

IN THE CARDIFF CIVIL JUSTICE CENTRE

Case No: E37YM815

Courtroom No. 8

2 Park Street
Cardiff
CF10 1ET

Thursday, 23rd May 2019

Before:
DISTRICT JUDGE PHILLIPS

B E T W E E N:

DR THOMAS BOWER

and

BREWDOG PLC

THE CLAIMANT appeared In Person
MR A GARIOCH appeared on behalf of the Defendant

JUDGMENT

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DJ PHILLIPS:

1. This is the judgment of the court. I am dealing with a small-claims hearing which involves a claim brought by Dr Bower, the claimant, against the defendant, Brewdog Plc, for damages and an apology for direct discrimination and breach of the Equality Act 2010. He also seeks an order that the defendant agrees not to undertake such discriminatory actions in the future.
2. Dr Bower represents himself, and Brewdog Plc are represented by Mr Garioch.
3. Proceedings were issued in this case in the County Court Money Claims Centre, and by his order dated 14 February 2019, His Honour Judge Harrison extended the time to issue proceedings. The court considering it just and equitable to do so.
4. Yesterday's hearing was listed in accordance with the order of District Judge James, made on 27 February 2019.
5. That order required both parties to send to the court, and to every other party by 27 March 2019, copies of all documents upon which they intended to rely, this to include any witness statements. The claimant has done so, but no such evidence has been filed or served by the defendant. The defendant, therefore, relies upon the content of its defence dated 24 October 2018.
6. At the commencement of yesterday's hearing, Mr Garioch told me that there was, in fact, no dispute as to the facts of the case, as set out by Dr Bower in his witness statement. He submitted the issue for the court to determine is the interpretation of the Equality Act 2010 and I agree that this appears to be the issue requiring determination by the court in this case.
7. The circumstances surrounding this case are set-out clearly in Dr Bower's witness statement, which is dated 12 May 2019, although I note this is almost identical to his witness statement dated 25 March 2019, apart from the added manuscript at the end.
8. For the purposes of this judgment, and by way of background, I set-out what Dr Bower says happened, when he visited the defendant's premises, a public house along Westgate Street in Cardiff and I quote:

‘At approximately 17.15 on 8 March 2018, I entered the Brewdog establishment at 31 Westgate Street, Cardiff, CF10 1EH. Listed above the bar were prices for drinks, I noticed that the product, Pink IPA, was advertised at a price of £4.00 and the product, Punk IPA, was advertised at a price of £5.00. The bartender then asked me what I wanted, and I requested a Pink IPA. The bartender then stated that I could not purchase this drink. I asked the bartender why this was the case? The bartender

stated that it was because I am male. I told the bartender that I thought he was not allowed to do that. The bartender replied, stating that the restriction was part of a marketing campaign. I responded telling the bartender that I thought this practice to be illegal. I then asked again for the Pink IPA for a price of £4.00. The bartender again refused to serve me the Pink IPA drink and said that I could purchase Punk IPA at the price of £5.00. I then felt forced to lie about my sex in order to receive the product at the lower price and told the bartender that I identified as female. The bartender then served me the drink at a price of £4.00. Whilst consuming the drink, I researched the Equality Act 2010, and concluded that Brewdog's price policy was contrary to the Act. After consuming the drink, I spoke to the duty manager, informing him that the price policy was discriminatory and contrary to the Act. The duty manager stated that he and other colleagues had received similar complaints, but he could not do anything about it because the instructions were said to have come from the company's head office. I left the premises at approximately 17.45'.

9. The defendants say that they undertook a satirical campaign in early 2018 to highlight issues of and encourage discussion relating to gender inequality. In particular, the gender pay-gap and sexist marketing. As part of this campaign, the defendant says it rebranded its product, Punk IPA and sold this as Pink IPA. They say the campaign was undertaken for four weeks and commenced on 8 March 2018, International Women's Day. They say, Pink IPA was sold to those identifying as women and was offered at a reduced price of 20%, on the basis of this being the gender pay gap in the United Kingdom.
10. The defendants say that during the campaign they continued to offer Punk IPA alongside its proportional product. The terms of the campaign were promoted by the defendant and its terms and motives clear. They say a portion of the proceeds from the sale of both Pink IPA and Punk IPA raised during the four-week campaign were donated to charitable causes tackling gender inequality.
11. The defendants draw a distinction between a circumstance where the claimant is refused a drink and then decides to leave, and what happened in this case. Namely, the claimant being initially refused a Pink IPA, but as a result of him identifying as female, then being supplied with this particular drink. They say there has been no direct discrimination and the court should dismiss the claim on that ground.
12. In support, they have referred me to the case of *Traveller Movement & Others v JD Wetherspoon Plc* (2015 – unreported), a decision of His Honour Judge Hand QC and in particular, what His Honour says at paragraph 157 of his judgment.
13. They argue that as the claimant identified as female, he received no different treatment. He

was able to purchase a Pink IPA. They say he was not forced to lie or to identify as female, that was his choice. They suggest the fact that he had to identify as female before he could purchase the Pink IPA at a price of £4.00 is not a relevant consideration. They say this was not an additional term which had to be fulfilled.

14. Dr Bower, in response, told me that he felt forced to lie to be able to purchase this particular drink. He told me he had no option if he wanted to purchase a drink at a reduced price. He said that whilst he was vaguely familiar with the campaign referred to, he should not have to lie as identifying as female before he could purchase the Pink IPA. He argues the fact that he had to do so, does represent an additional term.
15. On this issue I remind myself of what is set-out of Section 13 of the Equality Act 2010. This provides as follows: ‘A person, A, discriminates against another, B, if because of a protected characteristic, A treats B less favourably than A treats or would treat others’.
16. Protected characteristics are set-out at Section 4 of the Act and the relevant protective characteristic here is that of sex.
17. In my judgment, it is clear that in this case the claimant has been directly discriminated against by the defendant because of his sex. The fact that by identifying as female he was still able to purchase a Pink IPA, makes no difference. I accept what Dr Bower says, namely that identifying as female was the only way he could purchase a Pink IPA at a cost of £4.00. There has, therefore, been a breach of Section 13.
18. The defendants next rely upon paragraph 27, part seven of Schedule 3 to the Act and in particular, 27.1(a) and (b) and 27.3. 27.1 provides as follows:

‘A person does not contravene Section 29, so far as relating to sex discrimination, by providing a service only to persons of one sex, if, (a) any of the conditions in subparagraphs two to seven is satisfied and (b) the limited provision is a proportionate means of achieving a legitimate aim’.

27.3 says this:

‘The condition is that (a) the service is also provided jointly for persons of both sexes and (b) the service would be insufficiently effective were it only to be provided jointly’.
19. Mr Garioch suggested the service in this case was the sale of alcohol and Pink IPA was the same product as Punk IPA. So, that the service was provided jointly for persons of both sexes. It was simply a different name.
20. Mr Garioch also suggested that what had happened was a proportionate means of achieving a legitimate aim, when one considered the purpose of their campaign. He pointed out the price difference was only £1.00. The campaign only ran for four weeks.

21. Following questioning by me, I was told that whilst the bottles containing the lager would have been differently packaged, the alcohol taken from the pumps would be placed in the same types of glasses and on the noticeboard at the bar there would simply be reference to the two products and prices as Pink IPA £4.00 and Punk IPA £5.00.
22. Dr Bower suggested that the defendants were unable to justify the campaign at the cost of discriminating against men. He said, this had happened in all the defendant's establishments over a four-week period and that was not proportionate. He referred me to the defendant's press release, which I find at page 71 of the bundle.
23. On this issue, I am not persuaded that the defendants can rely upon paragraph 27 part seven of Schedule 3, to the 2010 Act. That, in my judgment, it would not have been clear that the product in question was the same product, but only different in name. I ask myself how would members of the public know this to be the case?
24. Pink IPA is charged at £4.00 and Punk IPA at £5.00. I believe most members of the public would believe these to be different products. The display of these products on the noticeboard would not convey a suggestion that these two products were the same. Indeed, the price difference would, to my mind, suggest the opposite.
25. Bottled Pink IPA were also in different packaging to Punk IPA. The press release at page 71 referring to it being packaged in, and I quote, 'lurid pink'. Having made that decision, I do not need to consider paragraph 27.1(b), namely whether the limited provision is a proportionate means of achieving a legitimate aim, as the defendant fails to establish the conditions set-out at 27.1(a).
26. I do, however, need to consider the defendants reliance upon Section 158 of the Equality Act 2010, namely the positive action defence. The defendants rely in particular upon Section 158.1(a) and 2(a). These provide as follows: 158.1 says this:

'This section applies if a person, P, reasonably thinks that (a) persons who share a protected characteristic suffer a disadvantage connected to the characteristic'.

158.2 says this:

'This Act does not prohibit P from taking any action which is a proportionate means of achieving the aim of (a) enabling or encouraging persons who share the protected characteristic, to overcome or minimise that disadvantage'.
27. Mr Garioch suggested the court should ask whether the defendants could reasonably think that females suffered a disadvantage in relation to pay, as a result of their gender, and he

suggests that they could. He goes on to submit that their campaign in this case had the clear objective to enable females to overcome any pay disadvantage. Its purpose was to raise awareness and discussion.

28. He relies on the case of *R (Z & Ors) v Hackney LBC* [2019] EWHC 139 (Admin) and in particular what is set-out at page 12 of the judgment and the reference to explanatory notes to the Equality Act, which stresses the need for any measures taken to be a proportionate way of achieving the relevant aim.
29. Mr Garioch submitted that if the court was against the defendant on their primary submission that the case should be struck-out as there was no evidence of direct discrimination, then the Section 158 defence was their strongest ground.
30. Dr Bower did not accept that females necessarily were at a disadvantage, and whilst they may be paid less than men, he suggested, there were a number of reasons why this could be the case. He did not think the case of *R v Hackney LBC* was relevant and he said it was unclear whether the defendants had any plan to monitor the results of their actions. He suggested the defendants had failed to demonstrate that their campaign was an appropriate way, or necessary, to achieve their stated aim.
31. He handed in a decision of the Employment Tribunal in the case of *Mr M Furlong v The Chief Constable of Cheshire Police*: Case Number 2405577/2018. This copy judgment is unsigned, and I am therefore unclear as to whether it has been approved. However, the parts that he relies upon, relate to the Employment Statutory Code of Practice. He is referring in particular, to paragraphs 18 to 26 of the judgment.
32. Mr Garioch pointed out to me that the case of *Mr M Furlong v The Chief Constable of Cheshire Police* was a decision of the Employment Tribunal. It was an employment case and the Code referred to related to employment law. It also dealt with Section 159 of the Equality Act and was, he said, of no relevance to the case that I was dealing with.
33. Dr Bower, for his part, responded by saying it was the only decision he was aware of and it was relevant to his case.
34. On this issue, again, I am not persuaded the defendants can rely upon Section 158 of the Equality Act 2010.
35. I ask myself the question, how the defendants' campaign can be said to enable or encourage any change to the pay gap, which is said to exist between men and woman? I should say, I accept there is such a gap and, as I said at the hearing, this is very much a hot topic at the present time and is much discussed in the press and on the television.

36. However, how does the defendants campaign enable women to overcome or minimise that disadvantage of being paid less? There is no evidence before me to show that this would be achieved and no evidence before the court that this was in any way being monitored by the defendant.
37. I am not persuaded the campaign would necessarily lead to increased discussion about this topic. Again, there is no evidence to support this or, indeed, how many people would have been aware of the campaign.
38. To that extent, the decision of the Employment Tribunal is helpful, although, I would have reached the same conclusion even if that decision had not been placed before the court. Whilst an employment case, what is said about what does proportionate mean, does at least give a steer to the sorts of issues that would need to be considered by this court. The defendants, therefore, fail to successfully defend the claim and the claimant succeeds.
39. Dr Bower seeks damages and an apology and that the defendants undertake not to take such discriminatory action in the future.
40. The court has no power to order an apology, nor to order any undertaking and the issue, therefore, is one of damages.
41. Dr Bower has claimed £3,000 and refers to the case I referred to earlier in this judgment of *Traveller Movement & Others v JD Wetherspoon Plc*. That case involved, as I understand it, a refusal to allow travellers to enter a public house. That was the way Mr Garioch described it and that appears to be the position in what, I have to say, is a very long judgment of the court. The result was an award of damages of £3,000 for injury to feelings.
42. That is a very different case to the one that I am dealing with.
43. Dr Bower was not refused entry. He was initially told on two occasions he could not purchase a Pink IPA. On identifying as female, he was able to purchase and drink the alcohol, which he did, and then he left. His evidence is that he felt humiliated and it was not a nice feeling. He said others were present who witnessed what was going on.
44. Mr Garioch says this is a case where there is no loss, as Dr Bower paid his £4.00 and was supplied a Pink IPA. That however, is not the point or the correct measure of damages in a case such as this.
45. I accept that Dr Bower would have felt humiliated and that this was not a pleasant experience for him.
46. Guidelines for assessing damages for injury to feelings in discrimination cases have been laid down by the Court of Appeal in the case of *Vento v Chief Constable of Yorkshire Police*

[2002] EWCA Civ 1871. These guidelines have been adjusted for inflation in the case of the *Da'Bell v NSPCC* [2009] UKEAT/0227/09 and was subject to further uplift in the case of *Simmons v Castle* [2012] EWCA Civ 1039.

47. In my judgment, this case falls within what is referred to as, the lower band of between £600 to £6,600 and is very much at the bottom of that band.
48. The appropriate figure to award, in my judgment, is £1,000 my taking into account the comment at paragraph 65 of *Vento v Chief Constable of Yorkshire Police*, when it was said that in cases of isolated or one-off occurrence, such cases will fall in the lowest band, but awards of less than £900 are to be avoided altogether, as they risk being regarded as so low as not to be a proper recognition of injury to feelings (The figure of £900 having been adjusted by *Da'Bell v NSPCC* and applying *Simmons v Castle*).
49. I shall therefore enter judgment for £1,000 and I propose to order the defendants to pay such sum to Dr Bower by 6 June, namely 14 days of today.
50. In addition, I note that Dr Bower paid a court fee of £115 and I believe he has also paid a hearing fee of £170, which totals £285. That simply leaves any travelling expenses or loss of earnings that Dr Bower would like to claim for. I will add the sum of £95 for loss of earnings. That is a total of £1,380.

End of Judgment

Transcript from a recording by Ubiquis
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