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## EMPLOYMENT TRIBUNALS

BETWEEN

**Claimant**

Mrs T Luck

and

**Respondents**

Mr & Mrs Simmons t/a  
Brents Tavern

**Held at Ashford** 11 July 2018

**Representation**

**Claimant:**

Mr T Pullen, Kent Law Clinic

**Respondents:**

In Person

**Employment Judge** Kurrein

## JUDGMENT

The Claimant's claims are not well founded and are dismissed.

## REASONS

### The Claims

- 1 On 10 October 2017 the Claimant presented a Claim alleging unfair constructive dismissal, a failure to pay holiday pay or to provide written terms and condition.
- 2 The Respondents Response denied those claims.

### The Evidence

- 3 I have heard the evidence of the Claimant and Mrs Simmons, read the documents to which I was referred and heard submission for each of the parties. I make the following findings of fact.

### Findings of Fact

- 4 The Claimant was born on 15 February 1978 and started work as a member of the Respondents' bar staff on 4 September 2011. She has a disabled child and was only entitled to work a maximum of 16 hours per week, until recently, without her benefits being affected.
- 5 When she started the Respondents went through their terms and conditions with her. They were far from compliant with S.1 Employment Rights Act 1996 and no copy was provided. The Respondent has no written disciplinary or grievance policy.

- 6 The Respondents became the landlords of the pub some 31 years ago, following Mr Simmons serving in the RAF for 21 years. It is described as a community local, and the vast majority of its customers are locals, many of whom are well known to each other.
- 7 The Respondents employ as many as seven part-time staff to cover the 84 hours a week the pub is open.
- 8 In December 2016 the Claimant's husband was employed as a trainee bar manager.
- 9 From early 2017 the Claimant's daughter, who was then 14, started working in the pub from time to time as a waitress for charity events on a casual basis. It appears the Claimant and the Respondents allowed her to socialise there.
- 10 In October 2016 a woman, LW, was employed as a part time member of bar staff working 24 to 30 hours per week.
- 11 I accepted the Respondents' evidence that they knew at that time that LW to had a troubled past. They are long terms volunteers as Welfare Officers with the Royal Air Force Association. In addition, Mr White had experience in training young people from his RAF service and Mrs Simmons had experience in Occupational Therapy in a Psychiatric setting. The wished to help LW get back on her feet and believed that offering her employment and training, which was provided regularly, would be of great assistance to her. I accepted their evidence that LW is now a competent and well-liked member of staff.
- 12 I did not accept the Claimant's evidence that LW was not trained. The Claimant was not present to witness such training, some of which involved role play upstairs. However, as is common in such employment, LW's colleagues were expected to assist and advise her "on the job".
- 13 The Claimant did not think that LW readily accepted guidance, and thought her conduct was unacceptable because customers complained. She refers to one specific incident, in December 2016, when LW told a customer to "fuck off". She told Mrs Simmons about this at the end of the shift and thought her reaction to be "somewhat blasé" because she commented that LW had problems at home and had experienced a difficult life.
- 14 I accepted Mrs Simmons evidence that the Claimant should have informed her of this incident immediately it took place: it was not the Claimant's role to deal with complaints. Mrs Simmons had later raised the issue with LW, who said she had reacted to a rude customer, and Mrs Simmons gave her guidance on how to deal with difficult situations. She thought LW had been very receptive to her counselling and she had since formed a good relationship with that particular customer.
- 15 On another occasion in early 2017, when the Claimant was on duty, LW was socialising in the bar with a group of friends. A fight broke out between that group and another, which the Claimant believed LW and her friends instigated, and Mrs Simmons asked the Claimant to leave the premises. I accepted Mrs Simmons' evidence that she asked LW not to socialise in the bar for the time being, but continued to allow LW the end of shift drink all staff were entitled to.

- 16 In early April 2017 the Claimant raised her concerns with Mrs Simmons that LW's conduct and behaviour was resulting in customers complaining to her and her colleagues. She thought Mrs Simmons attitude to her reports to be dismissive. I accepted Mrs Simmons' evidence that she was dealing with such issues with LW privately and the Claimant simply assumed that nothing was being done. Mrs Simmons spoke to several customers about issues that had been raised and dealt with them. She thought the Claimant believed, quite wrongly, that it was her role to deal with complaints, rather than to refer them to the proprietors.
- 17 It was the Claimant's evidence that what she saw as inaction on the part of Mrs Simmons had a damaging effect on her wellbeing and attitude to work. She felt disenchanting and hurt her concerns were not being dealt with.
- 18 On 26 April 2017 the Claimant and LW, after a four hour break, started the second part of a split shift together. The Claimant thought LW to be the worse for drink and to smell of cannabis. Other customers commented about this to the Claimant, which "led to me having to step in and deal with this". She says she felt uncomfortable and embarrassed in having to account for LW's behaviour. She accepted that it was not her job to deal with such issues, Mrs Simmons was in earshot, but was not called, and she did not tell Mrs Simmons of the incident until the end of the shift.
- 19 Miss Simmons was not happy about the delay in being informed of these allegations. She had spoken to LW about her coat smelling of cannabis in the past and had accepted that it was as a result of LW's unwelcome lodger, who she had later helped to evict, smoking cannabis in the flat. She had not smelt cannabis on LW since. At about this time she had seen LW, whose eyes and nose were running and who was suffering from Hay Fever, and had given her some Benedryl which tended to make her drowsy.
- 20 The Claimant has also complained that LW was given greater freedom to take breaks than her. I accepted Mrs Simmons' evidence that all staff were allowed to take a break, and get something to eat from the kitchen, provided the bar was covered. She accepted LW might do this more often because her medication required her to eat regularly. She thought that most of the time one person could manage the bar without difficulty.
- 21 On the night of 29 April 2017 the Claimant was not on duty or present. Her husband was working and her daughter was present socialising. LW was apparently present with her partner, socialising. It was reported to the Claimant that LW and/or her partner were dancing "flamboyantly", at one time on a table, and were kissing in view of customers, including the Claimant's daughter. She was told that LW's hands were "everywhere" and that her husband had shouted across the bar for LW to stop what she was doing.
- 22 The report Mrs Simmons received was slightly different. LW was with a female friend who started dancing on a table. LW tried to persuade her to get down and the friend bent over and kissed LW. The Claimant's husband then shouted. "Stop that, it's fucking disgusting, not in here".
- 23 Mrs Simmons thought that to be a most unprofessional way to deal with such an issue and entirely contrary to what she taught her staff. They were meant to

- monitor the premises continuously, both from the bar and by circulating to collect glasses. If they observed anything untoward a quiet word with those involved was usually sufficient to deal with the problem or to “nip it in the bud”.
- 24 One customer did approach Mrs Simmons to raise this conduct. She accepted Mrs Simmons’ assurances that she would deal with it appropriately. That customer is on good terms with LW.
- 25 I accepted Mrs Simmon’s evidence that the Claimant and her husband only raised the events of the previous evening with her on the 30 April 2017 to express their unhappiness that their daughter had witnessed them.
- 26 On that day the Claimant started her shift at 12.00 and LW started hers at 14:00. The Claimant had been made aware of the previous nights alleged events and whilst “extremely unhappy” to be working with LW tried to remain calm and behave professionally. It appears LW sensed the Claimant was unhappy with something and sought to apologise if she had upset her. The Claimant thought this to be antagonistic and asked LW to stay at one end of the bar. When LW failed to do so the Claimant shouted at her to “Leave me alone!”
- 27 Mrs Simmons was downstairs and realised that something was wrong. She saw that LW was upset and she left the bar in tears. She went upstairs and spoke at length to Mr Simmons. She continued to be tearful and explained that she had not wanted to upset the Claimant but to apologise to her, but had been rebuffed and told to go away.
- 28 Mrs Simmons was concerned at what had taken place. She had previous experience of staff falling out and wished to restore harmony if she could. She thought it unfortunate that the incident had knocked back LW’s self-esteem and assured the Claimant that she would rejig the rota to ensure that she and LW would not be on the same or overlapping shifts in the future. She took a considerable length of time to do so, a process she described memorably as “juggling a box of frogs”. The Claimant has acknowledged that her rota for the next week did not require her to work with LW at any time, although she might have to take over as LW was ending her shift.
- 29 On 7 May 2017, as the Claimant arrived for her shift, she alleges LW announced to all present at the bar, “I am off out to get pissed and screw all the women I can”.
- 30 Mrs Simmons has no knowledge of any such event. It was never reported to her by the Claimant or anyone else present. She finds this remarkable because customers generally delight in passing on gossip. I thought that rang true.
- 31 Later on that evening the Claimant decided she could no longer continue working at the pub. She wrote out her resignation and left it under the till for Mrs Simmons to find. She gave one week’s notice. She expressed her sadness at having to leave because she did not enjoy going to work anymore. She thought her feelings and those of her daughter (and her friend) arising from LW’s alleged conduct on 29 April 2017 had been “brushed aside” and referred to LW’s behaviour toward her on the following day.
- 32 The Claimant thought LW had been rude and aggressive to her “for months” and had demonstrated “cockiness” in doing what she wanted to because “she’s going

to be in charge soon". She accepted that Mrs Simmons had been upset in having to sort out the rota and hoped her leaving would make it easier. She was angry and disappointed in herself as she "could not get past this".

- 33 Both Mr and Mrs Simmons asked the Claimant to reconsider her position, but the Claimant was adamant that she did not wish to continue sorting out customer complaints, something Mrs Simmons assured her was not part of her duties.
- 34 The Claimant worked her shifts until 11 May 2017. On 12 May, when she was not on duty, she called in to speak to Mrs Simmons "in one final attempt to discuss the situation". I did not accept the Claimant allegation that Mrs Simmons was knitting and carried on while the Claimant spoke. It think it more likely that Mrs Simmons was, as she said, upstairs knitting a particularly complex row when the Claimant called up to her. She called down to ask the Claimant to wait for her to finish the row, did so, put the knitting down and went down to see the Claimant where they sat in the function room on the first floor.
- 35 It appears the Claimant confided in Mrs Simmons regarding her unhappy childhood, which Mrs Simmons found uncomfortable. She told the Claimant that she would not have to work her last shift and gave her her P45 and week's pay. She overlooked holiday pay and paid it slightly later.

### **Submissions**

- 36 I heard brief oral submissions. It is neither necessary nor proportionate to set them out.

### **The Law**

- 37 I have had regard to the provision of S.95(1)© Employment Rights Act 1996 and the following authorities:-

Western Excavating (ECC) Ltd v Sharp [1978] QB 761

Omilaju v. Waltham Forest London Borough Council [2005] ICR 481

Morrow v Safeway Stores [2002] IRLR 9

Croft v. Consignia plc [2002] IRLR 851

Blackburn v Aldi Stores Ltd [2013] IRLR 846

- 38 I also considered the decision in W A Gould (Pearmark) Ltd v. McConnell [1995] IRLR 516 which the Claimant relied on.

- 39 The onus was on the Claimant to establish, on the balance of probabilities that:-

39.1 The Respondent had so conducted itself, without reasonable cause, as to breach the implied term relating to trust and confidence.

39.2 She had resigned promptly in response to that breach without waiver or affirmation.

- 40 If she did so the Respondent had the onus to establish the reason for the dismissal and that it was for a potentially fair reason.

40.1 If it failed to do so the dismissal would be unfair.

- 40.2 If it did so I would have to consider whether, in all the circumstances of the case the dismissal was fair or unfair.
- 41 The Claimant appeared to rely on the decision in *McConnell* for the proposition that if an employee resigns because there is no grievance procedure that is potentially an unfair dismissal.
- 42 However, that decision was based on a specific implied term to take such grievances seriously, not on the more general term of trust and confidence.
- 43 However, that is not the basis on which the Claimant's claim has been advanced:-
- 43.1 Her claim does not refer to the lack of a grievance procedure or a specific implied term relating to one.
- 43.2 Her claim specifically refers to her raising concerns. The lack of a formal procedure did not, therefore, prevent her doing so.
- 43.3 Her claim specifically relied on an alleged failure by the Respondents to address and resolve her concerns regarding LW's behaviour as being a breach of the "fundamental term of mutual trust and confidence".
- 44 I accept that the implied term relating to trust and confidence can found such a claim, as it did in the case of Blackburn v Aldi Stores Ltd [2013] IRLR 846.

### **Further Findings and Conclusions**

#### **Unfair Dismissal**

- 45 I deal with each of the specific incidents in respect of which I have received evidence and made findings as set out above. It is neither necessary nor proportionate to repeat those findings.

December 2016

- 46 I find as a fact that the Claimant's working relationship with LW did not get off to a good start. She was not willing to give LW the same levels of support as did Mrs Simmons. There was a personality clash.
- 47 I further find that at the time the Claimant belatedly reported LW's inappropriate conduct toward a customer to Mrs Simmons she was not doing so in order to raise a grievance or complaint on her own behalf: she was reporting alleged misconduct by a colleague.
- 48 In my view Mrs Simmons dealt with this issue in an entirely reasonable manner: it was not for the Claimant to dictate to her employer what steps they should take.

Early 2017 – the "fight"

- 49 It is clear that Mrs Simmons took a view on what action to take in respect of LW's conduct on this occasion. The incident is only described in vague terms. It appears Mrs Simmons witnessed at least some of the conduct. There are no grounds on which I can find that her decision to temporarily exclude LW from socialising in the pub was unreasonable.
- 50 The Claimant does not suggest that she made a complaint or grievance to Mrs Simmons regarding the alleged conduct of LW. It is difficult to see how she could

have as the event did not directly involve her. She is simply recounting an event that took place.

Early April 2017

- 51 I refer specifically to my above findings of fact. Once again, the Claimant is reporting on a colleague's alleged misconduct. She does not appear to me to be raising a grievance, such as that she was having to deal with the complaints arising from LW's conduct, on her own behalf. I accepted that she was not required to do so in any event: she should promptly refer any complaints to Mrs Simmons.
- 52 It is also the case that Mrs Simmons was dealing with all the issues raised by the Claimant in a manner she thought appropriate in all the circumstances.

26 April 2017

- 53 This is yet another event in which the Claimant, rather than raise it promptly with Mrs Simmons, has taken it upon herself to deal with a perceived issue. Once again, she belatedly reports it to Mrs Simmons at the end of the shift but, again, as misconduct by a colleague rather than a complaint on her own behalf.

Excessive Breaks

- 54 There was no suggestion that the Claimant raised the issue of LW having more breaks than her with Mrs Simmons. Had she done so I am confident Mrs Simmons would have given her a reasonable explanation.

29 April 2017

- 55 It appeared to me that the Claimant was particularly upset by this incident because her daughter was present and it involved two women. In the circumstances of this case I did not accept that she, in her position as an employee, had any right to complain about LW's conduct. Her right to complain as a parent, it seemed to me, was limited because she had permitted her daughter to socialise in the pub. In any event, she did so, with her husband, the following day.
- 56 It is my conclusion that this was not a complaint by the Claimant as an employee to her employer, but a complaint by a parent to the proprietor of licensed premises.

30 April 2017

- 57 On this day the Claimant clearly had a bee in her bonnet about LW's conduct. She accepts that LW asked about what was upsetting her. The Claimant acted in excess of her authority in supposedly "ordering" LW to work at one end of the bar and was then rude to her.
- 58 In my view nothing that took place that day gave rise to anything on the part of LW or the Respondents of which the Claimant could legitimately complain. Quite the opposite: both LW and the Respondent had good reason to complain of the Claimant's conduct.

7 May 2017

- 59 I refer to my above findings concerning this incident. On the balance of probabilities I have concluded that this was not said: it is undoubtedly somewhat provocative and lewd, something not unknown in pub culture, but was bound to

come to the attention of Mrs Simmons if it took place. The fact that it did not undermines the Claimant's credibility.

Conclusion

- 60 Having regard to all my above findings I have determined that the various matters relied on by the Claimant, whether taken individually, cumulatively and/or as a whole, are not such as to amount to a breach of the implied term relating to trust and confidence.
- 61 For the avoidance of doubt, I also find that they would not have constituted a breach of any implied term to deal with grievances reasonably and appropriately.
- 62 In reality the matters complained of arose from a personality clash between the Claimant and LW: they were different people with different characters and mores. They did not see eye to eye.
- 63 The Claimant cannot reasonably complain of any inaction on the part of the Respondents: they took action where appropriate and it is not the Claimant's place to judge the reasonableness of the steps they took in respect of LW's conduct toward customers or as a customer.
- 64 Finally, and to the extent that the Respondents were deficient in any way, I have concluded that they were not matters of substance. I refer to Croft v. Consignia plc [2002] IRLR 851: the implied term relating to trust and confidence is only breached by acts which seriously damage or destroy it. An employee is expected to absorb lesser blows.
- 65 The Claimant has failed to establish that she has been dismissed and her claim for unfair constructive dismissal must be dismissed.

Other claims

- 66 The above finding is fatal to the Claimant's for notice pay. That must also be dismissed.
- 67 There was no evidence of any failure to pay holiday pay. That was conceded.

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Employment Judge Kurrein

15 June 2018