



OUTER HOUSE, COURT OF SESSION

[2024] CSOH 53

P263/24

OPINION OF LORD BRAID

in the Petition of

HIS MAJESTY'S SECRETARY OF STATE FOR BUSINESS AND TRADE

Petitioner

for

a disqualification order in terms of section 8 of the Company Directors Disqualification Act 1986

in respect of

MUHAMMAD AZAM

Petitioner: Tosh; Burness Paull LLP

23 May 2024

Introduction

[1] The petitioner seeks a disqualification order under section 8 of the Company Directors Disqualification Act 1986 in respect of the respondent, Muhammad Azam, who was until July 2023 the sole director (and shareholder) of a company, MA Fast Foods Limited, incorporated in Scotland on 13 January 2020 with the object of operating unlicensed restaurants and cafes. The company operated a fast-food takeaway premises known as Chicken Club at 46 South Clerk Street, Edinburgh. The company is, I am told, the subject of

dissolution procedure, although at whose instance was unclear, but which has been put on hold. The petition has been served on the respondent but no answers have been lodged.

The statutory framework

[2] Section 8 of the 1986 Act provides:

“Disqualification of director on finding of unfitness

(1) If it appears to the Secretary of State that it is expedient in the public interest that a disqualification order should be made against a person who is, or has been, a director or shadow director of a company, he may apply to the court for such an order.

(2) The court may make a disqualification order against a person where, on an application under this section, it is satisfied that his conduct in relation to the company (either taken alone or taken together with his conduct as a director or shadow director of one or more other companies or overseas companies) makes him unfit to be concerned in the management of a company.

[...]

(3) In this section ‘the court’ means the High Court or, in Scotland, the Court of Session.

(4) The maximum period of disqualification under this section is 15 years.”

[3] Section 12C(4) of the Act enjoins the court, when considering whether to make a disqualification order, and if so, what the length of that order should be, to have regard to the matters set out in paragraphs 1 to 4 of schedule 1 to the Act. That schedule includes, in paragraph 1, the extent to which the director was responsible for the causes of any material contravention by a company of “any applicable legislative or other requirement”; and, in paragraph 4, the nature and extent of any loss or harm caused, or any potential loss or harm which could have been caused, by the person’s conduct in relation to a company.

The conduct giving rise to unfitness: employment of illegal workers

[4] The conduct which is said to render the respondent unfit to hold office as a director is that he caused the company to breach section 15 of the Immigration, Asylum and Nationality Act 2006, which provides that an employer must not employ an adult subject to immigration control if (a) he has not been granted leave to enter or remain in the United Kingdom or (b) his leave to enter or remain in the United Kingdom is invalid, or has ceased to have effect, or is subject to a condition preventing him from accepting the employment. Where an employer contravenes section 15 of the 2006 Act, the petitioner may give the employer a notice requiring him to pay a penalty of a specified amount. An employer is excused from paying a penalty if he shows that he complied with the prescribed requirements in relation to the employment. Those requirements are set out in the Immigration (Restrictions on Employment) Order 2007/3290. In broad terms, for an employer to be excused from paying a penalty for a contravention of section 15 of the 2006 Act, he must show that the employee has produced certain documents, or the employer has carried out an online right to work check which confirms that the employee is allowed to work in the United Kingdom and is allowed to do the work in question, prior to the commencement of employment.

[5] On 4 February 2022 immigration officers identified two adults employed in the Chicken Club in contravention of section 15 of the 2006 Act. One, Arslan Khan, was a Pakistani national who was found working in the kitchen area. He told the officers that he had been working there for around 3 days a week for about 3 months, being paid between £30 and £50 in cash for his services. He said he worked under the direction of the owner, "Asam Khan". The other, Waqas Amjad, also a Pakistani national, was a student, permitted to work no more than 20 hours per week during term time. He had told Azam

this. He told the immigration officers that he was employed, paid by and worked under the direction of "Azam". He initially claimed to work around 20 hours per week over 3 days, but subsequently admitted to working for around 40 hours per week over 4 days and had done so for about 3 weeks. He was paid about £7 per hour, receiving £280 per week in cash. Both Mr Khan and Mr Amjad were paid less than the national minimum wage.

[6] Having issued the company with an information request, requesting further evidence and information, to which the company responded, the petitioner issued a Civil Penalty Notice to the company on 5 April 2022, imposing a civil penalty of £20,000 for its breach of section 15 of the 2006 Act. The penalty was due to be paid by 5 May 2022.

[7] On 28 April 2022, Mr Azam completed, on the company's behalf, an Objection Form, which he sent to the Home Office. In it, he declared that there was a statutory excuse for objecting to the issue of the civil penalty. He claimed that Mr Khan helped the business "free of cost" with cleaning and "putting in a pizza or two" but that the company did not employ him and he had only ever been offered food and a lump sum of money when he demanded it. As for Mr Amjad, he was a student with a right to work. He was merely undergoing training at the relevant time and there was nothing agreed as to how many hours he would work. He had not been provided with any employment contract or had any wages paid into his bank account. The respondent had previously told the immigration officers that Mr Amjad had been paid £7 per hour, into his bank account (although that was not vouched). The Home Office concluded, in light of the evidence it had, that the company remained liable for the civil penalty of £20,000. No appeal was marked by the company. The civil penalty remains unpaid. From paperwork supplied by the Home Office and lodged in process, it appears that in fixing the level of the fine, the Home Office took into account one mitigating factor, namely that the respondent had co-operated with inquiries

and had responded promptly, honestly and accurately to Home Office requests for information (although how that is to be squared with their disbelieving the respondent's assertion that Mr Amjad had been working only 20 hours per week is not at all obvious).

[8] Several significant facts arise, or can be inferred, from the foregoing. First, both workers were employed by the company. Even if what the respondent said about Mr Khan was true, which appears unlikely, he was receiving consideration in return for his services. Second, as the sole director, and having regard to what the immigration officers were told, the respondent was directly involved in their employment. Third, the respondent knew that Mr Amjad was working in excess of his permitted hours. Fourth, he caused the company to incur liability for a fine, which, fifth, was not paid. Finally, the company's ability to pay the fine is not known but standing that the company is facing dissolution, it seems unlikely that it will be able to pay.

The petitioner's submissions

[9] Counsel for the petitioner submitted that it was expedient in the public interest that a disqualification order under section 8 of the 1986 Act should be made against the respondent. His conduct as a director of the company made him unfit to be concerned in the management of a company. There had been a failure on his part to discharge his obligations as a company director. The use of illegal labour distorted the labour market, gave an unfair commercial advantage to an employer over its competitors, and created a danger that employees would not be treated in the same way and with the same protections as legal employees, giving rise to the possibility of the exploitation of vulnerable individuals. The company had been exposed to a fine which had not been paid. As regards the length of disqualification, an order of 6 years was appropriate. The purpose of the 1986 Act (and its

predecessors) was to raise standards in the conduct and responsibility of those who manage companies incorporated with the privilege of limited liability: *Re Swift 736 Ltd* [1993] BCC 312 at 315; *Re Westmid Packing Services Ltd (No 3)* [1998] BCC 836 at 841.

Decision

[10] The starting point is to consider the matters in schedule 1 to the 1986 Act, referred to in paragraph 3 above. In this case that comprises principally the facts that the respondent caused the company to breach the 2006 Act and that his conduct exposed the company to a fine which it has not paid and seemingly is unable to pay (thus giving rise to the potential for insolvency).

[11] Whether that conduct renders the respondent unfit to be concerned in the management of a company is a question of fact, including whether specific conduct measures up to a standard of probity and competence fixed by the court: *Re Sevenoaks Stationers (Retail) Ltd* [1991] Ch 164 at p176. Individual instances of conduct may be sufficient to establish unfitness: eg, *Secretary of State for Trade and Industry v McTighe and Anr (No 2)* [1997] BCC 224 at 230. The standard of conduct to be applied is an objective one: *Re Landhurst Leasing plc* [1999] 1 BCLC 286.

[12] *Sevenoaks* also provides guidance as to the approach to be taken to the length of any disqualification period which is imposed. The potential 15 year period is divided into three brackets. The top bracket, for periods over 10 years, should be reserved for particularly serious cases, including cases where a director who has previously been disqualified falls to be disqualified again. The minimum bracket of 2 to 5 years should be applied where although disqualification is mandatory, the case is, relatively, not very serious. The middle bracket of 6 to 10 years should apply to serious cases which do not merit the top bracket.

The period selected should serve the dual purpose of protecting the public against the future conduct of companies by persons whose past records as directors of insolvent companies showed them to be a danger to creditors and others; and deterring the respondent, and others, from repeating such conduct in the future: *Re Westmid Packing Services Ltd* (No 3) [1998] BCC 836 at paragraph 3.

[13] The conduct prayed in aid by the petitioner as giving rise to unfitness is unusual inasmuch as it is conduct which need not have been committed through the medium of a limited company, and is not said to have resulted in the company becoming insolvent, or creditors going unpaid (other than that the civil fine has not been paid). Nonetheless, paragraph 1 of schedule 1 to the 1986 Act is in wide terms, applying as it does to breach of any legislative requirement. There is a raft of English cases in which disqualification orders have been granted against directors who deliberately or negligently caused or allowed a company to employ workers illegally: see *Mithani, Director Disqualification*, Vol III, paragraph 760C, endnote 16 and the cases cited therein. The gravity of the conduct lies in the fact that it gives an unfair advantage to the company which ignores the rules at the expense of those which abide by the law; it gives an opportunity for the exploitation of migrant workers who are usually in a precarious state to begin with; and it exposes the company to a fine: *Secretary of State for Business, Energy and Industrial Strategy v Luthfur Rahman* [2020] EWHC 2213 (Ch), at paragraph 56; *Secretary of State for Business Innovation and Skills v Tayabur Rahman* [2018] BCC 567 at paragraph 94. Counsel referred me to a number of other cases, principally to demonstrate the varying length of orders which have been made but these are of limited value since, as *Westmid Packing Services*, above, made clear, each case must turn on its own facts and, in any event, the real question for me, if I do

make an order, in which bracket the case falls into: in particular, can it properly be said that the case is, relatively speaking, not very serious?

[14] As to whether an order should be made, I am satisfied that Mr Azam, as the sole director, and having regard to what Mr Khan and Mr Amjad told immigration officials, was directly responsible for the contravention of the 2006 Act. On any view, a deliberate breach of immigration law is a serious matter. Here, the breach was in relation to two workers, committed over a period of months, with the potentially harmful consequences set out above, and demonstrates such a lack of probity on the part of the respondent as to render him unfit to be involved in the management of a company. A disqualification order therefore falls to be made.

[15] As for the length of that order, I agree with counsel for the petitioner that the case lies either at the top of the lowest bracket or the bottom of the middle bracket, suggesting a disqualification period of either 5 or 6 years. The factors I take into account are that the respondent was himself directly and deliberately responsible for the employment of workers illegally; two workers were involved; and the respondent must have known that they were being employed illegally. Had these been the only factors, I might have given the respondent the benefit of the doubt and placed the case in the bottom bracket since all of those factors could have applied equally to a sole trader or unincorporated partnership. However, what tips the case into the middle bracket are several factors which show that the respondent is likely to have benefited financially from his conduct, and has escaped any consequences for him as an individual through the cloak of limited liability. These are that: (a) he paid his two employees less than the minimum wage, thus enhancing the company's profits; (b) he exposed the company of which he was a director, and to which he owed a fiduciary duty, to a fine; and (c) significantly, the fine has not been paid, and is unlikely to

be paid. The respondent has therefore benefited from the illegal conduct, from which others have suffered, directly and indirectly. Taking all these circumstances into account, I conclude that the case cannot be described as not serious, and therefore falls in the middle bracket. The 6 year disqualification period sought by counsel for the petitioner is therefore appropriate.

Disposal

[16] I shall make a disqualification order in the terms sought for a period of 6 years, together with the ancillary orders sought. I will also find the respondent liable in the expenses of the petition.