



EMPLOYMENT TRIBUNALS

Claimant: Mr M Nalder

Respondent: J D Wetherspoon Plc

HELD AT: Liverpool

ON: 30 January 2018
31 January 2018
1 February 2018

BEFORE: Employment Judge Robinson
Miss F Crane
Mr J Murdie

REPRESENTATION:

Claimant: In person
Respondent: Mr Siddall, Counsel

JUDGMENT

The reserved judgment of the Tribunal is that the claimant's claim for constructive unfair dismissal and for a detriment relating to his application to take paternity leave contrary to Section 47C and Section 48 of the Employment Rights Act 1996 both fail and are consequently dismissed.

REASONS

Issues

1. The issues before the Tribunal were whether the employers had shown an intention to abandon and refuse to perform Mr Nalder's contract acting in a way which was calculated or likely to destroy or seriously damage the relationship of trust and confidence between J D Wetherspoons and the claimant.
2. A second limb to the claim was whether the way in which the respondents dealt with the claimant's grievances meant that there was no reasonable opportunity for him to have those grievances properly and reasonably determined.

3. We considered whether there had been a fundamental breach of contract. The claimant made an application for notice pay but that application piggy backs upon the claim for constructive unfair dismissal. He resigned without notice. If he were to have won his case then notice pay would have been payable, or compensation which equated to his notice pay, would potentially have been available.

4. With regard to his detriment claim we had to decide whether the claimant's application to attend a training course was refused, was that refusal a detriment to him and was the reason for that refusal connected to the paternity leave that he was about to take. In other words was he subjected to a detriment by any act or any deliberate failure to act by his employer done for a prescribed reason?

Facts

5. The facts of the case are these. Mr Nalder worked for the respondents from December 2012 and became a Kitchen Shift Leader. He resigned on 19 May 2016.

6. His line manager was Karla Morrison who was the Pub Manager of the Thomas Telford pub in Ellesmere Port.

7. Vanessa Watson was a Shift Manager at the pub and the line manager for Karla Morrison was Nel Devitt.

8. We heard evidence from Mr Nalder, from Nel Devitt and Paul Miller (another line manager) who dealt with the claimant's grievance and took over from Nel Devitt when she went on maternity leave. We also heard from Sarah Greenwood who was another Pub Manager.

9. There had been tension in the pub between the claimant and other employees, in particular Vanessa Watson, for some time. Vanessa Watson had a number of her family working in the pub, including Tonia Watson her niece.

10. Mr Nalder made a number of allegations in a grievance which he lodged in January 2016. There was a hearing with Sarah Greenwood on 6 February 2016 with regard to that grievance.

11. The claimant had previously lodged a grievance in 2014. We were not taken to that grievance or the outcome. The claimant submitted a further grievance on 3 January 2016 which was sent to Nel Devitt. He complained about Vanessa Watson. Why it was not sent to Karla Morrison we did not find out. Karla Morrison would have been the appropriate person to whom to send the grievance.

12. The grievance complained about Vanessa Watson's attitude at the pub and that she played the fruit machines whilst on shift. The claimant suggested that Vanessa Watson had played the fruit machines over a period of three years. He had not raised a grievance about that issue before because, when he raised his grievance in 2014, he felt that his shifts had been cut down for making the grievance.

13. He also complained that Vanessa Watson stayed after shift drinking, she undermined the Duty Manager's shifts by sending staff home, entering the office and barking orders at staff. He also had concerns that she was interfering in the food order system and that she gave staff discounts to family members. The most serious allegation was that, when Vanessa took temporary charge of The Wheatsheaf, she was helping herself to Thomas Telford stock.

14. He complained that over Christmas 2015 he did not receive his tips because Vanessa was in charge of them. He was the only person not to receive his share.

15. He also made another serious allegation, that two years previously Vanessa had helped herself to £120 of staff tips.

16. He accused her of making unpleasant and untrue remarks about his girlfriend to other members of staff. Finally he complained that Miss Watson sent staff home from the kitchen when there was work to be done. Because of her attitude staff had left the pub.

17. That grievance was not fully looked into by management. Nobody took ownership of the process. Nel Devitt did some investigation of the machine issue by looking through CCTV footage to see if Mrs Watson was playing the machines in the morning. Nel Devitt also got in touch with Regal, the company that owned the fruit machines, to see if they had recorded any activity at times when there should not have been activity when the pub was, for example, closed. No untoward activity was discovered and the claimant was told that.

18. Ms Devitt produced no written report. She passed the rest of the claimant's complaints on to Sarah Greenwood who failed to do a proper and full investigation. She dealt with only half the issues. However she did have a meeting with the claimant on 6 February where some of the issues were discussed,

19. The grievance was solely about Vanessa Watson and not about Nel Devitt or about Karla Morrison.

20. The report only considered whether there was activity on the fruit machines in the morning because the claimant said that the activity had happened between 7 and 8 am.

21. The claimant told Ms Greenwood that he did not think there was untoward activity at other times. The claimant suggested that he could not raise these things with Karla.

22. The claimant's reasons, he said, for raising the grievance was because he had had a bad shift. In other words he was in a bad mood.

23. When it was put to him that he should have gone to Karla rather than Nel he agreed. He was asked on a number of occasions what outcome he wanted from his grievance. He thought that he ought to bring it to the attention of the manager because he felt that it was wrong that these incidents had occurred. He said that he

was happy at work. Mrs Greenwood organised the payment of the claimant's Christmas tips which he then received. She did no investigation with regard to the rest of the claimant's complaints despite telling him that she would start an internal investigation.

24. The claimant ended by apologising for not bringing these issues to Karla's attention but he said he would in the future.

25. Mrs Greenwood did not send a formal outcome letter to the claimant. It was her responsibility to do so and she apologised to the claimant.

26. The claimant then made no complaint to the respondents until the 8 April 2016. By that time Sarah Greenwood's involvement had finished without her giving him a grievance outcome. The claimant did not remind her.

27. It is only now that the claimant suggests that he was taken by surprise when he had the meeting on 6 February with Mrs Greenwood at the John Laird pub in Birkenhead. He was driven there by Karla and we find he knew what type of meeting he was going to. He was not taken by surprise.

28. On the 31 March 2016 the claimant requested to go on a five day course at the respondent's Regional Training Centre.

29. On 5 April 2016 he received a refusal from Karla Morrison on the basis that he was about to start paternity leave. His paternity leave was actually not due to start until 17 May.

30. Karla agreed with the claimant that he would not go on that course because his pregnant partner was ill and the claimant wanted to stay with her.

31. The claimant denies that that conversation took place. We only heard from him. Karla Morrison's evidence was in the form of a written statement but she did not attend the hearing.

32. However the claimant made no complaint, not even in his resignation letter, that he had been denied the opportunity of going on the course until the issue of these proceedings

33. The courses are held every week. The claimant applied to go on the course with the encouragement of Nel Devitt.

34. The claimant continued to work until 8 April when he was called in to a formal meeting with Karla Morrison. Lianne Mortimer, a Pub Manager at The Wheatsheaf, was also there. The claimant was asked questions about a £500 deficit with regard to stocks. The respondents were entitled to question him about that.

35. He felt he was ambushed at that meeting by Karla Morrison and so, on 8 April 2016, he lodged another grievance setting out a number of issues including his dissatisfaction with his previous grievance not being dealt with.

36. The claimant left work and was signed off with work related stress for seven weeks. He was not able to get to the first grievance hearing meeting because his partner gave birth. Eventually the meeting took place on 19 May 2016. Mr Miller had the lead role with Nel Devitt in attendance ostensibly as a note taker.

37. A human resources manager, Nirojini Sutharsan, provided the managers with a synopsis of nineteen points giving a neat summary of the claimant's complaints. The first eight points in the grievance raised the same issues as were raised in the grievance of January 2016. The other eleven points raised issues that had occurred between the claimant and Karla and the claimant and Vanessa in the intervening period between February 2016 and April 2016.

38. One of the points that he raised was that on 8 April he considered he was being investigated and he felt he had been victimised, harassed, bullied and discriminated against.

39. The claimant made it clear that he did not want Nel Devitt at the meeting on 19 April because she had not completed the January grievance. He wanted someone who was in his words "completely independent" of the original grievance and not mentioned in it.

40. On 21 April he was told by Mrs Sutharsan that she did not believe that the grievance concerned any issues with regard to Ms Devitt but concerned grievances only against Karla and Vanessa respectively. He was informed that in line with companies grievance policy his grievance would be processed by the Area Manager. The grievance policy of the respondents sets out a format for the managers to deal with grievances. It includes requiring the managers to ask what happened, why it happened, when it happened, where it happened and who was involved.

41. On 1st June 2016 Mr Miller set out his reasons for not upholding the grievance.

42. However that was after the claimant had resigned.

43. Dealing now with the grievance hearing in detail, it is clear that Nel Devitt was more than a note taker.

44. Prior to the meeting on 19 May, there was a return to work interview with the claimant. Nel Devitt took the lead and Paul Miller took the notes. Mr Nalder explained to Mrs Devitt that he felt that he was being investigated for stock losses and that Carla was trying to pin the loss on him.

45. He was asked whether moving pubs would help him and he said no and confirmed that he should not have to move as it was him who had lodged the grievance.

46. Mrs Devitt told him that she only offered a move to help and asked him if he would be happy to stay at The Thomas Telford. His answer to that was "if I don't have to work with them".

47. "Them" meant Karla Morrison and Vanessa Watson.

48. His contract of employment and terms of condition include a provision that in the event of business needs and/or operational requirements an employee may be transferred to another location within the company, not necessarily in the job to which they were appointed at their current location. It was noted that he walked out of work on 8 April 2016 in the middle of his shift, that his doctor stated on his fit notes that he was absent for stress. Those notes were presented on 11, 18 and 25 April 2016. He was off on paternity leave at the end of April 2016 to the beginning of May and then from 11 - 19 May absent again with stress.

49. The claimant had signed up with Karla on 13 February 2016 to a Performance Improvement Plan (PIP) on the basis that, although recent audits with regard to food stocks were good, control, paperwork and staff knowledge was highlighted as poor.

50. The claimant was given various objectives and understood that a failure to complete the objectives to improve his performance may result in further action up to and including dismissal or demotion to a lesser role.

51. At the grievance hearing in May, now chaired by Paul Miller after the return to work hearing, each of the nineteen points mentioned above were gone through by Mr Miller with the claimant.

52. The meeting lasted about four hours.

53. The claimant confirmed to Mr Miller that he did not wish to retract his February grievance.

54. So the details of that uncompleted grievance were gone through. The claimant suggested that when he eventually did have the meeting with regard to his initial grievance on 6 February he was only told in the pub by Karla that it was going to be a grievance hearing. There is no evidence of any objection by the claimant at that point. The claimant reiterated that he had not received a final response from Sarah Greenwood about the grievance he had raised.

55. The claimant complained that Sarah Greenwood had patronised him by saying that he might have been mistaken when accusing Vanessa of playing the machines when all she was doing was filling them up with money.

56. Mrs Devitt said that she had looked into the machine allegation and looked at the CCTV footage and there was no evidence that they were being played in the morning on the dates the claimant suggested. The claimant reiterated that the playing of the machines illicitly had been going on for three years.

57. The claimant then raised point six of his grievance that he had been subject to unfair treatment by both Vanessa and Karla. When asked to give examples he said that he was put on openings and stocks at the same time so that he could not do his job properly and that they had deliberately messed up his stocks and thrown away food which was in date so that he would get into trouble.

58. The claimant accepted that he walked out of the meeting on 8 April when he was discussing the issue of stocks with Karla Morrison and said he became stressed. That is why he went off work..

59. The claimant wanted to work opposite shifts to Vanessa so that he would not have to work with her. He said he asked Karla informally to do that. The claimant accepted that it was hard for that to be arranged and agreed Karla said she would try. He explained to Mr Miller that he did not like working with Vanessa because of the uneasy tension in the workplace.

60. During the course of the meeting all the grievance issues raised by the claimant were gone through in fine detail and the claimant had every opportunity to tell Mr Miller what was troubling him. At some point the claimant started to record the meeting, unbeknown to the respondent's managers. The respondent accepted the transcript as accurate. We set out below how each issue was dealt with.

62. The claimant raised the issue about holidays. He suggested that he was blamed for the way the pub kitchen was not able to cope when he was on holiday. But when his complaint relating to holidays was discussed, the claimant could not tell Mr Miller whether he had lost any holidays or not. He was asked if he knew the holiday booking procedure. He understood that two weeks notice had to be given to request a holiday. The contractual position was that six week notice was required.

61. The claimant accepted that he had been put on a PIP. The claimant suggested that he never received a copy of the PIP but did not chase it up. The claimant made it plain to Mr Miller that he thought he was being "screwed over" because someone else was doing the stocks and that he would get the blame for any shortfall. It was put to him that it was his responsibility to deal with stocks and he agreed. However the claimant was concerned that Karla had asked the niece of Vanessa Watson to come and do the stock checks and he thought that was suspicious.

62. Mr Miller put it to him that it was fair of the pub to investigate a £500 loss and Mr Nalder agreed. Mr Miller made it clear that he wanted the claimant back in work to do a good job for the company.

63. Although the claimant accepted that it was his responsibility to carry out the stock checks he felt that both Mr Miller and Mrs Devitt were setting him up for a disciplinary hearing with regard to the £500 stock deficit.

64. The claimant made serious allegations about Vanessa. He said that he had heard from other Duty Managers that she had a house full of Wetherspoon stock. Mr Miller asked the claimant why he had only brought that serious issue to the attention of the managers now. The claimant explained that he was worried about reprisals from Vanessa because, previously, when he had complained about her, he was only given a couple of shifts a week for months after the 2014 grievance.

65. It was pointed out to the claimant that he had applied to become a shift leader and had been promoted after 2014. The claimant said that was because he was keen to advance his career with Wetherspoons.

66. The issue of the 2014 grievance was also discussed because both Mr Miller and Mrs Devitt knew little of the detail of that earlier grievance. Mr Nalder did not mince his words, he said that Vanessa was stealing from the pub and that he gave examples of her coming to the kitchen and making sandwiches for her daughter to take to school.

67. Mr Miller suggested that the claimant was indulging in a personal attack on Vanessa. Mr Miller then asked him what his priority was. Was it that he had been treated unfairly or the personal issue with Vanessa? The claimant responded by saying he was treated differently once he put his grievance in. Mr Miller agreed that some of the points that he was raising were valid. The claimant made it clear that his common goal was the good of The Thomas Telford pub and it was hard to see someone mistreating it.

68. The claimant explained that he had raised these issues with Karla and that she had not done much to sort them out. It was pointed out to him that if he was accusing someone of stealing then Nel Devitt would have dealt with the matter very quickly.

69. The claimant said one of the reasons he had no faith in Karla was because Karla walked past the claimant saying "fuckin big whoop, doing your job" in a derogatory tone. That was said after the claimant had been upset because he got no praise for cooking all the food at a function in the pub.

70. Mr Miller laughed when that was raised in the meeting.

71. The claimant thought that that was inappropriate because it was his grievance which he wanted taken seriously.

72. However, the claimant had the opportunity to explain his upset at that comment.

73. The next issue discussed was not being able to go on a training course and it was declined because he was going on paternity leave.

74. The claimant confirmed that he had no conversation with Karla about that issue. The claimant did not, at the time, put Karla right and tell her she had made a mistake, he was not on paternity leave and could go on the course.

75. The claimant's explanation was that he only saw the email turning down his application to go on a training course on the day that he walked out although the email was sent to him on 5 April and he walked out on 8 April.

76. He was asked if he could have phoned her between 5 and 8 April and the claimant said he did not phone her because he did not know, before he walked out, he had been turned down for the course.

77. The rest of the hearing was taken up with the allegations of victimisation, harassment and bullying that the claimant brought to the attention of his managers. The allegations were vague and Mr Miller tried hard to get to the bottom of the claimant's issues with little success. The claimant said he had sought advice from ACAS and he said ACAS thought he had been bullied. However he was not able to point to any messages, emails or phone calls that he regarded as harassment or constituted harassment.

78. There was then a short break. Mr Miller reconvened the meeting and confirmed to the claimant what he was then going to do. He confirmed he would follow up everything the claimant had raised. Mr Miller told the claimant that the most important thing was to get the claimant back into work. There was some discussion as to whether the claimant could return to The Thomas Telford or go to work at a new pub, The Wheatsheaf.

79. The claimant said he wished to go back to the Thomas Telford. After four hours of discussion the meeting was brought to a close.

80. In the evening the claimant resigned by email with immediate effect suggesting that his position had become untenable. He felt that the interview had consisted of hints towards a disciplinary and that the hearing was "grossly unfair, dismissive and inappropriate".

81. He confirmed that he would be pursuing the respondents for constructive unfair dismissal, discrimination and victimisation.

The Law

82. With regard to constructive unfair dismissal the claimant has to show that there has been a fundamental breach of contract going to the heart of the relationship between himself and his employer, that he resigned in response to that breach of contract and that he resigned sufficiently quickly after the breach in order to avoid affirming the contract.

83. Section 95 of the Employment Rights Act 1996 provides that:-

"an employee is dismissed for the purposes of this part of the Act if 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".

84. The claimant has to set out the breach of his contract which has occurred and in this case Mr Nalder says that it is the implied term of trust and confidence that has been breached.

85. The conduct that has to cause the breach has to be serious. In the case of Pearce -v- Receptek (2013) AER p 364 the, then, President of the EAT, Langstaff J confirms that Tribunals should look at all the circumstances objectively, i.e. from the perspective of a reasonable person in a position of the innocent party. The contract breaker must have shown that there is a clear intention to abandon and altogether refuse to perform the contract.

86. Where there is a series of events and the employee resigns because there has been a last straw which tips him or her over the edge, the last action of the employer does not in itself have to be a breach of contract but the question to be asked by the Tribunal is does the cumulative series of acts taken together amount to a breach of the implied term. If the final straw is not capable of contributing to a series of earlier acts, and it is an entirely innocuous act, then it does not permit the employee to invoke the final straw principle.

87. Nothing done after the breach of contract can be put right by the employer.

88. With regard to the detriment relating to his application to take paternity leave, an employee has a right to take paternity leave and that employee has the right not to be subject to any detriment. We have set out the legal principle in paragraph 4 above (S.47C of ERA 1996). Applying that law to the facts of this case we concluded as follows. For clarity, and where appropriate, we have set out further findings of fact.

89. Having regard to the constructive unfair dismissal claim there were certainly issues between the claimant and his work colleagues which upset the claimant and the respondents were dilatory and inefficient in dealing with the claimant's first grievance in February 2016.

90. However, the claimant had a second bite of the cherry having regard to this issue because he lodged a second grievance in April 2016.

91. In the intervening period between February and April 2016 the claimant did not chase up his original grievance complaining it had not been dealt with.

92. Indeed there was a suggestion, and we accepted this, that the claimant only put in his February grievance because he had gone through a bad shift and he was annoyed at what had happened during that shift. He was not unduly perturbed, at the time, that the February grievance had only been partially dealt with. Furthermore by not complaining between February and April, if there had been a breach of contract in February, he has affirmed that breach by carrying on working.

93. Once Mr Miller and Mrs Devitt got hold of the second grievance they dealt with all the claimant's complaints fully, including the earlier February complaints which the claimant reiterated. That meeting lasted over four hours.

94. Mr Miller's handling of the grievance was, on occasions, not particularly professional. For example when he laughed at one of the claimant's complaint, suggesting it was trivial.

95. However whatever the claimant feels about the that meeting it is obvious from the recorded minutes (which the claimant recorded and produced) that both Mrs Devitt and Mr Miller, rather than wanting to dismiss the claimant, were encouraging him to stay in work and were anxious to get to the bottom of what was upsetting the claimant.

96. It was the claimant's perception that he thought he might return to work and be disciplined, but that was an erroneous view.

97. Both Mr Miller and Mrs Devitt were willing to listen to the claimant's grievances.

98. The claimant then resigned before he received the outcome to his grievance.

99. The claimant himself said to both the managers that he was not ready to come back to work until he had received his grievance outcome. We accepted that Mrs Nevitt was more than a note taker at the meeting and did involve herself in the discussion. We also accept that Mr Nalder did not want her at the meeting.

100. However that was an unreasonable request by Mr Nalder on the basis that he had not put in a grievance against Mrs Nevitt in the past. Furthermore he knew that Mr Miller was going to be the decision maker.

101. It is also clear from the transcript that Mr Nalder was difficult to deal with and unwilling, or unable, to set out his complaints. His allegations were often vague. Mr Miller followed the grievance procedure set out by the respondents policies referred to in paragraph 40 above. Mr Miller is required to ask the person who is making the grievance what outcome he was looking for. Mr Nalder gave no indication as to what he wanted, save to suggest that some of the issues that he complained about with regard to other employees amounted to gross misconduct.

102. Mr Miller did offer Mr Nalder the opportunity of going to another pub to work because he felt that Mr Nalder was so unhappy at The Thomas Telford pub. But no decision was taken as far as that was concerned.

103. Mr Miller also investigated the issues after the meeting. The meeting took place on 19 May 2016. Mr Miller had not carried out his investigation nor had he given his decision with regard to the claimant's grievance when Mr Miller was told that the claimant had resigned.

104. The reasons for the claimant's resignation were that he felt that the meeting began with a back to work interview and then "consisted of hints towards a disciplinary against me". The claimant goes on to suggest that the hearing was grossly unfair, dismissive and inappropriate and he was badgered to tell the managers what his ideal outcome would be.

105. The claimant therefore resigned with immediate effect.

106. Mr Miller wrote on 24 May 2016 a letter asking the claimant to re-consider his decision to resign. He gave him some time to reflect.

107. The time limit for him to come back and withdraw his resignation was 5pm on 3 June 2016.

108. The claimant did not withdraw his resignation.

109. Our decision on the constructive unfair dismissal issue is that, although there were mistakes made by the respondent managers with regard to this case, nothing in the treatment of Mr Nalder comes near to being a fundamental breach of his contract or a breach of the implied term of trust and confidence.

110. It is clear that Mr Nalder had issues with some of the people with whom he worked at The Thomas Telford pub, but nothing to suggest that the treatment of him by other employees amounted to a fundamental breach of his contract..

111. Nor can we say that anything that occurred in the meeting on 19 May was a last straw event which allowed the claimant to resign and successfully claim constructive unfair dismissal. The discussions were innocuous. Most importantly the whole tenor of the managers attitude was to get the claimant back working. There was no need for him to resign.

112. For all those reasons his application to the Tribunal for unfair dismissal fails and is dismissed.

113. Turning now to the allegation with regard to detriment in breach of Section 47C of the Employment Rights Act 1996.

114. Our first finding is that this claim is out of time and it was reasonably practicable for the claimant to issue proceedings within time. The request for permission to attend a training course was made on 31 March 2016 and the respondent's refusal on 5 April 2016 was for the reason that they erroneously thought he was starting his paternity leave. That was simply a mistake by the manager.

115. The claimant went off on sick leave for stress on 8 April 2016 and never returned to employment with the respondents.

116. The time limit for the issue of those proceedings expired on 4 July 2016.

117. Discussions with ACAS took place between 19 May and 7 June 2016. The conciliation certificate was issued on 7 June 2016.

118. The detriment claimed should therefore have been issued on or before 23 July 2016 and was issued on 4 August 2016. We have been given no reason why the application was late and time should not therefore be extended.

119. In any event we find that the cancellation of the claimant's training was by consent.

120. The claimant could have gone to that training any week of his choosing because they were held so frequently. There was no detriment to him. Moreover, the respondent managers were anxious that the claimant should go on the course. It was not in the respondent's interest not to have well trained staff and Nell Devitt encouraged the claimant to go on the course. The claimant accepted he had not been placed on the course and made no issue about it. It was obvious to him, or should have been, that his manager had got the date of his paternity leave wrong. He never raised a complaint at the time, which we find he would have done if he had been as upset as he now suggests.

121. There was no causal link between the paternity absence and the refusal because it was agreed between the parties that the claimant should go on the course some other time.

122. In all the circumstances, therefore, that claim is dismissed also.

12-04-18

Employment Judge Robinson

JUDGMENT AND REASONS SENT TO THE PARTIES ON

24 April 2018

FOR THE TRIBUNAL OFFICE