



THE EMPLOYMENT TRIBUNALS

Claimant: Mr J Denman

Respondent: (1) Solombre Ltd
(2) JHD Hospitality Ltd

Heard at: East London Employment Tribunal

On: 27 April 2018

Before: Employment Judge M Warren (sitting alone)

Representation

Claimant: In Person

Respondent: Mr Ludlow, counsel

RESERVED JUDGMENT

1. The Claimant's claims against the First Respondent fail and are dismissed.
2. The Claimant's claim for unpaid wages succeeds, (insofar as it relates to deductions made from his £750 weekly wage) the Second Respondent shall pay the Claimant without deduction £553.84.
3. The Claimant's claims in breach of contract and for holiday pay fail and are dismissed.

REASONS

Background

1. These proceedings arise out of a commercial enterprise entered into by Mr Barak, Mr White and Mr Denman. In summary, through the medium of the Second Respondent, they purchased an already successful restaurant, by

purchasing the shares of the First Respondent, which owned the restaurant. Mr Denman fell out with Mr Barak and Mr White, as a consequence of which he resigned his employment as a director of the Second Respondent and as manager of the restaurant. He brought claims of constructive unfair dismissal, for unpaid wages, for holiday pay and for notice pay, (breach of contract). As he did not have the required two years' service, he subsequently withdrew his complaint of unfair dismissal.

The Issues

2. Mr Denman's starting salary had been £120,000 per annum. He was paid weekly. His gross weekly pay was reduced from £2307 to £750 on 29 May 2017. Whilst he accepts that he agreed to that reduction, he says that he did so on the basis that the difference between the lower and higher weekly pay would be made up at the end of the year and that difference is therefore payable to him as unpaid wages on the termination of his employment.
3. The Respondents say that this is a straightforward case of the Claimant's salary being reduced by agreement, because it became apparent at an early stage that the original salary was unsustainable. They deny that there was any agreement that the difference would be paid at the end of the year. In the alternative, the Respondents say that Mr Denman affirmed the variation to his contract in the form of the reduced rate of pay by his having accepted the reduced rate of pay without protest between 29 May 2017 and the end of his employment on 24 October 2017.
4. Mr Denman claims one weeks' notice pay. He resigned, but he says in response to, ("acceptance of" in legal jargon) the Respondents fundamental breach of contract, (the implied term requiring the parties to maintain mutual trust and confidence) in the way that it had treated him.
5. Mr Denman also complains that unauthorised deductions were made from his wages to recover the cost of an iPhone that he had purchased, the Respondents say without required authorisation. The deductions were an itemised £19.23 per week and in addition, a sum of £50 per week that is not itemised on his pay slips. The Respondent accepts that these deductions were not authorised in writing and that Mr Denman was not issued with a written contract of employment.
6. During the course of the hearing, the holiday pay claim was resolved, in that Mr Denman conceded that he had taken paid leave and that there was none accrued due at the date of termination of his employment. His claim was that the holiday pay he received was at the reduced rate of £750 per week and should have been at the higher rate of £2307 per week.
7. Mr Denman was uncertain as to whether his employer was the First or Second Respondent. During the course of the hearing, he agreed that his employer at the time his employment was terminated was the Second Respondent.

Law

8. A contract may be agreed orally or in writing. The terms and conditions of a contract of employment ought to be in writing, as required by Section 1 of the Employment Rights Act 1996, but the employment contract never the less still exists even if it is never put in writing. The objective in constructing a contract is to establish the intention of the parties. That question is to be approached objectively, put this way, (in the context of a written contract) in Investors Compensation Scheme Ltd v West Bromwich Building Society [1998] 1 WLR 896:

“The meaning which the document would convey to a reasonable person having all the background knowledge which would reasonably have been available to the parties in the situation in which they are in at the time of contract.”

9. It is a cardinal principle of constructing a contract that the parties must have intended what they in fact said. But we do look at the circumstances surrounding the contract to assist us in determining how the language of a document would be understood by the reasonable person. The starting point is to attribute to the words in the contract their ordinary and natural meaning.
10. Where there is ambiguity in the terms of a contract, the wording is construed against the person seeking to rely on the term in question.
11. Where there has been a fundamental breach of any contractual term, the wronged party may accept that breach by terminating the contract in response to the breach and claim damages for breach of contract. A contractual term frequently relied upon in breach of contract in employment cases, is that which is usually described as the implied term of mutual trust and confidence.
12. The leading authority on this implied term is the House of Lords decision in Mahmud & Malik v BCCI [1997] IRLR 462 where Lord Steyn adopted the definition which originated in Woods v W M Car Services (Peterborough) Ltd namely, that an employer shall not, without reasonable or proper cause, conduct itself in a manner calculated or likely to destroy or seriously damage the relationship of trust and confidence between the employer and employee.
13. The test is objective, from Lord Steyn in the same case:

“The motives of the employer cannot be determinative or even relevant.....If conduct objectively considered is likely to destroy or serious damage the relationship between employer and employee, a breach of the implied obligation may arise.”

14. A fundamental breach by an employer has to be, “accepted” by the employee, to quote Lord Browne-Wilkinson in the EAT in *W.E. Cox Toner (International) Ltd v Crook* 1981 IRLR 443 :-

“If one party (the guilty party) commits a repudiatory breach of the contract, the other party (the innocent party) can chose one of two courses: he can affirm the contract and insist on its further performance, or he can accept the repudiation, in which case the contract is at an end...

But he is not bound to elect within a reasonable or any other time. Mere delay by itself (unaccompanied by an express or implied affirmation of the contract) does not constitute affirmation of the contract; but if it is prolonged it may be evidence of an implied affirmation...

Affirmation of the contract can be implied. Thus, if the innocent party calls on the guilty party for further performance of the contract, he will normally be taken to have affirmed the contract since his conduct is only consistent with the continued existence of the contractual obligation. Moreover, if the innocent party himself does acts which are only consistent with the continued existence of the contractual obligation, such acts will normally show affirmation of the contract. However, if the innocent party further performs the contract to a limited extent but at the same time makes it clear that he is only continuing so as to allow the guilty party to remedy the breach, such further performance does not prejudice his right subsequently to accept the repudiation...”

15. In a recent review of the law of affirmation in the employment contract context, HHJ Burke QC in *Hadji v St Luke’s Plymouth* UKEAT 0857/2012 summarised the law as follows:

(i) The employee must make up his [her] mind whether or not to resign soon after the conduct of which he complains. If he does not do so he may be regarded as having elected to affirm the contract or as having lost his right to treat himself as dismissed. Western Excavating v Sharp [1978] QB 761, [1978] 1 All ER 713, [1978] ICR 221 as modified by W E Cox Toner (International) Ltd v Crook [1981] IRLR 443, [1981] ICR 823 and Cantor Fitzgerald International v Bird [2002] EWHC 2736 (QB) 29 July 2002.

(ii) Mere delay of itself, unaccompanied by express or implied affirmation of the contract, is not enough to constitute affirmation; but it is open to the Employment Tribunal to infer implied affirmation from prolonged delay – see Cox Toner para 13 p 446.

(iii) If the employee calls on the employer to perform its obligations under the contract or otherwise indicates an intention to continue the contract, the Employment Tribunal may conclude that there has been affirmation: Fereday v S Staffs NHS Primary Care Trust (UKEAT/0513/ZT judgment 12 July 2011) paras 45/46.

(iv) There is no fixed time limit in which the employee must make up his mind; the issue of affirmation is one which, subject to these principles, the Employment Tribunal must decide on the facts; affirmation cases are fact sensitive: Fereday, para 44.

16. I was also referred to Abrahall & Others v Nottingham City Council [2018] EWCA Civ 796 which focuses on the concept of affirmation in the circumstances of a contractual pay cut, recognising the inequality of the parties bargaining position in a contract of employment and the particular nature of a contract of employment. A strong employment law experienced Court of Appeal agreed that continuing to work after a pay cut can amount to affirmation, if it can be said to be unequivocal. Employees should have the benefit of any doubt.
17. Section 13 of the Employment Rights Act 1996 provides that a deduction shall not be made from a worker's wages unless the deduction is authorised in the worker's written contract or the worker has beforehand, given his or her consent in writing.

Evidence

18. I have had before me a witness statement from Mr Denman and for the Respondents, I had witness statements from Mr Anthony White and from Mr Ajay Barak. I heard oral evidence from each of those three witnesses.
19. I also had before me a paginated and indexed bundle of documents running to page number 213.
20. Mr Denman wished to introduce some additional documents. The Respondents objected. The documents were:
 - 20.1. An Option Agreement in relation to shares in the Second Respondent.
 - 20.2. Some telephone records in relation to phone calls that he had made on his mobile telephone. He says that these will corroborate that he attended the home of Mr White for a board meeting at approximately 3:30 and not at 2:00. At this board meeting, it is alleged that, amongst other things, it was resolved to reduce his salary with his agreement. He says that the record as to timing undermines the veracity of the minutes.
 - 20.3. An alcohol licence. He says that this shows that application was made to remove him on 11 October, not 24 October as the Respondents allege.
 - 20.4. A weekly wage spread sheet, which he said showed no changes had been made to his weekly wage by agreement, (that is how I understood it at the time).

21. In deciding whether or not to allow these additional documents to be referred to in evidence, I had regard to the relative prejudice to the parties of allowing or not allowing them in. I also had regard to the overriding objective in Rule 2, which reads as follows:

The overriding objective of these Rules is to enable Employment Tribunals to deal with cases fairly and justly. Dealing with a case fairly and justly includes, so far as practicable—

- (a) ensuring that the parties are on an equal footing;*
- (b) dealing with cases in ways which are proportionate to the complexity and importance of the issues;*
- (c) avoiding unnecessary formality and seeking flexibility in the proceedings;*
- (d) avoiding delay, so far as compatible with proper consideration of the issues; and*
- (e) saving expense.*

A Tribunal shall seek to give effect to the overriding objective in interpreting, or exercising any power given to it by, these Rules. The parties and their representatives shall assist the Tribunal to further the overriding objective and in particular shall co-operate generally with each other and with the Tribunal.

22. I was told that the documents had been disclosed by Mr Denman on Monday 24 April, 4 days ago. I had in mind that Mr Denman is a litigant in person and the Respondents have been legally represented throughout, with experienced counsel here at the hearing. Avoiding unnecessary formality points towards allowing the documents in. Dealing with the case in a way which is proportionate suggests that I should allow in documents that might be relevant and disallow documents that are not. As the Respondents have already seen the documents, no adjournment should be necessary, it was not suggested that one would be. There did not seem to me to be any costs implications. As the Respondents have seen the documents in advance, I see little prejudice to them in allowing the documents in. Mr Denman will be prejudiced if I disallowed documents that may be relevant.
23. I could not see that the Option Agreement or the alcohol licence had any relevance to the case at all and I did not allow them to be referred to in evidence.
24. The wage spreadsheet is potentially relevant if it amounts to evidence that Mr Denman had not agreed to the variation in his weekly wage, I therefore allowed that in. As it happens, in due course, I did not find the document helpful. Mr Denman's telephone records for the day of the board meeting are potentially relevant if they do indeed provide evidence that the hearing

took place at a different time to that which the Respondents allege. I therefore allowed in the telephone records.

25. At the end of the hearing, after Mr Ludlow had made his closing submissions, Mr Denman presented me with 14 pages of written submissions, which I read.

Credibility of Evidence

26. I had no particular reason to doubt the credibility of any of the three witnesses from whom I heard. There are conflicts of evidence. I looked to the documentary evidence for corroboration to assist me when there were such conflicts to resolve.

Facts

27. The First Respondent owned and ran a successful restaurant known as Alec's Restaurant. The individual behind that was Mr Albert (Alec) Smith.
28. Mr Denman persuaded Mr White and Mr Barak to join him in a joint venture to purchase and run Alec's Restaurant. Mr White provided finance, (£2,250,000) and Mr Barak provided expertise, (although he also assisted with some further financing as well). The Second Respondent was formed on 20 January 2017 with Mr Barak and Mr Denman as its directors. Mr Denman was a 60% shareholder.
29. The enterprise required a further £2,250,000 which was funded by way of a bank loan, guaranteed by Mr Denman and Mr White.
30. The commercial arrangement was set out in a Joint Venture Shareholders Agreement, the parties to which were Mr Denman, Mr White, Mr Barak and the Second Respondent. An undated and unexecuted copy of the agreement was in the bundle at page 64. It was signed on 5 May 2017. The content of this document is relevant in that it provides at clause 4.2 that Mr Denman, "*will be employed on a full-time basis as such director and his initial salary shall be £120,000 per annum*". It also provides that supervision of the business of the restaurant shall be the responsibility of the Board of the Second Respondent and that during an initial period of 36 months or the earlier repayment of the bank loan, decisions of the Board shall be unanimous.
31. The former owner of the business, Mr Smith and also a Mr Ball, were appointed non-executive directors of the Second Respondent, to provide advice and guidance.
32. On 5 May 2017, the shares in the First Respondent were transferred to the Second Respondent and the joint venture began. The assets of the First Respondent were transferred to the Second Respondent in July 2017, I was not given a precise date.
33. No written contract of employment for Mr Denman was drawn up.

34. Mr Denman's first payslip is in the bundle at page 129. The name of the employer appearing is the First Respondent. It is dated 8 May 2017 and the gross pay is £2307. In evidence, Mr Denman agreed that in due course his employment was transferred to the Second Respondent, who was his employer by the time his employment came to an end. As a matter of law that would certainly have been in July 2017, when the assets of the First Respondent were transferred to the Second Respondent, by virtue of the Transfer of Undertaking Regulations. Arguably, Mr Denman was employed by the Second Respondent from the outset, as suggested by the Joint Venture agreement. I do not need to resolve that question. Either way, his employment and liability for his employment was with the Second Respondent at the end of his employment.
35. Payroll was administered by an Office Administrator, Ms Charmatz. She acted on the instructions of Mr Denman and arranged for him to be paid accordingly.
36. Within the first week or so, Mr Smith had telephoned Mr White and expressed concerns that Mr Denman was always late and did not seem to be taking any notice of his advice.
37. Also within the first few weeks, Mr Barak began to have grave concerns with regard to Mr Denman's timekeeping, the amount of work that he was doing and his relationship with staff and customers. He also had concerns as to the sustainability of Mr Denman's salary. On 25 May 2017, (page 164) Mr Barak sent an email to Mr Denman expressing alarm at the takings as compared to the outgoings, particularly in respect of the total wages bill. He commented in capital letters that the business would go under in a matter of weeks if things continued as they were. I accept that there was genuine concern as to the financial viability of the business and that the wages bill, (including the wages of Mr Denman) were a significant factor in that concern.
38. Mr Denman also accepted at the time that there was a genuine concern. He decided to reduce his salary to £750 per week. He gave instructions to Ms Charmatz to adjust his salary accordingly. This is reflected in his payslip for the week ending 29 May 2017, which shows that his basic salary before tax was reduced to £750.
39. Mr Denman says that he had a verbal agreement with Mr Barak that the difference between his rate of pay reflected in the Joint Venture Agreement and the reduced rate of £750 per week, would be made up to him at the end of the year when the business had recovered from its initial costs. Mr Barak says that is not true. I find that if there had been such an arrangement, with such a very significant sum of money involved and bearing in mind the parties had gone to the trouble of documenting their joint venture, it would have been confirmed in writing. I therefore find that there was no such agreement between Mr Barak or either of the respondents and Mr Denman. I find that Mr Denman arranged for his salary to be reduced of his own initiative, without initially discussing or

agreeing it with anyone, because he knew that his original salary was unsustainable.

40. Complaints had been received from staff that Mr Denman was taking their tips.
41. The directors, excluding Mr Denman, met on 2 June 2017 and agreed that Mr Denman should be given an opportunity to improve his behaviour and performance, but that his salary was unsustainable and would have to be reduced.
42. The directors then convened a formal board meeting to which Mr Denman was invited that day. The meeting took place at the home of Mr White. Minutes of the meeting are in the bundle at page 169. Mr Denman disputes the accuracy of these minutes. Mr White and Mr Barak say that at this meeting, Mr Denman agreed to return his shares, to enter into an option agreement for their return to him at a later date, that he would work, "hands on" in the restaurant reporting to the shareholders daily and that his salary would be reduced to £750 per week with immediate effect.
43. Mr Denman says that at this meeting, the directors demanded that he return his shares in return for which they would relieve him of his personal guarantees in respect of loan finance. He agrees that they said they were unhappy with his performance and that such unhappiness was expressed in robust terms. He disputes that there was any discussion about reducing his salary.
44. There are two points made by Mr Denman about the board minutes. The first is the statement that the meeting began at 2:00. He says that cannot be the case, because when he arrived at Mr White's house, he had to make a mobile phone call to Mr White from his car outside the gate, in order to obtain the entry code. He says that the time of that call was at 3:18. Mr Barak's response is that his recollection is that the meeting was at 2:00. The point was not put to Mr White. I am afraid I do not consider that sufficient evidence to undermine the veracity of the board minutes prepared from contemporaneous notes, which were signed by Mr White, whom I regarded as an honest witness. It may be that the reference to 2:00 is a reference to the meeting starting before Mr Denman arrived, it may be no more than a mistake.
45. The second point made by Mr Denman about the board minutes, is that they record Mr Denman agreeing that his new salary will be £750 per week with immediate effect. He says that is inconsistent with the fact that he had the previous week, arranged for his pay be reduced to £750 per week. It is in my view arguably inconsistent, but not sufficient to render the minutes not credible. It is entirely possible that his salary was discussed and his agreement to reduce his salary recorded in writing in the way that it is. Mr Barak's evidence was that he agreed Mr Denman had reduced his salary the week before, but he denies that they discussed that or that he even knew about it, beforehand. I accept his evidence.

46. I find that the board minutes accurately record what was discussed and agreed on 2 June 2017. Specifically, from that date, it was agreed that Mr Denman would be paid a reduced salary of £750 per week. There was no agreement or suggestion that the difference would be made up at the end of the year.
47. There was also a discussion in the board meeting about the allegations by two members of staff that Mr Denman was stealing tips.
48. Mr Denman continued to receive gross pay of £750 per week until week commencing 11 September 2017, when it was reduced to £730.77. Furthermore, if one subtracts the deductions from that gross pay figure, the net pay which Mr Denman should have received should have been £553.20 but was in fact £503.20, (£50 short). The reason behind these deductions was that Mr Denman had taken out a mobile phone contract to be paid for by the Second Respondent. Mr Barak discovered this in July or August 2017. He told Mr Denman that he should not have done so and as a consequence, Mr Denman agreed, but not in writing, that the deductions should be made from his salary to recoup the cost of the mobile phone and the contract. Although Mr Denman disputes that he gave such agreement, I find that if he had not agreed, he would have protested about the deductions in September when the first deduction was made, which he did not.
49. On 8 October 2017, Mr Denman removed £300 from the safe in order to purchase from a cash-and-carry, bottled water and some champagne. He says that he altered the cash up sheet to reflect this and subsequently put the money back in the safe, as I understand it because the items he intended to purchase were out of stock. The respondents say that Mr Denman returned the cash to the safe, £50 short. Mr Denman says that he returned the full amount. I have not heard or seen evidence about this. I accept that the respondents genuinely thought that Mr Denman had returned the cash £50 short. I decline to make a finding whether or not in fact, he did, it is not necessary for me to do so. On 14 October 2017, members of staff reported to Mr Barak that Mr Denman had stolen £30 in cash from the tips stored in the safe on 8 October 2017. Mr Barak spoke to Mr Denman and gave him the option of either walking away or facing suspension and enquiry by the police. Mr Denman did not respond, went home and then went on holiday.
50. Having heard nothing further, on 20 October 2017 Mr Barak wrote to Mr Denman inviting him to attend a disciplinary hearing on 24 October. The charges were theft of cash from the restaurant's takings, falsifying cash reports and lying about the theft.
51. Mr Denman replied on 23 October 2017 to ask for copies of the evidence against him and for the disciplinary hearing to be postponed. Mr Barak replied to say that Mr Denman had admitted stealing, that 72 hours' notice was sufficient and that the evidence would be discussed at the meeting, which will not be postponed.

52. Mr Denman replied by email dated 24th of October to give his resignation with immediate effect. He complains of constructive dismissal, stating that his position had become untenable, not just because of the disciplinary hearing, but because staff and customers had been informed of the reason for his departure.
53. Mr Barak replied to accept the resignation, stating that Mr Denman had admitted the allegations against him on 14 October and that they had indicated to staff simply that he was moving on.
54. On 24 October 2017, Mr Denman wrote a letter demanding the difference in pay for the period of reduction stating, *"I never accepted this reduction in pay and there is nothing in writing suggesting that it was to be a permanent arrangement accepted by both parties"*. He also demanded holiday pay, pay during a week's suspension and complained of deductions from his salary.

Conclusions

Deduction from Wages – Reduced Salary

55. Mr Denman was originally employed as Director of the Second Respondent and as manager of the restaurant, evidenced by clause 4.2 of the Joint Venture Agreement.
56. That states that his initial salary was £120,000. The word, "initial" indicates that the parties acknowledged that the salary might be varied.
57. Regardless of that, the contract was in fact varied, on 2 June 2017, when Mr Denman agreed that his salary henceforth would be £750 per week.
58. There was no agreement that the difference would accrue due and be made up at some later stage.
59. Had I found otherwise, I would in any event have found that Mr Denman had affirmed any breach of contract in the reduced rate of pay, by instructing Ms Charmatz to pay him that which he received and by continuing to work for the Respondents for a period of 22 weeks thereafter, without protest, evincing an intention to continue to be bound by the contract and to perform it. I see no basis on which to suggest that his affirmation was in any way equivocal.

Deduction from Wages – iPhone cost

60. I have found that Mr Denman did orally agree to a deduction being made from his wages to cover the cost of his iPhone. However, the Employment Rights Act 1996 requires that any deduction from one's wages must be authorised by a written contract, or in advance in writing by the individual. There is no such authorisation. The deductions are therefore impermissible and Mr Denman is entitled to succeed in this respect.

61. The deductions were £19.23 from the gross figure of £750 and a hidden deduction of £50, a total of £69.23 per week. That was for a total of 8 weeks and Mr Denman is therefore entitled to Judgement in the sum of £553.83.

Holiday Pay

62. As identified during the hearing, Mr Denman's claim for holiday pay is in respect of the difference he said he was due, between £750 and £2307 per week. As I have found that in fact, he is entitled to £750 per week only, this claim fails.

Notice Pay

63. Mr Denman resigned his employment on 24 October 2017. Up to that point he had absented himself from work without clarifying whether he had left as a consequence of being presented with the allegations against him, or whether he intended to remain in the Second Respondent's employment.
64. The Second Respondent had reasonable and proper cause to present Mr Denman with the allegations against him on 14 October: it had complaints from members of staff suggesting theft and it had what was regarded as suspicious cctv footage. Having not heard from Mr Denman further, it was entitled to write to him on 20 October and give him 3 days' notice to attend a disciplinary hearing. It was entitled to suspend him in the meantime. Staff and customers had not been told of his reason for departure. Mr Barak ought not to have told him that the evidence against him would be disclosed at the disciplinary hearing, such evidence ought to have been disclosed in advance, but that does not in my view amount to a breach of the implied term of mutual trust and confidence.
65. Having resigned with immediate effect, in circumstances where the employer was not in fundamental breach of contract, Mr Denman is not entitled to notice pay. His claim in this respect therefore fails.

Employment Judge Warren

14 May 2018