EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 8001001/2024

Held in Glasgow on 30 and 31 October 2024

Employment Judge S MacLean

Mr N Troy	**Claimant** **Represented by:** **Mr G Bathgate,** **Solicitor**
1893 Limited	**Respondent** **Represented by:** **Mr A McCormack** **Solicitor**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The judgment of the Employment Tribunal is that the respondent unfairly dismissed the claimant. The respondent is ordered to pay the claimant the total monetary of £14,416.28. The Employment Protection (Recoupment of Benefits) Regulations 1996 apply. The prescribed element is £3,756.40 which is attributable to the period between 4 July 2024 and 31 October 2024. The difference between the total monetary award and the prescribed element is £10,659.88.

REASONS

Introduction

1. In the claim form the claimant complains that his dismissal was automatically unfair because the principal reason for his dismissal was that he had taken

part or proposed to take part in the activities of an independent trade union at an appropriated time.

2. The respondent admits that the claimant was dismissed but says that the reason was his due to the failure in performance. The respondent denies that the claimant was dismissed because of his intention to participate in trade union activities at an appropriate time.

3. The claimant gave evidence on his own account. For the respondent I heard evidence from Fraser McIlwraith, director, and Ryan Ford, general manager. The witnesses were referred to a file of documents.

4. I have set out the facts as found that are essential to the reasons or to an understanding of the important parts of evidence. I have dealt with the points made by the parties in oral submissions whilst setting out the facts, the law and the application of the law to those facts.

Findings in fact

5. The respondent owns and operates the Strathduie Pub (the bar). Fraser McIlwraith is a director and shareholder of the respondent. Ryan Ford is the general manager of the bar.

6. The claimant is a member of the Unite union. He is the young member representative on the Scottish executive committee. The claimant is also the chair of the Unite hospitality in Glasgow and the chair of the Unite hospitality combine.

7. Mr Ford and the claimant had previously worked together and their friendship continued afterwards. Mr Ford offered the claimant casual employment at the bar. The claimant said that he would not be able to work from 9 June 2024 for two weeks as he had a pre-booked holiday. He also said that he would not be available to work on Tuesdays due to union commitments nor would he be available the weekends of 12 to 14 July 2024 and 27 to 29 July 2024 as he was attending union conferences.

8. From 27 May 2024, the respondent employed the claimant as a bartender on a zero hours contract. The claimant marked in the staff diary that he was "off" on the weekends of 12 to 14 July 2024 and 27 to 29 July 2024.

9. On 28 June 2024, the claimant noticed that he was rostered to work on Tuesday, 2 July 2024. He messaged Mr Ford reminding him that he could not work Tuesdays. Mr Ford said that he forgot and asked, "Like, at all?". The claimant replied, "Can sometimes do nights but Jess surprised me with KOL tix" and "Tuesdays are my days to do all my unite work, I'm usually in meetings from 11-6/7". Mr Ford amended the rota.

10. On 29 June 2024, Mr Ford spoke to the claimant about cleaning equipment not being put downstairs and a Martini light, which had been installed while the claimant was not working, not being switched on. The claimant took the comments on board. He explained that a customer had entered when he was taking out tables, and he had not had an opportunity to take the cleaning equipment downstairs.

11. Later when preparing the rota, Mr Ford noticed that the claimant's off days in the diary. He asked the claimant why he was unavailable. The claimant reminded Mr Ford that he was attending union conferences. Mr Ford asked how many more conferences the claimant would be attending. The claimant advised that these were the only ones in which he was booked. Mr Ford had informed the area manager about the claimant's trade union activities.

12. On 1 July 2024, the claimant was unexpectedly unavailable to attend his shift. Before his shift started, the claimant contacted the supervisor who was on shift to explain the situation. She confirmed that she would sort cover. Mr Ford messaged the claimant on 2 July 2024. The claimant provided an update which Mr Ford accepted. The claimant collected a key and advised that he would be working on 3 July 2024.

13. The claimant attended work on 3 July 2024 at around 10am. He discovered that the freezers had been off and the food was defrosting. The claimant tried unsuccessfully to speak to colleagues working the previous day. He then spoke to Mr Ford who asked the claimant to try to plug the freezers into

different sockets. The claimant, who used to be a chef, expressed concern about cooking the food given that it was unknown how long the freezers had been off.

14. While the claimant's back was turned, Mr McIlwraith arrived in the bar. He noticed that the food was not on display. Mr McIlwraith accused the claimant of not noticing him coming into the bar. The claimant apologised. Mr McIlwraith then asked about the food. The claimant explained about the freezers. Mr McIlwraith told the claimant to cook the food. The claimant commented that it could be dangerous. Mr McIlwraith instructed the claimant to cook the food even if it meant that it had to be given away. The claimant did what was asked. Mr McIlwraith left the bar.

15. Mr McIlwraith contacted Mr Ford to express concerns about the claimant. Mr Ford said that he had spoken to the claimant on Saturday. Mr McIlwraith said that he did not have a good feeling. He said that the claimant had to go. He asked Mr Ford if he wished to tell the claimant. Mr Ford agreed to do so.

16. Mr Ford attended the bar around 1pm. He was due to start at 3pm. The claimant felt Mr Ford's behaviour was unusual. When the claimant asked what was the problem, Mr Ford said, "Your vibes don't fit. You are not fitting in". When asked for clarification, Mr Ford referred to the owner breathing down his neck to get rid of the claimant. The claimant asked what he was doing wrong. Mr Ford looked around and referred to a fridge light not being on and excess stock being stored under the bar.

17. Mr Ford contacted Mr McIlwraith and advised that he had a problem letting the claimant go. He asked Mr McIlwraith to assist. Mr McIlwraith attended the bar and went to the lounge area. The claimant and Mr Ford joined him. Mr McIlwraith said that he wanted to discuss the claimant's performance. The claimant asked what brought this on. He said that he would not discuss this without a trade union representative present. Mr McIlwraith reiterated that it was performance. When asked for specifics Mr McIlwraith referred to failing to make eye contact when he came into the bar. The claimant was asked to

leave the bar. The claimant asked for written confirmation that he was being dismissed and reasons.

18. On 3 July 2024, the lead organiser, Unite hospitality sent an email to Mr McIlwraith, copied to the claimant, advising that it was believed that the clamant was dismissed because he is a trade union activist. Mr McIlwraith replied, copied to the claimant, that the respondent was unaware of the claimant's position as a steward which did not influence the decision to dismiss him. Mr McIlwraith said that the claimant was given a verbal warning when it was twice witnessed that he was not undertaking his duties satisfactorily: failing to open on time; failing to set up the bar to a satisfactory standard; and failing to acknowledge customers. He also referred to the claimant refusing to leave the premises.

19. The claimant responded to Mr McIlwraith by email sent on 4 July 2024 advising that he had never been given a verbal warning. The vague issues about performance and not making eye contact with Mr McIlwraith were first mentioned five days after the claimant reminded Mr Ford of his trade union commitments. The claimant said that the email was the first he heard about failure to open on time. The only discussion about failing to set up the bar properly was about not switching on a Martini light. The claimant did not refuse to leave. He was asked to do so by Mr McIlwraith and did so.

20. On 4 July 2024, Mr McIlwraith wrote to the claimant advising that after a verbal warning, following which there had been no improvement, the claimant been dismissed due to lack of confidence in his performance. The grounds were failure to open the premises on time; failure to completer the necessary tasks to ensure the bar was set up and ready for service and failure to acknowledge and greet customers when they entered the establishment.

21. At the date of termination the claimant was in receipt of monthly net pay of £1,083.33. He was in receipt of Universal Credit until 30 September 2024. The claimant started new employment on 6 October 2024. There is a monthly differential in earning of £438.88.

Observations on the evidence

22. The standard of proof is on the balance of probabilities, which means that if I considered that, on the evidence, the occurrence of an event was more likely than not then I was satisfied that the event occurred.

23. I considered that the claimant gave his evidence in a straight forward manner. His position was consistent with the contemporaneous correspondence. The evidence of Mr McIlwraith and Mr Ford was at times inconsistent with each other and with some of the documents produced.

24. I appreciated that in the hospitality sector, employees on zero hours contracts, "are let go" after trial shifts, or following a "conversation", shifts are no longer offered. Mr Ford and the claimant had worked together and had a good relationship. The claimant was offered employment against that background. Mr Ford's evidence was that while he had some concerns, he did not raise any issues with the claimant before 29 June 2024. I considered that the concerns, if any, were insignificant as had there been performance issues a "conversation" would have likely taken place before the claimant's two week absence in early June 2024.

25. Turning to the discussion between Mr Ford and the claimant on 29 June 2024, the claimant's position was that Mr Ford spoke to him about moving the mop and bucket downstairs and switching on a Martini light that had recently been installed. Mr Ford's evidence was that he spoke to the claimant about his performance and gave him a verbal warning. Later that shift, Mr Ford made a written note of the verbal warning which he signed and filed in a folder. Mr Ford said that he did not consider that issuing a verbal warning was a serious matter as he assumed that having spoken to the claimant there would be an improvement.

26. Mr McIlwraith said that he discussed the verbal warning with Mr Ford by telephone on 29 June 2024. Mr Ford's evidence was that he did not speak to Mr McIlwraith about issuing the verbal warning on 29 June 2024. He said that he mentioned it to Mr McIlwraith on 3 July 2024.

27. While there was a discussion, I considered that it was more likely that this was an informal chat reminding the claimant of the procedures and new lights. A verbal warning is disciplinary action. Had the discussion resulted in a verbal warning, the claimant would had understood that as otherwise there was no point in issuing it. The claimant was also in my view likely to have asked for it to be put in writing to him.

28. While Mr Ford said that he did so at the time, I was unconvinced. The written record of the verbal warning that was produced was perplexing in that it referred to the need for improvement and a review in two weeks, yet the claimant was dismissed during his next shift. At no point during the disciplinary process did Mr Ford mention to Mr McIlwraith that he had a written record of a verbal warning. To the contrary, Mr McIlwraith stated in correspondence at the time that the verbal warning was not documented. Had it been filed as suggested by Mr Ford, then this would have been readily available to the management team.

29. Mr McIlwraith referred in his evidence to being in the bar on 29 June 2024, when he raised with the claimant not being acknowledged, the A board not being displayed, and the mop and bucket not being taken downstairs. Mr Ford did not mentioned in evidence that Mr McIlwraith attended the bar on 29 June 2024. The claimant had no recollection of Mr McIlwraith being there. The claimant did recall a discussion about an A board not being displayed because it was broken, but that discussion took place before we went on holiday. This appeared consistent with a note in Mr Ford's note book.

30. Turning to the events on 3 July 2024, I considered that the respondent's evidence was contradictory. Mr McIlwraith said that it was his decision to dismiss the claimant following his visit to the bar that morning. He asked Mr Ford to deal with it. When he was unable to so do, Mr McIlwraith attended the bar and dismissed the claimant. Mr Ford said that Mr McIlwraith telephoned him and they were of the same mind that the claimant should be dismissed. Following that conversation he made a list of performance issues (which made no reference to A boards) in his note book, but was not able to

speak to the claimant. He panicked and contacted Mr McIlwraith who dealt with the matter.

31. Mr Ford has 9 years' management experience in the hospitality sector. He chose to employ the claimant who has previous bartending experience. While Mr Ford may not have conducted disciplinary proceedings before, given their relationship, I struggled to understand, why, if he had genuine concerns about the claimant's performance, and had already issued a verbal warning, he was so stressed about terminating the claimant's employment. It seemed more likely to me that that contrary to his evidence, Mr Ford did not have any involvement in the decision to dismiss the claimant and any performance issues were insignificant and further instruction would lead to improvement.

32. The respondent's evidence about the claimant's performance seemed to have been embellished. For example, the failure to inform the respondent about his unexpected unavailability on 1 July 2024 contradicted the documentation. It was mentioned in the response and at the final hearing but was not taken into account when dismissing the claimant. The documentation detailing the poor performance was inconsistent with the respondent's own evidence about what was discussed with the claimant before his dismissal.

33. There was an dispute about the respondent's knowledge of the claimant's trade union activities. The claimant's evidence was he believed that Mr Ford was aware of his trade union commitments, but did not necessarily know the positions that he held. It was undisputed that Mr Ford had knowledge. Mr McIlwraith denied any knowledge. He said that he wished he had as he would have been "better armed". Mr Ford was equivocal about who he informed about the claimant's trade union activities. He said that he may have shared with the area manager (and director). He then said that he did not think so because it was not relevant. He could not remember if he shared with Mr McIlwraith.

34. My impression was that the claimant was open about his trade union commitments. I did not consider that Mr Ford had any issue with this, and therefore felt that it was more likely than not that he would have mentioned it to his area manager. Given the staff are discussed at weekly meetings involving the area manager and Mr McIlwraith, I felt that it was more likely that not that Mr McIlwraith was aware of the claimant's trade union activities. I considered that as the claimant was on a zero hours contract and had given notice of his unavailability, it was odd that Mr Ford's should ask the claimant on 29 June 2024, how many other conferences he would be attending.

Deliberations

35. I referred to section 152(1)(b) of the Trade Union and Labour Relations Consolidation Act 1992 (TULR(C)A) which states that a dismissal will be automatically unfair if the reason (or if more than one, the principal reason) was that the employee had taken part or proposed to take part in the activities of an independent trade union at the appropriate time.

36. It was accepted that the claimant was dismissed and at the appropriate time he had taken part and was proposing to take part in the activities of an independent trade union. It was agreed that the issue that I had to determined was the reason for the dismissal. As the claimant has less than two years' continuous service, he has the burden of proof.

37. I then turned to consider whether the claimant's union involvement was the true reason for his dismissal. There was no evidence before me of the respondent's aversion to trade unions or anti-union bias.

38. I then considered the timing of the dismissal. This took place shortly after the claimant reminded Mr Ford of his unavailability on Tuesdays due to trade union commitments and availability for two weekends in July to attend union conferences. There was no evidence that Mr Ford was not willing to accommodate this as time off in the rota. He did however seek clarification that the claimant was not attending other conferences of which Mr Ford was unaware.

39. The respondent claims that the dismissal was for performance. I was not referred to any contract of employment or disciplinary procedures. While the claimant's employment commenced on 27 May 2024, and he had worked only a handful of shifts before his employment was terminated, I felt that if there was any issues about his "energy and vibe" or performance before 9 June 2024, it would have been understandable for the claimant to have been told that he was not being offered shifts shift when he returned from his holiday. What was less convincing was that no comment was made until the claimant returned to work on 29 June 2024. At that point Mr Ford appeared to be under pressure to get rid of the claimant which coincided with the reminder of the claimant's trade union activities. It was a remarkable coincidence that on his first shift after his holiday, the claimant's performance was such that he was issued with a verbal warning and during his next shift he was dismissed. As explained above I was unconvinced that a verbal warning was issued and the respondent's evidence of the claimant's poor performance on 3 July 2024 was embellished.

40. On balance I concluded that the principal reason for the claimant's dismissal was that he proposed to take part in the activities of an independent trade union at the appropriate time. Accordingly the dismissal was automatically unfair.

41. I turned to consider remedy. The claimant seeks compensation. It was agreed that the claimant was entitled to a basic award of £8,533. As regards compensatory award, the claimant had loss of earnings between 4 July 2024 and 30 September 2024, that is £3,250 (13 x £250 per week). While the claimant found alternative employment he has an ongoing loss of £438.88 per month or £101.28 per week). The parties agreed that any award would be for six months from 30 September 2024, that is £2,633.28.

42. The claimant was in receipt of universal credit accordingly the Employment Protection (Recoupment of Benefits) Regulations 1996 apply. The total monetary award is £8,533 + £3,250 + £2,233.28, that is £14,416.28. The prescribed element is £3,756.40 (£3,250 + (£101.28 x 5) which is attributable to the period between 4 July 2024 and 31 October 2024. The difference between the total monetary award and the prescribed element is £10,659.88.

S MacLean
Employment Judge

11 November 2024
Date of Judgment

Date sent to parties **13 November 2024**