Case Number: 2300565/2016

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EMPLOYMENT TRIBUNALS

BETWEEN

Claimant		**Respondent**
Mr R Durkan	and	**Hythe Royal British Legion Club Limited**

Held at Ashford on 23 January 2017

Representation	**Claimant:**	In person
	Respondent:	Mr Palmer, Former Chairman

Employment Judge Kurrein

JUDGMENT

The Judgment of the Tribunal is that:-

1. The Respondent has wrongfully and unfairly dismissed the Claimant.
2. It is ordered to compensate him for notice pay in the sum of £4,320;
3. In respect of his unfair dismissal it is ordered to pay him a basic award in the sum of £5,383.32 and a compensatory award in the sum of £4,211.96.

REASONS

1 On 4 March 2016 the Claimant, having completed early conciliation, presented a claim to the Tribunal alleging unfair dismissal, wrongful dismissal and entitlement to a redundancy payment. His claim to entitlement to a redundancy payment is not well founded and is dismissed.

2 On 29 April 2016 the Respondent presented a response in which it contested the Claimant's claims.

3 I have heard the evidence of the Claimant on his own behalf and the evidence of Mr Palmer former chairman, Mrs Ward. Former Secretary, Mrs Lemon, a cleaner/bar attendant who since been made redundant, and a Mrs Williams, a former bar attendant, who was also been made redundant. I read the

documents to which I have been referred and heard the submissions of the parties and I make the following findings of fact.

4 The Claimant was born on 15 October 1961 and started his employment with the Respondent as a Bar Steward on the 1 September 2004. He was provided with a succession of statements and particulars of employment and at least two job descriptions.

5 The Respondent had in place a staff handbook of which the Claimant was aware. The contract provided that the Claimant was responsible for rotering staff and organising cover if he was not available to carry out his duties when he was required to. The staff handbook had a provision that in the event the Claimant could not provide cover he should inform the Secretary of this. It also provided that the Claimant should give notice of any intended holiday on a Monday morning and would have it either approved or not on the following Wednesday. None of the documents pertaining to that process, whether in the past or the occasion with which I am concerned, have been provided by the Respondent. However, I am satisfied on the basis of the evidence I have heard that the procedure, particularly in respect of staff coverage, was not followed and cover had been arranged casually as between the Claimant and Mrs Lemmon.

6 I also find as a fact that it was known within the Respondent that in late 2015 the Claimant would be going to Florida to celebrate the wedding of his daughter to her now husband, who is employed by JCB in the Midlands. I specifically find that he does not have a computer business and the Claimant did not leave his employment with the Respondent for the purpose of taking up any position with his son-in-law.

7 The Claimant went to Florida as arranged, with his last day of work being on or about the 25 October 2015, and returned from his holiday on 13 November 2015. In his absence, however, on the 3 November 2015, the Active Pensioners Group which intended to meet at the Respondent's premises that morning turned up to find the premises locked. By chance a member of staff was passing and, following a phone call access was gained to the premises and the planned meeting took place as arranged.

8 It also appears that during the Claimant's absence the Respondent committee met on the 12 November 2015. It was at that meeting that Mrs Ward was appointed to succeed the previous incumbent as the Respondent's Secretary. Unfortunately, the Respondent has not produced the minutes of the meeting but I accepted the Respondent's evidence that the committee took the decision that the Claimant should be issued with a written warning concerning his failure to arrange cover for the 3 November 2015.

9 That letter was drafted by Mrs Ward and was in the following form

> "This is a written warning for failure to provide cover or conveying to the committee you could not get cover allowing them to sort the problem out to be able to open the club for the coffee and tea morning on 3 November 2015. It was only by pure chance one of the temporary bar staff was walking by that she offered to go back home to get the club key and allow them entry.

> As you know it falls within your remit to find cover for this and you failed to do so, so it was agreed by the committee that from 10 November Mr Joseph Moran would be opening up for the coffee and tea morning forthwith".

10 That letter was signed by Mrs Ward and dated 19 November 2015. It was addressed to the Claimant at his home address. In the course of the evidence it became clear that this letter was in an envelope with the Claimant's name written on it and placed in the Respondent's safe, to which the Claimant had ready access.

11 It was the evidence of the Respondent's that the Claimant must have removed this letter from the safe on 20 or 21 November and that he should not have done so.

12 However, there is no criticism of the Claimant's conduct whatsoever in the correspondence that followed his complaint concerning and references to that letter. I find as a fact that that his evidence, to the effect that he was handed the letter by Mrs Ward, should be preferred.

13 In reality that is not any real significance because it was clear from the evidence I heard that the Claimant could have been expected to take that letter from the safe and read it when he next attended the premises on his next working day on 20 November 2015. When the Claimant did read the letter on that day, in Mrs Ward's and Mr Palmer's presence, there was a row between him and Mr Palmer in which the Claimant protested that warning on the grounds that he had acted in accordance with usual practice to arrange a cover and he had been issued with the warning without any process being followed. Nevertheless the Claimant was subsequently informed by Mrs Ward on the 11 December that the warning would stand and he expressed again his dissatisfaction with that position.

14 On the 20 December the Claimant worked his last shift and took his pay cheque from the safe. He did not attend work thereafter but he wrote to the Respondent to state that he believed he had been constructively dismissed.

15 He did so by email sent to the Respondent on the afternoon of 22 of December 2015. He started by complaining about being issued with a written warning and gave his explanation that he had explained to the other staff the need to cover the coffee morning of the 3 November and, indeed, the events on Remembrance Sunday. He asserted that he had been told by Mrs Ward, as I have found, that the warning would not be withdrawn and complained that no procedure had been followed. He therefore felt he had no choice and expressed the view that he had been constructively dismissed.

16 The Respondent replied on 24 December 2015 and I noted that it did not take issue with the fact of the Claimant's possession of that letter. It sought to suggest that the Claimant might have resigned in the heat of the moment and that he should, if he so wished, withdraw his resignation and attend a grievance hearing if he had a grievance he wished to raise. It sought to say that the letter he had been given was not intended to be a formal warning and was not part of the company's disciplinary proceeding. I noted in that context

that Ms Ward drafted that letter with the assistance of her Employment Law Advisors, Peninsula.

17 The Claimant responded to say that his decision had not been in the heat of the moment, he asserted that he had given Mr Palmer the keys to the premises on 22 December and told him that as soon as he got home he would confirm by email that he had resigned. That evidence was not challenged on behalf of the Respondent.

18 In those circumstances I have to consider firstly whether or not the Claimant's contract was terminated and for that purpose I have applied the decision in the well known case of Western Excavating v Sharp [1978] QB 761. In that case the general principles were set out that in a complaint of constructive unfair dismissal the burden lies on the Claimant to establish, firstly, that the Respondent has fundamentally breached the contract of employment and, secondly, that he resigned in response to that breach and, thirdly, that he did not wait so long as to the affirm the contract or to waive the breach.

19 I am satisfied that the manner in which the Respondent conducted itself in giving the Claimant a warning for what in reality was, at most, a minor infraction without following any process at all, not even the ACAS Code of Conduct let alone its own procedures, amounted to and was accepted by the Claimant as a breach of the implied term relating to trust and confidence of which it is clear, from the decision in Morrow v. Safeway Stores [2002] IRLR 9, any breach of which amounts to a fundamental breach.

20 There was no reasonable or proper cause for the Respondent to act as it did. If it had wished to take action in respect of the Claimant's failure to ensure that there was cover for the 3 November 2015 it should have invited him to either an investigation meeting, at which he could set out his side of the story and the Respondent could give consideration as to whether it merited further action or not, or it could have invited him to a disciplinary hearing at which could have set out its case against him for being liable to potential disciplinary action. It did none of those things and its conduct was therefore wholly unreasonable and breached the implied term of trust and confidence.

21 I did not accept that the Claimant had waited too long to exercise his right to accept that breach. He had complained about the Respondent's conduct and was awaiting a response, he did not receive that until at least the 11 December when he was told that the warning would remain in place. That, in some ways, added insult to injury and to the extent necessary could have been a last straw within the principle set out in Omilaju-v-Waltham Forest London Borough Council [2005] ICR 481.

22 I am satisfied that the Claimant did resign in response to that breach, not only by walking out of the premises on 20 December 2015 but also by the conversation he had with Mr Palmer on 22 December when he handed him the keys and by his email later that day in which he expressly stated that he considered himself to have been constructively dismissed.

23 In those circumstances, the Claimant having established that he was dismissed, the onus is on the Respondent to establish not only the reason for

the dismissal but that it was a potentially fair reason. It has not produced any evidence to support the suggestion that the Claimant's dismissal was because of his conduct and I therefore find that it has failed to establish a reason for the dismissal that is potentially fair.

24 In any event the dismissal was unfair for several reasons:-

24.1 The Claimant was not given notice of any disciplinary process or the opportunity to defend himself.

24.2 The Claimant was not provided with copies of any evidence that was relied on.

24.3 The Claimant was not invited to a hearing at which he could put his side of the story.

24.4 The Claimant Claimant was not given the right of any appeal against the decision.

In those circumstances the dismissal is procedurally unfair.

25 However, it is also substantively unfair because the sanction of dismissal was wholly disproportionate to any wrongdoing that the Claimant might have been found guilty of had a fair hearing taken place.

26 Against that background I have no hesitation in also finding that the Claimant was not himself guilty of misconduct entitling the Respondent to dismiss him without notice.

27 The Claimant is therefore entitled to three month's notice pay in the sum of £3,600. In light of the Respondent's abject failure to comply with the ACAS Code of Conduct I consider it to be just and equitable in all the circumstances of the case to increase that award by 20%, giving a total figure of £4,320.

28 The Claimant is entitled also to a basic award of 18 week's pay and a compensatory award for the loss he has suffered as a consequence of the dismissal, including a sum for the loss of the statutory rights he enjoyed by virtue of his long service.

29 Against that I have given consideration to the Respondent's submission that the Claimant's misconduct in respect of the failure to arrange cover on the 3 November was such as to amount to contributory conduct. I accepted that submission, but I am also of the view that it is only such as to justify a deduction of 10%.

30 His basic award would have been £4,984.56, being 18 week's gross pay. I have reduced that award by 10% to show that he has been guilty of some contribution towards his dismissal. Against that, however, and once again because of the Respondent's flagrant failure to comply with the ACAS Code of Conduct, I have increased it by 20% thus giving a basic award figure of £5,383.32.

31 In considering the Claimant's compensatory award I have taken the view that as an experienced bar steward he had the ability and experience to gain alternative employment at a similar rate of pay within six months of the

termination of his contract. The first three months of that period has been accounted for by the notice pay which I have already awarded him, and I have therefore only awarded him loss of earning for a further period of 13 weeks from 23 March 2016, when his notice period would have expired, until 22 June 2016 being a total sum of £3,599.96. To that I have added the sum of £300 for his loss of statutory rights giving a total figure, before adjustments, of £3,899.96. I have again reduced that by 10% on account of contributory conduct, to give a figure of £3,509.96, but which has then been increased by 20% for the failure to comply with the ACAS Code of Conduct, to give a final figure of £4,211.96.

32 The Recoupment Regulations apply to this award. For that purpose:-

32.1 The total award is in the sum of £13,915.28;

32.2 The prescribed element is in the sum of £3,239.74;

32.3 The prescribed period is from 23 March to 22 June 2016;

32.4 The total award exceeds the prescribed element by £10,675.54.

Employment Judge Kurrein

8 February 2017