EMPLOYMENT TRIBUNALS

Claimant: Mr P Conde

Respondent: 1. Mr F Sanjoori
2. Chateau Napoleon Restaurant

Heard at: **London South (remotely by CVP)**
On: **20 September 2023**

Before: **Employment Judge Heath**

Representation
Claimant: Mr A Rozycki (Counsel)
Respondent: Mr Sanjoori in person

JUDGMENT

1. The respondents have dismissed the claimant by reason of redundancy, and must pay him a redundancy payment in the sum of **£12,436.20.**

2. The respondents have breached the claimant's contract of employment by not paying him the notice pay he is entitled to, and must pay him the sum of **£5329.80.**

3. The respondents have unfairly dismissed the claimant, but there is applied a 100% reduction in compensation pursuant to the principle in *Polkey v A E Dayton Services Ltd* [1988] ICR 142.

REASONS

Introduction and procedure

1. The claimant is a chef formerly employed in a restaurant owned by the second respondent apparently trading as the first respondent. He claims unfair dismissal, redundancy pay and notice pay after the restaurant went out of business.

2. Neither respondent entered responses, the claimant applied for a Rule 21 judgment, but the tribunal listed the matter for hearing today as the unfair dismissal claim needed to be heard.

3. The second respondent emailed the claimant's solicitors and the tribunal on 14 June 2023 to indicate he had not received a claim form but would be contesting the case at the hearing today. He did not apply for an extension of time to put in a response.

4. At the start of the hearing, I established from speaking to the second respondent that he owned "the Château" which employed the claimant. He also agreed that he was the sole director of a company "The Château (Coombe Lane) Limited" (company number 11998885) which had a registered office address at the same address as indicated for both respondents in the ET1. The second respondent said that he had not received post sent to the restaurant address. I was satisfied that the respondents had been properly served, and that proceedings had come to his attention and that no application for an extension of time for submitting a response been received.

5. In circumstances, and having regard to the observations of the EAT in *Limoine v Sharma* [2020] ICR 389, I allowed the second respondent to participate in the hearing by permitting him to cross examine the claimant and to make submissions. I did not permit him to give evidence. He had not presented a response setting out how he resisted the claim, or applied for an extension of time, and the claimant, who had presented his claim and evidence in an orderly fashion, could have been disadvantaged by being ambushed with fresh evidence.

6. I was provided with an 86 page bundle and a witness statement from Mr Conde who gave evidence and was cross examined by the second respondent. Both parties gave closing submissions, I deliberated, and gave an oral decision to the parties. The second respondent requested written reasons.

The facts

7. The claimant was employed as a chef from 1988 in the Château restaurant. In 2007 the second respondent took over the business renting the premises from the landlord. He told me that he owned "the Château" which employed the claimant. Payslips and P60s were issued citing the employer as The Château Napoleon. I am satisfied that the latter was a trading name employed by the second respondent, who was the claimant's employer.

8. It is well known that the hospitality business was very badly impacted by the coronavirus pandemic, and the respondent's business was no exception. Custom declined to such an extent that during the course of 2022 the second respondent was exploring options for selling the business. In September 2022 he mentioned to the staff, including the claimant, that he was exploring selling the business. I find that he

particularly explored a sale to one potential buyer, but that this sale fell through, possibly because the landlord would not consent to an assignment of the lease.

9. In October 2022 the second respondent told the claimant that he was thinking of closing the restaurant, possibly at the end of the year.

10. On 11 November 2022 the claimant sent the second respondent and email saying that he had only received half of his wages, and asking the second respondent to "*confirm your end date, which previously mentioned as the 28th December. Is this still correct?*"

11. On 15 November 2022 the landlord told the claimant that the second respondent had taken everything from the restaurant and closed it. The claimant did not know about this, and drove to the restaurant to find it empty. On 18 November 2022 there was a message on the restaurant's website saying that it had closed.

12. On 20 November 2022 the claimant emailed the second respondent saying that he needed payslips and a P45. On 21 November 2022 the second respondent replied that his accountant would organise this. On 25 November 2022 the claimant emailed the second respondent again to say that he had not received payslips or P45 and had been left without employment. The second respondent responded that he would chase this up.

13. On 26 November 2022 the claimant emailed the second respondent saying that he had been left unemployed without notice. He wanted to sort out final payment and redundancy payment. He provided links to the gov.uk website about making staff redundant and giving staff notice, and about redundancy pay.

14. On 1 December 2022 the claimant was sent his P45 which said that his employment ended on 10 November 2022. The claimant sent a number of emails to the second respondent during the course of January 2023, but received no response. The second respondent told me, and I have no reason not to accept this, that he was out of the country with health issues.

15. The claimant made a number of efforts to find further employment, which were unsuccessful until he gained employment on 9 August 2023.

The law

16. Section 86 of the Employment Rights Act 1996 ("ERA") provides:

> *(1) The notice required to be given by an employer to terminate the contract of employment of a person who has been continuously employed for one month or more—*
>
> *…*
>
> *(c) is not less than twelve weeks' notice if his period of continuous employment is twelve years or more.*

17. Section 139 ERA provides:

> *1)For the purposes of this Act an employee who is dismissed shall be taken to be dismissed by reason of redundancy if the dismissal is wholly or mainly attributable to—*
>
> *(a)the fact that his employer has ceased or intends to cease—*
>
> *(i)to carry on the business for the purposes of which the employee was employed by him*

18. Section 135 of the ERA obliges an employer to pay a redundancy payment calculated in accordance with section 162 ERA if the employee "*is dismissed by the employer by reason of redundancy*".

19. Under section 98(1) ERA it is for the employer to show the reason for dismissal and that such reason was potentially fair one under section 98(2). Redundancy is one such potentially fair reason.

20. Fairness is determined under section 98(4) ERA and depends on whether, in all the circumstances (including the size and administrative resources of the employer), the employer acted reasonably or unreasonably in treating the reason as sufficient reason to dismiss, and should be determined in accordance with equity and the substantial merits of the case.

21. General principles relating to fairness in redundancy process emerge from *Polkey v A E Dayton Services Ltd* [1988] ICR 142 where it was held that an employer will not be acting reasonably unless it:

    a. Warns and consults affected employees or their representatives;

    b. Adopts a fair basis on which to make selections for redundancy; and;

    c. Takes reasonable steps to avoid redundances.

22. *Polkey* is also authority for the principle that where there is a failure to adopt a fair procedure at the time of dismissal, dismissal would not be rendered fair just because the procedural unfairness did not affect the end result. Compensation can be reduced to reflect the chance of dismissal taking place had a fair procedure been adopted.

Conclusions

<u>Redundancy pay</u>

23. It was not contested this was a case where the employer ceased to carry the business for which the claimant was employed. In short it was a redundancy situation as set out in section 139 ERA. The respondent has not shown the contrary. As such the claimant was entitled to a redundancy payment. I accepted the sum as set out in his schedule of loss and conclude that he was entitled to the sum of **£12,436.20**.

Statutory notice

24. The claimant was also entitled to statutory notice. There is a question of when it was given. I remind myself that I permitted the second respondent to question the claimant and to sum up but not to give evidence. I find that, while the claimant may have been informed that buyers were being sought for the restaurant and latterly that the restaurant was closing, he was not given formal notice until 1 December 2022. He was not paid any notice on his dismissal, and given his length of service he is entitled to 12 weeks notice. I accept the sum set out in the schedule of loss, and award the claimant the sum of **£5,329.80**.

Unfair dismissal

25. In terms of unfair dismissal, I have set out above the principles by which a tribunal determines whether a dismissal for redundancy was fair or not. I find that the claimant was not given adequate warning of the redundancy situation, or consulted about it. In the circumstances, I find that the dismissal was unfair.

26. The real question was how much compensation is due to the claimant. The claimant's case, advanced by Mr Rozycky, was that, effectively, given only the claimant gave evidence there was no evidential support for any, or any substantial, *Polkey* deduction.

27. However, in response to questions from me, the claimant (very fairly and even-handedly) accepted that the business did in fact close, that the business did not have the financial wherewithal to survive, that the dismissal was unfair because no adequate notice of been given, and, critically, that the business was always going to close. While Mr Rozycky submitted that consultation may have led to some sort of way for the business to survive, this went against the claimant's own evidence that the business had no real prospect of surviving.

28. In the circumstances, I find that warning or consultation would have made no difference whatsoever to the eventual outcome. The claimant was always going to be dismissed for redundancy when the business collapsed. This is therefore a situation where a 100% *Polkey* reduction is appropriate.

Employment Judge **Heath**
20 September 2023

JUDGMENT & REASONS SENT TO THE PARTIES ON
26 September 2023

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FOR THE TRIBUNAL OFFICE