



EMPLOYMENT TRIBUNALS

BETWEEN

Claimant
MR T KANCZEL

AND

Respondent
QUANTUM HOTELS T/A THE
WINCHESTER HOTELS

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

HELD AT: BRISTOL ON: 19TH / 20TH / 21ST / 22ND JANUARY 2021
(VIA KINLEY CVP)

EMPLOYMENT JUDGE MR P CADNEY
(SITTING ALONE)

MEMBERS: MRS G A MEEHAN
 MRS CM EARWAKER

APPEARANCES:-

FOR THE CLAIMANT:- IN PERSON
 INTERPRETER – MS A BRODERICK

FOR THE RESPONDENT:- MR M CURTIS (COUNSEL)

JUDGMENT

The unanimous judgment of the tribunal is that:-

1. The claimant's claim that he was victimised within the meaning of s27 Equality Act 2010 is not well founded and is dismissed.
2. The claimant's claim that he was constructively unfairly dismissed is not well founded and is dismissed.

Reasons

1. By this claim the claimant brings claims of constructive unfair dismissal, and victimisation.
2. The parties consented to the hearing being conducted remotely via Kinley CVP for which the tribunal is grateful to them both. The tribunal has heard evidence claimant and his wife Ms Patricia Petrics; and on behalf of the respondent from Mrs Christina Lawrence (Head of Housekeeping) , Mr Paul Eaves (General Manager), Mr Matthew Richbell (Operations Manager) and read the witness statement of Ms Sarah Fairbrace (Financial Controller) the claimant having indicated that he did not challenge any of her evidence.

Facts

3. There is little or no dispute of fact between the parties although the parties invite us to draw very different inferences from those facts.
4. The respondent operates the Winchester Hotel and Spa. The claimant was employed from 15th March 2015 initially as a Linen Porter and was promoted to Assistant Head Housekeeper on 7th September 2016. His Line Manager was Christine Lawrence, and as Head of Housekeeping she reported to Mr Eaves, the General Manager. The hotel had some nine departments each with a separate head although there were some shared responsibilities as some of the departments were relatively small.
5. The claimant's wife was previously employed by the respondent and on 5th December 2018 she submitted an Employment Tribunal claim alleging that she had been discriminated against on the grounds of pregnancy or maternity. The respondent submitted an ET3 disputing the claims (although it was not factually in dispute that Mr Eaves had made comments attributed to him by the claimant) on 7th January 2019. Prior to any hearing the claim was settled via an ACAS COT3 agreement on 10th May 2019. As a result the claims were not specifically identified by the tribunal at a case management hearing but it appears from the pleadings that in broad terms that it was alleged that Mr Eaves had made inappropriate comments to the claimant about his wife's pregnancy; that having informed Ms Lawrence of her pregnancy that her workload had increased, and that the respondent had failed pay maternity pay. It is not in dispute that the claimant had supported her during the internal grievance process prior to the claim being issued; nor that he is referred to in the ET1 as the recipient of the comment from Mr Eaves.
6. On 29th May 2019 Ms Lawrence was approached by Ms Nina Chila, a room attendant, making a number of complaints about the claimant's management. Her allegations were put into writing with the assistance of her boyfriend, whose English was better than Ms Chila's. She specifically complained that on 24th May 2019 when

- her brother had reported sick, that the claimant had begun shouting at her insinuating that he wasn't genuinely ill which embarrassed Ms Chila. She alleged that this was not the first time that it had happened and that she believed the claimant had a problem with her and her brother. On 1st June 2019 Ms Lawrence was approached by another member of staff who was subsequently identified as "A" in an anonymised statement supporting Ms Chila's account and making further allegations including that she had heard the claimant threaten to punch Ms Chila's brother, and suggesting that the claimant made comments about Ms Lawrence criticising her ability to do her job. "A" also identified other members of staff who she said would support these allegations.
7. Ms Lawrence discussed the allegations with Mr Eaves and it was agreed that the respondent would provide a professional Hungarian interpreter to take their statements which occurred on 11th June 2019. It is not necessary to describe the statements in detail, but it is not in dispute that in broad terms they supported the allegations made by Ms Chila and "A". The claimant does not dispute that this account of how the allegations were made and the statements provided is true, nor that the complaints were genuinely made by Ms Chila and the four anonymised witnesses to Mrs Lawrence.
 8. Once Mrs Lawrence had obtained the statements she gave them to Mr Eaves, and her evidence, which is not challenged and which we accept, is that she played no further part in the events which followed.
 9. The respondent has a brief disciplinary policy which forms part of the contract of employment. Mr Eaves evidence, which we accept, is that they also have access to external HR advisors who provide both general and specific HR advice on individual cases. The general advice includes standard advice that twenty fours notice should be given of any disciplinary hearing. He sought specific advice about the claimant's case and that advice was repeated. Accordingly on 20th June 2019 he wrote to the claimant inviting him to a disciplinary meeting on 21st June to answer disciplinary charges that: "a) You behaved inappropriately towards Nina Chila including shouting at her in front of others; b) You made threats to strike another member of staff; c) You have openly criticised your line manager Chrissie Lawrence to others in an inappropriate manner; d) By your general actions and behaviour you are significantly demotivating members of your team." The letter advised that the claimant was entitled to be accompanied by a work colleague or Trade Union representative; and advised that if the claimant was unable to attend for an appropriate reason that he should notify Mr Eaves by email no later than 9.00am 21st June 2019. Copies of the five statements were given to the claimant with the letter.
 10. Shortly after the claimant received the letter he went to speak to Mr Eaves whose record of the conversation is not disputed. The claimant asked if he could bring his daughter to the meeting "as her English is better than mine". Mr Eaves refused the request on the basis that she was not a work colleague or Trade Union representative. Mr Eaves records his opinion that "...I have never found Tibor's English to be less than excellent at any time", which is also his evidence to the tribunal. The claimant then said, "You are only giving me one day to prepare?" and

- Mr Eaves replied, "Yes as per the invite- it is more than the required 24 hours." The claimant said, "yes one day to prepare for it ", and Mr Eaves replied, "Yes the meeting will be at the date and time on the letter." The claimant said "OK" and left his office.
11. On the same day the claimant sent Mr Eaves a resignation letter. His reasons for resigning were "*That I find it unfair that I only received 24 hours to prepare and defend myself against a case that has been preparing for at least two weeks; Before receiving these statements I have not received any verbal or negative feedback from neither my colleagues nor management; because in my opinion the base for this procedure is a previous tribunal claim initiated by my wife Patricia Petrics, who used to work in the hotel as well.*"
 12. The following day Mr Eaves wrote saying that although the respondent had not received any formal application to postpone the disciplinary hearing he was treating the resignation letter as such a request; and the hearing was moved to 25th June at 2.00pm. He urged the claimant not to make a decision about his future until after the hearing. The claimant replied stating that he had not requested any delay to the hearing; reiterated the fact that he was resigning and stated that he believed that the notice of twenty four hours amounted to a breach of the duty of mutual trust and confidence.
 13. The disciplinary hearing took place on 25th June 2019. During it the claimant handed Mr Eaves a written grievance. As a result, the disciplinary process was paused while the grievance was resolved. It was heard by Mr Richbell on 18th July 2019 and on 30th July he rejected it in writing. The claimant appealed and the appeal was heard by Ms Fairbrace who also rejected the appeal by letter dated 30th October 2019. As the grievance and the appeal post-date the claimant's resignation they have no bearing on the constructive dismissal claim; and there is no allegation made in respect of them as part of the victimisation claim, so it is not necessary to set out any of the detail of the grievance, the appeal, hearings, or the outcomes in this decision.
 14. After the grievance was concluded the disciplinary process resumed, although by this stage the claimant's employment had terminated. Mr Eaves conclusion was that the allegations were substantiated and that the appropriate sanction given the seriousness of the allegations, but taking into account the claimant's previous good record was a Final Written Warning.
 15. In addition to the disciplinary process the claimant makes an allegation as part of the victimisation claim that the respondent failed to protect his personal data by failing to protect the privacy of his email account. The background is that a number of members of staff share computer terminals but each had their own passwords to log on to their own accounts. Once in their account the email had a separate password. The claimant complains that his email account was insecure as that once logged on his email account was accessed automatically without using the password and that anyone could therefore read his private emails. On 8th June 2019 the claimant emailed Mr Richbell complaining that "Outlook still starts without asking for a password." Mr Richbell accepts that he overlooked this and did not reply.

16. The respondent's position is that they do not understand the claimant's allegation. If Outlook opened automatically it was likely that that was because the claimant had ticked the box for it to remember his password; and if he did not want anyone else to have access all he needed to do was to log off each time he stopped using the computer and/or change his password. In those circumstances they do not accept that factually there had been an failure to protect his email account irrespective of Mr Richbell's failure to respond to the email; and in any event as it was his work email account there should not have been any personal data on it.

Conclusions

Victimisation

17. The claimant alleges that a number of events both prior to and after his resignation are acts of victimisation. The events prior to the resignation are also the basis for the constructive dismissal claim. It is sensible to begin with the victimisation claim as, if the allegations prior to the resignation are made out as acts of victimisation they would also inevitably be fundamental breaches of the implied term of mutual trust and confidence and the constructive dismissal claim would be bound to succeed.

18. Section 27 of the Equality Act 2010 provides that:

(1) A person (A) victimises another person (B) if A subjects B to a detriment because—

(a) B does a protected act, or

(b) A believes that B has done, or may do, a protected act.

(2) Each of the following is a protected act—

(a) bringing proceedings under this Act;

(b) giving evidence or information in connection with proceedings under this Act;

(c) doing any other thing for the purposes of or in connection with this Act;

(d) making an allegation (whether or not express) that A or another person has contravened this Act.

19. The claimant contends that in general terms that his support for his wife during both the internal and tribunal processes amount to or include protected acts. In particular, he points to the fact that it was he who conveyed the information about Mr Eaves' comment to her, and that he is specifically referred to in the ET1; and that he supported her during her grievance. The respondents witnesses point to the fact that

- as the case never reached the point of preparation for the hearing and that as the comment was not in dispute that they did not know and could not have known that the claimant would have been a witness in any final hearing.
20. In his final submissions Mr Curtis makes no reference to any dispute as to there being a protected act but for completeness sake and for the avoidance of doubt in our judgement the claimant's part in relation to the comment is clearly giving information in connection with proceedings under the act within the meaning of s27 (2) (b), and is therefore a protected act.
21. The acts said to amount to a detriment prior to the resignation are:
- i) Deciding to take disciplinary action against C;
 - ii) Failure to provide C with adequate notice of the disciplinary hearing;
 - iii) Failure to provide C with evidence of the allegations until the invite letter.
22. In this part of the judgement we will deal simply with the question of whether the evidence supports the allegation that that these are detriments to which the claimant was subjected "because" of the of the protected act. In determining that question we bear in mind that if there is prima facie evidence from which we could conclude, in the absence of an explanation from the respondent, that the actions were acts of victimisation that the burden the shifts to the respondent to satisfy us that the protected act payed no part in them.
23. The claimant essentially relies on two facts as being sufficient to shift the burden. Firstly that the complaints of Ms Chila and "A" were raised within three weeks of the conclusion of the tribunal claim when there had been no disciplinary complaints against the claimant at any time in the previous four years; and secondly that the two people involved in investigating the complaints and determining the outcome, Ms Lawrence and Mr Eaves were both named in the ET1 as being responsible for acts of discrimination. In our judgement this is sufficient to satisfy stage 1 of the Igen v Wong test and shift the burden to the respondent.
24. The primary fact relied on by the respondent and which is not disputed by the claimant, is that the complaints were entirely genuine and have been accurately recorded by Ms Lawrence. The respondent submits that given that the claimant was in a supervisory role that allegations of harassment and abusive behaviour towards members of staff, of threats of physical violence, and of undermining his line manager were extremely serious and had to be dealt with. Given that it is accepted that they were genuine complaints it was inevitable and unavoidable they had to be dealt with as disciplinary allegations. The idea that they could not have been is fanciful and the seriousness of the allegations themselves provides a complete explanation as to why Mr Eaves decided to commence the disciplinary process. As we accept his evidence we find that the respondent has satisfied the burden of proof.

25. As set out above in relation to the giving of twenty-four hours' notice the respondent submits that this was not unique to the claimant. Mr Eaves evidence is that this is the general advice they have received from their external HR advisors as to the appropriate amount of time, and was the specific advice he received in this case. In addition, the respondents point to the fact that when Mr Eaves first understood that a longer period was being requested, he immediately granted it. If we accept this evidence, which we do, it again provides a complete explanation as to why the claimant was given twenty-four hours' notice and refutes any allegation that it was intended to disadvantage the claimant or that it was in any way linked to his support of his wife in her claim. Again, it follows that the respondent has satisfied the burden of proof.
26. The third allegation is of failing to provide the claimant with the evidence of the allegations until they were supplied with the invite letter. This is based on the claimant's assertion that it was unfair for him not have been informed of the allegations sooner, and unfair that he had not been given the opportunity to be interviewed as part of the investigation before moving straight to the disciplinary hearing. The respondent's response is that Mr Eaves took the view that he needed the full picture until decided what action to take, which is wholly reasonable, and that he acted on the external advice. There was in fact no investigation, Ms Lawrence simply received the allegations and passed them to Mr Eaves to make a decision and it is perfectly common for employers to proceed straight to disciplinary hearings where the initial information clearly discloses a disciplinary case to answer as was the case in respect of the claimant. Again, we accept Mr Eaves evidence in this respect, and find that the respondent has satisfied the burden of proof.
27. The specific allegations of victimisation in addition to those set out above, and which overlap with those set out above are :-
- i) Instigated a disciplinary process against the Claimant
 - ii) Mrs Lawrence investigation was biased and (not) impartial. Mrs Lawrence did not interview C about the allegations in the same way as she did the witnesses.
 - iii) Mr Eaves biased in that: involved in investigation and then hearing; failed to provide a full copy of the investigation report to C; failed to provide a range of possible outcomes from the hearing; failed to enable C to respond to each piece of evidence or to present his own case.
 - iv) Failed to protect C's personal data by failing to protect his privacy in respect of his email account
28. The first and second of those have been dealt with above. In addition, there was a further allegation of failing to pursue an informal resolution of his grievance which the claimant accepted in evidence that he was not pursuing.

29. That leaves firstly the allegations against Mr Eaves. In terms of his involvement in the investigation, the evidence before us which we accept, is that he was made aware of the allegations by Ms Lawrence, arranged for an interpreter to assist with the statements taken on the 11th June and liaised with the external HR advisors. He was not involved, and it is not alleged that he was involved in obtaining the underlying evidence itself. In those circumstances there is nothing from which we could conclude that his involvement created any perception of bias, let alone any actual bias.
30. In relation to the allegation that he had failed to provide a copy of the investigation report the evidence before us, as set out above, is that there was no investigation report to disclose.
31. In relation to the third it is correct that the invitation letter did not set out the possible outcomes. Mr Eaves evidence was that all outcomes were possible from no disciplinary action through to dismissal. It is hard to see how the claimant was disadvantaged by this and in any event no evidence that its absence is linked to the claimants protected act or his wife's earlier claim in any event.
32. The next allegation is of failing to allow the claimant to respond to each piece of evidence or to present his own case. This is on the face of the disciplinary hearing notes, the accuracy of which have not been challenged is not correct, in that the claimant was specifically given the opportunity to comment on the statements, was given further time during the hearing and given the opportunity to make any further comments he wished at its conclusion. In reality it appears on the evidence that the claimant's primary complaint is that the disciplinary hearing was not conducted as he wished it to be as he wanted to go line by line through each statement. However, the fact that it was not conducted as he wished is not evidence that he was not given a proper opportunity to present his case, which in our judgement he was. Again, there is in any event no evidence that the earlier protected act had any influence on the conduct of the hearing.
33. The final allegation is of the failure to protect his personal data. For the reasons set out above we accept the respondent's contention that there was no personal data to protect and that if there were it was open to the claimant to protect it by changing his password. There is in any event no evidence that Mr Richbell was aware of the earlier protected act, or the claimant's wife's claim at all. At the conclusion of the cross examination of Mr Richbell the claimant was invited to put this to him if it was part of his case. The claimant did not do so, and as stated above there is no evidence that Mr Richbell's failure to respond was in any way connected to the claimant's wife's claim or the claimant's involvement in it, and this claim must fail on that ground alone as an allegation of victimisation.
34. It follows that all of the allegations of victimisation must be dismissed.

Constructive Dismissal

35. The first three allegations of victimisation set out above are also relied on as allegations of breaches of the implied duty of mutual trust and confidence; that the employer shall not without reasonable cause conduct itself in a manner calculated or likely to destroy or seriously damage the relationship of trust and confidence. The test for this is objective.
36. The first is the decision to take disciplinary action. For the reasons set out above the respondent clearly in our judgement had reasonable and proper cause to take disciplinary action.
37. The second is only providing twenty-four hours' notice of the disciplinary hearing. We accept, as set out above that the decision to give twenty-four hours' notice was based on the advice received from the external HR advisor and that necessarily objectively the respondent had reasonable and proper cause to provide it in accordance with the advice it had received. For completeness sake we are inclined to the view that as recorded in Mr Eaves' note of the conversation that the claimant's question was an implicit request for more time and that it would have been preferable for Mr Eaves to have granted more time immediately, and that we would have been inclined to grant the request to allow the claimant to be accompanied by his daughter. However the question for us is not whether we would have acted differently but whether the request itself was a breach of the implied term which for the reason set out above we do not believe that it was; and in relation to being accompanied by his daughter there is in fact no allegation before us in relation to it in any event.
38. The allegation of failure to supply the evidence in support of the disciplinary allegations until they were supplied within the disciplinary letter itself is, for the reasons set out above perfectly normal practice. There is no obligation to interview as part of any investigation and no obvious unfairness in acting as the respondent did. We cannot identify any breach of the implied term in acting in this way.
39. It follows that the claimant's claim for constructive unfair dismissal must also be dismissed.

Employment Judge Cadney
Date: 05 February 2021

Judgment sent to parties: 17 February 2021

FOR THE TRIBUNAL OFFICE