Case No: 1403208/2019

EMPLOYMENT TRIBUNALS

Claimant: Mr K Zargaran

Respondent: Seaside Foods Limited

Heard at: Exeter **On:** 4 March 2020

Before: Employment Judge Fowell

Representation:

Claimant: In person

Respondent: Ms A Tresahar, Solicitor

JUDGMENT

1. The complaint of wrongful dismissal is dismissed.

2. The counterclaim for breach of contract is upheld.

3. No damages having been shown for breach of contract, the respondent is awarded no compensation.

REASONS

1. Seaside Food Ltd is a family-owned company operating a restaurant in Cornwall. Mr Zargaran worked there for a few months as their chef or head chef beginning on 5 February 2019.

2. This is a dispute arising out of his resignation, which was given on 26 April 2019. During his notice period he was summarily dismissed and so he brings a claim for wrongful dismissal i.e. failure to pay his notice pay in full. The respondent also brings a counterclaim for breach of contract, alleging that he was guilty of gross misconduct. To succeed in that counterclaim it is necessary for the respondent to show that he was in fact guilty of the misconduct in question.

3. I heard evidence from Mr Zargaran and behalf of the company from Ms Samantha Sheffield-Dunston. She and her husband Robert are directors of the business. I also had a witness statement from him and from another member of staff, Kate Womble. (Since these last two did not attend to give evidence I cannot attach the same weight to their evidence.) There was also about a hundred pages of documentary evidence, although not in an agreed bundle. Having heard that evidence and submissions from each side I make the following findings of fact.

Findings

4. As may be imagined, this is a business which depends heavily on the tourist trade and there is a rule that staff do not take holiday over the summer season, which runs from Easter until October. Nevertheless, early on in his employment, Mr Zargaran asked for a week's holiday from 9 May. There is an exchange of text messages about that request which was the subject of some dispute. According to his text, Mr Zargaran wanted to be off from 9 May "for a week and be back at work the following day for 9", i.e. for 9 am. Ms Sheffield-Dunston agreed on the basis that it was a total of one week's holiday and that he would be returning on 16 May when a large party was booked into the restaurant. Mr Zargaran however wanted to be off until 17 May. His text request was therefore unclear, and in fact inaccurate, but neither side realised at the time that they were at cross purposes.

5. On 26 April 2019 Mr Zargaran submitted his resignation. He did so in a detailed three-page email. It raised a number of concerns about working arrangements, with the implication that, if they were addressed, he would stay. He ended by stating that his last working day would be 30 May 2019 and that he was giving four weeks' notice plus the time he was going to be away from 9th to 16th May. It seems likely that Ms Sheffield-Dunston then realised that he was planning to be away on 16 May.

6. She attempted to have a meeting with him to discuss this, and other issues, over the next few days. It is not quite clear whether that meeting was to take place on Friday, 3 May or Monday, 6 May, but in any event, her proposal was that they meet at a Wetherspoons in the morning, away from the restaurant, to discuss matters. He refused, saying that he was at work that day and had too much to do. It was certainly a reasonable expectation that he would agree to such a meeting. It was not particularly out of his way, was in work hours and would allow things to be discussed in reasonable confidence. The fact that he refused to do so is some indication of the extent to which working relationships had deteriorated. He had been hoping for a more favourable response to his resignation, although in the meantime he had in fact found alternative employment. He also then brought forward his termination date to the end of the contractual one-month period, to expire on 24 May 2019.

7. Having been unsuccessful in discussing things face-to-face, Ms Sheffield-Dunston

responded to his resignation email by letter, and at equivalent length. The letter is undated but a subsequent letter refers to it as sent on 6 May. She explained that she had only agreed to the one week's holiday on the proviso that he was back at work on 16 May and that if he did not do so it would leave them in a difficult position.

8. Her next letter dealt with the change of his termination date and reminded him that they had agreed on 30 May 2019. It also insisted on a full stock-take on that day and so it was clear that her intention at that stage was that he work to the end of the month.

9. So, the issue about his return from holiday was not resolved and there was now a further issue about his last working day. On this second point, she asked him by email if he could at least work until 26 May which he was unwilling to do as he now had another job. He went away on holiday on 9 May, and Ms Sheffield-Dunstan emailed him on 13 May 2019, essentially telling him that he need not return to work:

> "Thank you for your response and as we cannot settle on a date and as you are unable to work until the 26th I feel it is in both interest to terminate your contract early.
>
> Therefore we will take your last working day as your previous last working day at [the restaurant] of Wednesday 9th May 2019.
>
> Any pay due to you will be paid on 7th June, along with any possible holiday pay."

10. That therefore left matters somewhat unclear. She did not state in that email that she would pay him for the remainder of his notice period, but no reason was given as to why not. The only apparent reasons for her decision were the disputes over his final day of work and his return from holiday.

11. Subsequently, however, the respondent says that he was guilty of gross misconduct. Those allegations were detailed in Ms Sheffield-Dunston's witness statement and I will briefly describe them.

    a. The first of these relates to the unapproved holiday on 16 May. On that issue, whilst it is clear that there was some confusion over the dates, and whilst Ms Sheffield-Dunstan's interpretation of the emails makes more sense, I also accept that Mr Zargaran genuinely believed that she had agreed that he would be returning on 17 May. In those circumstances I am not satisfied that this amounted to gross misconduct on his part. It was certainly not described as such at the time, or regarded as a disciplinary issue.

    b. The second issue was "aggressive, intimidating and unacceptable

behaviour and comments towards and in front of colleagues". This is perhaps the main allegation. It is supported by Ms Sheffield-Dunston's own evidence that he was aggressive towards her and others, supported by the other statements. There are also a number of emails in the bundle containing comments by members of staff. One for example, dated 8 May 2019, is from a potential new sous chef who had work experience with Mr Zargaran. Although much of it is blanked out it is clear from the remaining passage that he found the attitude of Mr Zargaran off-putting, if not hostile. Another text refers to the chef's attitude - a reference to Mr Zargaran - and said that other issues in the kitchen did not make it a great place to work. Hence, the employee in question was refusing to do further shifts. That is also supported by an email from Ms Sheffield-Dunston herself on 17 May 2019, to the claimant, asserting that he told one of his colleagues in the kitchen that he wanted to be feared. I find that there is sufficient evidence to the support this allegation and that he behaved in this way and that it amounted to gross misconduct.

c. The next allegation is of disclosing confidential information about the business, which is simply a question of him copying his resignation email to a colleague. That does not in my view stand a great deal of scrutiny since the confidential information in question has not been identified, and certainly his own intention to leave is something he is entitled to make known.

d. The next allegation is regarding failing to attend the meeting which I have already discussed. Although arguably misconduct, and the facts are not disputed, I am not satisfied that it can be described as gross misconduct.

e. Another relates to the return the keys to the premises. That occurred after his dismissal and was ultimately resolved, and again I am not satisfied that it was gross misconduct.

f. The final allegation is of undermining the respondent's business to his own benefit. That is a quite separate and distinct matter. As head chef he was authorised to make purchases on behalf of the restaurant for supplies of food, and chose to place most of their orders with one company, a business run by his girlfriend. Those facts were not disputed. There was in my view a clear conflict of interest between his actions in doing that and his duty to the business. It is clearly a serious matter to divert the money from the business to his girlfriend's business without the owners being aware of that connection. He says that their supplies were cheaper but that is disputed. But regardless of the precise calculation, the failure to disclose this connection justifies the conclusion that this was gross misconduct.

12. There were therefore two examples of gross misconduct which came to light following his dismissal, but they were not the reason for his dismissal.

13. The timing is not decisive however. In *Williams v Leeds United Football Club 2015 IRLR 383, QBD*, the club gave Mr Williams 12 months' notice of termination by reason of redundancy. But the next day they discovered, having trawled through his emails looking for something to justify his summary dismissal, that he had forwarded a pornographic e-mail over their e-mail system over five years earlier. They then dismissed him summarily and he claimed wrongful dismissal. The High Court rejected that claim, finding that the club had not known about the breach when it occurred but was entitled to take action when it was discovered. The Court rejected the suggestion that the club should have been prevented from relying on the breach because it was actively looking for misconduct that would justify summary dismissal — it considered that their motive was irrelevant to the contractual position.

14. This is not the case in which Ms Sheffield-Dunstan was looking for evidence against Mr Zargaran. It is simply the case that she became aware of these points in the days following his departure on holiday. She then decided not to pay the balance of notice pay due to him. Given the above authority, she was entitled to do so, and so as with Mr Williams, this complaint of wrongful dismissal must also be dismissed.

15. There is also a counterclaim by the company for losses which it incurred as a result of these breaches. However, no evidence has been presented about those losses, which relate to the allegations of aggressive behaviour and the conflict of interest with his girlfriend's business. Often in such cases, notional damages are awarded, but here it has to be borne in mind that the business saved the balance of his wages for the remainder of the notice period, a sum approaching £1000. Accordingly I am not satisfied that even a notional award of damages is appropriate and so I make no order for compensation.

Employment Judge Fowell

Date: 04 March 2020

Judgment sent to parties: 09 March 2020

FOR THE TRIBUNAL OFFICE