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EMPLOYMENT TRIBUNALS

Claimant: **Mr M S Parvez**

Respondent: **JD Wetherspoons plc**

Heard at: **East London Hearing Centre** **On: 19-20 October 2017**

Before: **Employment Judge C Ferguson (sitting alone)**

Representation

Claimant: Mr B Danial (Trainee Solicitor)

Respondent: Mr P Powlesland (Counsel)

JUDGMENT having been sent to the parties on 6 November 2017 and reasons having been requested in accordance with Rule 62(3) of the Rules of Procedure 2013.

REASONS

INTRODUCTION

1 By a claim form presented on 19 June 2017, the Claimant brought complaints of unfair dismissal and unauthorised deductions from wages.

2 At the start of the hearing I heard evidence and submissions on the issue of whether the Tribunal had jurisdiction to hear the wages claim. I ruled that it did not have jurisdiction because the claim was presented out of time and the complaint was therefore dismissed. Reasons were given orally and were as follows.

3 The Claimant's complaint of unauthorised deduction from wages has not been properly particularised. It appeared from a discussion at the start of the hearing that he is claiming he should have been promoted in 2013, and by implication paid a higher salary from then onwards, and there were a series of deductions every pay date from then until mid-January 2017 when he was promoted to the role of shift manager. The Claimant contacted ACAS on 23 May 2017 and presented his claim form on 19 June 2017, both outside the ordinary three-month time limit in s.23 of the Employment Rights

Act 1996. Further, I do not accept that it was not reasonably practicable for the Claimant to bring his claim within three months of the last alleged deduction, i.e. by 12 April 2017. The Claimant says that the reason he did not do so was because he thought the matter was being resolved internally, but a letter from the Respondent dated 18 January 2017 made it clear that, although they accepted he should have been promoted earlier, he was not going to be paid any back pay because they did not accept his actual pay was lower than it would have been if he had been paid as a shift manager. There was no basis for believing that the matter was still under consideration after that date. The Claimant's representative also suggested that the Claimant was unaware of his right to bring a Tribunal claim, but there was no evidence to support that. Even putting to one side the issue of the Claimant's failure to give particulars of the complaint until the morning of the final hearing, I conclude that the Tribunal has no jurisdiction to hear the complaint and it is dismissed.

4 The issues to be determined in relation to the unfair dismissal complaint are:-

4.1 Was the Claimant dismissed?

4.2 Has the Respondent shown that the reason for the Claimant's dismissal related to his conduct?

4.3 If so, did the Respondent have a genuine belief based on reasonable grounds and following a reasonable investigation that the Claimant was guilty of the alleged misconduct?

4.4 If so, was it reasonable for the Respondent to treat the Claimant's conduct as a sufficient reason for dismissal?

4.5 Was the dismissal procedurally fair?

4.6 If not, what is the percentage chance that the Claimant would have been dismissed following a fair procedure?

4.7 If the Claimant's dismissal was unfair should the basic and/or compensatory awards be reduced on account of the Claimant's conduct and if so, to what extent?

5 On behalf of the Respondent I heard evidence from Alicja Stopa and Danny McCluskey. I also heard from the Claimant.

FACTS

6 The Claimant commenced employment with the Respondent in May 2008. He worked in a number of different roles and by the time of the events giving rise to these proceedings he was a shift manager.

7 On 9 March 2017 the Claimant was on duty as the bar manager at the Great Spoon of Ilford. He was the most senior member of staff on duty. Two or three hourly paid staff members were also on duty. At around 9:25pm one of the other members of staff told the Claimant that there was a child in the pub, which was contrary to the policy that children were only allowed until 9pm. When the Claimant went to tell the customer that they would have to leave the customer was racially abusive towards the Claimant

and physically aggressive. I have seen the CCTV footage of the incident which shows the following chain of events. There was no audio recording.

8 The Claimant and the customer are seen standing up having a conversation moving between the door to the pub garden and the bar area. There are a few other customers sitting in the pub at nearby tables; a woman and a toddler are also later seen standing up near to the Claimant and the customer. After an exchange of words the Claimant walks away from the customer who follows the Claimant and pushes him with both hands from behind. The Claimant turns around and raises both hands towards the customer pushing him away. The customer then appears to punch the Claimant following which the Claimant picks up a chair and swings it above his head as if intending to hit the customer with it. The customer backs away and the Claimant puts the chair down. Further discussion then takes place and it appears the customer makes contact with the Claimant again. The Claimant then picks up a chair for a second time and moves towards the customer with the chair held above his head. The customer retreats and the Claimant put the chair down but the customer then picks up a chair himself. Another member of staff then comes towards the customer and the customer puts the chair down. The other member of staff speaks to the customer and the Claimant walks to the bar area.

9 An investigation took place into the incident and the Claimant was interviewed on 11 March 2017. Describing the incident the Claimant said:

> "To save myself I pushed him back then he keep coming towards me. I lost myself and to save myself I lift chair to scare him away but when I put the chair down he came and punched me again."

Later he said:

> "Until I pushed him to defend myself my behaviour was right but I am human being after all and if someone is being racist to someone is hard to control and I had to defend myself as well."

10 One other member of staff was interviewed and he confirmed that the customer was being racially abusive towards the Claimant.

11 It is not in dispute that the Respondent operates training for all front of house staff in dealing with difficult or violent customers and that the Claimant had attended the training. The Claimant said in his oral evidence that the proper response to the customer's behaviour in accordance with the training would have been to turn on his body camera (issued to all front of house staff), walk away to the bar area and call the police.

12 On the same day as the investigatory interview the Claimant was suspended. He was invited to a disciplinary hearing to take place on 17 March 2017. The allegation was that:

> "On 9 March 2017 at 21:26 while on duty you were having a fight with a customer who you were trying to remove from the premises and threatened to hit him with a chair."

13 The hearing was conducted by Alicja Stopa. At the hearing the Claimant submitted a statement saying that he picked up the chair to defend himself and had no intention of using it. He also said that his reaction had been influenced by an earlier racially motivated attack in October 2016 following which he required surgery on his nose and counseling. During the incident in the pub he said he experienced flashbacks to the earlier incident. He submitted medical evidence relating to the earlier attack.

14 Ms Stopa considered the Claimant's account, the interview with the other staff member, the CCTV footage and the medical evidence submitted by the Claimant and concluded that the Claimant should be summarily dismissed for gross misconduct. She considered he was experienced enough to know how to behave in that kind of situation and that dismissal was appropriate because she would not be able to trust him in the future.

15 The Claimant appealed, arguing in particular that the earlier attack in October 2016 constituted mitigating circumstances and that more weight should have been given to his nine years unblemished service.

16 An appeal hearing took place on 21 April 2017 conducted by Danny McCluskey. Mr McCluskey accepted that the earlier incident would have had a bearing on the Claimant's actions and that his length of service was a relevant factor. He informed the Claimant that his appeal was allowed and he would be reinstated but he would be issued with a first and final warning and demoted to the role of kitchen shift leader; this would involve a slight reduction in salary. The appeal outcome letter states:

> "It was clear that your conduct fell well below what is expected of an experienced shift manager and you accepted that it was right that you should be disciplined for your actions. Based on that, I explained to you that for you to continue as a shift manager would continue to pose a risk to the business and to the license. However I also took into account the mitigation you offered around your length of service as outline above. On the basis of this it was my decision to change the decision and reinstate you to a role in the company. Consequently you have been issued with a first and final warning which will be effective for 12 months from 17 March 2017. I also decided to demote you to the role of kitchen shift leader as I do not believe that you should continue running shifts front of house. This should also protect you from the risking of coming into contact with difficult customers."

17 The Respondent's disciplinary and dismissal procedure which is expressly stated to be non contractual provides that the Respondent:

> "may consider demotion to an alternative position as part of a disciplinary outcome. This should only be as an alternative to dismissal and changes to terms and conditions will always be offered with immediate effect".

18 Following the appeal hearing, on 25 April, the Claimant sent an email to Mr McCluskey referring to the "offer" to commence work on 28 April 2017 and asking for some time to consider it until he had had the chance to take legal advice. Mr McCluskey replied:

> "For the sake of clarity please note that my decision on your appeal means that you have now been reinstated to a role with JD Wetherspoon. Therefore it is not

> an offer in the sense that you appear to have understood it. Should you subsequently choose not to return to work then you will be resigning your position. You have shifts allocated on the rota from 28 April 2017 at the Walnut Tree Leytonstone so could you please clarify your intention to me in advance of then."

19 On 2 May 2017 the Claimant sent a further email to the Respondent saying that he had received legal advice. He said he was willing to temporarily accept the role of kitchen shift leader but that he should continue to receive the same salary as he had received in his previous role. Mr McCluskey replied on 6 May 2017 confirming that the appeal was closed, the Claimant was found to have committed gross misconduct and the sanction i.e. final written warning and demotion was commensurate with this. He wrote:

> "Following your reinstatement you are now employed as a kitchen shift leader at the Walnut Tree in Leytonstone and your hourly rate of pay is £8.70. This rate of pay is in excess of the standard rate paid to a kitchen shift leader. However I believe you should receive it in recognition of the fact that you have completed your MOD1 training. Additionally I am happy to provide you with guaranteed minimum hours contract of 40 hours per week in this role."

20 The Respondent suggested in cross-examination of the Claimant that the difference in pay amounted to around £500 a year. The Claimant thought that it would be a bit more than that in practice.

21 On 12 May 2017 the Claimant emailed Mr McCluskey stating that he did not accept the decision to demote him. It was not part of his contract of employment. He said:

> "I am therefore unable to continue my employment given you wish to change the terms of my contract of employment."

This was treated as notice of resignation. Although the Respondent said at the time that this meant that the original decision to dismiss was effective and the Claimant's employment terminated on 17 March 2017, the Respondent now accepts that the appeal outcome had the effect of reviving the contract of employment and the Claimant remained employed until his resignation on 12 May 2017. The Claimant has not yet been paid for the period 18 March to 12 May but the Respondent has undertaken to rectify that.

THE LAW

22 Section 95(1)(c) of the Employment Rights Act provides:

> "For the purposes of this Part an employee is dismissed by his employer if –
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> …
>
> (c) the employee terminates the contract under which he is employed (with or without notice) in circumstances in which he is entitled to terminate it without notice by reason of the employer's conduct."

Dismissals pursuant to section 95(1)(c) are known as constructive dismissals. Four conditions must be met in order for an employee to establish that he or she has been constructively dismissed: (1) there must be a breach of contract by the employer; this may be either an actual or anticipatory breach; (2) the breach must be repudiatory i.e. a fundamental breach of the contract which entitles the employee to treat the contract as terminated; (3) the employee must leave in response to the breach and (4) the employee must not delay too long before resigning otherwise he or she may be deemed to have affirmed the contract. (*Western Excavating (ECC) Ltd v Sharp* [1978] ICR 221 and subsequent cases)

23 Pursuant to section 98 of the Employment Rights Act 1996 it is for the employer to show the reason for the dismissal and that it is a potentially fair reason. A reason relating to the conduct of an employee is a fair reason within section 98(2) of the Act. According to section 98(4) the determination of the question whether the dismissal is fair or unfair:

> "(a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and
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> (b) shall be determined in accordance with equity and the substantial merits of the case."

24 In misconduct cases the Tribunal should apply a three stage test first set out in *British Home Stores Ltd v Burchell* [1980] ICR 303 to the question of reasonableness. An employer will have acted reasonably in this context if:-

24.1 It had a genuine belief in the employee's guilt;

24.2 based on reasonable grounds

24.3 and following a reasonable investigation.

The Tribunal must then consider whether it was reasonable for the employer to treat the misconduct as a sufficient reason for dismissal in respect of each aspect of the employer's conduct the Tribunal must not substitute its view for that of the employer but must instead ask itself whether the employer's actions fell within a range of reasonable responses (*Iceland Frozen Foods Ltd v Jones* [1982] IRLR 439).

Conclusions

25 Although the Respondent did not formally concede that the Claimant was constructively dismissed it did not argue otherwise and I accept that he was. There was no contractual right to demote the Claimant and the decision to move him into another role with a lower rate of pay without his agreement therefore constituted a fundamental breach of contract entitling the Claimant to treat himself as constructively dismissed. The Claimant resigned in response to that decision and did not delay to the extent that he affirmed the contract.

26 The Claimant did not dispute that the reason for his dismissal was his conduct. The central question is whether the Respondent acted reasonably. The relevant

decision for this purpose is Mr McCluskey's decision that led to the Claimant's resignation, namely the decision to demote him to a role that attracted a lower salary.

27 The Claimant did not dispute that Mr McCluskey had a genuine belief in the Claimant's misconduct. Mr Danial on behalf of the Claimant made a number of criticisms of the investigation in his submissions saying that the Respondent should have interviewed more witnesses and should have provided further CCTV footage. Those points were not pleaded and the latter was not put to either of the Respondent's witnesses. In any event there is no basis for arguing that the investigation was unreasonable. There was no dispute about what actually happened. It is sufficiently clear from the CCTV footage that was provided what happened physically and the Claimant never suggested that the footage was misleading.

28 The Respondent accepted that the Claimant had been racially abused and that the customer was physically aggressive. In his oral evidence the Claimant was admirably honest and thoughtful in saying that he had reacted badly to the customer's racist remarks and physical aggression and in particular he admitted that he should not have picked up a chair in the way that he did. He accepted that it was contrary to the Respondent's policy and the training he had received. He considered that a finding of gross misconduct was reasonable.

29 I accept that it is likely to have been a frightening incident for the Claimant, particularly given that he had experienced another racist attack relatively recently, but that does not excuse his conduct which went far beyond self defence and appeared to have the effect of escalating the incident. Even taking into account that the customer instigated the incident, the Claimant gave insufficient consideration to the safety of other customers, including the child who was present and the more junior members of staff. By picking up the chair in the way that he did, i.e. holding it over his head as if to use it as a weapon rather than in a self defensive position, he risked more serious retaliation by the customer and the incident could have become extremely dangerous. In those circumstances it is unarguable that the investigation was flawed or that there were inadequate grounds for the Respondent's conclusion.

30 The only remaining issue therefore is whether the decision to demote the Claimant fell within a band of reasonable responses. In his evidence the Claimant effectively accepted that it was. His main argument was that dismissal was not justified because of the mitigating factor of the earlier attack and his long service. He said that this was an isolated incident out of character and he should have been given a second chance. That is precisely what the Respondent decided on appeal. Even in the absence of medical evidence on the issue of whether the Claimant's previous attack could have affected his response to this incident the Respondent effectively gave him the benefit of the doubt and found that it was a mitigating factor and that that, in combination with the Claimant's length of service, meant that he should be offered a second chance. The only dispute was about the level of the Claimant's pay. The Claimant said he had been advised that it was unlawful for the Respondent to demote him and reduce his pay. That is of course right to a point but it fails to recognise that if an employer takes such a step in response to an act of misconduct any subsequent constructive dismissal may still be fair.

31 Given the Claimant's concession that his conduct amounted to gross misconduct and that it was reasonable for the Respondent to move him in to a non front of house role the Respondent's decision clearly fell within the band of reasonable responses.

This was a serious incident which affected the safety of staff and customers and could have affected the Respondent's license. It was perfectly reasonable for the Respondent to take the view that the Claimant could not return to a front of house role and that given his admitted culpability it would not have been appropriate to protect his pay.

32 For completeness I should say that the Claimant's representative sought to argue that the Respondent bore some responsibility for what happened because adjustments should have been made to the Claimant's working practices when he returned after the attack in October 2016. There was no evidence to support such an argument and the Claimant had never raised it before the hearing. The Claimant did not give any evidence about what happened when he returned to work or suggest in his evidence that the Respondent had not been supportive or that he was unable to continue in his role. There is nothing in this argument.

33 The Claimant's claim is dismissed.

Cost application

34 The Respondent claims costs on the basis that the Claimant's wages claim had no reasonable prospect of success or alternatively the Claimant acted unreasonably or vexatiously in pursuing it.

35 The wages complaint was dismissed on the basis that it was presented out of time and the Tribunal therefore had no jurisdiction to hear it. I find that there was no reasonable prospect of the Tribunal finding otherwise. Apart from a vague reference to wages not being backdated in the ET1 the claim was never particularized, even after the Respondent applied for it to be struck out; the Claimant said he maintained the complaints but did not provide further particulars. At the start of the hearing it emerged that the Claimant was complaining of being underpaid between 2014 and January 2017. On any view the claim was presented out of time and no reason was put forward to explain that. The Claimant sought to suggest that he believed it was being addressed by the Respondent but in light of the grievance appeal outcome letter there was no basis for such a belief. The Respondent has been put to the expense of responding to the complaint insofar as it was able to do so including preparing a witness statement which was ultimately unnecessary.

36 I award costs of £300 as claimed. Taking into account the Claimant's limited income that is a reasonable amount.

Employment Judge Ferguson

3 January 2018