



EMPLOYMENT TRIBUNALS

Claimant: E Simplicio

Respondent: Alfona Limited

Held at: London South Employment Tribunals by video hearing

On: 5 August 2021

Before: Employment Judge L Burge

Representation

Claimant: Mr Patel (Counsel)

Respondent: Mr Cretella (owner of the Respondent)

RESERVED JUDGMENT

1. The Claimant's resignation amounted to a constructive dismissal within the meaning of section 95(1)(c) of the Employment Rights Act 1996.
2. The Claimant was unfairly dismissed by the Respondent.
3. The Claimant's compensation shall be limited to 6 months from the date of his dismissal (*Polkey*). There shall be no reduction to the basic and compensatory awards on the grounds of contributory fault.
4. If the parties cannot agree, the Tribunal will decide the remedy for unfair dismissal at a further hearing on 2 December 2021.

REASONS

Introduction

1. The Claimant, Edgar Simplicio, brought a claim of constructive unfair dismissal against his employer, Alfona Limited.

The evidence

2. The Tribunal heard evidence from the Claimant who gave evidence on his own behalf. The Tribunal also heard evidence from Mr Cretella (owner of the Respondent) and Ms Henzell (Company Secretary of the Respondent) on behalf of the Respondent.
3. An electronic bundle of 149 pages was provided to the Tribunal. Both parties gave oral closing submissions.

Issues for the Tribunal to decide

4. At the start of the hearing the issues to be decided by the Tribunal were agreed with the parties:
 - a. Was the Claimant dismissed? (s.95(1)(c) Employment Rights Act 1996)
 - i. Did the Respondent without reasonable and proper cause, act in a manner which was calculated or likely to destroy or seriously damage the relationship of mutual trust and confidence between the Claimant and the Respondent?
 - ii. The alleged conduct relied upon by the Claimant was as follows:
 1. Mr Cretella not contributing to the cleaning tasks including on Sundays;
 2. Mr Cretella looking at social media instead of working;
 3. Mr Cretella leaving toothpicks and dental floss on work surfaces;
 4. Mr Cretella lying on a bench during service on several occasions;
 5. Mr Cretella walking around without shoes during service times;
 6. Mr Cretella loudly clapping hands near the Claimant shouting “come on” despite the Claimant saying that he did not like this;
 7. Mr Cretella deliberately burping near the Claimant including in his face;
 8. Mr Cretella loudly breaking wind and wafting the smell in late 2019;
 9. Mr Cretella asking the Claimant if he wanted to see a photograph of his faecal matters;
 10. Mr Cretella failing to pay the Claimant for 25 hours per week and/or failing to take steps to resolve the pay discrepancy until late August 2020 – this was also alleged to be a breach of an express term of the contract; and
 11. Mr Cretella’s conduct on 1 August 2020 in relation to shouting and screaming at the Claimant during two

conversations, one on the telephone and the other at the restaurant.

- iii. If so, was the breach repudiatory?
 - iv. Did the Claimant affirm or waive the breach of contract?
 - v. Did the Claimant resign in response to the breach?
 - vi. If so, was the dismissal unfair? (s.98 ERA). Was the Claimant dismissed for a potentially fair reason? The Respondent says that the Claimant resigned, he was not dismissed.
- b. If so, what remedy is the Claimant entitled to?
- i. What is the just and equitable level of compensation payable to the Claimant in respect of his basic and compensatory awards, having regards to whether:
 - 1. The Claimant had mitigated his loss (to be dealt with at a Remedy hearing);
 - 2. The Claimant would have been fairly dismissed in any event (*Polkey*); and
 - 3. The Claimant's conduct was capable and/or blameworthy and (in respect of the compensatory award) whether this contributed to the dismissal.

Findings of Fact

- 5. The Respondent is a company operating an Italian restaurant called L'antipasto in London (the "restaurant"). The Claimant started working at the restaurant as a casual waiter but then he worked as a waiter on a permanent basis from 2 September 2007 when it was owned by Alfonso Cretella. In October 2016 ownership was transferred to Alessandro Cretella ("Mr Cretella"), the son of Alfonso Cretella.
- 6. At the time of the Claimant's resignation the restaurant employed eight staff, four of whom worked in the front-of-house and four in the kitchen. The owner, Mr Cretella, also worked waitering shifts following the departure of a waiter, Mr Barbosa.
- 7. Initially, the Claimant worked seven shifts each week, but in 2014 he changed to working 25 hours per week across five shifts. His weekly shift patterns were Wednesday and Saturday evenings (from 6.00 pm), Sunday mornings (10.30 am to 3.00 pm) and Sunday evenings (6.00 pm to 11.00 pm), plus Tuesday evenings alternating with Saturday mornings every other week.
- 8. The Claimant's duties as a waiter included cleaning and tidying tasks during and after service. The duties were shared by whichever of the waiting staff were on duty during the relevant shift, including the restaurant managers.

9. Alfonso Cretella had operated a number of restaurants in South-West London and so oversaw the restaurant, only visiting once or twice a week. When he decided to retire from the restaurant negotiations began to take place for the restaurant to be transferred to a partnership comprised of the two managers and the restaurant's head chef. However, ultimately Alfonso Cretella decided to transfer the restaurant to Mr Cretella, his son. This news was disappointing to the Claimant. In his view the partnership would have been the better choice and to the Tribunal he was highly critical of Mr Cretella and his background experience. Mr Cretella decided to take a hands-on approach to the restaurant in order to learn the business. The Claimant was frustrated that the existing staff had to teach Mr Cretella.
10. The Claimant's view was that as Mr Cretella had decided not to replace a departing waiter, Mr Barbosa, he should take all of the tasks that Mr Barbosa had undertaken, not just the waitering tasks. Mr Cretella gave evidence that as the owner he had additional tasks to do such as ordering stock, fixing maintenance issues, setting up and maintaining a social media profile and responding to customer and supplier queries on his phone/ipad. Mr Cretella did not take a share of the tips as he was the owner so on Sundays when the Claimant and Mr Cretella worked alone as front of house the Claimant received all of the tips. To the Tribunal the Claimant said that Mr Cretella did not help with the cleaning, Mr Cretella said that he did. The Tribunal finds on the balance of probabilities that Mr Cretella helped occasionally with the cleaning, but did not help as much as the other waiters. Mr Cretella was the owner of the business and had other tasks to attend to. In cross examination the Claimant agreed that putting the restaurant on social media was the best thing that Mr Cretella had done.
11. In evidence to the Tribunal the Claimant was highly critical of Mr Cretella's professionalism, he said that he was very inattentive during service, customers were kept left waiting too long to be served, incorrect food and drinks orders were taken, and tables were not set up or cleared appropriately. The Claimant said that he was asked by customers to avoid Mr Cretella serving them, and that on two occasions he was "grilled" by regular customers about what Mr Cretella's workdays were so that they could avoid coming to the restaurant at those times. The Claimant did not tell Mr Cretella about this at the time. The Tribunal does not accept the Claimant's evidence as it is not credible that the Claimant would not have raised the complaints with Mr Cretella.
12. The Claimant gave evidence that Mr Cretella "had the habit of" lying down on one of the restaurant's side benches in full view of customers while they were eating. The Claimant took a photograph of Mr Cretella asleep on 15 March 2020 and produced the evidence to the Tribunal. The Claimant gave evidence that Mr Cretella walked around with no shoes while serving in the restaurant and that customers noted this and expressed their displeasure. Mr Cretella gave evidence that it was only once when he had had a lie down, that no customers had complained to him and that he would have expected his staff to feed back any complaints and none had done so. The Claimant gave evidence that he would come across Mr Cretella's used toothpicks and orthodontic brushes littering the bar area and it was left to him and

colleagues to clear these away. Mr Cretella did not agree with this and gave evidence that toothpicks were used for olives. The Tribunal finds, on the balance of probabilities that the Claimant did lie down on one or two occasions, that he did walk around briefly with no shoes on one or two occasions but no customers or staff complained to him and that he did occasionally leave toothpicks around.

13. The Claimant gave evidence that these issues were in stark contrast to how the restaurant operated under Alfonso Cretella prior to Mr Cretella taking over its ownership. The Claimant was highly critical of Mr Cretella to the Tribunal calling him “unprofessional and inept”. In cross examination when asked why he had not raised these issues properly he said that he did not have trust that Mr Cretella would be a good listener. The Tribunal finds that the Claimant did not raise the aforementioned issues with Mr Cretella until his letter of grievance on 31 August 2020.
14. Mr Cretella has reflux/oesophagitis which causes him to have excessive gas and he gave evidence, that is accepted, that this condition means that often he cannot control when he burps/breaks wind. The Claimant gave evidence that he knew about Mr Cretella’s medical condition. The Claimant also gave evidence that he found Mr Cretella “disgusting and puerile”. He said that on a number of occasions Mr Cretella called him over and deliberately burped loudly, sometimes into his face, Mr Cretella denied this happened. The Claimant recalled an occasion early in 2020 when Mr Cretella said in a light-hearted way to his wife “Edgar doesn’t like my burps”. Mr Cretella did not recall that incident and gave evidence that he tries not to dwell on this medical issue as it is a bit embarrassing. The Tribunal finds as a fact that Mr Cretella did make that comment to his wife but that, on the balance of probabilities, Mr Cretella did burp in the Claimant’s face albeit not deliberately.
15. The Claimant gave evidence that in late 2019 Mr Cretella broke wind loudly in front of customers and wafted the presumed smell towards the Claimant while grinning. Mr Cretella denied that the incident took place. Mr Cretella gave evidence that he did have a childish sense of humour and one of the reasons why he and the Claimant got on was that the Claimant did too. The Claimant gave evidence that the embarrassment left him “frozen” for a few moments. The Tribunal finds on the balance of probabilities that the breaking wind incident did take place, that Mr Cretella thought the Claimant found it funny and the Claimant did not make his embarrassment known.
16. The parties agreed that Mr Cretella clapped his hands and said “come on” to his staff. Mr Cretella gave evidence that this was a motivational technique he learnt when he worked in sales and that he did it to all of his team, to motivate them to work enthusiastically. The Claimant gave evidence that, on one occasion at the beginning of 2020, Mr Cretella asked “Does my clapping annoy you?” to which the Claimant replied “Yes, why do you do that?” and Mr Cretella responded that it was to motivate him. The Tribunal finds, on the balance of probabilities that Mr Cretella did clap his hands and say “come on” as a motivational technique to the whole team.

17. The Claimant gave evidence that at the beginning of 2020, Mr Cretella approached him and asked if he would like to see a photo of his faecal matters which he declined. The Claimant gave evidence that Mr Cretella often used unfiltered language about his own bodily functions and other inappropriate subjects. In evidence Mr Cretella said that the incident did not happen. Given Mr Cretella's childish sense of humour and the Claimant's habit of not voicing his upset the Tribunal finds, on the balance of probabilities, that the incident did occur but that the Claimant did not make it known to Mr Cretella that he did not think it was appropriate.
18. Following the implementation of a new pay slip system, in mid-2019 the Claimant raised with Mr Cretella that although his contractual hours were 25 per week, he was only being paid for 22½ hours. The Tribunal finds that Mr Cretella was initially dismissive but then in February 2020 he agreed the Claimant's pay was not right. The Claimant and Mr Cretella agreed that the Claimant would work out how much back pay he should be paid but the Claimant gave evidence that he did not do it.
19. The Tribunal finds as a fact that in April 2020, by which time the restaurant was closed due to the Covid pandemic, the Claimant was furloughed and Mr Cretella had recently had a new baby, the Claimant called Mr Cretella at home. Mr Cretella does not recall saying that he would ask the accountant to look into the Claimant's pay but the Tribunal finds on the balance of probabilities that he did. The Claimant gave evidence that during that telephone call he agreed that the process of calculating his back pay could be put off for a short while.
20. The Claimant was furloughed for three months and the restaurant was closed. Around the end of July Mr Cretella found out that the Claimant was taking three weeks' leave in August. In evidence Mr Cretella did not dispute that the Claimant had pre-booked the leave earlier in the year but said that this was a source of frustration for him as the restaurant had re-opened, it was a difficult time for the restaurant and August was a busy month with the government's "Eat Out to Help Out" scheme.
21. On 31 July 2020 the Claimant arrived at work in the morning and undertook the usual preparation. He gave evidence that he looked for the safe key with a view to accessing the cash float, it was not in its usual spot but he checked the rota and concluded that Mr Cretella was likely to know where it was. The Claimant gave evidence, that was not disputed by Mr Cretella, that Mr Cretella had misplaced keys on previous occasions and had sometimes accidentally taken the safe key home with him.
22. Shortly after Mr Cretella arrived in the evening, he asked the Claimant if he had retrieved the float cash from the safe to which the Claimant replied that he had not because the safe key was not in its usual place. Mr Cretella was annoyed that the Claimant had not called him earlier in the day to let him know as this was a potential security incident in the restaurant. Later that evening Mr Cretella found the key in his car.
23. On 1 August 2020 (the following day) the Claimant arrived at the restaurant in the morning. The chef asked the Claimant to ask Mr Cretella to buy bread

on the way in. Shortly after midday, Mr Cretella phoned in to say that he was running late but was on his way. The Claimant asked him to buy some bread. Mr Cretella was angry and demanded to know why he had not called him beforehand to ask him to buy bread as he had already gone past the bread shop and said words such as “Can’t you fucking call me?” and “You don’t call me about the fucking keys and now you don’t call me about the fucking bread”. The Claimant gave evidence, that is accepted by the Tribunal, that he felt very shaken.

24. The Claimant then recorded the exchange that occurred between himself and Mr Cretella once he arrived at the restaurant and a transcript was provided to the Tribunal. The conversation started with Mr Cretella angrily expressing his frustration with the Claimant saying that the Claimant comes to work and does not “give a shit”. The Claimant said that he comes to work, does the things he has to do and is part time after all and that Mr Cretella was demanding that he call. Mr Cretella replied “to fucking call me? To make a fucking phone call?”, he continued, “you come here three, four fucking times a week, you been here for 20 years.. you don’t think you can make a fucking phone call and take some responsibility.. help me out a bit Fucking call me... instead of just coming here... doing your basic bollocks.. playing on your phone... fucking doing it slow... that’s all you do. The Claimant responded “I do the cleaning up” to which Mr Cretella responded “that’s all you fucking do... you’ve been here for 20 years you could do more...”. The confrontation carried on similarly and lasted about four minutes, with the Claimant saying “you don’t know how to listen”, Mr Cretella saying “do you think I need you?” and the Claimant saying “ok so I must go”. Mr Cretella said “fuck off fucking shit... go, go away. Had enough of it”.... “take your fucking money and fucking go...”. The Claimant responded “I can’t have you speaking like that to me”.
25. The Claimant was due back into work that evening but did not turn up. Mr Cretella sent him a text message saying “Edgar if you’re not coming tonight don’t come tomorrow.” The Claimant replied “I’m sorry I’m not well because of stress and anxiety. I’ll keep you updated about tomorrow. I’ll let you know what my GP advises.” Mr Cretella replied “Don’t come in Edgar” and then “I have cover so if you’re not well best to stay at home.”
26. The Claimant was signed off work for stress and anxiety for a week until 10 August 2020 when his three week holiday began.
27. On 4 August 2020 the Claimant emailed Mr Cretella a copy of the sick note. Mr Cretella replied: “thanks for this Edgar. We will discuss your situation when you return from holiday”. On 14 August 2020 the Claimant sent an email saying that he also wished to discuss:

“as a result of a number of incidents, and most recently the events of Saturday 1st August, I take the view that your behaviour towards me and aspects of your conduct generally as owner/manager has undermined trust and confidence in the employment relationship.”
28. The Claimant went on to describe the incidents that had taken place on 31 July and 1 August 2020 and said that:

“these incidents, and other earlier ones (including the concern I have raised about the persistent underpayment of my wages), caused me to leave my morning shift early after telling you I was not prepared to be treated in this way. I regard your behaviour as disrespectful and humiliating, all the more so because your angry outburst was loud enough to be overheard by customers.”

29. Mr Cretella wrote to the Claimant that they would discuss the situation when the Claimant returned to work.
30. The Claimant’s last two weeks’ of pay were paid at the correct rate of 25 hours per week.
31. At 22:04 the evening before the meeting the Claimant wrote a letter to Mr Cretella detailing his surprise at Mr Cretella becoming the owner, criticisms of him as an owner of the business including failing to ensure a sufficient float was available, the assumption that he would fulfil cleaning duties but that he did not, leaving customer tables unclean, inappropriate conversations, burping, passing wind. The Claimant said that he “voiced his objections in relation to the photo and the burping” but that in relation to other matters he had become taciturn and unsocial and it would be “obvious to anyone that” he was indicating embarrassment. The Claimant raised pay discrepancies and the “final straw” incidents of 31 July and 1 August 2020.
32. Mr Cretella responded, defending his decision to take on the restaurant, admitting that he “still have plenty to learn and people management is one of those areas”. In summary he noted various points and said he would ensure that they were dealt with better (floats, toothpicks), said he did clean but also had additional tasks to undertake. He was “very sorry” that the Claimant felt he was inappropriate, he had a childish sense of humour and said he had “obviously misread situations” where he thought he could have a “bit of banter” but to “please accept my apologies” and that “he would not interact with [the Claimant] in that way again. In relation to pay, Mr Cretella would “arrange for [the Claimant] to be credited for the shortfall in hours for all hours you were working from when you raised this with me in August 2019 and when your pay was corrected 2 weeks ago.”
33. In relation to the incidents on 31 July and 1 August 2020 Mr Cretella felt justified with his response as a missing safe key was a serious issue which reflected the Claimant’s general lack of care and concern at times when working at the restaurant. Mr Cretella detailed a number of underlying issues with his conduct over the past years which he had raised with the Claimant summarized as:
 - a. frequent lateness,
 - b. regularly forgetting to put items on customers’ bills,
 - c. regularly using the phrase “but I am part time” when he was asked to do things in the restaurant,
 - d. after being on Furlough for 3 months during the Covid pandemic and then once back taking three weeks’ leave. Mr Cretella said that he was entitled to take holiday but this was a key time when the

government was operating the “Eat Out to Help Out” scheme and 3 weeks holiday at once was not appropriate at this time.

34. On 1 September 2020 the meeting between Mr Cretella and the Claimant took place. It lasted for almost an hour, during which there was a frank exchange of views and feelings on both sides. The meeting was recorded and agreed meeting notes were provided to the Tribunal. The Tribunal finds as a fact that:

- a. The Claimant felt that Mr Cretella burping/breaking wind in his presence was offensive and disrespectful. Mr Cretella reminded the Claimant about his medical condition and apologised for doing this in his presence. Mr Cretella said he burped in the Claimant’s face once but had not done it again. The Claimant thought he had done it more.
- b. Mr Cretella said he has ‘childish banter’ he had apologised both in his letter and verbally and did not mean to offend the Claimant.
- c. Mr Cretella said he was going to pay the Claimant his missing wages but had been waiting for the detail to investigate, which is why it had not been paid yet. Mr Cretella provided a calculation of what he believed the Claimant was owed but the Claimant disagreed and so would revert with his own calculation after the meeting.
- d. In relation to the incidents on 31 August and 1 September 2020 Mr Cretella reiterated that not notifying him of the missing safe key and the need to get bread was an indication that the Claimant did not show any care or concern for the restaurant. The Claimant said the swearing and aggression was unacceptable and said that he did not think that he could continue working for him. Mr Cretella apologised and said there were a number of reasons why his frustration had been building which had caused him to get angry:
 - i. The 3 week holiday being taken without the Claimant consulting him
 - ii. The Claimant being late to work (admitted by the Claimant)
 - iii. The Claimant regularly forgetting to put items ordered by customers on the bill (the Claimant admitted there was a time he had forgotten a lot but said he had improved)
- e. Mr Cretella did not want the Claimant to resign, he apologised for shouting and said it was the only time he had spoken to him in this way in the 4 – 5 years that they worked together.
- f. Towards the end of the meeting, the Claimant handed Mr Cretella a letter of resignation.

35. In evidence to the Tribunal, the Claimant was asked if he would have resigned/brought a claim if the incidents on 31 July and 1 August 2020 had not happened. He said “possibly” if Mr Cretella had not paid the outstanding wages. “I don’t really know. Working with [Mr Cretella] is like walking on

eggs, for a few years I have been trying to look down and carry on, I don't have a straight answer for that. I have been upset with a number of things, it got to a point where I couldn't take it".

36. Ms Henzell and the Claimant corresponded on the issue of the Claimant's back pay for the weekly missing 2 ½ hours and the gross amount of £2,171.34 was agreed and subsequently paid in early October 2020.

Relevant law

37. As the Claimant resigned his employment and relies upon a constructive dismissal, he must establish that he terminated the contract under which he was employed (with or without notice) in circumstances in which he was entitled to terminate it without notice by reason of the Respondent's conduct (s.95(1)(c) Employment Rights Act 1996).
38. *Western Excavating (EEC) Ltd v Sharp* [1978] ICR 221 sets out that the test of a constructive dismissal is a three-stage one:
- (1) was there a fundamental breach of the employment contract by the employer?
 - (2) did the employer's breach cause the employee to resign? and
 - (3) did the employee resign without delaying too long and thereby affirming the contract and losing the right to claim constructive dismissal?
39. The House of Lords in *Malik and Mahmud v BCCI* [1997] ICR 606 describe the implied term of trust and confidence as being an obligation that the employer shall not:
- "Without reasonable and proper cause, conduct itself in a manner calculated [or] likely to destroy or seriously damage the relationship of confidence and trust between employer and employee."*
40. In *Woods v W M Car Services (Peterborough) Ltd* [1981] IRLR 347 the EAT held that it is implied in a contract of employment a term that the employer will not, without reasonable and proper cause, conduct themselves in a manner calculated or likely to destroy or seriously damage the relationship of trust and confidence between employer and employee. Any breach of this implied term is a fundamental breach amounting to a repudiation since it necessarily goes to the root of the contract. The Employment Tribunal's function is to look at the employer's conduct as a whole and determine whether its cumulative effect, judged reasonably and sensibly, is such that the employee cannot be expected to put up with it.
41. Caselaw tells us that simply acting in an unreasonable manner is not sufficient, it has to be calculated/likely to "seriously damage" the relationship of trust and confidence where the balance has to be struck between an employer's interest and the employee's interest in not being unfairly and improperly exploited. In *Frenkel Topping v King* EAT/01606/15 the EAT reminded Tribunals that this is a high hurdle:

We would emphasise that this is a demanding test. It has been held (see, for instance, the case of BG plc v O'Brien [2001] IRLR 496 at paragraph 27) that simply acting in an unreasonable manner is not sufficient. The word qualifying "damage" is "seriously". This is a word of significant emphasis. The purpose of such a term was identified by Lord Steyn in Malik v BCCI [1997] UKHL 23 as being:

"... apt to cover the great diversity of situations in which a balance has to be struck between an employer's interest in managing his business as he sees fit and the employee's interest in not being unfairly and improperly exploited."

13. Those last four words are again strong words. Too often we see in this Tribunal a failure to recognise the stringency of the test. The finding of such a breach is inevitably a finding of a breach which is repudiatory: see the analysis of the Appeal Tribunal, presided over by Cox J in Morrow v Safeway Stores [2002] IRLR 9.

Compensation

42. If an unfair dismissal complaint succeeds, remedy is determined by sections 112 onwards of the ERA. Where re-employment is not sought compensation is awarded by means of a basic and compensatory award.

43. The basic award is a mathematical formula determined by s.119 ERA. Under section 122(2) it can be reduced because of the employee's conduct:

"Where the tribunal considers that any conduct of the complainant before the dismissal (or, where the dismissal was with notice, before the notice was given) was such that it would be just and equitable to reduce or further reduce the amount of the basic award to any extent, the tribunal shall reduce or further reduce that amount accordingly"

44. S.123(1) ERA provides the amount of the compensatory award:

"...shall be such amount as the tribunal considers just and equitable in all the circumstances having regard to the loss sustained by the complainant in consequence of the dismissal in so far as that loss is attributable to action taken by the employer."

45. If the Tribunal considers that a fair dismissal might have led to the same result, even if that would have taken longer, the Tribunal can reduce the compensation (*Polkey v A E Dayton Services Limited*) [1988] ICR 142). The duty falls on the Tribunal to construct a "working hypothesis" as to what could or would have occurred (*Gover and ors v Propertycare Ltd* 2006 ICR 1073, CA,). Guidance on *Polkey* deductions is set out in *Software 2000 Limited v Andrews* 2007 ICR 825.

46. A reduction to the compensatory award for contributory fault is primarily governed by section 123(6):

"Where the tribunal finds that the dismissal was to any extent caused or contributed to by any action of the complainant, it shall reduce the amount of the compensatory award by such proportion as it considers just and equitable having regard to that finding..."

47. The leading authority on deductions for contributory fault under section 123(6) remains the decision of the Court of Appeal in *Nelson v British*

Broadcasting Corporation (No. 2) [1980] ICR 111. It said that the Tribunal must be satisfied that the relevant action by the Claimant was culpable or blameworthy, that it caused or contributed to the dismissal, and that it would be just and equitable to reduce the award.

Discussion and conclusions

Issues 1 – 6

48. The Claimant was against Mr Cretella from the start. In his view, the restaurant should have been transferred to the partnership comprising of the two managers and the restaurant's head chef. He thought that the owner Mr Cretella should have done an equal share of cleaning duties, he should not have walked around without shoes, he should not have left toothpicks around, he should not have had a sleep, should not have clapped and said "come on" in order to motivate, should not have looked at social media whilst working. These were not the Claimant's decisions to make, they were Mr Cretella's. It is not for the Claimant to say how Mr Cretella should conduct his business. In the circumstances of this particular case as set out above, they do not constitute unreasonable conduct.

Issues 7 - 9

49. The Claimant knew about Mr Cretella's medical issue where he had excess gas and often could not control whether he burped or passed wind. Mr Cretella's evidence that he tried not to dwell on his medical issue so as to maintain a level of confidence as it was a bit embarrassing goes some way to explaining (but does not fully) what he described as his childish sense of humour. The Claimant thought that his body language showed his dislike, but Mr Cretella had not interpreted it in that way and to the contrary thought that the Claimant shared his sense of humour. A reasonable person would have told Mr Cretella that he did not find these things funny and that that he would like him to stop rather than relying on his body language which was not clear to Mr Cretella. The Tribunal concludes that burping near the Claimant, loudly breaking wind and wafting the smell and asking the Claimant if he wanted to see a photo of his faecal matters were inappropriate and amounted to unreasonable conduct. The Tribunal reminds itself that simply acting in an unreasonable manner is not sufficient, the breach has to be calculated/likely to "*seriously damage*" the relationship of trust and confidence. The Tribunal concludes that these issues were not so serious as to seriously damage the relationship of trust and confidence.

Issue 10

50. The Claimant was not paid correctly. It took a year for the Claimant's pay to reflect his working pattern of 25 hours, rather than 22 ½ hours, although this was remedied prior to the Claimant's resignation. What was not remedied was the back pay owing to the Claimant as a result of not paying the Claimant correctly. Was there reasonable and proper cause for Mr Cretella not to have paid the Claimant correctly and not to have paid the back pay immediately once he was aware? The Claimant did say that he would work out what was owed and let Mr Cretella know, which he did not do and also

said it could be on hold for a while. However, ultimately it is the Respondent's responsibility to pay the Claimant the correct pay on time and this was not done. Mr Cretella could have asked the accountant to look into the matter and make the appropriate back pay as soon as possible but he did not do so. Not paying the Claimant his full pay on time is both a breach of the express term of the Claimant's contract of employment and the implied term of trust and confidence as it is so serious as to seriously damage the relationship of trust and confidence.

Issue 11

51. Mr Cretella was frustrated with the Claimant on 31 July/1 August 2020. He felt that the 3 week holiday was inappropriate because he had just had three months' furlough while the restaurant was closed and because they were under pressure with the "Eat out to Help Out" scheme. He also felt that the Claimant did not show any care or concern for the restaurant, in his view he should have notified him of the missing safe key and the need to get bread. Did this give Mr Cretella reasonable and proper cause to behave as he did on 1 August 2020? Mr Cretella repeatedly shouted and swore at the Claimant and told him to "fuck off fucking shit... go, go away. Had enough of it".... "take your fucking money and fucking go...". The Claimant cannot be expected to put up with the behaviour Mr Cretella displayed on that day. This conduct is so serious as to be likely to seriously damage the relationship of trust and confidence, there was no reasonable and proper cause for such an extreme reaction. Mr Cretella later apologised but by then it was too late.

52. The Claimant did not affirm or waive the breach of contract, he resigned at the end of the meeting on 1 September 2020 and made it clear that he was resigning in response to the breaches. The Claimant's resignation amounted to a constructive dismissal within the meaning of section 95(1)(c) of the Employment Rights Act 1996. It follows that as the Respondent accepts that the Claimant resigned and there was no fair dismissal process, the Claimant's dismissal was unfair.

Polkey

53. It is difficult for a Tribunal to enter into the realms of what might have happened had the Respondent acted fairly, nevertheless it is necessary in order to decide on whether a *Polkey* deduction is warranted.

54. The Respondent did pay the Claimant what he was owed once the figures were agreed and this happened soon after the Claimant's resignation. Mr Cretella was clear that he did not want the Claimant to resign, he apologized for shouting and said that this was the first time that he had done so in the 4 or 5 years that he had employed the Claimant. Mr Cretella said there were a number of reasons why his frustration with the Claimant had been building which had caused him to get angry:

- iv. The 3 week holiday without consulting him
- v. Being late (admitted by the Claimant)

- vi. Regularly forgetting to put items ordered by customers on the bill (the Claimant admitted there was a time he had forgotten a lot but said he had improved)

55. This evidence of Mr Cretella's was not challenged in cross examination. Nor was it put to the Claimant. Looking at the agreed notes of the frank and detailed meeting on 1 September 2020 it is evident, and the Tribunal finds as a fact, that Mr Cretella did have these concerns and the Claimant admitted to them. Added to this was Mr Cretella's view that the Claimant did not have care or concern for the restaurant, demonstrated by not calling about the safe key and the bread. Because of these concerns the Tribunal concludes that Mr Cretella would have fairly dismissed the Claimant within 6 months. Further, in evidence the Claimant said that he really was not sure if he would have resigned if the 31 July/1 August incident had not happened. There was also the pay issue but also "working with [Mr Cretella] is like walking on eggs, for a few years I have been trying to look down and carry on, I don't have a straight answer for that. I have been upset with a number of things, it got to a point where I couldn't take it". The Tribunal concludes that an alternative is that the Claimant would have decided to leave and find another job within six months. Either way, it is just and equitable that the Claimant's losses are limited to six months.

Contributory conduct

56. The Claimant said he was going to work out what back pay he was owed and also agreed that it could be put on hold. The Claimant also, in the mind of Mr Cretella, should not have taken 3 weeks off given the difficult circumstances at the restaurant and should have notified him of the missing safe key and the need to get bread. These contributions to the dismissal cannot be said to be "culpable or blameworthy" such that it caused or contributed to the dismissal and it would therefore not be just and equitable to reduce the award.

Employment Judge **L Burge**

Date: 13 August 2021

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