Case No: 2300711/2016

THE EMPLOYMENT TRIBUNAL

SITTING AT:	**LONDON SOUTH**
BEFORE:	**EMPLOYMENT JUDGE K ANDREWS**
MEMBERS:	**Mrs T Bryant** **Ms S Khawaja**

BETWEEN:

Mr N Hachem

Claimant

and

Open Circle Ltd
t/a Meza Restaurant

Respondent

ON:	**2 & 3 February 2017**

Appearances:
For the Claimant: **In person**
For the Respondent: **Mr P Taheri, Counsel**

JUDGMENT

1. The claims for unpaid annual leave and wages were withdrawn and are dismissed.

2. The claimant was unfairly dismissed. The compensation payable to him in that regard will be adjusted for the reasons set out below.

3. The respondent was in breach of its duty to provide the claimant with written particulars of employment. Compensation of two weeks pay in that regard is payable for the reasons set out below.

4. The claims of breach of contract and sexual orientation discrimination are unsuccessful and are dismissed.

5. A remedy hearing is listed on 9 May 2017.

REASONS

1. Although the claimant had legal representation in the preparation of his case he represented himself at the Hearing. English is not his first language but he expressly confirmed at the outset that he was happy to proceed and we were satisfied throughout that he was sufficiently able to understand the proceedings.

2. In this matter the claimant complains that he was unfairly dismissed, had been discriminated against on the ground of sexual orientation and had not been paid the notice pay he was due. He confirmed at the outset of the Hearing that he had been paid all other wages and holiday due to him and therefore those claims were withdrawn.

3. When discussing the issues the claimant said that his claim form, which had been prepared by his legal representatives, was incorrect in a number of matters although it had been prepared on his instructions. Similarly there were some discrepancies between the response form (drafted when they were not legally represented) and the respondent's position at the Hearing. Accordingly some latitude was granted to both parties in the way they presented their case.

4. It was a feature of this case that the nature of the relationship between the claimant and his employer went beyond the usual nature of such a relationship. There was a close and personal shared history, in particular, between the claimant and Mr Antippa. The claimant had also introduced Mr Youssef into the respondent's employment as they had worked together before. Because of this dimension the proceedings at times became emotional. Taken together with the claimant being in person, we allowed a certain amount of latitude in the presentation of his claim and formal rules of evidence were adjusted accordingly with a view to achieving the overriding objective.

Evidence

5. We heard evidence from the claimant and for the respondent from
    a. Mr Hikmat Antippa, co-owner and founder;
    b. Mr David Salbashian, co-owner and sole director (not an employee and with a background in IT);
    c. Mr Ali Youssef, restaurant manager (employed since August 2014).

6. The witness statement of the claimant was prepared by him alone and was not comprehensive. The witness statements for the respondent were prepared by legal representatives, who came on the record on 23 January 2017, but also were not comprehensive. Accordingly all witnesses gave substantial additional live evidence. Further it became clear that the bundle of documents, prepared by the respondent's legal representatives, was incomplete. Specifically, there were iMessages on Mr Salbashian's mobile phone that should have been disclosed as they are clearly very relevant to the issue of when the claimant was dismissed. With the agreement of the claimant, he and the Tribunal looked at those iMessages

during the course of the Hearing. Hard copies were subsequently provided and added to the bundle.

7. In general terms we found all of the respondent's witnesses to be compelling, credible and candid in their answers to questions. The claimant was less consistent in his evidence and not always straightforward in the answers he gave. Further he was at times during his evidence very emphatic, loud and did not appear to be listening well. We do not find that he was deliberately trying to mislead the Tribunal rather that he genuinely believed he had been treated badly but at times had lacked insight into his own behaviours which continued through to this Hearing.

Relevant Law

8. Unfair dismissal

9. By section 94 of the Employment Rights Act 1996 ("the 1996 Act") an employee has the right not to be unfairly dismissed by his or her employer.

10. In this case the claimant's dismissal was admitted by the respondent and accordingly it is for the respondent to establish that the reason for the dismissal was a potentially fair one as required by section 98(1) and (2). If the respondent establishes that then it is for the Tribunal to determine whether the dismissal was fair in all the circumstances (including the size and administrative resources of the respondent business) having regard to equity and the substantial merits of the case (section 98(4)). In applying this test the burden of proof is neutral.

11. In this case the respondent relies upon conduct and therefore the Tribunal must consider whether the respondent acted reasonably in treating the claimant's conduct as sufficient reason for dismissing him.

12. In that exercise, the Tribunal is guided by the principles set out in British Home Stores Ltd v Burchell [1978] IRLR 379, affirmed by the Court of Appeal in Post Office v Foley [2000] ICR 1283. Accordingly the Tribunal will consider whether the respondent by the standards of a reasonable employer:
    a. genuinely believed the claimant was guilty of misconduct;
    b. had reasonable grounds on which to sustain that belief; and
    c. at the stage at which it formed that belief on those grounds, had carried out as much investigation into the matter as was reasonable in the circumstances of the case.

    Any evidence that emerges during the course of any internal appeal against dismissal will be relevant in that exercise but otherwise material not before the employer at the relevant time is irrelevant.

13. The approach in Burchell is modified to the extent that even if the respondent fails to establish one or more of the three limbs above the Tribunal must still ask itself if the dismissal fell within the range of

reasonable responses referred to below (Boys and Girls Welfare Society v Macdonald 1997 ICR 693).

14. Further, the Tribunal must assess – again by the standards of a reasonable employer - whether the respondent's decision to dismiss was within the band of reasonable responses to the claimant's conduct which a reasonable employer could adopt (Iceland Frozen Foods v Jones [1983] ICR 17 and Graham v S of S for Work & Pensions [2012] IRLR 759, CA). The band of reasonable responses test also applies to whether the respondent's investigation was reasonable (Sainsbury's Supermarkets v Hitt [2003] IRLR 23).

15. When considering the procedure used by the respondent, the Tribunal's task is to consider the fairness of the whole of the disciplinary process. Any deficiencies in the process will be considered as part of the determination of whether the overall process was fair (OCS Group Ltd v Taylor [2006] ICR 1602). The Tribunal will also take account of the ACAS Code of Practice on Disciplinary and Grievance procedures.

16. In coming to these decisions, the Tribunal must not substitute their own view for that of the respondent but to consider the respondent's decision and whether it acted reasonably by the standards of a reasonable employer.

17. Where the Tribunal considers that any conduct of the claimant before the dismissal was such that it would be just and equitable to reduce the basic award it shall reduce that award accordingly and/or finds that the dismissal was to any extent caused or contributed to by the action of the claimant it shall reduce the amount of the compensatory award by such proportion as it considers just and equitable. Compensation can also be reduced to take into account the likelihood that the claimant would have been dismissed in any event if a fair procedure had been followed (Polkey v AE Dayton Services Limited [1988] ICR 142). Further, any award can be adjusted by up to 25% if there has been a failure by either party to comply with the ACAS Code of Practice referred to above.

18. <u>Breach of contract</u>

19. All employees are entitled to be treated in accordance with the terms of their contract of employment, whether express of implied. In particular, where no express notice period is agreed the employee is entitled to receive a minimum amount of notice of termination in accordance with section 86 of the 1996 Act.

20. <u>Failure to provide written particulars of employment</u>

21. By section 38 of the Employment Act 2002 if a Tribunal finds in favour of an employee in relation to a claim under a jurisdiction listed in schedule 5 (which includes unfair dismissal) and when the proceedings were begun the employer was in breach of its duty to provide written particulars of employment pursuant to section 1 of the 1996 Act, a further award is

payable of not less than two weeks pay or four weeks pay depending upon the circumstances.

22. Sexual orientation discrimination

23. Section 13 of the Equality Act 2010 provides that a person discriminates against another if, because of a protected characteristic, he treats that person less favourably than he treats or would treat others. Sexual orientation is a protected characteristic.

24. To answer whether treatment was "because of" the protected characteristic requires the Tribunal to consider the reason why the claimant was treated as he/she was. The Equality and Human Rights Commission Code of Practice states that whilst the protected characteristic needs to be a cause of the less favourable treatment it does not need to be the only or even the main cause.

Findings of Fact

25. Having assessed all the evidence, both oral and written, we find on the balance of probabilities the following to be the relevant facts

26. The respondent is a small employer with five employees. It operates three restaurants (Mezas 1 and 2 plus La Tapiera) and a production unit used for the preparation of meat. The claimant commenced employment as head chef at Meza 2 with the respondent on 5 April 2011. He often also worked in the production unit and regularly visited the other sites. He received no written contract of employment upon commencement or at any time to date. Accordingly he was entitled to the statutory minimum notice period. The respondent had and has no written policies nor access to any HR advice.

27. The respondent relies upon a series of allegations regarding the claimant's behaviour between 1 January 2014 and 6 November 2015 which it says amounted to misconduct on his part. This included swearing and using abusive language to colleagues, aggression towards the head waiter, unacceptable behaviour in front of customers, intentionally damaging the respondent's property, deliberately obstructing the appointment of a temporary chef to cover during the claimant's extended holiday, failing to attend work when expected, walking out in the middle of preparation of large orders and sending abusive and offensive text messages. The claimant denies that he was guilty of any misconduct during this period. No formal allegations were put to the claimant at the time and no investigations were carried out. Accordingly, the only evidence before us was the conflicting oral evidence of the witnesses together with a very few contemporaneous documents that had any bearing on the allegations made.

28. Within those documents was an exchange of iMessages between the claimant and Mr Salbashian following a meeting on 26 February 2014 between the claimant and the head waiter aimed at resolving the differences between them. When asked about these iMessages the claimant did not accept that the exchange was with him as the copy disclosed did not show his telephone number. However later in the Hearing when he and the Tribunal looked at Mr Salbashian's mobile as described above in connection with a different set of iMessages, he did accept that his number was the one used by Mr Salbashian. We therefore find that the February 2014 iMessages were exchanged with him.

29. The respondent says that during the meeting on 26 February 2014 the claimant was very abusive in Arabic to the head waiter, including an offensive reference to his sister, who then responded physically and had to be restrained. The claimant says that he said nothing offensive and the head waiter had tried to attack him for no reason.

30. The respondent says it then suspended the claimant for two days by an iMessage from Mr Salbashian that said:

> "Hi Nader. Don't come to work tomorrow or Friday. I want things to calm down a bit. What happened today was unnecessary in my opinion. Let's meet on Friday at 5 PM please"

and subsequently:

> "Let's meet on Friday 5 PM. I will let you know where. Probably Central London. Don't worry about coming to work Thursday or Friday"

31. We find that the content and the tone of these messages do not support the respondent's case that this was a suspension or any kind of warning. They could in fact have been read by the claimant as supportive of him as a victim him even though this is not how they were intended.

32. The respondent also says that during a meeting on 28 August 2015 the claimant was verbally warned by Mr Youssef due to damage to company property. Mr Youssef was persuasive in his evidence that he gave this warning but the claimant disagreed saying no warning was given. We prefer the evidence of Mr Youssef and find that on this occasion some sort of disciplinary verbal warning in general terms was given to the claimant.

33. The claimant took an extended holiday in September 2015. There is a dispute between the parties as to whether he returned to work as required after the holiday but whichever is correct, this led to a meeting between Mr Antippa and the claimant on or about 4 October 2015. During this meeting the claimant said he did not want to return to work but Mr Antippa was keen to encourage him to do so. Consequently he offered the claimant an unspecified reduction in hours together with a change in responsibilities (namely to be responsible for meat preparation from the production unit and to supervise the various kitchens) for the same salary. Mr Antippa regarded this as a promotion for the claimant. The claimant agreed to this change and returned to work the following day.

34. Following that return to work, however, the respondent remained unhappy with the claimant's conduct particularly towards colleagues and a meeting was held with him by Mr Salbashian and Mr Antippa on 7 November 2015. Again there is a dispute as to what was said at this meeting. Both Mr Salbashian and Mr Antippa say that the purpose of the meeting was to address the claimant's behaviour and attitude but also to find a way forward as they wanted to retain him within the business. They say that during the meeting the claimant said that it was completely normal to fight with colleagues, be abusive, that he did occasionally lie and that he considered that to be acceptable. Mr Antippa said that it was these statements that led him to "give up" with the claimant and he then left it to Mr Salbashian to decide what to do with him. The claimant agrees that he said it was normal that fights would happen between colleagues but that he did not say he lied. Instead he says that it was Mr Antippa who told him he should lie. Further he said that he was speaking in Arabic and that therefore Mr Salbashian, who is a native English speaker, could not have understood what was being said. To this Mr Salbashian said that the meeting was conducted in a mix of English and Arabic and that Mr Antippa translated the Arabic for him.

35. Our finding is that the meeting was held in a mix of English and Arabic (translated for Mr Salbashian) and that the claimant did say it was normal to fight (not meaning physically fight) and argue. We also find that lying was mentioned in some way but not as described by the claimant. Rather, in the context of a conversation where the respondent was asking the claimant to change his ways and find a way forward, the claimant said something to the effect of "this is the way I am" and showed no intention of changing his behaviour. It was because of that attitude displayed by the claimant that Mr Antippa decided that he had had enough of trying to accommodate the claimant and he left the decision to Mr Salbashian as to what should be done.

36. Mr Salbashian's decision was that he could not trust the claimant to behave in the future and he dismissed him without taking any further steps to investigate his alleged conduct the following day. Again there is a dispute between the parties as to what was said during this meeting. We find that Mr Salbashian expressly told the claimant that he was dismissed and in response the claimant asked to be paid what he was due and said goodbye to the other staff shaking hands with each of them. This is also supported by an iMessage sent by Mr Salbashian to the claimant on 5 December 2015 asking him to return anything he still had that belonged to Mezza "like keys, chef jackets".

37. Mr Salbashian says he posted a letter of dismissal to the claimant on 14 November 2015 expressly referring to their conversation on 8 November and confirming that his last day of employment would be 31 December 2015. The claimant says that this letter is a fake and he never received it. In the absence of any proof of posting or receipt (that sending the letter recorded delivery would have provided), we find that the claimant did not receive this letter. However given our finding that he was expressly told

on 8 December that he was being dismissed, this does not change the position regarding the termination of his employment.

38. The respondent paid salary to the claimant until 31 December 2015.

39. The claimant says that he only found out that he was being dismissed on 2 January 2016 when he received a copy letter from the respondent that stated:

> "To Whom it may concern;
>
> This letter is to confirm that [the claimant] has ceased his employment at Open Circle Ltd (T/A Meza restaurant), 70 Mitcham Rd, SW17 9NA from 31st Dec 2015.
>
> For any further information please don't hesitate to contact me."

40. Mr Salbashian says that this letter was provided by him to the claimant in response to a request for a reference. It is clearly on its face in the form of the reference rather than a letter of dismissal and we accept Mr Salbashian's evidence.

41. As to the more general allegations made by the respondent in respect of the claimant's behaviour, we are persuaded by the respondent's witnesses that he was, in general terms, guilty on various occasions of unacceptable behaviour towards his colleagues including being argumentative.

42. This is supported by the claimant accepting in his evidence that he had been told by all of Mr Youssef, Mr Salbashian and Mr Antippa "both before and after September [2015]" that he was a troublemaker. He did not accept that he was in any way guilty of misconduct although he did say that every four or five months he had had to challenge various employees of the respondent because of their substandard work. This was in keeping with Mr Antippa's written evidence that the claimant would regularly fight with colleagues and would escalate matters to a fight or argument at least one a week. In his live evidence Mr Antippa accepted that that was an exaggeration and that such incidents happened every few months. The claimant's demeanour whilst giving evidence also leads us to accept the respondent's witnesses description of his behaviour in the workplace.

43. The claim of sexual orientation discrimination arises from an alleged comment by Mr Youssef. The claimant's position on this allegation has varied. His claim form (which of course the claimant now says is incorrect) states that the comment was made by "the restaurant owner" on 5 November 2015 when he told the claimant not to speak to him because he was gay and gave him two months' notice. It also states specifically that the reason for the dismissal was because the respondent believed the claimant was gay. The case management order reflects that allegation but the claimant did not attend that hearing.

44. In his witness statement the claimant says that the comment was made on 13 October and that it was made by Mr Youssef (not the owner). He says

that he said good morning to Mr Youssef who then said to him "you are not a man (gay)". Further that he believed Mr Youssef made people believe the claimant was gay and that is why they no longer liked to work with him and that is why he was dismissed.

45. At the outset of the Hearing the Employment Judge sought to clarify the nature of the claimant's sexual orientation discrimination claim with him. At that stage he confirmed that he is not gay, that Mr Youssef made the comment in Lebanese and said that he was gay. He also said that his statement at paragraph 9 of his witness statement was "100% correct". During the course of the Hearing the claimant said that Mr Youssef said to him "you're not a man, you're gay".

46. Mr Youssef's evidence, given in a very straightforward and credible way, was simply that he never said anything to the claimant of this nature and that the comment was not made.

47. We prefer Mr Youssef's account in this respect to the claimant's. We find that no comment was made to the claimant about his sexual orientation. Nor do we find that any such comment was made to any other employees or that any such comment or any belief about his sexual orientation was relevant to the later decision to dismiss.

Conclusions

48. Unfair dismissal

49. It is clear that the respondent followed no formal process when deciding to dismiss the claimant. Even taking into account the size and resources of the respondent we find the dismissal to be unfair on that basis alone. We do not accept Mr Taheri's argument that in effect the claimant had been given warnings throughout his employment. Although he had been challenged generally from time to time about his behaviour and in August 2015 was given a verbal warning by Mr Youssef, this did not amount to an effective warning to him to improve his behaviour or face more serious consequences. Further, the challenges that had been made were more than outweighed by the promotion he was effectively given in October 2015.

50. The respondent also fails to satisfy all of the Burchell principles. We find that although Mr Salbashian did have a genuine belief in the claimant's misconduct that belief was not based on reasonable grounds given that there was no process preceding it and nor was there a reasonable investigation. Again, even taking into account the respondent's size and resources, and looking at the case in the rounds, the dismissal was outside the band of reasonable responses and unfair.

51. Having concluded that the dismissal was unfair we have considered what adjustments should be made to the award of compensation and set them out in the order in which they should be applied.

52. Compensation should be reduced to take into account the likelihood that the claimant would have been dismissed in any event had the respondent followed a fair procedure. We find that a fair procedure would have resulted in the claimant receiving a final written warning on 8 November in respect of the unacceptable comments he made on 7 November. We then assess that, given the pattern of the claimant's behaviour over his employment, another incident of misconduct would have happened within three months – the claimant's own evidence was that disputes with colleagues happened every 3-4 months. At that point it would reasonably have taken the respondent one month to deal with that new incident fairly at which point, given the final written warning already on his record, they would have fairly dismissed the claimant on 4 weeks' notice. His employment therefore would have extended from 8 November 2015 to 6 April 2016. As he was paid his salary until 31 December 2015, the maximum period of compensation in respect of loss of earnings he shall receive is for the period 1 January 2016 to 6 April 2016.

53. There was a very clear breach by the respondent of the ACAS Code of Practice in that they did not follow the guidance therein as to a fair disciplinary process. Again we take into account the size of the respondent but also note that Mr Salbashian, as its sole director, works elsewhere in financial services. It is unreasonable for the respondent to rely on an argument that they simply had no idea of their responsibilities in this regard. We consider that a 10% uplift is appropriate to compensation payable.

54. Having concluded that the claim of unfair dismissal is established and that compensation will be payable to the claimant, albeit adjusted as described above, and given our finding that he was not provided with written particulars of employment, it follows that an award must be made to him. We do not find any exceptional circumstances to preclude such an award (being a very small employer is not in itself exceptional). We have the discretion to award between two and four weeks pay. Given the size of the respondent we award the minimum payable – two weeks pay.

55. Further we conclude that compensation for unfair dismissal should be reduced to take into account the claimant's own blameworthy conduct that contributed to his dismissal. The claimant's attitude and behaviour towards his colleagues in the period of his employment up until 7 November 2015 had created a situation where the respondent then made the decision that they did to dismiss following his failure to give the reassurance sought about his future conduct. Of course we have also found that the respondent failed to follow a reasonable procedure and therefore they were also to some extent responsible for the unfair dismissal. We assess, however, that the claimant was more responsible than the respondent and compensation will therefore be reduced by 60%.

56. <u>Sexual Orientation Discrimination</u>

57. Given our finding that the conversation between the claimant and Mr Youssef on 13 October did not happen as described by the claimant and

that the reason he was dismissed was solely because of his conduct, the claim of direct discrimination fails. The claimant also at various times in the hearing referred to what could amount to an allegation of harassment (although this was not in his claim form). For completeness, we confirm that we do not conclude that Mr Youssef or any employee/representative of the respondent made any comments to anyone about the claimant's sexual orientation.

58. Breach of Contract

59. Given our finding above that the claimant was told by Mr Salbashian on 7 November that he was dismissed on that date and he was paid until the end of December, he was paid more than his statutory notice period to which he was entitled. Accordingly this claim also fails.

Remedy Hearing

60. It follows that a remedy hearing is necessary to complete the calculation of the compensation payable to the claimant. It is hoped however that given our findings with regard to contributory conduct, Polkey and the section 38 award, the parties may be able to reach agreement between themselves on this matter.

61. If the parties do reach agreement they will please notify the Tribunal as soon as it is reached. However the matter is listed for 1 day commencing at 10am on **9 May 2017** in case it is needed.

Employment Judge K Andrews
Date: 15 March 2017