



# EMPLOYMENT TRIBUNALS

COVID-19 Statement on behalf of Sir Keith Lindblom, Senior President of Tribunals

“This has been a remote hearing not objected to by the parties. The form of remote hearing was by CVP. A face to face hearing was not held because it was not practicable and no-one requested the same.”

**Claimant**

**Respondent**

**Mr D Bylinski**

**v**

**Boogaloo Enterprises Ltd**

**Heard at:** Watford (by CVP)

**On:** 1 & 3 (Deliberation) September 2021

**Before:** Employment Judge Alliot  
Mrs C Grant  
Mrs I Sood

## Appearances

**For the Claimant:** In person  
**For the Respondent:** Mr Alistair Veck (Counsel)

## JUDGMENT

The judgment of the Tribunal is that:

1. The claimant's claims are dismissed.

## REASONS

### Introduction

1. The claimant worked for the respondent as a bar tender from either 25 May or 5 June 2019 until his dismissal on 10 December 2019. The exact start date is not that material but we have no reason to doubt the claimant's assertion that he began work on 25 May 2019.
2. As recited in the case management summary dated 27 January 2021, there is no suggestion in the response that the respondent disputes that the

claimant was working under a contract personally to do work, such that he falls within the definition of an employee for the purposes of the Equality Act 2010, s.83.

3. By a claim form presented on 7 February 2020, following a period of early conciliation from 17-20 December 2019, the claimant brings claims for race and sex discrimination and for unpaid holiday pay. The holiday pay claim has since been paid by the respondent.

### **The issues**

4. The issues were set out in the case management summary by Employment Judge Andrew Clarke QC on 27 January 2021. They are as follows:-

Unlawful direct discrimination (s.13 EqA 2010)

4.1 The claimant relies on the protected characteristics of sex and race.

4.2 Did the respondent treat the claimant in the following ways:

4.2.1 Unjustifiably criticising the claimant repeatedly and (by Mr O'Boyle) watching the claimant while working. The claimant will allege that the respondent allowed the supervisors (all, or almost all, of whom were female) to perform poorly and lazily, to display a lack of competence (or experience) without criticism. By way of example, when a team member appeared drunk at the end of a shift, Mr O'Boyle questioned the claimant about how this had happened, implying criticism of him, but did not criticise or (initially) even question any female supervisor.

4.2.2 Leaving the claimant to deal with putting away deliveries, with broken glass and with any more difficult tasks, rather than dividing them between staff members.

4.2.3 Accusing the claimant on two occasions of stealing when he had taken drinks from a fridge in the cellar which contained staff drinks and which female staff members removed drinks from without specific permission, or criticism.

4.2.4 Dismissing the claimant (and only him) after questioning him and others about a stock shortfall, when there was no evidence to suggest that he was responsible and he was not a supervisor.

4.2.5 Criticising the claimant for drinking after shifts, when nothing was done about (or said to) female staff who drank to excess after shifts.

4.2.6 Leaving the claimant to run the bar while all others were called to a staff meeting.

4.3 Was this “less favourable treatment”, ie did the respondent treat the claimant less favourably than it treated others in not materially different circumstances? The claimant relies upon the various female supervisors and others working with him on shift and/or a hypothetical comparator. The claimant’s case as to differential treatment is summarised above.

4.4 If so, was this because of the protected characteristics of race and/or sex?

**Claim in time:**

5. The claimant asserts that insofar as a claim in respect of any individual act relied upon would have been presented outside the primary limitation period if that act were to be considered in isolation, this is not the case as it represented conduct extending over a period and/or a series of similar acts or failures for the purposes of s.123 of the Equality Act.
6. If the Tribunal disagrees, it will need to consider whether it is just and equitable to extend time.

**Remedy**

7. The claimant seeks financial compensation, including an amount for injury to feelings and his unpaid holiday pay.

**The evidence**

8. We were provided with a trial bundle running to 142 pages. We had witness statements and heard oral evidence from the following:

The claimant;  
Mr Gerry O’Boyle, director of the respondent and effectively in charge of staff matters;  
Mr John Keane, responsible for the administration of the respondent;  
Ms Jade Sinclair, worked at the respondent for a few months in 2019 until September 2019, initially as a bar attendant and then as a supervisor.

9. Within the hearing bundle we have a number of unsigned statements from the following:

Ms Katrina Maxed, a floor assistant who worked alongside the claimant;  
Mr Ed Pettey, a floor assistant who worked alongside the claimant;  
Mr Benjamin Liao, a floor assistant who worked alongside the claimant;  
Mr Hiroki Takashina, a floor assistant who worked alongside the claimant.

**The facts**

10. The claimant is a Polish national and is male.

11. The respondent runs the Boogaloo Bar in North London.
12. It is clear to us that the workforce at the respondent's bar was somewhat transitory with a high turnover of short term employees/workers. The claimant was employed in May 2019 and was only ever intending to stay a short time to earn money before travelling abroad.
13. We have been provided with a list of staff who worked for the respondent at one time or another between the claimant's start and leave dates. This breakdown reveals the following:-
  - 13.1 There were seven shift supervisors, one male and six female;
  - 13.2 There were eight bar attendants, two male and six female;
  - 13.3 There were nine floor assistants, seven male and two female;
  - 13.4 There were three chefs, three male.
14. Thus, excluding management, there were 14 female staff and 13 male staff.
15. As regards nationality, nine of the staff were non-British, being Polish, Hungarian, Dutch, Japanese, Slovak, Canadian, Irish, Swedish and Italian.
16. The claimant was employed as a bar attendant. This was a different role to a shift supervisor. The shift supervisor served at the bar in the same way that the claimant would. However, the shift supervisor had extra duties which consisted of supervising the staff on duty, training newcomers and cashing up at the end of the night. In particular the shift supervisors could direct staff to do whatever tasks were necessary. The shift supervisors were paid approximately £2.00 per hour more than the bar attendants. As such the shift supervisors were not comparable to the bar attendants.
17. The bar staff were not supposed to drink alcohol whilst on duty. There was a separate fridge for staff drinks which was in the cellar. This was referred to as the "rider". The staff drinks kept in the fridge were of different brands to those on sale to the public in the bar. This was presumably so that drinks could be readily identified as coming from the staff fridge. At the conclusion of their shift the staff were entitled to a drink from the staff fridge.
18. Nevertheless, Ms Sinclair gave candid evidence to the effect that a few members of staff would take drinks from the rider during a shift. She told us that whilst it was not allowed it did happen. On occasions members of staff would bring drinks from the rider up to the bar and drink whilst on duty. In addition, members of the public would sometimes buy members of staff a drink as a tip and sometimes members of staff would take the drink rather than charging for it, printing the receipt and getting cash back later. Ms Sinclair acknowledged that the supervisors would on occasions drink as did other members of staff.
19. It is clear to us that the claimant was hard working and good at his job. His job involved glass collection, operating the glass washer, serving drinks,

accepting payments and restocking the bar. When deliveries were made he accepted that his job entailed moving the deliveries to the cellar. The claimant was trained and did operate the glass crusher machine and the cardboard crusher. Again, these were parts of his job.

20. The claimant wanted to work long hours as he was saving for foreign travel. The claimant was given an extra duty of cleaning the beer pipes and was paid an extra £30 every time he did so. The claimant suggested to Mr O'Boyle that the bar serve cocktails and we have seen various documents showing that this idea was developed and that the claimant was largely responsible for it. When the claimant provided cocktail training to other members of staff he was paid an additional £40 for it.
21. The claimant initially intended to leave the respondent in October to travel abroad but was persuaded by Mr O'Boyle to stay for the seasonally busy months of November and December. As the claimant puts it in his witness statement: "I was happy with the trust and the recognition which I felt was finally earned".
22. We have in our bundle a number of text exchanges between the claimant and Mr O'Boyle and Mr Keane which are unremarkable in that on occasions the claimant was requested to do specific tasks. As late as 8 December 2019 the claimant was requesting a £100 cash advance.
23. The claimant's principal complaints concern Mr Gerry O'Boyle. He refers to Mr O'Boyle having mood swings and states that on some days he would be in a good mood chatting away but that the smallest failing was able to change his mood completely and could end with verbal abuse and some scolding. In addition some of the untested and hearsay statements from floor assistants complain about a sometimes hostile working environment due to Mr O'Boyle's conduct. On the other hand Ms Sinclair refers to having a good working relationship with Mr O'Boyle and Mr Keane. We find that in all probability Mr O'Boyle did have mood swings and could on occasions be abrasive towards members of staff. However, we are not here to judge poor management and have examined the evidence to see if there are facts from which we could infer that the motivation of Mr Boyle was on the grounds of the claimant's nationality and/or sex.
24. At the start of the claimant's witness statement he describes his first day of work on 25 May 2019. He states as follows:-

"Soon I noticed a certain division of the tasks, with most of the "supervisors" only serving the drinks and not engaging in some of the less liked duties. The person appointed to do them on the shift was Katrina Maxed who, like the rest of the staff, worked part-time and her duties were glass collection and restocking."
25. The claimant states that he tried to help Katrina Maxed but this was queried by the supervisors. He goes on to state:-

“Katrina Maxed has later explained to me that she was not favoured by the owner Gerry O’Boyle unlike the rest of the girls and that was the reason behind her being mostly appointed to worse, heavy tasks.”

26. In her untested witness statement Katrina Maxed refers to being one of the mistreated employees. Katrina Maxed is female and British.
27. We have some texts between the claimant and Katrina from 14 December 2019, after the claimant had been dismissed. In the context of discussing the claimant’s dismissal, we found the following exchanges illuminating:-

“Katrina: That’s sort of what u expect from the Boogaloo...  
He fired Emma cus he felt like it  
...  
And that other girl  
... cus she was wearing tracksuit bottoms  
...  
He is  
... completely driven by impulse.”

28. Later the following is stated:-

“When Gerry kept saying to Emily he was going to fire me every five minutes a few months back.”

29. Whilst these instances were not specifically put to Mr O’Boyle, they nevertheless formed part of the claimant’s case and, if accurate, point to Mr O’Boyle treating British and female members of staff abrasively and on impulse. Whilst the working environment may have been challenging for members of staff due to Mr O’Boyle’s actions we find that he was not motivated by issues concerning nationality or sex.
30. We have examined each of the allegations of treatment against the evidence before us.
31. The first allegation is that Mr O’Boyle unjustifiably criticised the claimant repeatedly. This is an unspecific and general allegation. We have looked at the claimant’s witness statement and, as regards himself, there are perhaps two instances of criticism. One is that the claimant was asked to do some cleaning which the claimant resented because he thought a supervisor should have been asked to do it as well. We do not agree with the claimant on this point. The cleaning was the claimant’s job and the supervisor was not expected to do it. The other instance of complaint is that Mr O’Boyle accused him of alcohol consumption during a shift when he was drinking tea from a mug at the bar. Mr O’Boyle’s evidence was that on that occasion he had been informed by an individual who worked on door security that the claimant was drinking alcohol from a mug behind the bar whilst on duty. He asked the claimant if he was drinking alcohol. In our judgment Mr O’Boyle was entitled to ask the claimant. The claimant denied it and apparently that was the end of the incident. We do not find that the matters complained about were unjustifiable as far as Mr O’Boyle is concerned.

32. The claimant alleges that the respondent allowed the supervisors, mainly female, to perform poorly and lazily, to display a lack of competence (or experience) without criticism. As already observed we have found that the supervisors were not comparable to the claimant. Again, this is a very general allegation and we lack specific instances from which to draw conclusions. The claimant has not established that the supervisors performed poorly or lazily or displayed a lack of competence or experience. As such we cannot conclude that there was a failure to criticise them.
33. The one example in the list of issues concerns when a team member appeared drunk at the end of a shift. The claimant accepts that this new member of staff was visibly drunk by the end of her shift. Mr O'Boyle questioned the claimant about how that had happened. We find that Mr O'Boyle was entirely entitled to question the claimant about this. The claimant accepts that Mr O'Boyle spoke to two other members of staff about it. Mr O'Boyle told us that he did ask the supervisor, Hannah Submit, about the incident.
34. The claimant complains about being left to deal with putting away deliveries and broken glass and the more difficult tasks. This principally relates to the claimant complaining that the supervisors did not have to do these tasks. We find that this was not part of the supervisors' duties. Putting away deliveries and dealing with broken glass was part of the claimant's job.
35. The claimant complains about being accused on two occasions of stealing when he took drinks from the fridge in the cellar. Whilst there may be some confusion as to what order these two events took place in, it was common ground that one involved a bottle of wine and one involved a bottle of beer. The important distinction to make is that the instances when the claimant took drink from the rider were on occasions when he was not on duty but when he had attended the bar to drink there.
36. In her witness statement Ms Sinclair states as follows:-

“I remember one incident involving the claimant, Dominic Bylinski. One night he was drinking in the bar, and he got very drunk, and he went down to the cellar and took a bottle of wine from the fridge with the staff drinks. I knew it was the fridge with the staff drinks because of the brand of the wine. I was working this evening and I witnessed the incident. I remember debating with my colleague whether to tell Gerry O'Boyle or not. In the end we decided to tell Gerry O'Boyle. I remember that Gerry O'Boyle took the bottle of wine back from Dominic and told him to go home.”
37. We accept Ms Sinclair's evidence on this point and find that the claimant was in the bar, was not on duty, was intoxicated and went down to the cellar to remove wine from the staff fridge.
38. The second occasion was witnessed by Mr Keane. He states as follows:-

“Whilst I don't remember the specific date, one Saturday night when the claimant was not working and was seated at a table drinking with a friend in the bar, I observed the

claimant going down to the cellar on two occasions within the space of approximately 45 minutes when he had no reason to do so. The second time he emerged from the cellar I noticed that the beer sticking out of his coat pocket that looked like the brands on the table that he and his friend were drinking. Broken bottles where the stock was kept were also discovered by the supervisor in charge that night, Sylvia Edwards. She said to her knowledge this damage was not caused by any of the staff who were working that night.”

39. Mr Keane did not challenge the claimant that night but informed Mr O’Boyle the next day who asked the claimant about it. The claimant apparently denied taking any beer at that time and the matter did not progress from there. We find that the claimant was off duty during this incident.
40. It may well be that the claimant was accused of stealing in those terms but we also find that when off duty the claimant was not entitled to go down to the cellar to help himself to drinks from the staff fridge. Whilst female members of staff may have removed drinks from the staff fridge without permission, the only evidence we have was that that would have been when they were on duty.
41. The claimant complains that he was criticised for drinking after shifts when nothing was done about or said to female members of staff who drank to excess after shifts. We heard no evidence on this issue at all and accordingly we find that this has not been proved.
42. The claimant complains that he was left to run the bar whilst all others were called to a staff meeting. This concerns an event on 19 October 2019 when the claimant was endeavouring to train staff in making cocktails. It would appear that there were various interruptions which he found frustrating. The training was taking place during opening hours and accordingly the bar needed to be tended. The claimant stated that following the training members of staff moved on to a meeting. He accepted that as the premises were open someone had to cover the bar and as the most experienced barman he was an obvious person. He said he just did it, no-one asked him to. The respondent’s case was that the meeting was for supervisors only and that is why the claimant was not relieved in order to attend the meeting.
43. Lastly we deal with the dismissal of the claimant. A stock audit was undertaken by John Fuller covering the period from 10 October to 21 November 2019. This was 42 days or six weeks. The report indicated a stock shortage to the value of £6,560.33. Mr O’Boyle said that he was shocked and confused when he saw this figure. That is an understandable reaction.
44. On 10 December 2019 John Fuller came to the respondent to carry out another stock audit. He informed Mr O’Boyle that he thought that the stock shortage was attributable to theft.
45. The claimant was summoned to work early and was the first to arrive. The claimant then had a meeting with Mr O’Boyle, Mr Keane and Mr Fuller. The claimant was questioned about the stock shortage and, on his account, was



told it was his chance to come clean. Such wording indicates to us that Mr O'Boyle clearly had a suspicion that the claimant was responsible. The claimant was asked if he had ever previously taken drinks without permission and he accepted that he admitted the wine and the beer incidents previously described. Mr O'Boyle thereupon said: "We're done" and dismissed the claimant.

46. Later on 10 December 2019 the claimant had text exchanges to Emily and Katrina. To Katrina he stated:-

"I was falsely accused of stealing £6,000 worth of stock and fired."

47. To Katrina he stated:-

"I have been falsely accused today of stealing £6,000 worth of stock and fired basing on those accusations."

48. Being contemporaneous reports, it is quite clear to us that the claimant understood at the time that he had been dismissed having been accused of taking stock.
49. We find that in all probability Mr O'Boyle was angry at the large stock deficiency. We find that Mr O'Boyle suspected that the claimant may have been responsible but did not have any proof. We find that Mr O'Boyle dismissed the claimant when he confirmed that he had not only taken the wine from the staff fridge but the beer on the second occasion.
50. We can readily understand how the claimant would have been distressed at finding himself accused of taking the stock when there was no proof that he had. We also readily understand why the claimant regards his dismissal as being unfair.
51. All the other members of staff were interviewed and accused of the stock loss. The only differential in treatment was that the claimant was dismissed.
52. We do not find that that treatment was less favourable treatment in that the comparator to be in not materially different circumstances would have to be a British individual and/or a female member of staff who had admitted to taking drinks from the staff refrigerator on two previous occasions when not on duty. In our judgment that hypothetical comparator would have been treated in the same way.
53. As regards the treatment alleged, where we have found it established, we have concluded that it was not less favourable treatment.
54. Further, we find that none of the treatment of the claimant was because of his protected characteristics of race and/or sex.
55. Accordingly, the claimant's claims are dismissed.

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Employment Judge Alliot

Date: ...2 November 2021.....

Sent to the parties on: .....

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For the Tribunal Office