EMPLOYMENT TRIBUNALS

Claimant **Respondent**

Mr Martin Entwistle **v** Carlsberg Marston's Brewing Company Limited

Heard at: Cambridge by CVP **On**: 14 March 2022
Before: Employment Judge Forde

Appearances
For the Claimant: In person
For the Respondent: Mr R Barker, Partner Mills & Reeve LLP

JUDGMENT

1. The claimant's claim of unfair dismissal is not well-founded and is dismissed.

2. The claimant's claim of breach of contract in respect of notice pay is not well-founded and is dismissed.

REASONS

Introduction

1. By way of a claim form dated 24 December 2020, the claimant complains of unfair dismissal and wrongful dismissal arising from the termination of his employment by the respondent on 9 September 2020. The claimant's dismissal arises chiefly from events that occurred on 6 August 2020 when the claimant invited a group of his friends to the respondent's London Fields Brewery (LFB), and specifically its tap room and brewery.

2. By way of its response, the respondent resists the claimant's complaints. It says that it conducted a fair and reasonable investigation of the allegations of misconduct which confronted the claimant during the course of the disciplinary investigation that followed the events that took place on 6 August 2020 and that at the end of that process it was entitled to dismiss the claimant. Specifically, the respondent's case was that the claimant had, in conducting the brewery tour, committed an act of gross misconduct by way of a breach of its and the government's rules and guidelines that were in place at the time and were designed to combat the spread and effects of coronavirus or COVID-19.

Issues

3. The issues to be determined by the tribunal were agreed at the outset of the hearing as follows:-

   3.1 What was the principal reason for dismissal? Did the respondent genuinely believe that the claimant had committed misconduct?

   3.2 If the reason was misconduct, did the respondent act reasonably in all the circumstances in treating that as a sufficient reason to dismiss the claimant?

   3.3 Did the respondent have a reasonable belief that the claimant had committed misconduct?

   3.4 If so, did the respondent have reasonable grounds for that belief following a reasonable investigation?

   3.5 Was the dismissal procedurally fair?

   3.6 Was the decision to dismiss within the range of reasonable responses of a reasonable employer?

   3.7 If the dismissal was unfair, what is the appropriate remedy?

Evidence

4. I heard evidence from Mr Allen Stubbs, the dismissing officer and Mr Stephen Stringer, who heard the appeal of the claimant's dismissal. I also heard evidence from the claimant and the tribunal admitted the evidence of Mr Ian Toft who was not required to give evidence in person.

5. The parties had prepared an agreed bundle which was referred to from time to time during the course of the hearing.

Findings of fact

6. The relevant findings of fact are as follows.

7. The claimant, Mr Entwistle, was employed by the respondent as the Managing Director of LFB, which included a tap room open to the public.

8. On 6 August 2020, the claimant hosted eight friends in the tap room, where they had drinks and dinner after which the claimant conducted what I shall describe as a guided tour of the brewery area upon which he was accompanied by his eight friends.

9. In light of the covid 19 pandemic, the respondent had conducted a risk assessment of the tap room and introduced a number of measures which were considered to be in line with those recommended or directed by government by way of regulation with the aim of reducing the risk of infection within the premises occupied by LFB. These measures included controlling the number of customers who could congregate within the

designated areas of the tap room, and numerical limits on numbers in specific areas of the Brewery.

10. On 15 June 2020, ahead of the return to work of a vulnerable employee "K" who had been shielding in line with medical advice, LFB's Head Brewer, Mr Provis-Evans sent an email copied to all LFB employees including the claimant informing the email's recipients of the imposition of a series of rules designed to facilitate the safe return to work of "K".

11. It was a matter of dispute between the parties as to whether or not the content of Mr Provis-Evans' email contained rules or guidance and if there were rules, whether those rules were binding on the claimant. It was the claimant's case before the tribunal that he had discussed "K's" return to work and relevant health and safety steps with Mr Provis-Evans. However, it was also the claimant's position that he had not approved the content of Mr Provis-Evans' email and as such, he considered that the content of the email amounted to guidance only and not a series of rules which all of LFB's staff had to observe and adhere to.

12. It was the respondent's case that Mr Provis-Evans email contained a series of rules and mandatory directives which were to be observed by all of its employees at LFB including the claimant.

13. The relevant section from Mr Provis-Evans' email is set out below as follows:

> "Rules:
>
> - As of Wednesday 17 June, no one will be allowed to enter the brewery (brewhouse, cellar, brewery office, brewery walkway) through any of the access points (brewery office door, door from Tap Room to brewery, toilet corridor door, main cellar shutter), unless there is an emergency.
>
> - This includes when the Brew Team are not at work, and should generally be the case regardless.
>
> - If our attention needs to be got we have installed a doorbell on the outside of the brewery office door (assuming you cannot get through via text/phone).
>
> - Brew team will ensure lights are off when we leave each day, and for close by the Tap room the shutter can be lowered from the outside.
>
> - Ollie will need to drop/pick up pallets from the main shutter, so we asked Ollie to remain in the forklift
>
> And further
>
> - Brew team will continue to use hand sanitiser when entering/leaving any areas in the brewery building/ Tap room and continue to maintain a high level of personal hygiene/sanitation.
>
> - Brew team will wear face masks when working within two meters of each other.

- Any staff who may work with us on the canning line must follow the same rules as the Brew team."

14. The rules set out above were prefaced by the following paragraph:

> "… it is imperative we take this seriously and adhere to it. K has put in some serious effort complying (Government & GP advice) with what is essentially 12 weeks of isolation, we as a team/company have a responsibility to continue the shielding as best we can."

15. It is a matter of dispute between the parties as to whether the conduct of the claimant and his friends while in the Taproom was in breach of government guidance and the respondent's rules. What happened on the day in question was not in dispute and was in any event captured on CCTV. As regards the visit to the brewery, it can be seen and was accepted by the claimant that that none of the visitors wore face masks, including the claimant while in the brewery. It can also be seen that at least one of the claimant's party engaged in what I will describe as boisterous, alcohol fuelled horseplay whilst in the brewery.

16. Following the visit, a number of LFB staff raised concerns to the respondent's management as to the claimant's conduct and actions on 6 August 2020. Those concerns resulted in a disciplinary investigation conducted by Mr Bruce Ray, Group Government and UK Corporate Affairs Director. At the end of his investigation, Mr Ray produced an investigation report.

17. That report was available to the tribunal in the agreed bundle. The report's findings found, inter alia, that the claimant had demonstrated ignorance of social distancing guidelines, that he had visited the brewery in contravention of the respondent's rules that applied at that time, had failed to control the behaviour of his guests whilst in the brewery area, and had failed to support staff from a safety point of view. At the same time, the report identified that the claimant had accepted that he had breached government advice but had rejected that his conduct was "unbecoming of the lead of the LFB operation" whilst accepting that he had not set a good example.

18. In addition, the claimant challenged the validity of the rules set out in Mr Provis-Evans' email on the broad bases that they were of limited application in terms of limiting the transmission of the virus and because he did not agree that those matters stated to be rules in the Provis-Evans email had the effect of no more than guidance and nothing more. Further, he raised a number of mitigating issues including the impact of lockdowns on his mental health.

19. In addition, the claimant had, in Mr Ray's view, developed a series of explanations which sought to justify the entry into the brewery area on 6 August. For example, the claimant had asserted (as he did before the tribunal) that he had been aware that "K" would be absent from work on Friday 7 August, the day after the group's visit to the brewery and therefore knew that she did not have to be in the brewery until the following Monday. It was the respondent's case before the tribunal that while it was true that

"K" did not attend work on 7 August this was due to being instructed not to do so on account of the visit to the brewery by the claimant's party the previous evening. The consequent effect of the claimant's explanation during the course of the investigation led to Mr Ray reaching the view that this was evidence of the claimant "post-rationalising" his view of the rules and protocols in place so as to justify his actions. Understandably, the claimant disputes this.

20. The claimant attended a disciplinary hearing on 7 and 9 September 2020 conducted by Mr Stubbs. Following that meeting, Mr Stubbs wrote to the claimant by way of letter dated 9 September 20202 informing the claimant of the outcome of the disciplinary hearing. Mr Stubbs' started by explaining that the meeting had been arranged to discuss allegations of serious breaches of health and safety rules which could potentially amount to gross misconduct. In Mr Stubbs' view the claimant had committed a very serious error of judgment by breaching government company guidelines both in the taproom and in the brewery area. As regards the brewery, Mr Stubbs identified that taking his friends on a brewery tour while aware of the respondent's position as regards "K's" health and not following the respondent's explicit rules and guidelines as regards conduct within the brewery area was being "extremely irresponsible". It followed that Mr Stubbs determined that the claimant's conduct amounted to gross misconduct and he dismissed the claimant accordingly.

21. The claimant appealed his dismissal. The appeal was heard by Mr Stringer. He upheld Mr Stubbs' decision. In his letter in response to the appeal dated 7 October 2020, Mr Stringer addressed the claimant's concerns that Mr Stubbs had not communicated clearly his reasons for reaching a finding of gross misconduct, a major plank of his appeal. For clarity, Mr Stringer set out in his letter dated 7 October 2020 to the claimant the nine bases that Mr Stubbs had identified as contributing to his finding of gross misconduct. Mr Stringer upheld the claimant's dismissal and therefore dismissed his appeal. Specifically, he identified that the claimant, as the Managing Director LFB, had a duty of care to protect the health and safety of al LFB employees as well as all customers, consumers and food safety. Mr Stringer concluded that the claimant's conduct and actions constituted a serious breach of health and safety.

22. Needless to say, it was the claimant's case that the respondent's finding that he had breached health and safety was incapable of being substantiated. The claimant presented scientific opinion that cast doubt on the belief that coronavirus could be transmitted by way of surface transmission. However, and as I had explained at the start of the hearing, the tribunal's role was to determine the issues before it and it was not empowered or capable of assessing the merits or demerits of the science the claimant wanted to rely upon. Notwithstanding, it remained a plank of the claimant's case before the tribunal that while it had been wrong of him to have taken a group of people into the brewery it was the case that the visit was not one which would have caused any danger or risk to any employee or visitors to the brewery or its employees. It was his view that what had

occurred was not a gross misconduct offence, that he did not break any rules and that no one became ill as a result of the conduct identified above.

23. Further, the claimant identified that Mr Stubbs had fallen into error and therefore procedural failure in failing to identify criteria that could be identified as gross misconduct. Most importantly, the claimant asserted in closing submissions that Mr Provis-Evans' email contained a series of requests rather than rules. Consequently, it was his submission that he had not broken any rules, and the respondent had not proved that he had broken a rule.

24. While I heard evidence around the claimant's visit to the taproom with his party, the tribunal's evidential focus as regards the claimant's conduct focussed on the claimant's visit to the brewery with his party. Further, I do not find that the claimant breached any of the respondent's rules or guidelines that relate to the taproom

25. I find that the information set out in Mr Provis-Evans' email contained rules that were clear and unmistakeable in terms of their intention and purpose. first, they are stated to be rules. second, it is abundantly clear that the purpose behind the rules were the stated health and safety objectives. Third, the email required strict adherence to rules stated within it which I find to be at odds with guidance which connotes voluntary adherence.

26. Furthermore, I find that staff working at LFB on the night in question for whom the claimant had responsibility were alarmed and concerned at the claimant's actions such that they raised their concerns with those that manage the claimant. That concern resulted in a disciplinary investigation conducted by Mr Ray, the dismissal by Mr Stubbs and the unsuccessful appeal conducted by Mr Stringer. In respect of all of the disciplinary steps undertaken by the claimant, I find, on the balance of probabilities, that the respondent conducted a fair and proper disciplinary investigation and was entitled to find that the claimant had not followed its policies and procedures in relation to health and safety that were in place at the time. The investigation conducted by Mr Ray was meticulous in its approach, afforded the claimant an opportunity to state his case and reached an objectively justifiable outcome. Both the hearing and appeal were conducted in accordance with ACAS guidance. For example, the claimant was informed of the full substance of the allegations of misconduct that he faced and was informed of his right to be accompanied.

Relevant law and conclusions - unfair dismissal

27. Section 98(4) of the Employment Rights Act 1996 confers an employee has the right not to be unfair dismissed. Enforcement of that right is by way of a complaint to the tribunal under section 111. The employee must show that he was dismissed by the respondent under section 95 ERA 1996, but in this case the respondent admits that it dismissed the claimant (within section 95(1)(a) of the 1996 Act) on 9 September 2020.

28. Section 98 of the 1996 Act deals with the fairness of dismissals. There are two stages within section 98. First, the employer must show that it had a

potentially fair reason for dismissal within section 98(2). Second, if the respondent shows that it had a potentially fair reason for the dismissal, the tribunal must consider, without there being any burden of proof on either party, whether the respondent acted fairly or unfairly in dismissing that reason.

29. In this case, it is not in dispute that the respondent dismissed the claimant because it believed he was guilty of gross misconduct. Misconduct is a potentially fair reason for dismissal under section 98(2). The respondent has satisfied the requirements of section 98(2).

30. Section 98(4) then deals with fairness generally and provides that the determination of the reason whether the dismissal was fair or unfair, having regard to the reasons shown by the employer, shall depend on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee; and shall be determined in accordance with equity and the substantial merits of the case.

31. In misconduct dismissals, there is well established guidance for tribunals on fairness within section 98(4) in the decisions of Burchall [1978] 1IR LR 379 and Post Office v Foley [2000] IRLR 827. The tribunal must decide whether the employer had a genuine belief in the employee's guilt. The tribunal must decide whether the employer held such genuine belief on reasonable grounds after carrying out a reasonable investigation. In all aspects of the case, including the investigation, the grounds for belief, the penalty imposed and the procedure followed in deciding whether the employer acted reasonably or unreasonably within section 98(4), the tribunal must decide whether the employer acted within the range of reasonable responses open to an employer in the circumstances. It is immaterial how the tribunal would have handled the events or what decision it would have made, and the tribunal must not substitute its own view for that of the reasonable employer.

32. I find that the respondent was entitled dismiss the claimant based on the respondent's genuine belief that the claimant was guilty of misconduct. further, I find that the decision to dismiss fell within the range of reasonable responses open to it as an employer confronted with the claimant's misconduct. In his letter to the claimant in which he advised the claimant of his dismissal, Mr Stubbs set out in clear unequivocal terms why the claimant was dismissed.

33. The claimant contends that the respondent did not carry out a reasonable investigation, but I have found that the respondent did conduct a reasonable investigation and one which fell within the range of reasonable responses of an employer. Accordingly, the claimant's claim of unfair dismissal is not founded and is dismissed.

Relevant law and conclusions - breach of contract.

34. The claimant was dismissed without notice. He brings a claim of breach of contract in respect of his entitlement to notice.

35. The respondent says it was entitled to dismiss him without notice for reason of the finding of gross misconduct. In other words, the claimant's conduct was such that it amounted to a repudiatory breach of contract which entitled the respondent to treat the contract as if it was at an end. I find that the acts of the claimant while in the brewery and in the days after amount to a clear and substantial breach of the contract of employment. His decision to contravene the rule regarding unauthorised entry to the brewery, his failure to have regard to the health and safety of his fellow employees and his attempts to post-rationalise his action after the event are all serious matters. In other words, the claimant's actions as I have identified individually and cumulatively amounted to gross misconduct.

36. Given my findings that the respondent was entitled to reach the view that it did in respect of the claimant's conduct and it follows that the claimant's claim of breach of contract is not founded and is dismissed.

Employment Judge Forde

Date: 3 May 2022

Sent to the parties on: 5 May 2022

For the Tribunal Office