



# EMPLOYMENT TRIBUNALS

**Claimant:** Mr A Mascia

**Respondent:** Pizza Express (Restaurants) Ltd

**Heard remotely via CVP**

**On:** 8 February 2021

**Before:** Employment Judge Davidson

## **Representation**

**Claimant:** in person

**Respondent:** Mr M Foster, Associate

# RESERVED JUDGMENT

**The tribunal finds that the claimant was unfairly dismissed. His public interest disclosure claim fails and is hereby dismissed. His wrongful dismissal claim fails and is hereby dismissed.**

**The parties should seek to agree remedy but if they are unable to do so by 30 March 2021, they are to notify the tribunal and a Remedy Hearing will be listed.**

# REASONS

## The hearing

1. The following applied to this hearing:

1.1. The hearing was a remote public hearing, conducted using the cloud video platform (CVP) under rule 46. The tribunal considered it as just and equitable to conduct the hearing in this way.

1.2. In accordance with Rule 46, the tribunal ensured that members of the public could attend and observe the hearing. This was done via a notice published on Courtserve.net. No members of the public attended.

- 1.3. The parties were able to hear what the tribunal heard and see the witnesses as seen by the tribunal. From a technical perspective, there were no difficulties.
- 1.4. No requests were made by any members of the public to inspect any witness statements or for any other written materials before the tribunal.
- 1.5. The participants were told that was an offence to record the proceedings.
- 1.6. Evidence was heard from the claimant, Mentor Mziu (Operations Manager) and Eloi Lorente (Operations Manager). There was a bundle of documents available electronically.
- 1.7. The tribunal ensured that each of the witnesses, who were all in different locations, had access to the relevant written materials which were unmarked. I was satisfied that none of the witnesses was being coached or assisted by any unseen third party while giving their evidence.

### The Issues

#### *Unfair dismissal*

2. The issues were agreed as follows:
  - 2.1. What was the principal reason for dismissal and was it a potentially fair one in accordance with sections 98(1) and (2) of the Employment Rights Act 1996 ("ERA")? The respondent says that it was a reason relating to the claimant's gross misconduct;
  - 2.2. if so, was the dismissal fair or unfair in accordance with ERA section 98(4), and, in particular, did the respondent carry out a reasonable investigation, which led to a reasonable belief in the- claimant's alleged conduct and did the respondent in all respects act within the so-called 'band of reasonable responses' in dismissing the claimant?
  - 2.3. The claimant says that another employee GB had been guilty of similar conduct to that alleged against the claimant, but had not been dismissed.
  - 2.4. if the claimant was unfairly dismissed and the remedy is compensation:
    - 2.4.1. if the dismissal was procedurally unfair, what adjustment, if any, should be made to any compensatory award to reflect the possibility that the claimant would still have been dismissed had a fair and reasonable procedure been followed / have been dismissed in time anyway. (*Polkey v AE Dayton Services Ltd [1987] UKHL 8*). The respondent accepts that the claimant lodged an appeal against his dismissal but no appeal hearing was carried out, which the respondent says was due to an administrative oversight;
    - 2.4.2. did the claimant, by blameworthy or culpable actions, cause or contribute to dismissal to any extent; and if so. by what proportion, if at all, would it be just and equitable to reduce the amount of any compensatory award, pursuant to ERA section 123(6)?

*Public interest disclosure (PID)*

- 2.5. Did the claimant make one or more protected disclosures under ERA section 43B?
- 2.6. What was the principal reason the claimant was dismissed and was it that he had made a protected disclosure?
- 2.7. The alleged disclosure the claimant relies on is an email sent on 24 January 2019 to RB (Restaurant Manager) and PJ (Operations Manager)

*Breach of contract*

- 2.8. To how much notice was the claimant entitled?
- 2.9. Did the claimant fundamentally breach the contract of employment by the alleged gross misconduct?

The Facts

3. The tribunal found the following facts on the balance of probabilities:
  - 3.1. The respondent operates a national chain of restaurants including several restaurants in Central London including Great Portland Street.
  - 3.2. The claimant started employment with the respondent in December 2015 as a cleaner and, by February 2016 had been promoted to Duty Manager. It was an express term of his employment that, if he was Duty Manager, he had to keep the restaurant open to the public for the advertised hours unless otherwise authorised by their Operations Manager.
  - 3.3. On 17 November 2019, the claimant was covering as Duty Manager at Great Portland Street. He found out that the cleaner was unwell with symptoms that could signify food poisoning. In accordance with the respondent's protocols, the cleaner was asked to go home and seek medical advice.
  - 3.4. The claimant rang the Assistant Manager in charge of that restaurant and left a message informing her that the cleaner had been sent home sick. He did not say anything to her about closing the restaurant.
  - 3.5. Due to the reduction in the staff levels, the claimant took the view that he would have to take over the cleaner's role on Pot wash as none of the other members of staff were willing or had been trained. He was aware that he would not be able to run the restaurant if he was on pot wash.
  - 3.6. He therefore decided to close the restaurant early to new customers and to limit the service to takeaway or Deliveroo orders. He did not consult his manager about this decision and he informed his staff of his decision. He instructed one of his team members, Gaetano, to turn away customers after 10pm. The CCTV evidence shows that Gaetano turned away customers from 9.40pm.

- 3.7. Shortly after the restaurant closed, the Operations Manager, Mentor Mziu came to the restaurant as part of his role overseeing a number of restaurants. He disagreed with the decision to close and reopened the restaurant until its scheduled closing time of 11pm.
- 3.8. He then investigated the issue of the claimant closing the restaurant early and conducted interviews with those on duty at the time. He did not interview the cleaner or the Assistant Manager.
- 3.9. His conclusion was that the claimant's conduct warranted disciplinary action under the disciplinary procedure. The claimant was invited to a disciplinary hearing and was sent the investigation materials, other than Mentor Mziu's investigation report.
- 3.10. The disciplinary hearing was conducted by Eloi Lorente who decided that the misconduct was sufficiently serious as to warrant summary dismissal for gross misconduct. He took into account the impact on the restaurant's reputation with the public, the potential loss of revenue to the respondent and to the team members and the claimant's failure to show remorse or to accept that closing a restaurant in those circumstances without approval is not a valid option for a Duty Manager.
- 3.11. The claimant appealed against the dismissal. The respondent failed to deal with his appeal.
- 3.12. Gaetano was also disciplined under the respondent's disciplinary procedure but he was not dismissed.

#### Determination of the Issues

##### *Unfair Dismissal*

4. The tribunal reached the following conclusions applying the test in *BHS v Burchell [1978] IRLR 379*, taking care not to substitute its view for that of the respondent.
  - 4.1. The respondent genuinely believed that the claimant had committed the misconduct of closing the restaurant early.
  - 4.2. The respondent had reasonable grounds for that belief in that the claimant admitted that he had taken the decision to close the restaurant early.
  - 4.3. I find that there was a reasonable investigation. Taking the points of criticism by the claimant of the investigation in turn, I find as follows:
    - 4.3.1. The failure to interview the cleaner or the Assistant Manager was not a flaw because on the claimant's own case, their evidence could not have added to the investigation into the misconduct in question. The cleaner had been sent home and the claimant accepts that he did not tell the assistant manager that he was thinking of closing the restaurant early.

- 4.3.2. The issue of the cleaner's health issue, which is why the cleaner was sent home, is not relevant. It is not disputed by the respondent that the claimant acted correctly in sending the cleaner home. The issue relates to whether the claimant should have closed the restaurant without authorisation when there were eight members of staff in the restaurant. The reason for the claimant's absence is not relevant to this issue.
- 4.3.3. The alleged errors in the transcript of the interviews and hearing notes have not been identified by the claimant and there is nothing contentious in the meetings which were crucial in the respondent reaching its decision.
- 4.3.4. The difference in treatment of Gaetano is not an act of unfairness since Gaetano's misconduct was committed on the instructions of the claimant, who was Duty Manager at the time.
- 4.3.5. The claimant should have been sent the investigation report prior to the disciplinary hearing. However, I find that this procedural flaw had no impact on the decision. The only matter raised in the report was a reference to a previous early restaurant closure but the claimant had an opportunity to comment on that and it did not form part of the respondent's decision.
- 4.4. I must also consider whether dismissal is an appropriate sanction. I must consider whether dismissal is within the range of reasonable responses and I find that it is. Although some employers may have given the claimant another chance, others would have regarded this as a dismissal offence. Therefore, the respondent's decision is within the range of reasonable responses.
- 4.5. I find that the disciplinary procedure was fair until the dismissal. However, the respondent offered the claimant the right of appeal but, when he attempted to exercise this right, no appeal was arranged. Taking into account the size and administrative resources of this respondent, I find that this was a serious failing. It has not been suggested that the respondent decided that there was no point in holding an appeal. It was simply an administrative oversight which prevented the claimant having his dismissal reviewed internally.
- 4.6. This is contravention of the ACAS Code of Practice and fair employment practices. I find that this is not just a technical error but it is a serious procedural failing. Given the circumstances of the dismissal and mitigation that the claimant could have put forward, there is a possibility that the claimant may have had his sanction reduced from dismissal to final written warning.
- 4.7. I therefore find that the dismissal is unfair.
- 4.8. However, I find that there is an 75% chance that the appeal manager would have upheld the decision to dismiss and the compensatory award must reflect this in accordance with the *Polkey* guidelines. I also find that the claimant contributed to his dismissal by his conduct and the basic award

and compensatory award will be reduced by 60% on that account. I also find that the respondent failed to follow the ACAS Code in a material way and I will uplift the award by 25%.

*Public Interest Disclosure*

4.9. The claimant has failed to show any reason why the dismissal would be linked to the previous protected disclosures in January 2019. I accept the respondent's evidence that the investigating manager and the dismissing manager were not aware of these disclosures.

*Wrongful dismissal*

4.10. I find that the claimant is not entitled to notice pay as he breached an express term of his employment contract by closing the restaurant to new customers without getting authorisation from an Operations Manager.

5. Remedy

5.1. I have set out above the factors which I will take into account in determining the amount of the award in this case. If the parties are able to reach agreement on remedy using these guidelines, there will be no requirement for a Remedy Hearing. If they are unable to reach agreement by 30 March 2021, they should notify the tribunal and a Remedy Hearing will be listed.

---

Employment Judge Davidson

---

Date 12 February 2021

RESERVED JUDGMENT & REASONS SENT TO THE PARTIES ON  
16 February 2021

.....  
.....  
FOR EMPLOYMENT TRIBUNALS