



# EMPLOYMENT TRIBUNALS

**Claimant:** Ms J Prewett

**Respondent:** Green King Services Limited

**HELD AT:** Sheffield **ON:** 10-11 June 2019

**BEFORE:** Employment Judge J M Wade  
Mr M Firkin  
Mr T Fox

**REPRESENTATION:**

**Claimant:** Mr R Bradley (Scottish advocate/counsel)

**Respondent:** Mr M Rudd (counsel)

Note: The written reasons provided below, corrected for error and elegance of expression, were provided orally in an extempore Judgment delivered on 11 June 2019, the written record of which was sent to the parties on 17 June 2019. A written request for written reasons was received from the claimant on 12 June 2019. The reasons below are now provided in accordance with Rule 62 and in particular Rule 62(5) which provides: In the case of a judgment the reasons shall: identify the issues which the Tribunal has determined, state the findings of fact made in relation to those issues, concisely identify the relevant law, and state how the law has been applied to those findings in order to decide the issues. For convenience the terms of the Judgment given on 11 June are repeated below:

## JUDGMENT

- 1 The claimant's complaint of sexual harassment succeeds.
- 2 The claimant's complaint of unfair dismissal fails.
- 3 By consent, the respondent shall pay to the claimant the sum of £5000 within twenty eight days (by 9 July 2019).

# REASONS

## Introduction

1. The claimant in this case had presented two complaints: one of sexual harassment and one of constructive unfair dismissal. They were subject to case management orders from Employment Judge Rostant. The issues were very clearly set out for the Tribunal in a case management summary sent to the parties on 2 April 2019.

## Approach to the evidence

2. The Tribunal heard from the claimant herself and also from a former colleague, Mr Davey, and on behalf of the respondent we heard from Mr Bentley (the alleged harasser), Mr Gaunt who was the claimant's line manager, and Mr Baxter who heard the claimant's appeal.
3. It will be apparent when we deliver our findings of fact the assessment we have made of the witnesses from whom we have heard. We have given ourselves our usual direction about making findings of fact and have indicated our application of it to this case below:

*Is the account consistent with subsequent investigations or witness statements given? The claimant has been consistent about two alleged interactions with Mr Bentley, save in one respect where we consider her memory has been affected by subsequent understanding.*

*What evidence is there from others about the witnesses' conduct and demeanour at the time, both before and after any allegations? The claimant is broadly supported in her account by two witnesses who were present. There is no corroboration for Mr Bentley's account of a conversation about real ale being sold in vessels.*

*What other evidence is there about the way the witnesses behaved on other occasions, perhaps not in dispute? There is evidence the claimant herself swears; there was no direct evidence of behaviour to that alleged against Mr Bentley by him on previous occasions.*

*What was the Tribunal's impression of the witnesses when questioned: was the impression that they were telling the truth? The Tribunal assessed the claimant as frank and honest, and a reliable witness of truth, other than on the one matter we mention below. We could not say that Mr Bentley gave a different impression in his oral evidence, although the hearing was clearly an uncomfortable experience for him.*

*What does the totality of the chronology or circumstances tell the Tribunal about the inherent likelihood of the accounts? The account given by Mr Bentley is inherently unlikely in the context of the events described; similarly the claimant's addition of "I want a woman for the night" is inherently unlikely because it removes the potential double entendre: to put it another way it would remove the potential for humour and does not flow in the comments as told by the claimant.*

*An initial impression or assessment of a witness has to be checked against all the other factors; we have tested whether we consider the claimant has told knowingly untruths on this matter, but that would be entirely inconsistent with Mr Gaunt's position and indeed the respondent's position in the grievance, which was discharged for lack of evidence, rather than disbelief of the claimant. We ask ourselves whether it is likely Mr Bentley would make up or contrive his account of the interaction, and we come to the position that that is more likely of him, than of the claimant, because of the consequences and embarrassment of the matter.*

*A genuinely held belief which is wrong, or one untruth told, does not necessarily render other evidence from that witness unreliable; we have applied this direction in relation to the one area we consider the claimant mistaken.*

*People often deny unlawful acts ("well he would, wouldn't he"); this in our judgment is the explanation for Mr Bentley's account.*

*Generally good historians still tell untruths; people do, on occasions, behave in unexpected ways, whatever the overarching likelihood; this too, in our assessment, applies to Mr Bentley.*

4. Notwithstanding this direction and our comments above, the findings that we make cannot be perfect. They are not necessarily the truth of any particular matter. They are the Tribunal doing its best, with the evidence that it has, to resolve a dispute between parties using the civil test: what is more likely than not taking into account everything that we have heard. Memory is well established to be inherently unreliable as a means of finding facts. Recordings are often reliable, CCTV is often reliable, memory is often not reliable.

#### Findings of fact

5. The claimant was employed by the respondent from 1995 and latterly as the manager of the "Big Tree" Pub. In April 2018 or thereabouts Mr Gaunt became her regional business development manager. They worked very successfully together without any issues and Mr Gaunt well liked the claimant. She also knew Mr Bentley, who was the respondent's risk manager for a number of pubs, including the Big Tree, and they had met for work on a handful of occasions before the summer of 2018, typically for scheduled review meetings.
6. On 20 July 2018 the claimant's pub failed an audit and she was, as a result, given a final written warning by the respondent. That was dated 31 July and the disciplinary proceedings for that warning were carried out by a different business manager (not Mr Gaunt). The claimant accepted that warning and the remedial measures that were very swiftly put in place.
7. Those measures were discussed on a conference call before 1 August to address all of the issues raised by the audit. They included food hygiene and kitchen standards.
8. On 1 August Mr Bentley and Mr Gaunt arranged to meet at the pub to discuss and review the measures in place with the claimant. Mr Gaunt and Mr Bentley were sat at "table 2" in the bar area. Their attendance that day was purely

about the kitchen standards in the audit. The claimant came over to join them with her paperwork. She joined the conversation when Mr Bentley was saying to Mr Gaunt: "do you know what a growler is?" Mr Gaunt replied, "no". Mr Bentley said to the claimant, "if you know don't tell him"; and then he told a joke about "a bloke saying when I ask for a growler I don't want a pork pie".

9. The Tribunal does not consider that Mr Bentley added to that joke, the words "I want a woman for the night". The claimant was confused by the apparent joke. She had a sense of unease because Mr Bentley had looked at her when he said, "if you know don't tell him". "Growler" is, in fact, a term in Yorkshire for a pork pie, and is also in some quarters a slang term for a vagina, but that was at the time unknown to the claimant.
10. On the way to a meeting a few days later, the claimant asked her colleagues, a male and a female colleague, what "a growler" meant. She even suggested to them that she might have misheard, and the word "gripper" might have been used. The colleagues did not discover then the answer, by use of "Google" or otherwise, to make sense of the joke, but they told her, because of the claimant's unease, to record Mr Bentley if he were to make any comments in future.
11. At work the claimant then asked a colleague, Mr Davey, her deputy chef at the time, what "growler" meant, and he gestured to her that it was a slang term for a vagina. The claimant's daughter had also "googled" and discovered the same slang meaning and relayed this to the claimant, who then understood fully the joke told and felt unhappy about it.
12. Mr Bentley visited the pub again, for kitchen standard reasons, on 13 August. Behind the bar the claimant asked him, "what do you want to see first?" He replied with the words, "depends what's on offer?". He said that in earshot of Mr Davey and the claimant felt irritated by that innuendo. She dropped her paperwork. Her thought was, "here we go again". Mr Bentley then touched her on the back of her shoulder and they went into the kitchen to deal with the kitchen check.
13. After that visit the claimant was very much focused on her day job, which was bringing the pub back up to the required standard. On 11 September another colleague, a Mr Ambler, visited to check on how that was all going. He saw some cartons and other items on a work service and he considered Mr Bentley would not be impressed by the kitchen standards on display. He asked the claimant to come over and, "be Phil Bentley", by standing to see the view of the worktop that Mr Ambler had. The claimant became very upset about that and asked Mr Ambler to leave. The claimant accepted that "she chucked him out of the pub". The claimant swears regularly. She did so on this occasion. She knows her audience very well, and appreciates that language needs to be moderated depending on the audience.
14. That day she phoned Mr Gaunt and told him she was resigning because of harassment by Phil Bentley. She confirmed that in an email the next day, and she referred in her email to sexual harassment by Mr Bentley.
15. Mr Gaunt took some advice, and then he told Mr Bentley that they would not attend for their scheduled visit to the "Big Tree" that week, because it would not be appropriate. The claimant had given 12 weeks' notice, having looked

up what was required and her last day at work was scheduled to be 5 December.

16. Mr Gaunt asked her if she wanted to make a formal complaint, and she said that she did; as a result he attended at the pub a few days later and took statements from the Claimant and her colleague.
17. Mr Gaunt also gave his own account of the 1 August visit in an email describing Mr Bentley “as his usual jovial self” on and that Mr Bentley had told “a lame joke” on that occasion. Mr Gaunt also said that he did not see anything inappropriate in what had happened on 1 August.
18. An investigation was then conducted by Human Resources who did not see or interview Mr Gaunt. They did not see or interview the claimant. They interviewed Mr Bentley, who by then had been told before his interview that the allegation was of sexual harassment, including the incident or discussion on 1 August. He had not been provided of a copy of Mr Gaunt’s account of that incident.
19. Mr Bentley, at his investigation meeting, relayed a very detailed account of the visit on 1 August. He had clearly given a great deal of thought in relaying his chronology, and providing a detailed time line. It was very different in character on the essential point to that of the claimant and Mr Gaunt: he suggested, in response to the allegation that a poor taste joke had been told, that to the contrary he had had a conversation with the claimant about real ale sales, and that was the context in which the word “growler” had been used (as the name of a vessel in which to sell real ale).
20. The upshot of those investigations were that the claimant’s grievance was rejected. There was then an appeal conducted by Mr Baxter in November and he also rejected the appeal against the grievance outcome. Mr Baxter interviewed Mr Gaunt over the telephone. He did not interview Mr Bentley again. He did review CCTV from 13 August, and he interviewed the colleague that had been in the car when the claimant on the way to a meeting.
21. It will be apparent from these findings that unlike Mr Baxter and Human Resources, the Tribunal unanimously rejects Mr Bentley’s evidence that there was a discussion on 1 August about selling real ales in takeaway jugs, also known as growlers.
22. We also reject his account that he added the words, “a coffee” after the words, “depends what’s on offer”, on 13 August. We do consider that the claimant is mistaken about the words being added, “I want a woman for the night”, when she came over to the table where Mr Bentley and Mr Gaunt were in conversation. We consider that she has overlain that addition, to her memory, after hearing what the slang meaning of growler can be, and at the point that the double entendre in the joke became clear to her subsequently.
23. The claimant talked to ACAS before her employment ended and before 6 November. She was advised by ACAS to complete internal procedures. She had also spoken to a solicitor by that stage, that is by 6 November. She had worked hard on the pub standards. Before her employment ended on 5 December, the pub had achieved a five star rating in a particular category.
24. The claimant sought the outcome of her internal appeal against the grievance outcome and she was told that it would be available by 27 November. It was

not so available. The respondent's grievance policy provides 14 days for a grievance outcome to be delivered following a meeting, and a further 14 days for an appeal to be delivered following an appeal.

25. The claimant's grievance meeting was on 6 November, following her in initial grievance on 20 September; the outcome was sent on 19 October, without the claimant having being seen by Ms Walle of Human Resources at all (who rejected the grievance).
26. On 27 November the claimant approached ACAS formally for conciliation commencement and she was issued with a certificate on 19 December. She issued her claim, with very few particulars, on 6 February 2019. The particulars were clarified, as I have indicated, in a discussion at the case management hearing on or around 2 April.

#### Consideration and conclusions

27. These are the findings of fact that enable us to determine the complaints. The relevant law and issue list appears in the case management orders which we do not repeat here.

#### The sexual harassment complaint

28. The first issue in relation to the sexual harassment allegation complaint arising in August 2018, is limitation, and it is convenient to deal with that first. The matters that we take into account, and which amount to further findings of the Tribunal are these. The claimant did not have a clear understanding of time limits in relation to these matters at all. She did understand there was a time limit for presenting a Tribunal complaint, or at least presenting her complaint to ACAS, but did not understand from when that ran. She understood that she needed to complete an internal procedure first.
29. The claimant completed her claim herself on line. She had earlier access to a solicitor and to ACAS. We have also taken into account that the respondent did not adhere to the time limits in its own grievance process. Most importantly in this case the internal grievance process, for a number of different reasons, was inherently unjust and unsatisfactory in a case where a serious allegation was made and there was conflicting evidence of what was said. No single independent person interviewed or heard all of the evidence at any stage of the grievance or appeal process.
30. We also bear in mind that because the allegations of sexual harassment form the claimant's case of unfair constructive dismissal, which was presented in time, the allegations have to be determined as facts in the case in any event. The potential prejudice therefore, to the respondent and to Mr Bentley, is less than it might be otherwise.
31. Taking these factors into account we have determined that it is in the interests of justice to exercise our discretion to extend the time limit in relation to the sexual harassment complaint: the time limit for presenting a complaint of sexual harassment alleged on 1 August and 13 August 2018 is extended to 6 February 2019, when the complaint was presented.
32. We come to ask ourselves the questions that are on page 31 of the bundle in relation to the sexual harassment complaint. Did the respondent engage in the conduct that was alleged, that is Mr Bentley making the two comments

that he is alleged to have made; and engaging in those two conversations with the claimant in the manner in which he was alleged to have done so.

33. We have rejected Mr Bentley's evidence about a number of matters. We also inherently reject his evidence that he did not know of the double entendre or the slang meaning of the word growler when he told the lame joke that Mr Gaunt recalled he had told.
34. Both incidents were Mr Bentley engaging in low level, poor taste humour with sexual innuendo. To that extent we have concluded that it was conduct of a sexual nature and therefore prohibited conduct within the Act.
35. If we are wrong about that we consider the purpose and/or effect on the claimant of what was inherently unwanted conduct. Did the conduct have the purpose of violating her dignity? It is inherent in our conclusions that we consider Mr Bentley's primary purpose on both occasions was humour. As Mr Gaunt put it, Mr Bentley was being his usual, if misguided, jovial self. His purpose was not to harass the claimant. Did his conduct have the effect of violating her dignity, or creating an intimidating, hostile, degrading, humiliating or offensive working environment for her? Was it conduct reasonably to be perceived as doing so?
36. The claimant is used to dealing with all sorts of customers and encounters in her working life, but this was a colleague with whom, at the time of these events, she had a very serious job to do. She was trying to bring the pub back to its former high standards. At that time she was subject to a final written warning, and she was very vulnerable to being dismissed if the pub's performance and standards did not improve.
37. In that context, engaging in poor taste humour with sexual innuendo, even without any malicious intent on the part of Mr Bentley, is reasonably to be perceived as violating the claimant's dignity, and creating a hostile working environment for her. She had, at that time frankly, enough on her plate, and the last thing she needed were attempts at humour of that particular kind. Her complaint succeeds. That is a unanimous decision of this Tribunal.

#### The unfair dismissal complaint

38. We then come to consider the issues in the unfair dismissal case, set out for us on page 31.
39. The claimant firstly has to establish that the conduct on the part of Mr Bentley was conduct without reasonable and proper cause. It is apparent in our conclusions that we consider it was not conduct with reasonable and proper cause.
40. The claimant then has to establish that it was conduct calculated to destroy or seriously damage trust and confidence. Again, on our findings, it will be apparent that we do not consider it was calculated to do so.
41. We then ask, was his conduct **likely** to destroy trust and confidence, or to seriously damage it. On that question the claimant fails before this Tribunal. Not every act of irritating, poor taste humour, which amounts to sexual harassment, properly described, will cross the threshold of amounting to conduct which is likely to seriously damage or destroy the necessary trust and confidence between **an employer** and employee.

42. We say that because all colleagues have to work together. We are all capable and fallible and sometimes we make mistakes. Not every mistake by a colleague is likely to destroy or seriously damage trust and confidence in the employer. Mr Bentley, we remind ourselves, was not the claimant's boss – Mr Gaunt held that post. The claimant knew that the employer in this situation, faced with a grievance, would seek to deal with these matters when a complaint was made, as she did at a later stage. Furthermore, it is indicative of the degree of seriousness, and whether the conduct could be considered repudiatory, that the claimant did not resign immediately in response to it, but resigned a month or so later.
43. Even if we had concluded that the conduct was a breach of the implied term of trust and confidence, we then ask did the claimant resign at least in part in response to Mr Bentley's conduct? On the contrary the events that followed his conduct are those that caused her resignation, in the context in which they occurred. The claimant was working hard to get the pub back on track, a colleague of Mr Bentley's visited and made an observation criticising the state of the kitchen which the claimant clearly considered, and came out in her evidence, as "something of nothing". That colleague sought to coach the claimant on that issue in a manner which touched a nerve. That colided with the overarching circumstances of being on a final written warning at the time, having a chef who was a struggling to help her make the required improvements, and to some extent the circumstances in her personal life of a bereavement that year.
44. All of these matters, in our judgment, were those that caused the resignation, from the claimant's point of view: "I've had enough". We quite understand why she might have reached that view at this point in her life and in these circumstances, and she was entitled to end her employment, as any employee may do at any time of course, but this was not "at least in part in response" to Mr Bentley's conduct and not therefore a dismissal.
45. The result of that conclusion is that the constructive unfair dismissal complaint does not succeed and it is not well founded, again a unanimous decision of the Tribunal. Having announced this extempore decision the parties were then able to agree remedy in accordance with the Consent Judgment recorded above.

Employment Judge JM Wade  
Date 17 July 2019  
REASONS SENT TO THE PARTIES ON

5 August 2019