

- a) Was the decision to dismiss within a band of reasonable responses.
- b) Whether the equity and the substantial merits of the case point to an unfair dismissal.

27. If the Tribunal consider the dismissal was unfair, it must consider what the outcome of a fair procedure would have been; *King and ors v Eaton Ltd (No.2)* 1998 IRLR 686, Ct Sess (Inner House),

28. The Tribunal must also consider under s.123(6) ERA 1996 whether deduction should be made from the compensatory award for any contributory actions by the employee which could be said to be blameworthy and have led to the dismissal.

29. The claim of wrongful dismissal requires a different test by the Tribunal to that of unfair dismissal. Wrongful dismissal is a common law claim of breach of contract. Hence the Tribunal must consider the terms of the contract and whether the actions of the employer have been in line with the contract. Where a dismissal has occurred without payment of contractual notice ('summary dismissal'), the Tribunal must consider whether the Claimant's actions were sufficient to warrant a breach of contract to allow the employer to end the contract summarily.

30. S.135 ERA indicates that;
- (1) An employer shall pay a redundancy payment to any employee of his if the employee—
 - (a) is dismissed by the employer by reason of redundancy, or
 - (b) is eligible for a redundancy payment by reason of being laid off or kept on short-time.
31. Payment is set out by way of a statutory formula, but may also be dictated by contractual payments which will include as a minimum the statutory requirement.
32. Payment will only be made to an employee whose employment is being terminated by reason of redundancy under s.98 ERA. No entitlement to redundancy payment will arise where termination of the employment is for a reason (fair or otherwise) which is not redundancy.

Decision

33. The Claimant was employed by the Respondent from 1 April 1993 as a chef in their take away restaurant. There was a family connection between the Claimant's wife and the Respondents and hence the Claimant felt an obligation to respect and trust the views of the Respondent, more than he might any other employer.
34. In 2018 the Respondent began to discuss succession planning for the time in the future when they wanted to retire. They began to discuss how this would happen and took some steps to speak to their solicitor. It was suggested to the Claimant and Mr Lok that they would take over the business at some point in the future when Mr and Mrs Pun no longer wanted to work in the business. The Claimant was aware of this plan, but took no action as a result of it as the future date was uncertain. The whole matter was brought into strict relief when Mr Pun was diagnosed with cancer in September 2018. At that point Mrs Pun told the Claimant that the plan to pass the business to himself and Mr Lok would happen the following month and the Claimant and Mr Lok needed to attend at their solicitors to sign the formal agreements. As both Mr and Mrs Pun ran the business for the Respondent it was entirely appropriate for Mrs Pun to ask the Claimant to do so on behalf of herself and her husband.
35. The Claimant agreed to do this. He clearly had little time to consider the implications of taking on the business, but freely agreed to do so, albeit with some sense of duty to his family members. He was aware that this would mean that he and Mr Lok would be running a business together and that he would no longer be employed by the Respondent. There was no evidence to suggest that the Claimant believed that if he did not agree to taking over the business that it would be closed and he would be dismissed.
36. The Claimant took steps to set up the administration required to run a business by himself; appointing an accountant, registering for VAT and trying to open a business bank account. All these actions are consistent with the Claimant being aware that he would no longer be employed by the Respondent. He also paid a substantial amount of his own money to the

Respondent's solicitors for what he was told was a deposit for the rent of the property. It was in fact a requirement of the Council landlord for the transfer of the lease to the Claimant and Mr Lok. It did not ultimately happen, but the Claimant was willing to make a financial investment in order to run the business.

37. In evidence the Claimant agreed that his employment with the Respondent terminated on 7 October 2018 and that he returned to the same work in the same location on 8 October 2018. The central difference being that on 8 October 2018 the Claimant worked as proprietor of the business, in partnership with Mr Lok. There was no evidence to suggest that a redundancy situation had arisen. There was no evidence to suggest that the business no longer required the services of a chef, nor that the need for the Claimant's role had been altered by economic, technical or organisational reasons. The evidence therefore does not support the Claimant's employment being terminated by the Respondent for reasons of redundancy.
38. Likewise, the evidence does not support the Respondent's assertion that the employment was terminated for reasons of conduct. There was no evidence to support the suggestion that the Claimant had acted in a way to fundamentally breach any express or implied term of the contract. Nor that the Respondent had responded to any such act.
39. The evidence in this case supports the parties having discussed and mutually agreed that the Claimant would cease to be an employee on the basis that he (with Mr Lok) was taking over the business. It was therefore agreed that his employment by the Respondent would cease on 7 October 2018 and that he would immediately commence to manage the business in partnership with Mr Lok. Whilst the Claimant may have felt that he was agreeing to this out of loyalty to his family, he did so with understanding of the obligations he took on and without threat of dismissal if he did not agree. In such a situation, the employment contract was brought to an end by way of mutual agreement. There was neither dismissal, nor resignation. The parties were in agreement that the relationship would change and that the Claimant would work for himself and Mr Lok and pay a small charge to the Respondent each month, in order to be allowed to use the business name.
40. The actions of neither the Claimant nor Mr Lok beyond 8 October 2018 are of any relevance to this case, as the parties agree that the contract terminated on 7 October 2018.
41. The Claimant has therefore failed to persuade me that he was dismissed by the Respondent. Having failed to discharge the burden of proof on the issue of dismissal, the Claimant's claims for wrongful dismissal and unfair dismissal must be dismissed and his claim for redundancy pay must fail due to a lack of a redundancy situation.

Employment Judge Cowen

Date 21 April 21

JUDGMENT SENT TO THE PARTIES ON

23 April 21

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