EMPLOYMENT TRIBUNALS

Claimant: Mr K Remelie

Respondent: Mr M Gollings t/a The Boot Inn

HELD AT: Liverpool **ON:** 17 August 2017

BEFORE: Employment Judge Robinson
(sitting alone)

REPRESENTATION:

Claimant: In person
Respondent: Mr J Byrne of Counsel

JUDGMENT

The judgment of the Tribunal is that:

1. The claimant's claim for constructive unfair dismissal succeeds. His claims for damages for breach of contract and unlawful deduction of wages are dismissed.

2. The respondent will pay forthwith to the claimant the sum of £4,339.13 which is made up as follows:-

Basic award	£2,884.65
Compensatory award for loss of earnings	£1,538.48
Total	£4,423.13
Less earnings during the period 28 September 2016 to 27 October 2016	£84.00
Total	**£4,339.13**

3. The recoupment provisions do not apply.

REASONS

1. This is a constructive unfair dismissal claim together with a notice pay and a holiday pay claim for seven days' holiday pay.

2. There is much dispute between Mr Gollings, the owner of The Boot Inn in Cheshire, and his former chef, Mr Remelie, in relation to what happened in September 2016 when the employment relationship ended. My findings of relevant facts are as follows.

The Facts

3. Mr Remelie is a good chef with 30 years' experience. He is 53 years of age. He worked for The Boot Inn for five years. When he resigned he was head chef with Mr Simon Mitton the sous chef. Initially the two men got on. They fell out. Mr Gollings thought it was because Mr Remelie had asked Mr Mitton to come in to cover a shift and for family reasons Mr Mitton refused. Mr Gollings thought that that upset the claimant. The claimant resigned on 28 September 2016 and that is the effective date of termination.

4. Over a period of time the relationship between the two chefs deteriorated. In September 2016 they were not speaking to each other except professionally. The claimant accepts that the atmosphere was unpleasant and that he was angry with Mr Mitton about certain things, the details of which are largely irrelevant although I will touch on them later.

5. On 9 September 2016 Mr Gollings and the claimant discussed the issue. Mr Gollings had heard rumours of the rift between the two men before that meeting and merely hoped that it would all settle down, but by 9 September 2016 things had got worse. The discussion on 9 September was short because the claimant was busy in the kitchen, it was near the end of his shift and Mr Remelie was tired .

6. Mr Gollings took no other steps other than to suggest to the claimant that the two chefs should "shake hands and make up". Mr Gollings then went away for the weekend. Unfortunately, over that weekend, the relationship got worse between the two chefs. Mr Mitton approached Mr Remelie and remonstrated with him for accusing him of being a paedophile. Whether Mr Remelie had actually said that about Mr Mitton is difficult to ascertain but there was some suggestion that a 15 year old girl, who was working at the pub, had a crush on Mr Mitton. Whether that upset Mr Remelie or not I do not know.

7. However on his return to the pub on 12 September 2016 Mr Gollings invited the claimant for a chat because he realised that the relationship had not improved. He insisted that the claimant take two weeks' holiday. The claimant did not want to take that holiday. It was paid leave and it was in addition to his holiday entitlement. There was no meaningful discussion, however, between the two men and no attempt

was made by Mr Gollings to sort out the problem between the claimant and Mr Mitton. Mr Mitton was left in post. Mr Remelie was sent off on an unwanted holiday. Mr Remelie had no say in whether he went on holiday.

8. Whilst the claimant was away Mr Mitton ran the kitchen and the claimant thereafter never returned to work to run the kitchen. He did go back briefly on Monday 26 September 2016 but was told by Mr Mitton that he was not on the rota and that Mr Gollings wanted to see him on Wednesday 28 September 2016.

9. Consequently on 28 September 2016 there was a second meeting between Mr Gollings and the claimant. There are two different versions of events. Mr Gollings says that he asked all the staff in the interim when the claimant was on holiday if there had been any impropriety between members of staff. It was a vague question mentioning no names. Mr Gollings tell me that he heard nothing untoward from those enquiries.

10. Mr Remelie's version is different. He says that he was told by the respondent on 28 September 2016 that he had asked "all the girls", not all the staff, if Mr Mitton had been "touching them up" and no-one said that Mr Mitton had.

11. Although the difference in evidence is not entirely material I did decide that I preferred the claimant's version of events.

12. The upshot of the discussion was that Mr Gollings took the claimant away from the kitchen and demoted him. Mr Gollings tells me that it was on the same pay. Mr Remelie says it was on less pay. Mr Gollings says that he gave the claimant cash in advance at that point. Whether this was to sweeten the demotion I do not know. Mr Remelie tells me that he received no cash on that day. Mr Remelie, in any event, felt demeaned by the way he had been treated by Mr Gollings. He had been taken out of the kitchen and was now being asked to do menial tasks. Mr Gollings' reason for removing Mr Remelie was that a kitchen is a dangerous place and he did not want an argument between his two chefs which might turn aggressive. Without properly investigating the matter he had decided that it was Mr Remelie who had been the aggressor and that it was Mr Remelie who was in the wrong.

13. Mr Remelie could not stomach being demoted and doing menial jobs around the pub and being taken out of the kitchen and so he informed the respondent he was leaving and resigned at that point.

The Law

14. Section 95(1)(c) of the Employment Rights Act 1996 provides that there is a dismissal when the employee terminates the contract with or without notice in circumstances such that he or she is entitled to terminate it without notice by reason of the employer's conduct. That is known as a constructive unfair dismissal.

15. In order for the claimant to succeed in his claim the Tribunal must rule that the employer's conduct was a repudiatory breach of contract, and if the employer is guilty of conduct which is a significant breach going to the root of the contract or which shows that the employer no longer intends to be bound by one or more of the

essential terms of the contract, then the employee is entitled to treat himself as discharged from any further performance. The employee must establish that there was a fundamental breach of contract on the part of the employer, the employer's breach caused the employee to resign and the employee did not delay too long before resigning thus affirming the contract and losing the right to claim constructive dismissal.

16. The Tribunal has to identify the specific term of the contract which it is alleged has been breached. In this case there is no doubt it is the implied term of mutual trust and confidence.

17. With regard to breach of contract, as the only issue was notice pay I have included in the award of damages the claimant's notice pay as part and parcel of his compensatory award.

18. With regard to unlawful deduction of wages, there is a right under section 13 of the Employment Rights Act 1996 not to suffer unauthorised deductions. An employer should not make a deduction from wages of a worker employed by him unless the deduction is required or authorised to be made by virtue of a statutory provision or a relevant provision of the worker's contract or the worker has previously signified in writing his agreement or consent to the making of the deductions. The claim being made by the claimant relates to holiday pay. The onus is upon the claimant to prove he is owed money and that the total amount paid to him is less than the amount " properly payable".

Application of Law to Facts

19. Applying that law to the facts of the case I came to the following conclusions, and I set out some further facts below for ease of presentation.

20. I concluded that Mr Remelie was on some occasions intemperate in his attitude towards Mr Mitton. On the other hand Mr Gollings would accept no other way of dealing with the impasse between the chefs other than his own.

21. There are a number of things Mr Gollings could have done to address this difficulty other than reduce Mr Remelie to, in effect, the status of a handyman. It is important to note that no time limit was put on these new duties that were given to Mr Remelie and which were outside his important role in the kitchen. Chefs are proud, they are skilled, and it is not surprising that Mr Remelie took umbrage at being treated the way he was treated on 28 September. That treatment also came out of the blue. There was no warning given to the claimant as to what Mr Gollings would do when he, the claimant, returned from his holiday.

22. Expecting the two chefs to sort matters out when they were at loggerheads smacks of weak management and poor employment practice. Mr Gollings could have got the two chefs together to talk through the issues. If they refused then he could have investigated the matter fully and he could have taken written statements from the two combatants and from other members of staff who were relevant to the issues. He did none of those things. He could have decided during that investigation

who was wrong and who was in the right, and who needed to be disciplined if anybody.

23. There was a practical solution open to Mr Gollings. He could have placed the two chefs on rotas which would mean they had little or limited contact with each other. He could have done that for a relatively short period at least to allow tempers to cool. He could also have taken an undertaking from both these professional men that their personal animosity towards each other would not spill over into their working lives in the kitchen. Another alternative could have been for him to suspend both chefs to allow for them to cool off. The unwanted holiday given to Mr Remelie was tantamount to a suspension of the claimant. Mr Mitton was not suspended. Even if Mr Gollings felt it was the claimant who was the one at fault he still should have been even-handed in his dealing with the two men and he was not.

24. The investigation, when the claimant was absent, was flawed. Mr Gollings did not take written witness statements from any of the staff. He did not focus on any particular issue or decide what the issue potentially was. He asked vague questions and the claimant was not asked for his version of events. If, as Mr Golling suggests, the claimant was unwilling to cooperate with the investigation he could have warned him of the consequences of not doing so. I do not accept the claimant was unwilling to cooperate. He was simply surprised at the way Mr Gollings dealt with him.

Conclusions

25. Having taken all those issues into account I concluded that Mr Gollings had been guilty of poor employment practices. But did that mean that there had been a breach of contract? I felt that Mr Remelie had proved that he (the claimant) had been constructively unfairly dismissed. The treatment of him went to the heart of the relationship. There was a fundamental breach of the contract. The implied term of trust and confidence had been broken by Mr Gollings' conduct. The reasons for so concluding are as follows:-

26. To present the claimant with a fait accompli and reduce his status to that of handyman even though he was paid the same money or not, went to the heart of the relationship. Furthermore, Mr Gollings did not allow Mr Remelie to have a voice in his discussions with him. He made a unilateral decision. Whatever the respondent thought of the vague allegation of the claimant about Mr Mitton, it was incumbent upon him to give the claimant a fair hearing and he did not do that. Mr Gollings' actions of reducing the claimant's status, demeaning him in front of staff so that he lost face before his colleagues, is sufficient to show that the employer was guilty of conduct which is a significant breach going to the root of the contract of employment.

27. I considered, after coming to that conclusion, whether the claimant's actions warranted a reduction in compensation for contributory fault i.e. his alleged bad behaviour. I decided on balance not to do so for these reasons:

(1) That allegation has not been pleaded or referred to in the hearing today and has not been pleaded in the ET1.

(2) I do not actually know the extent of the alleged poor behaviour by the claimant. If matters had been delved into more constructively by Mr Gollings as to why the claimant was so upset with Mr Mitton and whether his was a reasonable complaint to make, then the extent to which the claimant was acting unreasonably could have been placed before me. It was not.

28. This was a tiff, and I accept a serious one, between two senior employees of the respondent. Good and fair management by the respondent would have avoided these proceedings. It is not appropriate to suggest, as Mr Gollings has done today, that if the claimant had shaken hands with Mr Mitton "we would not be here". Employment arguments sometimes cannot be settled by a shake of the hand. They are settled by an employer carrying out proper and fair processes for all the staff. Consequently I will not reduce the compensation.

29. With regard to holiday pay, I have heard no evidence. I do not know whether Mr Remelie has or has not been paid holiday pay, and if he is owed holiday pay, for how many days. I therefore do not know how much is owed.

30. In those circumstances I cannot award Mr Remelie any money for loss of holiday pay.

31. As mentioned above, I have included the claimant's award for notice pay in his compensatory award.

32. As for the Tribunal fees, there is no need for me to make any order for repayment in view of the recent Supreme Court decision in July 2017.

33. Having decided on liability I then discussed the issue of remedy with the parties. Mr Byrne on behalf of the respondent accepted that the basic award was £2,884.65. There was some discussion and evidence taken with regard to Mr Remelie's mitigation. Within the period from 28 September 2016 to 27 October 2016 when he got another job on more pay he did do a shift for another restaurant and earned £84. I accepted that that sum should be deducted from the award.

34. With regard to mitigation of loss, although Mr Byrne questioned Mr Remelie on the number of jobs available in Cheshire restaurants at the time, especially coming up to Christmas, I accepted Mr Remelie's evidence that he had mitigated his loss and tried to get jobs after he resigned, and subsequently did so within a very short period of time (four weeks). In those circumstances the respondent has not proved that the claimant has not mitigated his loss. The burden is upon him.

35. Having heard evidence from Mr Remelie, and Mr Remelie having been cross examined on the issue, I decided that the following payments should be made.

36. Mr Remelie should receive his basic award as set out above. He should not receive seven days' holiday pay as I have heard nothing with regard to that issue. The amount of net loss during the four weeks between jobs was calculated at £1,538.48 and I award that sum as the only compensatory award to Mr Remelie, and

I deduct the £84 that he earned at Piste, another local restaurant, in that month when he was out of work.

37. The sum due therefore to the claimant from the respondent is £4,339.13 and I order Mr Gollings to pay that to Mr Remelie forthwith.

11-10-17

Employment Judge Robinson

JUDGMENT AND REASONS SENT TO THE PARTIES ON
13 October 2017

FOR THE TRIBUNAL OFFICE