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EMPLOYMENT TRIBUNALS

Claimant

Respondent

Mr J Baio

AND

Carluccio's Limited

FINAL HEARING

HELD AT: London Central **ON:** 24 and 25 April 2019

BEFORE: Employment Judge Hildebrand (Sitting alone)

Representation:

For Claimant: In person, assisted by Ms O Rouse
interpreter from the Portuguese

For Respondent: Mr P Collyer, Solicitor

RESERVED JUDGMENT

The Claimant's claims of unfair dismissal, breach of contract for holiday pay and unlawful deduction of wages fail and they are therefore dismissed.

REASONS

The Claim

1. By a claim presented to the Tribunal on 13 November 2018 the Claimant claimed that he had been unfairly dismissed by reason of gross misconduct. He denied making sexual comments and touching a fellow worker. He suggested that the complainant had made other accusations against him and this should have been taking into account.

The Response

2. By a response and grounds of resistance presented to the Tribunal on 18 February 2019 the Respondent resisted the proceedings. The Respondent had denied unfair dismissal stating that there was a permissible fair reason for the dismissal namely conduct, a fair process had been followed and the sanction was within the reasonable band of responses available. The claims for wrongful dismissal, wages and holiday were also resisted.

The Evidence

3. I heard from the Claimant and on the Respondent's side from the dismissing officer Ms M Bacon and from the appeal officer Mr S Ligato. The Claimant gave evidence through an interpreter who assisted in translating all aspects of the proceedings for the Claimant. Although the Claimant has worked for the Respondent for eight years his use of English was described by him as informal and he requested the assistance of an interpreter.

The Findings of Fact

4. The Claimant was employed by the Respondent on 12 June 2010. He was summarily dismissed on 28 September 2018. At the time of his dismissal he was employed as a kitchen supervisor. On 4 September 2018 Mr Jaco de Lange spoke to a female member of staff who confirmed that the Claimant had made unwanted touching and inappropriate comments to her over a period of time and in particular on Sunday 2 September 2018.

The Investigation

5. Mr de Lange spoke to the Claimant regarding the allegations and the Claimant was suspended that day. Mr de Lange took a note of the exchange. It recorded that allegations were made that on Sunday the Claimant had spoken to the female member of staff referred to hereafter as A. The allegation was that the Claimant touched A inappropriately in the walk-in fridge, touched her neck and kissed her on the neck. The Claimant responded, "I was joking with her saying we should go for a drink after work". He also said "I don't remember touching her in the fridge. I did say I love you but it was a joke".
6. A letter of 4 September 2018 to the Claimant confirmed that he had been suspended while the Respondent conducted an investigation into alleged inappropriate behaviour to a fellow employee and alleged inappropriate touching and inappropriate comments made to a colleague.
7. A statement was taken from 'A'. She recorded that on 2 September she came to work at 4pm. The Claimant and two colleagues were working in the kitchen. While she was working on the antipasti section the Claimant

told her "I want to eat you" he also said, "I'm thirsty for you". When she went to the walk-in fridge the Claimant followed her. In the course of the hearing Ms Bacon gave evidence that the walk-in fridge is approximately the size of one of the advocates tables used in the Employment Tribunal, the table equating to the floor area or standing area with shelves around. It is clear that it is therefore a very constricted space for one person, let alone two. A said "he took me from my neck closing my mouth with his finger, with the other hand he was touching my chest and he kissed me in the neck".

8. She also said, "Also this Sunday and on other days he used to pull my t-shirt and bra and telling me that I love you". She further said that on Monday morning 3 September 2018, when she was about to leave work, the Claimant asked her if she would wait for him to go out for a drink and talk in private.
9. Another employee present on 2 September 2018, Mr Julian Sepulveda, stated that he was working in the grill section when A went to the walk-in fridge. She was followed by the Claimant. Whilst she was taking or leaving something on the shelves of the walk-in fridge the Claimant approached her and surrounded her putting his hand in her mouth and kissing her on the neck.
10. The Claimant was invited to a disciplinary hearing on 7 September 2018 and provided with the statements of the two employees and notes of the investigatory meeting which Mr de Lange had produced. The hearing was to be chaired by Mr Michal Kozlowski, General Manager. At the hearing on 7 September the Claimant requested that some additional witnesses be interviewed. He referred to Mr Dario di Battista and Mr Prefruina Mukanga. The hearing was adjourned, and Mr Kozlowski took statements from these two individuals.
11. These statements were supplied to the Claimant under cover of a letter of 12 September 2018 and the Claimant was invited to attend a further disciplinary hearing on 18 September.
12. Mr de Battista recalled A coming upstairs on 2 September 2018 and he said that he could see that she was upset. She told him of a number of occasions when the Claimant had grabbed her from the neck and pushed her into the walk-in fridge and kissed her on the neck. When he asked her if she wanted to press charges to sort this out, she responded "no".
13. Mr Mukanga did not notice anything out of place. There is nothing to suggest he was in a place where he should have seen something.
14. The second disciplinary meeting took place with Mr Kozlowski on 12 September. The Claimant recorded that he had asked A to go to the walk-in fridge to help change labels so that she could finish her shift earlier than scheduled. The Claimant was preparing food on the pasta section and went to the fridge to put some butter there. A was present in the fridge.

He asked her to move and put his hand on her shoulder because he could not reach the shelf above where she was standing to place the butter there. He left the fridge and did not notice anything was wrong.

15. Mr Kozlowski explained to the Claimant that he had three possible courses of action. He could take no further action, or he could undertake more investigation or proceed to a disciplinary hearing. He said he appreciated the time the Claimant had been working for the company but in any case, they had the statement of the victim A and a witness.
16. Mr Kozlowski said he was left with the decision to send the Claimant to another disciplinary meeting.

The Disciplinary Hearing

17. The disciplinary hearing was held by Michelle Bacon, Operations Manager, and took place at 11am on 18 September 2018. The Claimant indicated that he was happy to proceed without a representative. Ms Bacon read through the statement of A. The Claimant denied the use of the words "I want to eat you" and "I am thirsty for you".
18. When it was pointed out to him that two people had said that the Claimant had touched A, he said this was a lie because one day when he was working with them A had made a dish without a key ingredient, green beans, and the manager had asked who was responsible. A had said that she was. Ms Bacon questioned the relevance of this. The Claimant also stated that Mr Sepulveda was upset on this occasion. It appears this incident was in late June or early July 2018. Ms Bacon asked the Claimant if he thought that the incident with the green beans would have caused A to be so upset that she would make up a story to get the Claimant dismissed. He responded by saying that when A was upset. Mr Sepulveda was upset as well.
19. Ms Bacon then asked about the Claimant hooking A's bra. He denied this. She then asked him whether he had asked A out for a drink or told her that he loved her. He responded that he had never said either remark. She then asked why he had told Mr de Lange that he had, and he responded, "No I did as a joke". Ms Bacon said: "I do not think you are telling me the truth, if you like her just tell me" and the Claimant replied that he did not. Later in the interview the Claimant accepted that he had said "I love you" to A but as a joke. Ms Bacon also asked why the Claimant had not raised the issue of the beans with Mr Kozlowski and he replied that he did not ask him. When asked again about inviting A for a drink the Claimant responded "Maybe yes, I was surprised when Jaco told me but I do not remember, maybe Jaco did not get me. It was a joke. I work with many girls before with no problems." Towards the end of the meeting the Claimant was asked if he wished to add anything and said maybe an apology.

The Disciplinary Outcome

20. On 19 September Ms Bacon began preparing a letter which was subsequently amended by her HR advisors and was sent to the Claimant on 27 September arriving on 28 September 2018. The Claimant was summarily dismissed for gross misconduct. He was told he would be paid up to the date of the letter.
21. The letter was dated 19 September but as stated was not received by the Claimant until 28 September. It is a carefully written letter and Ms Bacon sets out her conclusion and rationale with clarity. Ms Bacon did not accept that the Claimant had any reason to touch A even on his own version of events. She believed he would have behaved differently with a male colleague. Two days after the incident the Claimant stated that he did not remember touching 'A'. Eight days after the incident he remembered touching 'A' on the shoulder. Ms Bacon also pointed out that the version given by 'A' was matched closely by her witness Mr Sepulveda. When asked why he thought Mr Sepulveda would lie the Claimant produced two scenarios, one being the beans and the other the fact that 'A' was moving to another restaurant. Ms Bacon thought neither of these was plausible nor substantial enough to provide a reason for two individuals to make such extreme allegations against the Claimant if they were untrue. She recorded that Mr Di Battista gave evidence about how upset A was after the encounter on 2 September. Ms Bacon also referred to the fact that the Claimant had denied saying "I love you". He changed his position as the conversation continued and, having accepted he said it, said that it was said as a joke. Ms Bacon found inconsistencies between the two interviews and was offered no explanation by the Claimant for colleagues making up such a serious allegation.
22. In light of the seriousness of the misconduct identified she decided summary termination for gross misconduct was appropriate notwithstanding the length of the Claimant's service and his clean record.

The Appeal

23. By a letter dated 4 October the Claimant appealed. He denied making any inappropriate sexual comments against 'A'. He said he only touched her shoulder to lean over. The Claimant pointed out that touching was common in the kitchen environment. The Claimant had told Mr de Lange that he said he loved 'A' and then said this was a joke. He indicated in the appeal that it was normal to say that as he liked to play and be friendly with co-workers. He also said it was not the first time that they had made an accusation against him and he had referred to this on 18 September.

The Appeal Hearing

24. The appeal hearing took place on 2 November before Mr S Ligato. The Claimant queried a payment made to him. He also said that he was surprised to get a letter saying no decision had been made when the dismissal letter was received on 28 September dated 19 September. This was before the letter he had received saying no decision had been made.

This aspect is explained by Ms Bacon taking HR advice as referred to above. Mr Ligato decided that he would speak to A and Mr Sepulveda. A described a lengthy history of sexual harassment by the Claimant. She had been working four to five months at the restaurant. She said she did not want to go to work anymore and was scared to go in to the walk-in fridge. She did not see the Claimant act this way with anyone else. Mr Ligato put to A the claim that Mr Sepulveda was her best friend and he would lie to protect her. She responded that Mr Sepulveda had told the Claimant to stop because he saw what happened in the walk-in fridge. A said that the Claimant had come in to the fridge and grabbed her throat and touched her. She said she was shaking and went to smoke and finished her shift. She waited for Mr Sepulveda because she was scared to go home alone. Mr Ligato also interviewed Mr Sepulveda who was confident of what he had seen. Despite what A said about the Claimant closing the door, when the Claimant entered the fridge the door was partially closed, and this indicated that it was opened half way.

The Appeal Outcome

25. On 30 November Mr Ligato wrote to the Claimant to confirm the outcome of the meeting. He said that he had received nothing from the Claimant as to why Mr Sepulveda and A would collude on an allegation of this nature. He had spoken to them and both had confirmed their original statements as a true reflection of the incident. He stated that the Respondent was aware of the Claimant's clean disciplinary record but because of the seriousness of his actions this could not be taken into consideration on this occasion. He concluded that he had a reasonable belief that as kitchen supervisor the Claimant's actions were inappropriate and led to another member being sexually harassed and upheld the decision of summary termination.

Closing Submissions

26. The parties made brief oral closing submissions. The Respondent reviewed the evidence. The Claimant raised a number of matters, some of which had not been canvassed in the course of the hearing. No law was cited save for the relevant provisions of the Employment Rights Act and the authority of Burchell.

The Law

27. Section 98 of the Employment Rights Act 1996 provides that it is for the employer to show the reason for the dismissal and that it is one of the potentially fair reasons. The reason relied on this case is contact.
28. Thereafter with a neutral burden of proof it is for the Tribunal to decide whether the dismissal is fair or unfair having regard to the reasons shown by the employer. This will depend on whether in the circumstances including the size and administrative resources of the employer, the employer acted reasonably or unreasonably in treating it as a sufficient

reason for dismissing the employee and shall be determined in accordance with equity and the substantial merits of the case. Appellate authority indicates that a useful matrix for consideration in a case of a conduct dismissal is to decide whether the Respondent's decision makers formed an honest belief in the misconduct of the Claimant. A Tribunal may then consider whether such belief was formed upon reasonable grounds. Finally, the Tribunal may consider whether the reasonable grounds were obtained after such investigation as a reasonable employer would undertake. In addition, all three aspects of this process are to consider in analysing the Respondent's conduct whether the Respondent acted within a range of reasonable responses to the situation. Further, in deciding whether summarily dismissal is an appropriate sanction the Tribunal should consider whether that sanction falls within the range of reasonable responses. The Tribunal will also consider whether the procedure utilised by the employer is fair.

29. Applying that short statement of the law to the facts of this case I turn firstly to the question of the reason for dismissal.
30. The Claimant's assertions that there was something in the prior relationship between him and 'A' and Mr Sepulveda which would amount to put in bluntly to a vendetta does not bear serious examination. An issue over one dish in a busy restaurant could not on any view be a realistic basis for a conspiracy to create a false allegation of serious sexual harassment. In this context the Respondent is entitled to give consideration not just to the incident on 2 September but also to the surrounding background as identified by Mr Ligato when he interviewed 'A' in the course of his appeal. The Claimant made no coherent attempt to set up another reason for the dismissal to refute the reason demonstrated by the Respondent. The Respondent accordingly demonstrated that the potentially fair reason of conduct was the reason for the dismissal.
31. There is no doubt that the Respondent's decision makers formed a belief, and an honest belief at that, in the misconduct alleged against the Claimant. The Claimant was flawed in his response to serious allegations and to put it bluntly flippant when the issues were addressed to him. He changed his position inside the course of a meeting. It is clear that inappropriate exchanges were taking place between the Claimant and 'A'. These were not exchanges that in any way appear to have been invited by 'A' and consequently it is clear that this was unwanted conduct.
32. It is further clear that the decision makers had reasonable grounds for the decision which they reached and the belief which they held.
33. The question arises whether a reasonable investigation been undertaken. There is no suggestion from the Claimant as to any other step which might have been taken. He raised the suggestion that CCTV should have been available. It is difficult to see how CCTV could cover every location in a work place. It would be unwelcome to those working and is primarily

something to be installed in locations where security is required or the public is present.

34. There is therefore no effective challenge to the adequacy of the investigation in this case.
35. Finally, the question arises whether summarily dismissal falls within the band of reasonable responses to the misconduct alleged. This was a serious attempt at intimacy in a constricted location against an individual who complained of a significant course of conduct. The Claimant's response to the allegation was completely unsatisfactory. He showed no contrition and appeared flippant and contradictory. It would be impossible to say that the sanction of dismissal was not available to a reasonable employer in the circumstances.
36. In relation to the question of procedural fairness the Claimant made reference to the failure to supply an interpreter to him in the course of the proceedings. I am not clear from anything said by the Claimant that he has demonstrated how an interpreter would have assisted him in this case. The initial response which he made to the allegation was in a brief investigatory discussion with his manager. It would not be possible to bring an interpreter in to a discussion of that type.
37. The next possible occasion when an interpreter might have assisted is at the disciplinary hearing. The primary difficulty faced by the Claimant was inconsistency of his responses not difficulties with language. By the same token the Claimant stated that he believed the difference in cultural background was a component in whatever took place between A and himself. When asked about this the Claimant could offer no satisfactory explanation in relation to why A should accept conduct on the terms dictated by the Claimant in an environment where she should have been protected from precisely this conduct.
38. I did not find any satisfactory challenge to the procedural fairness of the Respondent's action.

Conclusion

39. The Claimant's unfair dismissal claim therefore fails. In relation to the Claimant's claim of wrongful dismissal in the light of the findings above it is clear that the Claimant committed gross misconduct. He made an advance towards a female colleague when she was trapped in a confined location. The Respondent was entitled to bring the contract to an end. There is no basis for a finding of wrongful dismissal.

The Monetary Claims

40. Finally, I turn to the Claimant's other monetary claims.

41. The Claimant claimed that he was entitled to twenty-eight days holiday per year. The Respondent agreed with that and calculated pro rata that he was entitled to fourteen days, the holiday year having commenced on 1 April. The Claimant claims that he is due seventeen days. Given that the Claimant worked for almost exactly half of the holiday year, I believe the figure of fourteen days is correct. The Claimant accepted he had taken eleven days and the Respondent accepted that he was due three days and paid three days namely £305.40. That is a full discharge of the Respondent's obligations.
42. The Claimant raised a claim for an additional three days on the basis that an additional week was allowed at the end of every five years of employment. He may well be correct in that, but he did not produce any contractual provision to suggest that a pro rata amount of three days would be due in the event that he had completed three days of the five year period. The claim for further holiday pay therefore fails.
43. Finally, the Claimant claimed that he was not paid what he should have been paid for the month of September. By my calculation he was paid to 14 September and then claimed that he should have been paid to 28 September. That is a further two weeks. His contractual week is forty hours per week at his hourly rate of £9.75 making a total for the two weeks of £780. In fact, the Claimant was paid not eighty but ninety hours by the Respondent and again I find the Respondent has discharged its obligation to pay wages to the Claimant. That claim also fails and it is therefore dismissed.

Employment Judge Hildebrand

Dated: 1 May 2019

Judgment and Reasons sent to the parties on:

18 June 2019

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For the Tribunal Office