



EMPLOYMENT TRIBUNALS

Claimant

Respondent

Miss C Smith

v

JD Wetherspoon plc

Heard at: Watford (remotely)

On: 11 February 2021

Before: Employment Judge Wyeth

Appearances:

For the Claimant: In person

For the Respondent: Miss A Stroud (Counsel)

JUDGMENT

The claimant's complaint of automatic unfair dismissal for asserting a statutory right is not well founded and is dismissed.

REASONS

The claim

1. By way of a claim form presented on 12 September 2019, following a period of early conciliation from 4 to 12 September 2019, the claimant brought a single complaint of automatic unfair dismissal for asserting a statutory right contrary to s104 of the Employment Rights Act 1996 ("ERA").

The issues

2. The matter came before EJ Smail for case management on 20 May 2020. That preliminary hearing took place by telephone. The issues to be dealt with at today's hearing were recorded by EJ Smail as follows:
 - 2.1 Was the principal reason for dismissal that the claimant had asserted a statutory right, namely that she was not being paid for nor given nor promised her contractual 12 hours a week? The respondent asserts that she failed her probationary period for reasons of performance and conduct, including lateness.
3. At the start of the hearing today, the parties confirmed that EJ Smail had

captured the claim and issues correctly but it was agreed that the issues required a little more refinement.

4. The parties agreed that the claim of automatic unfair dismissal for asserting a statutory right required me to determine the following:
 - 4.1 Did the claimant assert a relevant statutory right (which in this case was said to be that she was not being paid or not being given or promised her contractual hours per week)?
 - 4.2 If so, was the assertion made in good faith?
 - 4.3 If so, was the assertion the reason for the claimant's dismissal on 5 August 2019?

Procedure

5. Due to the pandemic this hearing was held remotely by agreement using CVP. Despite being by video link, the hearing progressed very smoothly and without any significant technical issues or hitches. I had before me a bundle of documents consisting of 275 pages (with a few additional insertions). The page references below relate to the bundle unless otherwise stated.
6. I also had before me witness statements from the claimant, and Miss Samantha Pugh (Pub Manager), Miss Grace Dalton (Shift Manager) and Mr Alex Sloan (Regional Personnel Manager) on behalf of the respondent. It was agreed that the claimant would give her evidence first as she had the burden of proving that she was automatically dismissed for the stated reason. I then heard from each of the respondent's witnesses in the order set out above.
7. The evidence was concluded shortly after the lunch break. I then heard submissions from Miss Stroud on behalf of the respondent followed by the claimant. I was able to provide an extemporaneous judgment and reasons but at the conclusion of the hearing the claimant requested written reasons. I reminded all parties that in those circumstances the Judgment and Reasons would be published on line.

Findings of fact

8. I make the following findings of fact on the basis of my assessment of all the evidence before me.
9. The respondent is a company that owns and runs a well-known chain of pubs. The claimant commenced employment with the respondent at the public house known as the "Railway Bell" in New Barnet on 12 June 2019. There seems to be some disagreement about her job title but in essence she was employed as a Bar Associate. Under the terms of her contract (p140), she was guaranteed a minimum of 12 working hours per week.
10. In accordance with clause one of her contract, the claimant was subject to a

probationary period (applicable to all new employees). That document as it appeared in the bundle was difficult to read but it was possible to make out the material part of that clause which provided for the claimant's employment to be terminated at any time in accordance with clause 9 (specifying the requisite notice to be provided depending on the circumstances) during the first 13 weeks of her employment with the respondent. The claimant accepted that a probationary period applied to her and that she was well within that period at the date she was advised that her employment was to be terminated.

11. The probationary period entitled the respondent to review the performance of the claimant.
12. Notably, during her probationary period the claimant had three instances of lateness, the first of which was on 22 June 2019 less than two weeks after the commencement of her employment. The remaining periods of lateness were on 11 and 12 July 2019 (both within a calendar month of starting work). Whilst these were not significant periods of lateness she nevertheless arrived circa 7 or 8 minutes after she was due to be at work.
13. On 12 July 2019 the claimant had to leave her shift early at around 9.30pm despite being scheduled to work until approximately 11.00pm, because she was unwell with food poisoning. As a result, the claimant was unable to work her shift the following day (13 July). Likewise, it appears she was due to work on 15 July 2019 but was unable to attend because she was still unwell. The claimant was cross-examined about her hours of work in the first five weeks of employment with the respondent. The claimant accepted that she had worked over 21 hours in the first week, 20 hours in the second week and 28 hours in the third week (commencing 1 July 2019). In her fourth week of employment (commencing 8 July 2019) the hours she worked were just over 10, but that was the week that she was unwell. Had she been fit to work she would have worked in excess of the 12 hours stated in her contract.
14. Be that as it may the claimant accepted in evidence that she did not complain at all about a lack of hours until 23 July 2019. According to the claimant's own evidence (which, on this point, I accept) the first complaint she relied on regarding her hours was made by telephone to Mr Sloan on the morning of 23 July 2019. The claimant followed that complaint up with an email on the same day (at p181, which appears repeatedly on various pages throughout the bundle). In that email she says:

"Please find attached information required following this morning's telephone conversation. My contracted hours are 16 and it has not been agreed to receive less than 16 hours and as the handbook says to inform the company [sic]. I have tried to talk about this and it has not been possible on my shift. I have been told work hours for all staff had to be cut and it may be possible I will be paid for the online training one was asked to complete in my own time..."

15. This admission by the claimant that she did not complain about her hours until 23 July 2019 is significant chronologically. There are two key instances that occurred prior to the claimant making this complaint to Mr Sloane.

16. On 21 July 2019 there was an incident at the pub involving a customer who also happened to be a manager of one of the respondent's other pubs. That customer for these purposes has been identified as Charlie. All that needs to be said about that incident for these purposes is that the managers responsible for supervising the claimant on 21 July believed that she had become unnecessarily involved in an altercation that Charlie was having with one of the bouncers. The claimant says that Charlie was rude to her and called her an idiot but nevertheless I accept the evidence of Miss Dalton and Miss Pugh before me today that they were concerned about the fact that the claimant had become involved in this incident when she should not have done.
17. The following day, 22 July 2019, Miss Dalton undertook a probation review with the claimant. The record of that review appears at page 177 of the bundle and is signed by the claimant as well as Miss Dalton. It is clear from that review that the respondent had concerns about the claimant's performance prior to any complaint the claimant made about her hours of work to Mr Sloane. Five out of the seven categories the claimant scored 1 out of 3, the lowest score, namely "needs to improve". Evidently, the view of those managing her was that she was performing very poorly at that stage irrespective of her lack of punctuality and sickness absence. Indeed, she was only meeting the standard expected in the remaining two categories, one of which was "Timekeeping and Attendance". Whilst I find it surprising that the claimant was considered to meet the standard of attendance and time keeping given her instances of lateness and absenteeism at such an early stage of her employment, I accept Miss Dalton's evidence that the reason this was not reflected in the first review was because she had not logged the fact that these instances had occurred at that stage. In any event, her lateness and absence to which I have referred above is not in dispute.
18. Printed at the bottom of the ratings section of that probationary review pro forma is the following:

"Any "needs improvement" rating may result in extending the probationary period and/or termination of employment [my emphasis]. All other ratings will result in a successfully completed probationary period."

It appears that the claimant was not taking on board instructions, suggestions and advice from those responsible for managing her. I fully accept that the review that was undertaken by Miss Dalton was an honest one. It may well be that the claimant disagreed with Miss Dalton's assessment of her performance but I reject the suggestion that this was in any way influenced by something the claimant had not even complained about at this point (which, need it be said, would be a chronological impossibility). Indeed, it was the claimant's case in evidence today that she had not complained about any lack of hours that she had been allocated for the week commencing 22 July 2019 during that review meeting. Instead, she had simply enquired about the fact that the week that she was about to start appeared to have her working less hours than she should have been allocated.

19. I interpose at this stage that there was also some reference during the evidence today to the fact that the claimant had raised the issue of her online training for which she had not been paid. When I asked the claimant directly whether she had complained about this to anyone she very candidly admitted that she had not. She simply mentioned to those managing her (but not Samantha Pugh) that she had not yet been paid for the online training she had undertaken and had been assured that she would be paid, which she accepted. I also accept Miss Dalton's evidence that at the point of the probation review on 22 July 2019 the claimant had undertaken all the online training that she was expected to undertake. I do not need to resolve the issue as to whether Miss Dalton instructed the shift manager Carla to ensure that the claimant was paid for that online training because it does not assist in resolving the issues that I have to determine today. I am nevertheless persuaded that Miss Dalton was keen to ensure the claimant got paid and was supportive of the claimant not least because it is surprising that the claimant did not pursue the matter further with any of her direct managers if she believed they were deliberately seeking to avoid any payment for this training. In any event, given that the claimant accepts that this did not form any complaint she made to the respondent it is not a matter that I need concern myself with any further.
20. There can be no doubt that the claimant complained about her hours and the fact that she believed she was not being allocated sufficient hours in accordance with the contract in her telephone call and follow-up email to Mr Sloan of 23 July 2019 (to which I have referred already). It stands to reason that any failure to provide the claimant with her contractual hours would of course mean that she was not paid for those hours, which in turn would be an unauthorised deduction of wages. To that extent, by complaining about the failure to allow her to work the correct number of hours she was in essence complaining about an unauthorised deduction of wages. That said, it does appear that the claimant was confused about the number of hours she was entitled to be allocated given that her complaint raised an expectation of 16 rather than 12 contractual hours per week.
21. Indeed, having complained about those hours not being allocated to her (i.e. 16) she received an email from Mr Sloan the same day who confirmed that her contractual hours specified a guaranteed minimum number of 12 and not 16 per week (p181a). He also went on to explain that the only reason that she did not receive pay for the guaranteed minimum hours of 12 per week for the weeks commencing the 8th and 15th July was because of her sickness absence.
22. The claimant maintains that she has never before seen the email from Mr Sloan on p181a. I consider that doubtful but, be that as it may, I do not need to form a definitive view because this email is not material to the issues in dispute in any event. I accept that the claimant made an assertion that she was not receiving the number of hours that she (albeit erroneously) believed she was entitled to receive under her contract and that this resulted, in her view, in an unauthorised deduction of wages. Accordingly, she was asserting what she genuinely believed to be a statutory right.
23. Irrespective of whether or not she had sight of Mr Sloan's email on p181a, I

also accept that the claimant clearly believed at the time she made the complaint that she should have received more hours than she had done for the weeks commencing the 8th and 15th July 2019. It matters not that she was only entitled to 12 rather than 16 hours under her contract. She was making a complaint of being allocated too few hours in good faith.

24. Following the making of that complaint there were continuing concerns about the claimant's performance during her probationary period spilling over from the previous review. Around the same time as sending her email complaining about a lack of hours, on 24 July 2019 the claimant emailed Mr Sloan this time to complain about the incident involving Charlie. She indicated that she considered she had been badly treated not least because he was apparently rude to her. Mr Sloan forwarded both of the claimant's emails (of 23 and 24 July) to the manager of the pub, Samantha Pugh on 30 July 2019 (p189). In her evidence, Miss Pugh suggested that the issue regarding the claimant's hours was not something that had particularly attracted her attention. The greater concern was over the incident involving the way in which the claimant had reacted to the problem with a customer (Charlie) on 21 July 2019. Mr Sloan had asked Miss Pugh to gather statements in relation to that incident.
25. In her response to Mr Sloan's email on p189 which she sent on the same day (30 July 2019), Miss Pugh indicated that the claimant's probationary review was due on the Monday. She asked Mr Sloan whether she should conduct that review on the Monday or whether she should leave it until she heard further from Mr Sloan. I consider this evidence to be particularly relevant. Irrespective of the fact that Mr Sloan forwarded a copy of the claimant's email of 23 July complaining about a lack of hours to Miss Pugh on 30 July - which would be the first time on the evidence before me that Miss Pugh was made aware of the complaint (or more specifically the assertion of the statutory right) upon which the claimant relies - there can be no doubt that the second probation review meeting was already scheduled to take place according to Miss Pugh's email. Accordingly, I accept the respondent's evidence that there was always intended to be a second probation review meeting with the claimant on 5 August 2019 irrespective of any complaint she made about her lack of hours.
26. Following the email that Miss Pugh had received from Mr Sloan on 30 July 2019, in the bundle before me was a text message that Miss Pugh sent to the claimant on 31 July 2019 in which she says:

"Hiya hun, I've just been reviewing the rotas and I've seen you only have 10 in these next 2 rotas so in order for you to get your hours could you please start at 6 on Sunday? Also next week I need a 6-10 in the evening on Thursday so if you could do that you would get your hours? I'll speak to grace I don't know what the confusion is. Let me know if that's OK".

I consider this evidence to be relevant in that it appears that the issue of hours was not something that was particularly problematic for the claimant's managers. They were very willing to correct the fact that she had been allocated an insufficient number of hours. I accept the evidence of Miss Dalton that this was nothing more than a mistake. If either Miss Dalton or Miss Pugh, or for that matter Mr Sloan, was aggrieved by the claimant's complaint about hours, that does not appear to be reflected in

this text message from Miss Pugh to the claimant.

27. As anticipated, the claimant was invited to a further probation review meeting on 5 August 2019. A record of that review appears at pages 201 to 202 of the bundle. Evidently, concerns about the claimant's performance had still not improved. Noticeably however the claimant's score for "Customer Focus" had improved as she was awarded a three, being the maximum. I am satisfied that if this probation review really was a sham that was being used as a pretext for her dismissal, it is unlikely that Miss Dalton would have increased the claimant's score in respect of one of the criteria when completing it. I also note that Miss Dalton was reasonably positive about the claimant's attitude as she awarded her a score of two. On this review Miss Dalton did take account of the claimant's three periods of lateness and two days' sickness absence which scored against her.
28. Nevertheless, I am satisfied from their evidence (which I accept) that Miss Dalton and Miss Pugh had formed the view that the claimant was not performing to the standard that they would expect of someone who was new to the position. I consider it relevant that on 6 August 2019 Miss Pugh sent a further email to Mr Sloan at p204. Notably it is the claimant who refers to this in her evidence. In that email Miss Pugh states [sic]:

"Hi Alex.

Attached is the paperwork from charlottes probation. I have started writing up a end of probation letter to send her but tbh I don't know what to put on it without setting her off. She was dismissed due to 3 lateness's 1 sickness in probation. Not following instruction. Failure to complete tasks to a satisfactory standard. E.g. She broke the coffee machine 3 times. When we realised it was her one of the team leaders tried to show her how to do it properly to which she responded I know what I'm doing I have read the SOP...well she didn't cos she broke it again that day! Uniform. She always wears a lacy collar under her t-shirt so it was stated that although she looked smart it wasn't to company standard. She wore heels to work once...And argued with me that it should be ok as she finds them comfortable when I told her they weren't acceptable. There was a hot pants incident. She has no idea of service practice despite being on the bar and floor and meet doing a glass and fruit training session in our last staff meeting which she attended so her knowledge isn't where it should be especially considering her e-learning is all complete. Although she makes a big effort with the customers. They all dislike her they say she is scary and creepy...And finally after being asked to get a blue mop on Sunday to mop the bar she then went and got a green one and mopped the bar floor with it halfway until someone noticed. I have told you all this to show it firstly has nothing to do with her complaint and also to see if you can help me write the letter to send to her...

In her probation review she called us cowboys and said we didn't have any idea how to manage and were clearly still training ourselves as she has lots of experience at 5 star hotels and greggs and we don't know what we are doing, told grace she was out of line, grace did explain this was discussed with all management. She then text me saying that she cannot believe grace ended her probation after her shift has started when she was doing a good job. That it was rude for her to be sat in a room with people she hadn't worked with much and be told to leave. That is was all unprofessional and rude. I have blocked her number from whatsapp, I don't feel replying will help the cause at all.

Just so you have alllll the information ready.

Thanks
sam"

29. I do not doubt that much of that may be disputed by the claimant. Indeed when a number of those examples were put to her today in cross-examination she denied there were problems of that kind. In particular she denied she broke the coffee machine, she accepted she wore boots that had heels but offered to go home and change them but was told not to worry and did not wear them again. She denied wearing a lacy collar. She challenged the suggestion that customers found her 'creepy'. Irrespective of the fact that the claimant challenges the assertions made in that email, I do consider that email to be particularly pertinent. It contains a detailed explanation of the difficulties that Miss Pugh believed to exist in relation to the claimant. Whether or not these are justified is not in issue. I am entirely satisfied on the balance of probabilities that these perceived reasons were the true basis for the claimant being unsuccessful in her probation and her failed probation was the reason (and only reason) for her dismissal. Her failed probation had nothing to do with any allegation that she had not been provided with sufficient hours of work.
30. I take on board the fact that Miss Pugh says in the email set out above that she has told all this to Mr Sloan to show that it "firstly has nothing to do with her complaint and also to see if [he] can help [Miss Pugh] write the letter to send to [the claimant]". It is not entirely clear what she means by the claimant's "complaint" and whether this is a reference to the complaint the claimant made about the incident on 21 July 2019 involving Charlie (on 24 July 2019) or about her hours in her email of 23 July. Nevertheless, I do not consider that Miss Pugh's reference to any complaint by the claimant creates an inference that the content of the email was anything other than a genuinely reflection of Miss Pugh's real concerns in this matter.

The Law

31. Below I set out in brief terms the law that is material to the claim I am required to determine on the basis of the facts I have found to be relevant in this case.
32. Under s104 ERA, an employee's dismissal is automatically unfair if the reason or principal reason for the dismissal is that: a) the employee brought proceedings against the employer to enforce a relevant statutory right; or b) the employee alleged that the employer had infringed a relevant statutory right.
33. It is immaterial whether the employee actually had the statutory right in question or whether the right had been infringed, but the employee's claim to the right and its infringement must have been made in good faith (s104(2)). Furthermore, it is sufficient that the employee made it reasonably clear to the employer what the right claimed to have been infringed was; it is not necessary actually to specify the right (s104(3)).
34. Guidance on the application of the statutory provisions was provided by the Court of Appeal in Mennell v Newell and Wright (Transport Contractors) Ltd [1997] ICR 1039. Importantly, the allegation need not be correct, either as to entitlement to the right or as to its infringement, provided the claim or allegation was made in good faith.

Conclusions

- 35. Applying the relevant law to the facts, I have reached the following conclusions.
- 36. The claimant's complaint to Mr Sloan about the lack of hours she had been scheduled did amount to an assertion of a statutory right for the purposes of s104 ERA. She was clearly stating that the respondent had not complied with its contractual obligations to provide her with a minimum amount of work (and pay) that she was entitled to. This was, in essence, an assertion that the respondent had made an unauthorised deduction of wages.
- 37. The claimant's complaint was made in good faith. Despite its timing, it did not appear to be a reaction to the first probation review outcome that was ultimately very poor for the claimant. Even if it was, it does not follow that such a complaint was made in bad faith.
- 38. Nevertheless, notwithstanding any assertion of a statutory right, I am entirely satisfied that the claimant's employment was terminated because of concerns about her performance during her probation period, her approach to other members of staff and a response to the way she was being managed during that time and not because she had raised a complaint on 23 July 2019 (or any other time) about the fact that she had not received her guaranteed minimum hours.
- 39. I have no hesitation in concluding that the claimant's principal reason for dismissal was not for asserting a statutory right, or for that matter, in any way connected to it directly or indirectly. It was entirely due to her perceived poor attitude and performance. Her complaint about a lack of contractual hours had absolutely no bearing on the decision to terminate her employment.
- 40. For the above reasons, the claimant's claim is dismissed.

Employment Judge Wyeth

Date: 8 April 2021

Judgment sent to the parties on

....16 April 2021.....
THY

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For the Tribunal office